

Student Number _____

Final Examination
Professional Responsibility, Professor Leslie Griffin
University of Houston Law Center
May 10, 2005
9 A.M. -12:30 P.M.

THESE EXAMINATION QUESTIONS MUST BE RETURNED AT THE END OF THE EXAM.

This examination is **CLOSED BOOK, NO NOTES**. You may not consult any other materials or communicate with any other person. You are bound by the Law Center's Honor Code. **Don't forget that it is a violation of the Honor Code to discuss the exam's contents with any student in this class who has not yet taken it.** I recommend that you not talk about the contents of the exam until finals period is over.

Write your student exam number in the blank on the right side of the top of this page. If you are handwriting your examination, write your examination number on the cover of *each* of your bluebooks. Number your bluebooks by indicating the book number and total of books (e.g., 1/5, 2/5, 3/5, 4/5, 5/5). If you are using the computer, write your examination number on *each diskette* and at the beginning of your response to *each question*. If you are handwriting, please **do not use pencil**. At the end of the exam, you **MUST** turn in the examination along with your answers. Please do not write your name, social security number or any other information that provides me with your identity.

This exam is twelve pages long, with **FOUR** questions. Question I is worth 30 points. Question II is worth 30 points. Question III is worth 30 points. Question III includes 15 multiple choice questions worth two points each. Question IV is worth 10 points. You have three and a half hours. I recommend that you spend 60 minutes each on Questions I and II, 45 minutes on Question III and 15 minutes on Question IV. You have an extra 30 minutes to use at your discretion.

Read carefully. Think before you write. Accurate reading of the question is essential. Good organization, clear statement and avoidance of irrelevancies all count in your favor. In your answers, you should cite to any applicable provision of the Model Rules, the Texas Rules and to the governing case law that is relevant to the question. You do not need to cite rule numbers, but you must spot the ethical issues that are covered in the rules.

If you write your exam, use **ONE SIDE** of a page only, and **SKIP LINES**. If you type, **DOUBLE SPACE**, and leave wide margins.

Honor Code. It is a violation to use ANY aid in connection with this examination; to fail to report any such conduct on the part of any other student that you observe; to retain, copy, or otherwise memorialize any portion of the examination; or to discuss its contents with any student in this class who has not yet taken it. By placing your exam number in the PLEDGE blank below, you are representing that you have or will comply with these requirements. If for any reason you cannot truthfully make that pledge, notify me as soon as possible. **Sign your number and not your name.**

PLEDGE: _____

Question I

(30 points, 60 minutes)

Bob had a long-term relationship with Jane. The couple lived together for a number of years and had a son together, Bob, Jr. Jane had two other children from a previous relationship: a daughter named Tess and her twin brother, Tim. While Jane and Bob were separating, Tess accused both Bob and Bob's father, Henry, of sexual abuse.

Bob and Henry were arrested on the same day. When Bob was arrested, he was read his *Miranda* rights and denied the allegations. Hours later, Bob was informed that his father had been arrested earlier in the day for sodomizing Tess, Tim and Bob Jr., and that his father had confessed to those crimes. After recovering from the shock of being informed that his father had molested his grandson, Bob spoke to Detective, and then signed an inculpatory, written statement concerning the allegations by Tess. The statement said that when Bob was fighting with Jane and drinking too much he would climb into bed with Tess and then sometimes have sex with Tess thinking she was Jane. The interrogation was neither audiotaped nor videotaped. Although Bob signed the statement, Bob thinks Detective misinterpreted his comments about Tess and Jane and that he didn't confess to anything.

Bob and Henry were indicted on the same day. Bob and Henry retained Attorney to represent them. Henry and Henry's wife, Wanda (who is also Bob's mother), gave Attorney a \$5,000 cash advance retainer. Attorney promised to give Wanda a receipt; he never did. After receiving the \$5,000 retainer, Attorney refused to do any work on the cases until the married couple raised more money toward an unspecified fee. Shortly thereafter, Attorney convinced Henry to withdraw money from his pension fund to pay Attorney's fee. Henry signed over his pension checks to Attorney in the amount of \$16,000. At the time that he deposited the checks, Attorney told Henry that he would have the checks clear through his account, retain another \$5,000 toward his fee, and return the balance to the family. In fact, Attorney retained \$14,000 for himself and returned \$2,000 to Henry.

Two weeks later, Henry pled guilty to attempted sodomy in the first degree. Bob's case went to trial. There was a pre-trial hearing to determine whether Bob's inculpatory statement to the police was voluntarily given. At the hearing, Detective testified that he and his partner had taken Bob to the station house, that he received his *Miranda* warnings, that he confessed to sodomizing Tess, and that he voluntarily signed a written statement to that effect. Bob testified at this hearing that he was not informed that he was under arrest and was not read his *Miranda* rights; when he broached the subject of calling his attorney, Detective told him that "[a]n innocent man don't need no attorney." Bob vehemently denied that he had confessed to sodomizing Tess. The trial court found that Bob knowingly, intelligently, and voluntarily waived his *Miranda* rights prior to being questioned and that the statement was voluntarily signed.

Tess testified against Bob at the trial. Henry did not testify. Bob was convicted of three counts of sodomy in the first degree for sexually molesting Tess. As the jury was deliberating, Attorney told Bob that it looked as though he would be convicted and

advised him to flee to another state. Bob fled. Bob was sentenced *in absentia* to three concurrent eight-and-one-third to twenty-five year terms on the three counts for which he was convicted.

Henry filed a grievance with the State Bar about Attorney and the pension checks. On the day that Attorney was served with notice of the State Bar investigation, the police received an anonymous phone call telling them Bob's whereabouts. Bob went to prison.

You are Bob's new lawyer. Bob asks you to do EVERYTHING you can do BOTH to help him AND to punish Attorney for his misdeeds. Write a memo describing the actions you consider undertaking on Bob's behalf. Assess how successful or unsuccessful you believe these actions will be. Be sure to explain your reasons for choosing these actions and for believing they will succeed or fail.

Question II

(30 points, 60 minutes)

Polly is an associate prosecutor in the Big City United States Attorney's Office (USAO). Polly has been on the job for ten years. She loves being a prosecutor. In the future she hopes to head the office by becoming the United States Attorney (USA). One day a defense lawyer, Dan, who is representing Sam Smith, visits Polly's office. Dan tells Polly that the police lied when they filled out the affidavit to get their search warrant for Sam's home. Polly thought about asking Tom, the prosecutor in charge of Sam's case, about the affidavit, but instead she conducted her own investigation of Dan's allegations. After reviewing the relevant documents in the case and visiting the crime scene, Polly concluded that the police had grossly misrepresented the facts when they applied for the search warrant.

Polly met with her Supervisor Sally and the United States Attorney Al. All three agreed that the validity of the warrant was questionable. After the meeting, Polly sent Al a memo describing her investigation, concluding that the affidavit was falsified, and recommending that the case against Sam Smith be dismissed. Al advised Polly to tone down the memorandum and make it less accusatory of the police. Polly rewrote the memorandum under Al's direction. Polly, Al and Sally then met with representatives of the Police Department.

After the meeting with the police, Al was still not certain that Sam's case should be dismissed. Al told Tom to proceed with the case pending the outcome of a defense motion challenging the search warrant, which was filed the day Dan spoke to Polly in her office. The defense motion asserted that there was an untrue statement in the affidavit for the search warrant.

Polly told Dan that she believed the affidavit contained false statements. Dan subpoenaed Polly to testify at Sam's trial. Al told her not to mention the memorandum in her testimony. Polly told the jury that the statements in the affidavit were false and that she had written those conclusions in a memorandum addressed to Al. The judge dismissed the case against Sam because of prosecutorial misconduct.

