

Student Number _____

**Final Examination in Professional Responsibility
Professor Leslie Griffin, University of Houston Law Center
July 1, 2009, 6-9 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 handwriting, please **do not use pencil**. If you write your exam, use **ONE SIDE** of a page only, and **SKIP LINES**.

If you are using a computer, please follow the directions that you learned at the training session. If the system fails, you should immediately start writing in your bluebooks. You **do not** need to write your exam number on the flash drive.

At the end of the exam, you **MUST** turn in this copy of the examination. Please do not write your name, social security number or any other information that provides me with your identity.

This exam is **NINE** pages long, with **THREE** questions worth 100 total points. You have **THREE HOURS** to complete the exam. Question I is worth 35 points; I recommend that you spend 60 minutes on it. Question II is worth 35 points; I recommend that you spend 60 minutes on it. Question III includes 12 multiple choice questions, worth two points each, for a total of 24 points, and one short question worth 6 points. Write the answers to all the questions, including the multiple choice questions, in your bluebook or on your typed exam; there is no scantron or other form on which to enter the multiple choice answers.

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.

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
(35 points, 60 minutes)

Harry and Wanda were married for twenty-five years and together had three children, Juan, Dewey and Troy. They were a very happy and loving family. After Wanda died, Harry became the executor of her estate. He retained the law firm of Smith & Jones to advise him on managing Wanda's estate. Harry needed advice especially about the separate versus community property aspects of the estate, i.e., what belonged separately to Harry and to Wanda and what they held jointly as community property.

Harry told Smith & Jones lawyers that he and Wanda had orally agreed that Auto Stock belonged to Harry and Oil Stock belonged to Wanda. Smith & Jones wrote Harry a memo advising that the Auto and Oil Stocks were presumed to be community property, and that additional information was necessary before classifying the assets. According to Smith & Jones, Harry was also advised that he should probably pursue a declaratory judgment to properly classify the stock, which he declined to do.

Smith & Jones, relying upon an analysis performed by Harry's accountant and without seeking a declaratory judgment, prepared an estate tax return for Wanda that did not include Auto Stock among her assets. Smith & Jones also drafted Harry's will.

Harry died thirty years later, leaving the bulk of his estate to charity. Lawyer Larry is the executor of Harry's estate. One month later, Juan, Dewey and Troy, as beneficiaries of their mother Wanda's trust, sued Harry's estate alleging that Harry had misclassified the Auto Stock as his separate property, and as a result underfunded their mother's trust by \$20 million. They also filed suit against Smith & Jones for their \$20 million losses.

Larry also sued Smith & Jones for legal malpractice.

1. Explain in detail how Juan, Dewey and Troy, and Larry, will attempt to prove their legal malpractice claim.
2. Identify the defenses available to Smith & Jones.
3. What should the result of the lawsuits be *in Texas*?
4. Identify all other legal theories that courts might use to resolve these claims and what the result of the cases would be under those theories.
5. If you could write the law of malpractice, how would these cases be resolved? Be sure to give reasons in support of your conclusions.
6. Should any of the lawyers in this question be subjected to professional discipline? Why or why not?

Question II
(35 points, 60 minutes)

As a result of an antitrust investigation into the practices of the computer chip industry, the Department of Justice (DOJ) filed criminal price-fixing charges against numerous defendants. Lawyer Light is a partner at the law firm of Light and Dark. In 2004 she represented Finite Technology's Vice President of Sales, Gordon Greed, in the DOJ investigation about the pricing of the chips. DOJ filed criminal charges against Greed, who pled guilty and served time in prison. Light's criminal representation of Greed ended in 2005. In 2006, she represented Greed in a civil lawsuit brought by Peet Industries against him in connection with the chip pricing; her participation was limited to preparing him for a deposition in May 2006. Light and Dark law firm has 25 lawyers; only Light, one partner, one associate and a paralegal worked on Greed's criminal case.

During Light's representation of Greed, the two entered into a joint defense agreement (JDA) with Finite Technology and Finite's lawyers. The JDA set forth the agreement among the attorneys, their firms and their clients in connection with the investigation of the computer industry being conducted by the DOJ, as well as related civil litigation. The JDA contained a confidentiality provision. Also, in Paragraph 13 of the JDA, the parties agreed to waive possible conflicts that might arise out of the joint defense relationship. It stated as follows:

While the precise nature of each possible conflict that may arise in the future cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial or in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information.