Al was understandably angered by Polly's disloyalty to the client. He reassigned Polly's big murder case, *U.S. v. Walker*, to another prosecutor. He told Polly that he could either transfer her to the Small City USAO, or, if she stayed in Big City, he would let her handle misdemeanor cases only and no felonies. He also gave her the new title of assistant prosecutor.

Answer the following three questions (question 3 is on the next page):

1. The judge wants to write an opinion that explains what prosecutorial misconduct was present in this case. Write a memo assessing the ethics of the prosecutors.

2. Polly wants to sue for the changes in her job. Assume for this question that there is no governmental immunity from lawsuit. Do you think Polly **SHOULD** be allowed to sue the USAO successfully for her damages? Why or why not?

3. What prosecutorial policies and laws should be in place to handle situations like this? Are these policies and laws any different from what you would recommend for a corporation?

Question III

(15 questions, 2 points each, 45 minutes)

1. Daniel Hill is an attorney who formerly represented Thomas Mitchell in connection with Mitchell's plans to develop a shopping center. Mitchell terminated Hill's representation when Mitchell decided to delay, but not cancel, the plans for the shopping center. The plans for the shopping center are still secret. Hill now has the opportunity to purchase land next to the proposed site of the center at an advantageous price, and he is tempted to do so because he knows that Mitchell will need the land for parking when he develops the shopping center.

Which of the following statements most accurately describes Hill's options under the Model Rules of Professional Conduct?

- a) Hill may purchase the land because Mitchell is a former client.
- b) Hill may not purchase the land unless he obtains the informed consent of his former client.
- c) Hill may purchase the land because Mitchell terminated his services and forfeited any right to confidentiality of his plans.
- d) Hill may purchase the land as long as he first informs the seller of his former client's plans to develop the shopping center.

2. Robert Simpson is about to go to trial on a criminal charge of burglary. His lawyer, Raymond Browder, has interviewed his client and learned that his client wishes to testify at trial that he was with his girlfriend at her apartment at the time of the crime. Simpson tells Browder that he insists on testifying and he insists that his girlfriend be permitted to testify to corroborate the alibi. Browder does not believe that either Simpson or his girlfriend is telling the truth, but he is not sure they are lying.

Which of the following most accurately describes Browder's duties under the Model Rules of Professional Conduct?

- a) Browder must permit his client to testify but may decline to offer the testimony of the girlfriend.
- b) Browder must follow his client's instructions and have both the defendant and his girlfriend testify.
- c) Browder may decline to offer the testimony of either the defendant or his girlfriend.
- d) Browder must not allow either the defendant or the girlfriend to testify because to do so would be to present false evidence to the tribunal.

3. Alan Walker is a lawyer who specializes in criminal defense. He is asked by Kevin Beasley and Ricky Kelly to represent them together in connection with charges that they committed an armed robbery of a convenience store.

Which of the following statements most accurately describes Alan's options under the Model Rules of Professional Conduct?

- a) Alan may represent both of them as long as they give informed consent to the dual representation and the clients confirm that consent in writing.
- b) Alan may not represent both of these defendants in the same case because there is a conflict of interest.
- c) Alan must first reasonably believe that he can provide competent and diligent representation to each client and, if so, must obtain informed consent from each client, confirmed in writing.
- d) Alan may represent both defendants as long as Alan reasonably believes that he can provide competent and diligent representation to each client.

4. Edward Finberg is an attorney who represents a plaintiff in an employment discrimination action. The defendant makes a settlement offer that Edward believes is ridiculously low.

Which of the following statements most accurately describes Edward's options under the Model Rules of Professional Conduct?

- a) Edward need not forward the settlement offer because he reasonably believes that the offer would not be acceptable.
- b) Edward must forward the settlement offer to his client unless the client has made it clear that the offer is not acceptable or has authorized Edward to reject it.
- c) Edward must forward the settlement offer to his client.
- d) Edward need not forward the settlement offer to the client unless the client has made it clear that all offers are to be forwarded to the client.

5. Frank Talent is an attorney with the United States Department of the Interior. One of the matters on which he has worked personally and substantially for the Department is litigation to open up the Audubon Wildlife refuge to logging. The Department is defending its decision to permit logging against a suit filled by Tree Huggers, Inc., an environmental protection group. Frank now wishes to leave the government and go to work for Ripon & Morris, a firm that represents Logging USA, Inc., a corporation that has intervened in the suit between Tree Huggers and the Department because it owns the logging rights in the Refuge.

Which of the following most accurately describes the law firm's options with respect to hiring Talent under the Model Rules of Professional Conduct?

- a) Talent may be hired and assigned to the Tree Hugger litigation because Ripon & Morris represents a client whose interests are not adverse to the interests of the Department of the Interior.
- b) Talent may be hired as long as he is not assigned to participate personally and substantially in the Tree Hugger litigation.
- c) Talent may be hired but may participate in the Tree Hugger litigation only if the Department of the Interior gives informed consent, confirmed in writing.
- d) Talent may be hired but must be screened from participation in the Tree Hugger litigation and must receive no part of the fee from the case.

6. Abraham Regenstein is an attorney in a city that is in close proximity to another state. He is admitted to practice only in his home state. His practice frequently requires him to go into the neighboring state to meet with clients. To facilitate his practice, he is considering opening an office in that neighboring state.

Which of the following statements most accurately describes his obligations under the Model Rules of Professional Conduct?

- a) He must not establish a continuous and systematic presence in the neighboring state unless he is admitted to the bar of that state.
- b) He may establish the office as long as he does not hold himself out as licensed to practice law in that state.
- c) He may establish the office as long as its sole purpose is to facilitate temporary legal services in the neighboring state.
- d) He may establish the office if he associates an attorney licensed in the neighboring state for his activities in that state.

7. Kirk Kilpatrick is an attorney whose firm formerly represented Stone Age Shoes, Inc. Several months ago, one of Kirk's partners, Mark Thompson, left the firm to open his own practice. One of the clients that Mark took with him was Stone Age Shoes, Inc. Mark also took with him to his new practice every lawyer who knew anything about Stone Age Shoes, Inc.'s matters, although Mark did not take with him several secretaries and paralegals who have knowledge of that company's confidential information. Kirk's firm has now been approached by a new client that wants to sue Stone Age Shoes, Inc., in a matter closely related to a transaction in which Kirk's new firm formerly represented Stone Age.

Which of the following statements most accurately describes Kirk's firm's duties in this situation under the Model Rules of Professional Conduct?

- a) The firm may not represent the new client against Stone Age because Stone Age is no longer a client of the firm.
- b) The firm may represent the new client against Stone Age because Stone Age is a former client and every lawyer who had knowledge of its confidential information has left the firm.
- c) The firm may not represent the new client against Stone Age because Stone Age is a former client and there are staff members still employed by the firm who have knowledge of Stone Age's confidential information.
- d) The firm may represent the new client against Stone Age because Stone Age is no longer a client of the firm.

8. David Gerson is a lawyer who specializes in drafting wills. He recently learned from a client that the client has a good claim against a physician for medical malpractice. David wants to refer the case to his law school classmate, Grady Ross, who specializes in such cases. David, however, wants a fee for the referral.

Which of the following most accurately states the circumstances under which David and Gary can share the fee under the Model Rules of Professional Conduct?

- a) David and Gary may share the fee as long as the total fee is reasonable.
- b) David and Gary may share the fee only if the division is in proportion to the services rendered by each lawyer.
- c) David and Gary may share the fee if they assume joint responsibility for the representation, the client gives informed consent, and the total fee is reasonable.
- d) David and Gary may share the fee as long as the client gives informed consent.