Finite and its lawyers then collaborated extensively with Light and Greed in the investigation, including sharing confidential and privileged information regarding Finite's legal strategy as well as other information Finite obtained during its investigation of the alleged price-fixing conspiracy.

In January, 2008, Light and Dark law firm announced its merger with the Cloud Law Firm. Cloud Law Firm represents several plaintiff semiconductor companies in a lawsuit against Finite connected to the price-fixing. The Light and Dark signs were replaced by signs saying "Cloud Law Firm," and the Light and Dark partners became partners at Cloud. Light joined Cloud as a partner. Because Light's representation of Greed had ended, the files from that case are stored with the Information Technology (IT) staff, and only IT staff can open and read those files.

In October, 2008, Cloud decided to erect an “ethics wall” to protect against the inadvertent disclosure of confidential information to personnel at Cloud that the Light and Dark lawyers learned during their representation of Greed. Specifically, Cloud issued an “Ethics Wall Notice” that directed former Light and Dark employees not to discuss or share any confidential information they may have received in the course of their representation of Greed with anyone at Cloud. The notice also stated that all Cloud attorneys and staff assigned to computer chip-related cases were prohibited from discussing or otherwise accessing information related to Light and Dark’s representation of Greed. Cloud’s document management system has been specially coded so that none of the former attorneys and staff of Light & Dark can access any documents related to the current litigation between Finite and the semiconductor companies.

Finite files a motion to disqualify Cloud from the semiconductor litigation. How should the court rule on the motion? Be sure to identify arguments on both sides of the issue and to give reasons for your conclusions.

Question III

(30 points: 12 2-point questions and 1 6-point question, 30 minutes)

1. George Clinton is an attorney who recently won a preliminary injunction against a defendant. George has just learned, in a confidential conversation with his client, that his client testified falsely at the hearing on the preliminary injunction.

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

- A. George must seek to withdraw as counsel but may not reveal why to the court without his client's informed consent.
- B. George must inform the court of his client's perjury if his client will not recant and withdrawal from the case will not solve the problem created by the perjury.
- C. George must immediately inform the court of his client's perjury.
- D. George must seek to "noisily" withdraw from the case and inform the court and opposing counsel of the perjury.

2. Olive Optimistic hired Albert Attorney to file a lawsuit for defamation and agreed to pay his standard hourly fee for all time spent. Olive believed her case was worth \$500,000. After most of the case was dismissed on summary judgment, Albert strongly recommended Olive accept the defendant's offer of settlement of \$50,000. Olive reluctantly accepted and the defendant paid the \$50,000 into Albert's trust account. Albert sent his bill for fees of \$30,000 to Olive who disputed half his bill.

It is proper for Albert to

- A. Give Olive the \$50,000 and let her decide how much to pay Albert.
- B. Give Olive \$20,000 and transfer \$30,000 to his operating account.
- C. Give Olive \$20,000, transfer \$15,000 to Albert's operating account, and retain \$15,000 in the trust account.
- D. Keep the \$50,000 in the trust account pending a final agreement of the fee dispute.

3. Jones, the driver of a car, and Smith, his passenger, were injured as the result of a collision with a bus. Jones and Smith believe the bus driver was entirely at fault, and they want to bring a negligence action against the bus company. Jones and Smith seek to hire attorney Adams to represent them.

Which of the following would be proper conduct by Adams?

- I. Accept the proffered employment only after informing Smith that he may have a cause of action against Jones and obtaining Jones' and Smith's written consent to represent them both against the bus company.
- II. Withdraw from the common representation if discovery shows that Smith has a claim against Jones.

III. Represent Jones and Smith, and also represent the bus company in a solely unrelated matter before the Transportation Board.

- A. I only.
- B. II and III only.
- C. I and II only.
- D. None of the above.

4. Charles wanted to buy a laptop computer for his daughter in high school. He went to George's Computer Shop and George showed him a fancy laptop with all the bells and whistles, saying with a smirk, "I 'acquired' this last night and I will sell it to you for \$100." Charles knew this price was too low to be legitimate, but he bought the computer anyway.