9. Lee Anne Pulis is an attorney who is representing a man in a divorce action. Her client has just called her and said (referring to his wife's lawyer) "I ought to just go over there and shoot that lousy low-life." She does not believe her client is likely to do any such thing but is concerned about her professional responsibilities.

Which of the following most accurately describes Lee Anne's obligations under the Model Rules of Professional Conduct?

- a) She must disclose what her client said to her opposing counsel because her client has threatened to cause death or serious bodily harm, even though she does not believe harm is likely.
- b) She may not disclose the client's statement because she does not believe that the client is likely to carry out the threat.
- c) She may disclose the client's threat anonymously to the police.
- d) She has discretion to disclose her client's threat to her opposing counsel to prevent death or serious bodily harm, even though she does not believe harm is likely.

10. Sheldon Atlas is an attorney employed as general counsel to the General Tool Company, Inc. He is licensed in the state where he currently resides and works. His employer has asked him to move to its new headquarters in another state and to continue to act for the corporation as general counsel, a capacity in which he makes no court appearances.

Which of the following most accurately describes Sheldon's options under the Model Rules of Professional Conduct?

- a) He need not become licensed in the new state because he is employed as an in-house counsel and does no litigation.
- b) He cannot render legal services in the new state for his employer until he is admitted to the bar of that state.
- c) He can render legal services for his employer in the new state on a temporary basis as long as those services arise out of or relate to similar services he rendered in the state where he was licensed.
- d) He need not be admitted to the bar of the new state because, as an in-house counsel, he is not engaged in the practice of law.

11. Benjamin Watson is an attorney who has just learned from a former client that the client lied at a court appearance in the client's case, which concluded a month ago.

Which of the following statements most accurately describes Benjamin's duties under the Model Rules of Professional Conduct?

- a) Benjamin has no duty to reveal the former client's false testimony because the proceeding is concluded.
- b) Benjamin may not reveal the former client's false testimony because to do so would violate Benjamin's duty of confidentiality.
- c) Benjamin must reveal the former client's false testimony because the former client perpetrated a fraud on the court.
- d) Benjamin must seek to have the former client correct his testimony but, if that effort fails, inform the court that the former client lied.

12. Rebecca Wolfson is an attorney who specializes in forming limited real estate partnerships. She has learned that one of her clients has been using a legal opinion that she drafted as part of a scheme to defraud investors. The client has made it clear that it intends to continue doing so.

Which of the following statements most accurately describes Rebecca's options under the Model Rules of Professional Conduct?

- a) Rebecca must withdraw from representation of this client and may disclose to potential investors that they are being defrauded.
- b) Rebecca may withdraw from representation of this client, may give notice of the fact of her withdrawal, and may disaffirm the legal opinion that is being misused.
- c) Rebecca must withdraw from representation of this client, may give notice of the fact of her withdrawal, and may disaffirm the legal opinion that is being misused.
- d) Rebecca must withdraw from representation of this client, must give notice of the fact of her withdrawal, and must disaffirm the legal opinion that is being misused.

13. Tim Lybrand is an attorney who is representing a prominent businessman in litigation over a multi-million dollar contract. On the eve of trial, Tim learns that his client has withheld from production to the opposing party a crucial document. The document was covered by a proper discovery request to which no objection was made. The client refuses to permit Tim to turn the document over to the opposing party.

Which of the following statements most accurately reflects Tim's duties under the Model Rules of Professional Conduct?

- a) Tim must seek Court permission to withdraw from the case but must keep the client's misconduct confidential.
- b) Tim must withdraw immediately from the representation of this client but must keep the client's misconduct confidential.
- c) Tim must seek Court permission to withdraw from the case and may, if necessary, disclose the client's misconduct to the Court.
- d) Tim may seek Court permission to withdraw and give notice to all parties of the fact that he is seeking to withdraw because of professional considerations.

14. Tom Reid is an attorney who has been asked to represent the husband of a prominent orthopedic surgeon in a divorce action. Tom realizes at the outset that he does not have experience with respect to the tax issues that may follow from dissolution of this marriage.

Which of the following most accurately describes Tom's options under the Model Rules of Professional Conduct?

- a) With informed consent from his client, Tom may limit the scope of his representation to the dissolution of the marriage.
- b) Tom must not undertake the representation unless he associates with tax counsel who would be competent to handle those aspects of the client's problems.
- c) Tom must not undertake the representation because it would require him to perform services for which he is not competent.
- d) Tom may undertake the representation only if the client gives informed consent to him doing so despite his lack of competence in tax law.

15. Emory Clancy is an attorney who specializes in disputes between securities brokers and their clients. He has been asked to represent Appleton Investments, Inc. in a civil action to void an arbitration award recently entered against Appleton. Emory learns, however, that one of his associates, Nancy Allgood, was one of the arbitrators in the case.

Which of the following most accurately describes Emory's obligations under the Model Rules of Professional Conduct?

- a) Emory must decline to represent Appleton because of his associate's service as an arbitrator in the dispute.
- b) Emory may represent Appleton as long as Nancy is timely screened from any participation in the case, is apportioned no part of the fee therefore, and notice is promptly given to all parties and the tribunal.
- c) Emory may represent Appleton only with the informed consent of all parties to the dispute.
- d) Emory may represent Appleton.

Question IV

(10 points, 15 minutes)

1. (5 points) **Re-read these facts (taken from Question 8):** David Gerson is a lawyer who specializes in drafting wills. He recently learned from a client that the client has a good claim against a physician for medical malpractice. David wants to refer the case to his law school classmate, Grady Ross, who specializes in such cases. David, however, wants a fee for the referral. **What would David and Grady have to do in order to comply with a) the old Texas rule and b) the new Texas rule on referral fees?**

2. (5 points) **How are the ethics rules for arbitrators and mediators different from those governing litigators?**

Enjoy the summer. Don't forget to consult your Model Rules at work!

ExamMemo
Professional Responsibility, Spring 2005
Professor Griffin

I awarded grades according to the law school's grading curve. The curve was as follows, based on a total possible 100 points. The number in parentheses indicates the number of students who received that letter grade.

90-100	A	(6)
86-89	A-	(9)
80-85	B+	(22)
74-79	B	(18)
67-73	B-	(5)
60-66	C+	(10)
55-59	C	(4)
45-54	C-	(5)
Below 45	D+	(1)

You are welcome to pick up your exams at the front desk of the Health Law Institute. You will need to know your exam number in order to get the exam. The exams are in the boxes in order of grades and not in numerical order.

In Question I, your answer should have had four basic headings: ineffective assistance of counsel, malpractice, breach of fiduciary duty, and discipline. For all four areas, you needed to do a good job of applying the law to the facts, not just listing the elements or requirements of the law. Conflict of interest was worth a lot of points, not only in the disciplinary setting but for the ineffective assistance of counsel claim. Students who lost points on this question usually did a poor job with *Cuyler v. Sullivan*.

Question II required you to write about the prosecutor's obligations to seek justice and to turn exculpatory material over to the defense under *Brady*. Good answers to part two of the question talked about the specifics of whistleblower law as we learned it in *Wieder* and *Bohatch*. Part three let you show off your knowledge of Sarbanes Oxley and the current debates over reporting misconduct. Students lost points in all parts of this question by either failing to cite case law or to use the facts of the question.

Answers for Question III are as follows:

1—B	2—A	3—C	4—B	5—C
6—A	7—B	8—C	9—B	10—A
11—A	12—C	13—C	14—A	15—B

For the first part of Question IV, the old Texas rule stated:

1.04 (f) A division or agreement for division of a fee between lawyers who are not in the same firm shall not be made unless:

(1) the division is:

- (i) in proportion to the professional services performed by each lawyer;
- (ii) made with a forwarding lawyer; or
- (iii) made, by written agreement with the client, with a lawyer who assumes joint responsibility for the representation;

(2) the client is advised of, and does not object to, the participation of all the lawyers involved; and

(3) the aggregate fee does not violate paragraph (a) [about reasonable fees].