On his way home, Charles went to Alice Attorney's office to have her draft a lease for his real property. Charles showed her the laptop and relayed George's comments. Alice replied that Charles should not tell anyone about the great deal because the laptop was probably stolen.

Was Alice's conduct proper?

- A. No, because Alice advised Charles to commit a fraudulent or illegal act.
- B. No, unless Alice refused to provide representation without an adequate reason.
- C. Yes, because Alice recognized that the laptop was a great deal and didn't want to obstruct Charles' present to his daughter
- D. Yes, unless Alice accepted Charles as a client.

5. Betty Bankruptcy attorney represents a corporation in a federal Chapter 11 bankruptcy reorganization plan. The corporation was owned jointly by a married couple, Adam and Eve. Eve approached Betty and asked if she would represent her in a marital dissolution action against Adam. This suit would be filed in state family court.

May Betty accept Eve's representation?

- A. Yes, because the subject matter of each representation is totally unrelated to the other.
- B. Yes, if both the corporation and Eve consent after consultation.
- C. No, unless the federal bankruptcy court and state family court both approve of the representation.
- D. No, because Betty's relationship with each client will probably be adversely affected by the other representation.

6. Attorney had been representing Client for several months in a matter involving the ownership of some antique jewelry. Client claimed he purchased the jewelry for his wife with his own funds. Partner, Client's business partner, claimed the jewelry was a partnership purchase in which he, Partner, had a one-half interest. While the matter was pending, Client brought a valuable antique jewelry box to Attorney's office and said:

“Keep this in your vault for me. I bought it before I went into business with Partner. Do not tell him or anyone else about it until my matter with Partner is settled.”

Later that same day, a police officer, who was in Attorney’s office on another matter, saw the jewelry box when a clerk opened the vault to put in some papers. The police officer recognized it as one that had recently been stolen from a collector. Attorney was arrested and later charged with receiving stolen property.

Is Attorney subject to discipline if Attorney reveals that Client brought the box to her office?

A. Yes, because Client instructed Attorney not to tell anyone about the jewelry box.

B. Yes, if the disclosure would be detrimental to Client’s interests.

C. No, because the jewelry box was not involved in the dispute between Client and Partner.

D. No, if the disclosure is necessary to enable Attorney to defend against a criminal charge.

7. Mary Magician was a very experienced and skillful criminal trial attorney. Georgianne Guilty hired her because she had heard of her criminal trial success. Georgianne had a long history of robberies, and when she spoke came across as a common criminal. Still, Georgianne felt that if she could personally testify at trial the jury would believe her. Mary felt strongly that Georgianne did not understand the best legal strategies and that her desire to testify was a grave error. Accordingly, against Georgianne’s wishes, Mary waived a jury trial and refused to call her at the bench trial. The trial court found that the state did not meet its required burden so Georgianne was acquitted.

Mary is

- A. Subject to discipline because she overrode Georgianne’s wishes as to trial strategy.
- B. Subject to discipline because she did not allow Georgianne to testify.
- C. Not subject to discipline because Georgianne was not convicted.
- D. Not subject to discipline because an experienced lawyer can choose the appropriate trial strategy.

8. Robert Rawlings is an attorney who is representing the defendant in a personal injury action. He recently had the plaintiff in the case examined by his consulting physician. Robert has learned from that physician that the plaintiff, Amy Dylan, has a life-threatening, but remediable, condition. Amy is unaware of this condition.

Which of the following statements best describes Robert’s options under the Model Rules of Professional Conduct?

A. Robert may disclose Amy’s condition to Amy if he reasonably believes that doing so is necessary to prevent her reasonably certain death.

B. Robert may disclose Amy’s condition to Amy because the information is not covered by the attorney-client privilege.

C. Robert may not disclose Amy's condition to Amy without his client's permission because that is information relating to the representation of his client.

D. Robert must disclose Amy's condition to Amy if he reasonably believes that doing so is necessary to prevent her reasonably certain death.