The new rule states:

(f) A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if:

(1) the division is:

- (i) in proportion to the professional services performed by each lawyer; or
- (ii) made, between lawyers who assume joint responsibility for the representation; and

(2) the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed, including

- (i) the identity of all lawyers or law firms who will participate in the fee-sharing agreement, and
- (ii) whether fees will be divided based on the proportion of services performed or by lawyers agreeing to assume joint responsibility for the representation, and
- (iii) the share of the fee that each lawyer or law firm will receive or, if the division is based on the proportion of services performed, the basis on which the division will be made; and

(3) the aggregate fee does not violate paragraph (a) [on reasonable fees].

For part two of question four, most of you identified basic differences between the litigator's duties to client's and the arbitrator's role as third-party neutral. Additional points were awarded for remembering that the screening rules are different for arbitrators, as are the rules about unauthorized practice of law.

Following are the best student answers to the exam questions.

Question #1:

It looks like Bob (B) has few options to help himself and punish Attorney (A) for his misdeeds. To get out of prison, he might try an ineffective assistance of counsel claim. To get some monetary damages, he might try a breach of fiduciary duty claim, or a criminal malpractice claim. Finally, to further punish A, B should consider reporting A's conduct to the State Bar for Disciplinary actions.

I. Ineffective Assistance of Counsel

To succeed on an ineffective assistance of counsel (IAC) claim, B would have to show the two part Strickland test: 1) a deficiency in A's performance, meaning an error where counsel was not functioning as counsel, and 2) that the deficiency prejudiced the defense, meaning the error was so serious as to deprive the defendant of a fair trial, and that but-for the error, the result would have been different. If B wanted to overturn his conviction, he would have to show that there would have been reasonable doubt if A never committed his errors.

A. Deficiency

B has to point to errors of A. B might argue that A should have called Henry to testify. The jury might have believed there was some molestation going on, but did not know who was doing it. Because Henry (H) was admitting to some of the molestation, it seems perfectly relevant testimony to bring up at B's trial, to show at least some reasonable doubt.

It appears that A had no problem representing both B and H at the same time. B has a good case that A had a conflict of interest. A current client conflict of interest exists where the parties are directly adverse, or representation will be materially limited by the lawyer's responsibilities to someone else, which could be himself. B would argue first that A's representation of him is materially limited by the fact that Wanda is paying some of the money. More importantly though, the representation might have been materially limited because A felt loyal to Henry, and did not want to call him in A's trial. A might argue that not calling H was "strategy" in that he didn't want the jury to get the idea that anyone was molesting anybody.

There might also be a specific conflict of interest. A lawyer can accept payment from a third party if 1) the representation will not be affected and with 2) informed consent of the client. B would argue that he never gave informed consent for Wanda to pay on his behalf. Also, representation was affected because it led to the concurrent client conflict of interest above. This appears to be a clear violation of the Model Rules.

Also, B could claim that the error was not bringing up mitigating evidence of the possibilities of intoxication / insanity at the sentencing phase. However, there needs to be more facts on this issue as to exactly what happened in the sentencing phase.

Finally, the facts don't say whether A ever filed a motion to suppress, which clearly would be something an attorney in A's position would try.

B. Prejudice

Under *Mickens*, prejudice can be presumed when its 1) like you had no counsel at all or 2) counsel was absent during a critical stage at trial. Also, under *Sullivan*, representing active conflicts which led to impaired representation allows a court to presume prejudice. A should argue that prejudice should be presumed here because A was representing both B and H at the same time, and their interests were materially adverse. Also, there is the possibility of the 3rd party payer conflict resulting in a presumption. He would argue that the impaired representation was the fact that A did not call H to the stand, and perhaps that A did not raise any mitigating circumstances after the trial.

But, if B can't succeed in showing a presumption, he would have to argue that but for the errors, there would have been reasonable doubt to overturn his conviction. He would need more facts to prove that his motion to suppress his statements would be successful, and thus depriving the State of the necessary evidence needed to convict him.

On its face, it looks like a good case for IAC. However, as we have seen 99% of these cases fail, so this claim will likely fail also. I would still bring the claim because I would take it pro bono.

II. Breach of Fiduciary Duty

To succeed on a breach of fiduciary duty (BFD) claim, B would have to show the following elements:

A. Duty

A duty is established through a showing of the attorney client relationship (a-c). Such a relationship originates when 1) the intent of the client plus consent of the attorney or a failure to negate consent, or 2) lawyer gives advice, or 3) by the subjective interpretation of the client an a-c relationship was formed. Clearly, A was B's lawyer because he represented him in his criminal defense trial. The fiduciary duty is to be loyal and honest to your client.

B. Breach of Duty

To show a BFD, a client generally has to show acts of disloyalty or dishonesty on the part of his lawyer. This typically can be shown by Conflicts of Interest and disclosures of confidential information. First, A can argue the same conflicts of interest, described *supra*.

A lawyer must not disclose confidential information. However, a lawyer may disclose when there is a reasonable probability that 1) there is likely to be substantial

bodily harm or death to someone or 2) a client will or is using the lawyer to commit a crime or fraud. Henry filed a grievance with the State Bar. On the day A had notice of that, there was an anonymous phone call telling the police where B was. This evidence suggests that A leaked the information about B's whereabouts after the trial. B would argue that this amounted to a disclosure of confidential information. A might argue that B was using him to commit a fraud on the court and obstruct his own justice, and thus he had the authority to disclose the information. However, this seems an odd argument, considering it was A who suggested that B flee to another state.

Also, B can argue that A lied about his fees. A told H that he would retain \$5,000 but it appears that he retained \$9,000. A would argue that B doesn't have "standing" for this argument because the transactions don't involve him directly; instead this argument should be brought by H. A clearly committed a violation, but it might not be relevant to B in his BFD claim.

C. Causation

Unlike a malpractice claim, B does not have to show he would have won his "case within a case." Instead, with BFD he can have actual damages or even no actual damages and still win. He does not appear to have any actual monetary damages as a result of the breach of fiduciary duty. But, he can still win a BFD suit and recover his fees that he paid to A. Bob's problem is that the facts don't indicate that he personally paid any fees. B would argue that all the fees came from H and Wanda, so even if B wins his BFD suit, he would recover nothing.

D. Damages

It looks difficult for B to establish any actual monetary damages. However, assuming that B was after any fees he paid to A, he does not have to show actual damages to win a BFD claim.

III. Criminal Malpractice

To succeed on a criminal malpractice claim, B would have to show 4 elements:

A. Duty

A duty is established as described, *supra*. B would argue that A had a specific duty to offer mitigating circumstances or call H at B's trial, or bring a motion to suppress in pretrial.

B. Breach of Duty

If B can establish those specific duties, then A breached those duties because he didn't do any of them. Additionally, ethical violations are not per se malpractice, but they can assist in a finding of such. Thus, B can point to the ethical violations above, as well as the others described in part IV.

C. Causation

A would have to show that but for A's negligence, he would have won his "case within a case." With criminal malpractice, this means A would have to show his innocence, a difficult burden to show. B seems to be denying any molestation, so he could be innocent. However, he would have to show that if A had examined H, then he would have been found innocent. His conviction seems to be primarily based on his confessions, so entry of H's testimony probably will not change the outcome.

D. Damages

B's damages are that he was convicted of a crime. He would have to show he was innocent and would therefore have won his "case within a case"

IV. Disciplinary Actions from State Bar

Finally, B can report A's actions to the state bar for possible disciplinary actions. The conflicts of interest as well as the other violations described above can be reported for possible disciplinary action.

Fees

A lawyer must charge reasonable fees. The basis for the fees must be reasonably disclosed to the client. A promised Wanda a receipt, which he never gave her. He convinced H to sign over his pension checks and he wanted an "unspecified fee." Also, the parties would argue that A lied to them about how much additional money he was going to take (\$5,000 versus \$9,000). This appears to be a clear violation of not disclosing the basis of fees to the clients.

Expediting Litigation (Delay)

A lawyer should expedite litigation as far as reasonably possible, and should not delay litigation for the purposes of obtaining more fees. A refused to do work until the married couple raised more money. B would argue that A should have been working on their cases, and expect additional fees instead of just refusing to do any work.

Scope of Representation

A lawyer cannot "coach" a client on how to commit a crime or fraud and "get away with it." Clearly, how A advised B to flee to another state to avoid going to prison is a violation here.

Misconduct

A lawyer commits misconduct if he violates any of the Model Rules, or does other crimes or acts which show his dishonesty, or otherwise show he is unfit to practice law. All the previous possible violations could result in Misconduct. Because of the extreme nature of how A recommended B flee to another state, disbarment seems a likely punishment.

V. Conclusion

An IAC claim seems appropriate, because of the possibility of presuming prejudice based on an active COI that led to impaired representation. Criminal malpractice has historically been very difficult to prove, and Bob is probably primarily concerned with getting out of prison. Also, it doesn't appear that B has much monetary damages. Thus, I would probably not bring a criminal malpractice claim. The BFD seems meritorious, but again there is the problem of no fees paid from B to A. So, I would probably not bring the BFD claim either. Reporting to the bar for disciplinary action seems like a good option. There is a heavy violation in coaching the client to leave the state, so A has a good change of getting disbarred, which would seem to satisfy B.

Question #1:

I. Actions taken to Help Bob (B)

In order to help Bob (B) be freed from his criminal convictions of three counts of sodomy in the first degree for sexually molesting Tess (T), I would file a motion to vacate the judgment of the trial court based on Ineffective Assistance of Counsel (IAoC). The test to find IAoC is based on the two-part Strickland test from the Supreme Court, noting that IAoC is present when 1) counsel's performance was deficient (i.e. counsel was not effectively acting as counsel), and 2) counsel's deficient performance prejudiced the defense (i.e. performance was so egregious so as to effectively prevent defendant from having their right to fair trial). The performance by counsel is based on a reasonable professional judgment standard, so that if an attorney should act as a reasonable attorney in the situation would. See Wiggins and Jones. In this particular case, the IAoC claim rests on the apparent conflict of interest (CoI) that Attorney (A) has in his representation of Henry (H) and B. For an IAoC claimed based on a CoI, the Strickland test is slightly modified because the court deems that the defendant has not gotten effective representation at a crucial proceeding in the trial. The IAoC test in a CoI situation is therefore modified into the Sullivan modification. Under Sullivan, Prong 1 of the Strickland test is met if there was an actual conflict and if this conflict effected the representation of the defendant. Prong 2 does not have to be met, as this would be too substantial a burden for the defendant to prove in a CoI situation. Considering these

rules, I would first bring the IAoC based on CoI and prove up the Sullivan standard

First, there must be an actual conflict. Under MR 1.7, a lawyer shall not represent a client when there is a concurrent conflict of interest. A concurrent conflict of interest exists when clients' interests are directly adverse and representing them would materially limit the attorney's (attny) ability to represent the clients. If there is a concurrent CoI, the attny cannot represent both clients unless he reasonably believes that he can represent both clients competently and diligently, both clients give informed consent, the clients are not making claims against each other, and the representation is not prohibited by law. Here, it is clear that there is a concurrent conflict of interest for A representing both H and B. The interests of H and B may be directly adverse, and it is likely that A's ability to represent them both is limited by representing them both. Because Tess made claims against both H and B, it seems likely that B or H may want to blame the other for the claims that Tess made. Thus, their interests would be directly adverse. Thus, A should not represent them both unless both clients give informed consent and he reasonably believes he can represent them both adequately. Even under the forgiving reasonable professional judgment standard, it seems unlikely that A could believe that he could represent them both adequately and competently. Any attny would see the obvious implication where 2 criminal's defendants are indicted for the same crime on the same day. Their interests are simply too divergent to supply them both with adequate representation. Additionally, it is not explicitly stated that the implications of the representation was explained to B and H, therefore making it impossible for them to give their informed consent. Considering the fact that there is a clear concurrent conflict of interest which both could not be consented to by both clients, and in either case was not clearly consented to by both clients, A had a concurrent conflict of interest that is in violation of MR 1.7.

Even without the concurrent CoI between H and B, there is another conflict in allowing Wanda (W) to pay B's fees. Despite the fact that she is family, B is no longer a minor and should be paying his own legal fees so that A has no CoI. MR 1.8 rules that a lawyer shall not accept payment for legal services by someone other than the client unless the client gives informed consent, there is complete independence of the lawyer in making all decisions, and the client's confidentiality is protected. When A allowed W to pay for B's fees, he made the CoI he was already involving himself in even worse. By accepting the payment of W, it is likely that he then felt an obligation to also do what W wanted to do for B. Although there is no clear factual evidence of this influence of W over A, it may be implied by the fact that A did not seem to take any clear action against the Detective and claim that B did not confess. Furthermore, A did not make a cross claim against H for the claims, which is what a reasonable attorney would do, in an effort to place the blame on H. Because W was interested in the outcomes for both H and B, A should not have allowed W to pay for both of their fees at the same time. Moreover, the fact that the fees were kept in the one place by A further evidences the fact that A was deeply involved in a CoI.

To meet the 1st prong of the Strickland test for CoI situation, the conflict must have also affected A's representation of B. Again, it seems clear that there was some

effect to A's representation of A due to the conflict. As has been aforementioned, there are 2 ways that A was involved in a CoI. Did this CoI effect representation? Here, the answer seems to be a definite Yes. Again, as fore mentioned, a reasonable attorney would have made many attempts to shift the blame to H. Additionally, a reasonable attorney would make a significant case out of the Detective's apparent involuntary confession by B, which A seemed to not mention in this case. Either way, A's representation of B was clearly effected by his Conflicts of interest.

Because Prong 1 of the Strickland test is met here, for a conflict of interest situation there is no need to meet prong 2.

Additionally, I would mention in the motion that his claim of guilt with the Detective was involuntary, thus making it ineffective. B has a constitutional right to counsel when arrested on a criminal count. Here, Detective effectively told him that he would not get counsel. This could have distressed B to the point of making an involuntary agreement with Detective. In any case, the evidence of B's guilt should not have been admissible at the trial court level and B's conviction should be vacated.

Finally, I would claim that B should not be punished for listening to his lawyer's advice about fleeing the jurisdiction. The attorney client relationship is meant to be one of trust, and the lawyer violated that trust by telling B to flee when it was a crime.

II. Ways to Punish Attorney (A)

Fortunately for Bob, there are many ways to punish A for his acts. First and foremost, as a new lawyer, I can bring many of A's actions to the attention of the state bar for his complete lack of competence. In fact, under MR I have a duty to do such as long as I don't have to disclose client confidences. Thus, I can tell the state bar and try and get disciplinary sanctions from them. I can report A to the bar for failing to keep a client reasonably informed, as is his duty under the MR. When A made promises to provide a receipt, he failed to do so, thus violating his duty of communication with his client. Although the promise was to Wanda, as a 3rd party that was affected by his actions he owed a duty to her, as well. I could also tell the bar that A violated the rule for fees. First, he violated the rule because his retainer funds were not kept in a separate trust account and accounted for each service that would effectively pull from that trust account. Second, the fee agreement should be written out and the scope and duties of the representation spelled out for the client. Here, there was no written agreement and A kept seeking more money. Additionally, the fee was unreasonable. A fee must be reasonable in order for it to be valid, even if the client consents to the fee. The factors for reasonableness are spelled out both in the Fordham case and by the MR's. They include such things as:

1. The novelty of the question, the time and scope of the question and ability needed to represent the matter
2. The past relationship of the lawyer and client
3. What other lawyers in the area charge for the same services

4. The ability and reputation of the attny
5. The likelihood that taking the client precludes taking other clients.
6. Time limitations imposed
7. The outcome of the matter
8. Actual time spent on the situation

From these factors, it seems possible that the fee of what essentially comes out to \$21,000 is an unreasonable fee. The question of sexual abuse is not likely a novel question, and there is no evidence that A found a novel approach. In fact, A lost the case, so he clearly didn't find a novel defense that cleared B of the charges. Then A successfully convinced B to keep giving money out of his pension fund, which seems like a poor reflection on the validity of the fees. Taken together, these fees seem to be unreasonable and should not be enforced by the court.

Aside from the fees, I could also note that A aided and abetted B in fleeing the jurisdiction. A lawyer shall not commit a crime that reflects poorly on his honesty, truthfulness, or general fitness as a lawyer under the MR. Additionally, a lawyer shall not assist a client in committing a crime or fraud. Therefore, in telling B to escape the jurisdiction, not only was A helping his client commit a crime but was committing a crime himself that clearly reflects on his fitness as a lawyer.

Taken together, these many acts should convince the bar to punish A. This may include disbarment, suspension, public reprimand, or rehabilitative sanctions. For these egregious acts, I would support disbarment from the practice of law for A.

Another way to punish A is to file a claim for legal malpractice. There are 4 elements to this type of negligence claim: Duty, Breach, Causation, and Damages. A duty exists when there is an attorney client relationship. Here, there is clearly such a relationship between A and B. A breach exists when an attorney acts in a way that is not in accord with how a reasonable attorney would act in the same situation. Here, the attorney aided B in committing a crime, involved himself in a conflict of interest that inhibited his ability to represent B, among other grievances. There was a breach of the duty. Causation is proved by showing case-in-a-case. This means that B has to prove that but-for A's negligence, B would have won the case. This is the problem with a legal malpractice claim. It is very hard to prove. Effectively, B would have to prove his innocence because he was convicted on criminal charges. If B could prove this, which is unlikely, then damages are also proved.

However, because this is so difficult to prove, B might have more success with a breach of fiduciary duty claim. For a breach of fiduciary duty claim, B would only have to prove duty, breach, and causation. The duty and breach are clear here, and causation does not rise to the level of case-in-a-case. As long as B can prove that A's actions led to the conviction of B in some way, then that should be sufficient. Furthermore, damages in a breach of fiduciary duty claim do not have to be specific, as long as there is an amount placed on them, which is easier than the case-in-a-case standard for legal malpractice. Thus, it seems much more likely that B will be able to prevail on a breach of fiduciary duty claim and will be able to recover his fees.

III. The Success of the Aforementioned Approaches to B's Problem

First, the IAoC claim will likely fail before the court. Even in Sullivan, where the court was fully aware of the CoI, they court deemed that there was no IAoC. The standard is very high to meet, and the evidence against B seems to be strong. The word of a police officer against a suspected child sexual abuser is, to say the least, unbalanced. Even if A had been not had the CoI, B would probably still have lost. Additionally, the court might take into account that H's trial was already over when B's started. Because H had already pled guilty, there was less of a conflict of interest than if both had been pleading not guilty at the same time. Because the court seems to side so often that an attorney has met the reasonable professional judgment standard (even if sleeping through testimony as in McFarland), they will not likely vacate B's conviction.

On the State bar claims, I think that B will have relative success. A's actions were so egregious and reflect poorly on the law profession. Disciplinary sanctions are given for 3 reasons: protect the public; protect the administration of justice, and protect the reputation of the profession. Here, sanctions against A would meet all three goals. The actual sanction of disbarment may not be applied, however, as it is rarely used. However, at the least, it seems very possible that the bar will sanction A by some kind of suspension, especially considering that they did so for the much less obvious violation of failing to report an attorney to the bar in *In Re Himmel*.

A's fees may be taken away from him for several reasons: 1. his fee was unreasonable, 2. if his breach of fiduciary duty claim succeeds, or 3. because the court feels that he was acting uncivilly by taking B's pension fund (similar to the *Lee v. American Airlines*, where incivility cost Lee much of his firm's lawyer's fees).

The legal malpractice claim is unlikely to succeed for the aforementioned reasons. In a criminal case, it is simply too hard to prove the level necessary to show that the criminal defendant was in fact, innocent. Thus, B will likely not succeed on legal malpractice. But, his breach of fiduciary duty claim is much more likely to succeed. Although violation of the MRs does not give rise to a cause of action or prove per se negligence, there is enough evidence of A's actions that show that he was not acting as a true fiduciary to B. Thus, B should be able to reclaim the attorney's fees that A took, and at the very least, have a fund waiting for him when the gets out of jail.

Question #2:

I. Judge's Memo on Prosecutorial Misconduct

A. Bringing the Case

In general, the MR state that a prosecutor should only bring claims for which they have probable cause. In this situation, Polly (P) was not bringing any claims, so this does not appear to be an issue for her. However, Tom's (T)'s bringing of the claim may

be questionable and would need to be determined based on any other evidence that could lead to T's believing there was probable cause to bring an action against Sam Smith.

B. Fraud on the Court

Tom (T) was allowing a fraud on the court to be committed. An attorney has a duty under MR 3.3 of candor to the court. This means that the lawyer cannot tell the court false facts and must fix these falsities if need be, must not present false evidence to the court, and must provide the court with controlling adverse authority if opposing counsel does not. Here, T, P, A1 and S knew that false evidence in the form of an affidavit was being presented to the court. T's has duty to take reasonable steps to resolve this issue under Model Rule 3.3. P's duty arises from knowing that T is allowing a fraud to be committed on the court. Thus, because P knows that the fraud is being committed, P has an implied duty to promptly and reasonably resolve the breach of candor to the court. It would be most advisable for P to talk to T directly about the situation and allow him to fix it instead of conducting her own separate investigation. T should first consult with his client, and if that doesn't resolve the fraud on the court, he can either withdraw or disclose the information to the court because it is an ongoing fraud on the court that meets the prevention of crime/fraud for the confidentiality privilege. Although this doesn't have to be immediate, it must be reasonably prompt. Thus, T has time to discuss the matter with his client, his supervisor, and then he must move forward with a decision.

C. Duties of Partners, Supervising Attorneys and Subordinate Attorneys to Report Misconduct

P decided to ask her supervising Attorney, Sally (S) what she should do, and had a meeting with the head of the office, A1. Both A1 and S have special duties in their roles as partners and supervisors. The head of the office, A1, has a duty as a partner to make reasonable sure that all lawyer are following the rules of professional conduct. S and A1 as supervising attorneys, have a duty to follow the rules of professional conduct, reasonably make sure that subordinates are following the rules, and are held liable for violations of the rules by his subordinates. P and T, as subordinates, have to follow the rules of professional conduct, but can concede to a supervisor's reasonable resolution on an arguable question of professional conduct. In this situation, P was unsure of her ethical obligations to report someone's violation of duty of candor to the court and the validity of the warrant. Thus, a meeting was held on the issue with Supervisor Sally (S), P and A1. Following that meeting and A1's advice to tone down the accusatory tone of the memo stating that there was a violation by the police concerning the affidavit, T proceeded with the trial. This raises 2 questions: First, is A1's and S's decision to wait to bring the affidavit to the attention of the court until after the defense brings it up a reasonable resolution of an arguable question of professional ethics, and second, if not, are T and P liable for misconduct? On the first issue, was it a reasonable resolution of an arguable question to allow T to continue with the trial awaiting a ruling from the Court? The facts make it appear to be an arguable question, at least as to P. While T's duty is a bit clearer, P's duty is not as clear. She didn't give the evidence to the court, the affidavit

is questionable but not decidedly false, and it is reasonable to think she is not clear on her ethical duties. Thus, the matter seems arguable. Was A1's and S's decision to move forward a reasonable resolution? For, T, T's duty is to promptly resolve the issue when there is a violation of duty of candor to the court. However, this doesn't mean that it has to be immediate. In fact, the rules allow time to discuss the matter with the client and try to get them to fix the situation, to withdraw from the case if need be, or even the time to consider disclosing confidential information to the court. Thus, waiting for the defendant's motion to be ruled on concerning the affidavit may be a reasonable resolution to the issue. For P, to make her tone down the tone of her memo may be normal when presenting information to a client. A1 didn't suggest to drop the matter then and pretend it didn't happen, but that it may not be a big deal after all and everyone should wait it out. Thus, the resolution seems reasonable.

A later finding that professional misconduct has occurred could affect all parties to matter. Because supervisors are liable for the violations of their subordinates, both A1 and S will be implicated if either T or P is found to be in violation of a rule of professional conduct. Generally, subordinates are liable for their actions that violate the rules of professional conduct, regardless of the fact that they are subordinates. However, if the court finds that the subordinates (P and T) acted in accord with A1 and S's reasonable resolution to an arguable question of legal ethics, P and T might have protection from misconduct with the "superior orders defense." The superior orders defense allows subordinate attorneys a safe haven from violation of the model rules in 2 situations: 1. when they concede with a supervising attorney's reasonable resolution of an arguable question, and 2) when, because a supervising attorney has asked them to act in a way that ends up being a violation of the MRs, the subordinate attorney does not have the requisite "knowledge" required to be acting with professional misconduct in assisting in a violation. Because both P and T responded to a supervisor's reasonable resolution, both may be protected from a violation of the MRs.

D. Prosecutorial Duty to Disclose Evidence

Additionally, both T, and A1 through T, could be violating the prosecutorial duty of searching for all of the facts of the case, and presenting to the defense evidence, even if it may result in the defendant's innocence. While prosecutors should still act with the "warm zeal" supported in the MRs to act with promptness and diligence in representing a client, on the issue of evidence that may hurt the prosecutor's case, the rules are different. The prosecutor must inform the other side of evidence that may exculpate the criminal defendant. T, knowing of the questionable validity of the warrant, should have presented such evidence to D. In failing to do so, T violates his duty of prosecutorial ethics, and A1 is inculcated as his supervisor. A1 may be further guilty of asking P to effectively fail to disclose material information on the stand. Similarly, P could be liable for actually lying on the stand. The resolution of this issue would rely on the court's interpretation of deception. Some courts have said that misleading statements or omissions amount to false evidence, while others have stated that it is the adversary's job to smoke out deception. Thus, A1's ethical violation may hinge on this result.

The policy of requiring prosecutors to disclose evidence makes sense because in criminal situations, the defendant's freedom and very life may be on the line. With such strong interests, the defendant should only be convicted if he actually committed the crime. Forcing the prosecution to provide the defense with all evidence protects the freedom and lives of defendants and promotes the administration of justice.

E. Testimony of a Prosecutor

Under the advocate-witness rule, an attorney cannot testify in a case in which they are representing a client, barring a few limited circumstances. Here, because P is not directly representing Smith, she may testify and has a duty to be honest in her testimony both as a normal witness and as an agent of the justice system. P cannot provide the court with false evidence through her testimony. However, her testimony may be protected by the attorney-client privilege. The attorney client privilege applies when a confidential communication is made between privileged parties in the process of obtaining legal advice. The privilege may be waived if it is not asserted, if the information is disclosed to 3rd parties, and if the client gives informed consent. Here, T had an attorney client relationship with S, and thus their communications were privileged. P did not have a direct relationship, but any information she has is protected by a duty of confidentiality between lawyers in the same office. A1 has asked that P not tell about the memo concerning Smith and the affidavit when she testifies. Failure to disclose this information could be a fraud on the court, depending on the court's ruling about the role of the adversary in seeking out deception. However, P might be able to assert the attorney client privilege in this situation and not testify, because the communication was made in furtherance of the prosecution of Smith. The defense, on the other hand, would be able to say that this is a crime/fraud and that the privilege should not apply. The crime fraud exception's application means that communications between a client and attorney where the client intended to use the attorney's legal services for the purpose of committing a crime or fraud are no longer protected under the attorney client privilege. Application depends on the time of the discussion. If the crime/fraud is a past crime/fraud, it is still protected. If it is an ongoing or future crime/fraud, it is not protected and must be revealed if the adversary carries his burden of proof. Here, the fraudulent affidavit is a fraud on the court, which is a valid fraud action. See *Bersani v. Bersani*, where fraud on the court allowed crime fraud exception to apply to locate hiding wife and children. The question is if the affidavit is a past or ongoing/future fraud. Although it technically happened in the past, it seems likely that it is an ongoing fraud because the affidavit is still being used to validate evidence in the current proceeding. Thus, the crime-fraud exception will seemingly apply to the memo concerning the affidavit. Despite A1's ethically questionable request to keep the memo quiet, P may have to disclose its existence.

II. Can Polly Sue for Damages?

Generally speaking, while an attorney has a duty to report misconduct under the Model Rules, they do not have a duty for the retaliatory actions of their supervisors. For

example, in *Weider v. Skala*, the attorney who was discharged for reporting ethical violations was not allowed to bring a claim for retaliatory discharge. However, P may have a claim for breach of contract based on the implied-in-law obligation that supervising lawyers have to their subordinates. The court in *Weider* noted that this is a valid claim for attorneys who report misconduct and are then retaliated against. Therefore, P may be able to sue USAO for breach of the implied-in-law obligation to follow the rules of professional conduct when practicing law. In this situation, P should be able to bring such a suit against USAO. The MR requires lawyers to report misconduct, and there should be protection for lawyers who act on that duty. Allowing such a claim to be brought validates the importance of ethical layering and protects the integrity of the profession. This rule applies seemingly even more in the important situation of criminal law and government prosecutors. As public servants, lawyers should be keenly aware of their acts of conduct, as violation of them reflects poorly not only on the profession, but on the government as a whole.

Furthermore, P attempted to solve the problem within USAO, by going to her supervising attorney. When he seemed to overlook the discrepancy, P should be able to report his misconduct. Even if her report turns out to be wrong (and hopefully in most cases it will), we should protect the good faith efforts of attorney's who try to meet their duty to report misconduct, as the dissent in *Bohatch* noted. Doing so promotes the important self-regulation that the profession of law requires.

This ability is perhaps even more important in the government context than in the private sector. We want to encourage public service, which is difficult at lower salaries. Protecting whistleblowers in government positions may be a vital part to keeping people in government jobs and slowing down the speed of the revolving door.

III. Prosecutorial Laws and Policies

In order to solve situations such as the above, prosecutorial policies and laws should be developed in several ways to resolve the situation. First, there should be a prosecutorial policy that when evidence of a defendant's guilt is based on a reasonably questionable violation of the defendant's constitutional rights, the prosecutor must discuss the matter with the defense attorney. Although in this situation the defense counsel was aware of some wrongful conduct, a prosecutor should not be allowed to withhold information and lie to the court in order to see if a case can go forward. This is a waste of judicial time and expense, and should be resolved so that prosecutors cannot maintain actions based on violations of a defendant's constitutional right.

Second, there needs to be some kind of limitation on the superior orders defense. The MR requires reporting, but then gives subordinate attorneys a safe haven by hiding behind supervisors. The MR should provide for a Qualified Legal Ethics Compliance committee in each firm or group of lawyers. This QLECC would be headed by attorneys whose compensation is not rewarded by the amount of money the firm makes. Thus, the disinterested lawyers would form a QLECC which would allow subordinate attorneys to report possible ethical violations without fear of losing their jobs. Based on their

decision, the QLECC would then actually report the misconduct or would be held liable for a later discovered violation.

Last, even within government law, lawyers who are punished for reporting misconduct or attempting to remedy misconduct should be able to bring claims for retaliatory action. Just as in employment law where employees can sue for retaliatory action from their employers, lawyers should also be able to. Of course, the presumption is that employers may be able to change their employee's positions and terminate them at-will. However, in order to promote the important policy of self regulation within the law, lawyers who are retaliated against should have a claim for retaliatory action if there is a reasonable question as to the relation between the change in their employment status and the reporting or investigation of misconduct.

Question #2:

1) Prosecutors have wide discretion in carrying out their duty to seek justice. However, there are some ethical limits on this discretion. The conduct of supervising USA AL is questionable and appears to have crossed the ethical line. First, AL (All prosecutors) has the obligation to seek justice. Justice is not served by prosecuting & convicting an innocent defendant. Therefore, prosecutors must make a determination that there is enough credible evidence to charge someone with a crime. The rules are silent on what the standard should be. Some argue a low standard of probable cause suffices. Others argue a prosecutor should not go forward if he/she does not believe beyond a reasonable doubt that the D is guilty. Since the ethics/rules are silent on this matter, the individual prosecutor or office policy drives the required standard. Here, however, AL ordered the continued changes of Sam until the motion challenging the warrant was decided. If the USA did not have any other evidence of Sam's guilt, other than that obtained by the unlawful warrant, then AL and the USAO should have dropped the charges because of their obligation to seek justice.

Justice is not served by using unlawful means to violate people's constitutional rights, nor is it served by charging a D with no credible evidence. The USAO also has duty to be candid with the tribunal and not knowingly offer false evidence. Here the law enforcement used false statements to get the warrant. Once the USAO had knowledge of that misrepresentation, they had a duty to remedy the violation by alerting the court. Once again, waiting to correct this misrepresentation until the outcome of a defense motion was not ethical or necessary and was a violation. USAO has an affirmative duty to correct.

Additionally a prosecutor has a duty to disclose exculpatory evidence to a defendant. Here, the USAO attempted to threaten that release by advising Polly to not discuss it at the hearing under oath. While the memo itself may have been a work product, thus privileged, the facts discovered during Polly's investigation were exculpatory and were required to be released to Dan and Sam. AL advised Polly not to mention the memo – his reasons why are suspect. He may argue that it was because of

work product privilege; however, it appears that the real reason was he didn't necessarily want to let this off. He appears to have wanted the suppression to fail so that Sam could be prosecuted despite the unlawful warrant. Polly had a duty to not lie while on the stand (3.3). If Dan specifically asked her about her investigation, she could not lie, but could not assert proper privilege. Finally subordinate attorneys have a duty to follow the Model rules unless a supervising attorney instructs the subordinate to take action based on a reasonable resolution of an arguable question of professional duty. Here, Polly couldn't follow AL's request to possibly withhold exculpatory E or lie under oath because there is not an arguable question. However, if he advised her to not to disclose the memo because of work-product privilege, then she could follow his orders because that is reasonable resolution of an arguable question.

In conclusion, prosecutors are held accountable to the Model Rules. They have additional requirements of turning over exculpatory evidence to defendants and an obligation to seek justice. This obligation affords them a lot of discretion, but does not allow them to violate the Model Rules.

2) Polly should be allowed to sue the USAO in a tort suit for retaliation and should collect allowable damages. Clearly Polly is receiving an adverse employment decision (demotion, fired) due to a protected action. The counts have held that absent an employment contract in an at will employment state, a firm has an implied fiduciary duty to not fire junior attorneys (not partners) for following the Model Rules.

We want to encourage lawyers to practice ethically and therefore some protection is necessary. This implied fiduciary duty could and should be applied to the case of assistant prosecutors. We want to encourage prosecutors to carry out their obligation to seek justice in a manner that doesn't jeopardize people's liberties and freedoms. Bringing criminal charges against others has many devastating consequences which should be avoided at all costs to protect innocent D's. Since prosecutors have such wide discretion, allowing an assistant prosecutor to sue in tort for "whistle blowing" may offer a needed restraint to that sometimes overreaching power/discretion. In Polly's case, she received an adverse employment action because she chose to follow the Model Rules. She upheld her obligation to the court by not only refusing to offer false testimony, but took affirmative steps to correct the false info/misrepresentations the court received due to bad accounts of the police. Polly also upheld her duty to turn over all exculpatory evidence to D.

Lastly, Polly's participation at the hearing and disregard to her supervising attorney was necessary to ensure criminal charges that were not substantiated by any credible evidence would be dropped. Polly obviously upheld her duty as a subordinate attorney to follow all Model Rules and her supervisor's reasonable resolution of an arguable question of professional duty when she complied with AL's request to tone down the 1st memo. This lends evidence to the validity of AL's inappropriate motives for requesting Polly to not disclose the memo at the hearing. The damages awarded should be nominal and only enough to make her whole. The state is not rich and allowing high damage awards may bankrupt the USAO or detrimentally effect tax payers.

In conclusion, Polly should be allowed to Sue for retaliation by applying the implied fiduciary duty to non-partner attorneys because she was following her professional duties and public policy is served by encouraging attorney's to act ethically especially when they have the power to pursue criminal charges.

3) Prosecutorial policies and laws should encourage the attorney's to follow the rules of ethics and report knowing violations could result in the loss of someone's liberties. Since there are not many restraints on a prosecutor's wide discretion, violations are likely to be occurring. Looking to the policies of corporations might be applicable to prosecutors. Rule 1.13 requires an attorney to report a knowing violation of rules or laws. This seems reasonable for prosecutors. Protection should be offered to encourage this reporting. Additionally 1.13 allows reporting out of the organization, thus breaking confidentiality. When there is a substantial risk that a material violation will result in injury to financial interests or property. In applying this rule to prosecutors, I would change the last part to "... substantial risk of loss of liberty." We have constitutional protections in place to protect a person's ultimate liberty – freedom.

In places like Texas where there is no public defender program that can counter the benefits and power of the prosecutors office, a rule encouraging reporting of misconduct may do well in serving public policy. The prosecutors represent the people of the state and thus should be responsible to those people. If malpractice is not an option because of immunity, then at the very least there should be a rule like 1.13 that requires reporting of known violations to prevent the potential harm of loss of liberty.

Obviously, a 1.13 type rule for prosecutors will have to be altered in order to accommodate a DA's duty to seek justice to protect citizens. A focus on safety, freedom and protection of defendant's constitutional rights must be included. I would support policies and rules that would encourage reporting known violations made by fellow prosecuting attorney's, support staff, and law enforcement officers in order to protect liberty interests of D's. In addition to applying a 1.13 type of rule, I'd advocate that all other rules apply including subordinate/supervisor attorney duties if they don't already.