9. Paula Plaintiff retained Donna Defense to represent her in a claim against Mega Manufacturing. Donna's fee was one-third of any recovery plus costs. Mega paid \$100,000 to settle the claim and sent a check payable to Donna's law firm for the full amount. There were \$10,000 in costs incurred in pursuing the case.

Donna's law firm may

- I. Deposit the \$100,000 check into the trust account and prepare and send a \$90,000 check to Paula.
- II. Endorse the \$100,000 check and send the endorsed instrument to Paula.
- III. Deposit the \$100,000 check into the trust account, and prepare and send a \$60,000 check to Paula.

- A. I, II, or III.
- B. I only.
- C. II only.
- D. III only.

10. In which of the following four situations is the attorney-client privilege a viable defense?

- I. A defendant delivers records to an attorney intending the attorney-client privilege to bar an otherwise valid subpoena.
- II. A defendant shows her banker all the records upon which she has claimed an attorney-client privilege.
- III. A defendant's attorney retains a non-lawyer assistant to assist in preparing documents for trial.
- IV. A defendant reveals confidential information to a lawyer during an initial interview but decides not to hire the lawyer to handle the matter.

- A. One of the above.
- B. Two of the above.
- C. Three of the above.
- D. All of the above.

11. Laura Lawyer and Connie Client entered into a representation agreement. Pursuant to the agreement, Connie paid Laura a \$10,000 advance, which was deposited into the law firm's trust account. The trust account also contained other law firm clients' fee and cost advances. The agreement specified that the law firm would bill for its time and costs monthly, and withdraw the billed amount from the trust account ten days later unless a complaint was received from Connie. Laura tendered her billing statements to Connie monthly, but did not withdraw any funds until fifteen months later, when the matter was

finally concluded. The total fees billed were \$8,500, and Laura refunded \$1,500 by check to Connie. Laura then wrote a check on the trust account payable to the law firm's general operating account for \$8,500.

Was Laura Lawyer's conduct proper?

- A. Yes, because Laura tendered accurate monthly fee statements to the client as agreed.
- B. Yes, because Laura deposited the \$10,000 retainer into the trust account, rather than the operating account.
- C. No, because Laura required the client to make a \$10,000 advance payment before any fees had been legitimately earned.
- D. No, because Laura's failure to transfer the earned fees from the trust account to the operating account within a reasonable time after the monthly billings constitutes a commingling of funds.

12. Arron, Inc., is an energy resale corporation listed on the New York Stock Exchange. Iola Innocent represented the corporation as their corporate attorney. An employee hotline received an anonymous complaint stating that the company management had directed the accountants to artificially inflate earnings. The complaint alleged that the Chief Financial Officer (CFO) had fraudulently used special purpose entities to misclassify liabilities as revenue. Iola investigated and found the complaint was essentially accurate and the amounts were very material. She then reported up the corporate chain ultimately to the disclosure committee of the Board and requested they stop the financial fraud. The Board, CEO, and CFO all refused and directed Iola to forget the whole matter and not inform the Securities and Exchange Commission (SEC) of her concern.

Which of the following conduct would subject Iola to discipline from the bar association?

- I. Do nothing.
- II. Make a noisy withdrawal.
- III. Contact the SEC.
- IV. Disavow to the SEC any document Iola helped prepare containing questionable financial information.

- A. None of the above.
- B. Only one of the above.
- C. Only two of the above.
- D. Only three of the above.

13. (6 points) Draft a Model Rule of Professional Conduct that would provide adequate guidance to an attorney like Jordan Mintz, from the day he begins work at Enron.

Exam Memo, Professional Responsibility

Professor Griffin, Summer 2009

I awarded grades according to the law school's grading curve, which requires a class average between 2.9 and 3.1. The average for this class was 3.1. 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.

91-100	A	(4)
88-90	A-	(8)
85-87	B+	(13)
75-84	B	(41)
71-74	B-	(6)
65-70	C+	(4)
Below 65	C	(1)

You are welcome to pick up your exams at the front desk of the Health Law & Policy Institute. You will need to know your exam number in order to get the exam. Please read over this memo and your exam before asking me any questions about your grade.

For Question I, it was important for you to identify the proper tort duty and to *think through the facts*. If you had stopped to diagram the facts, you would have seen that 1) the sons are beneficiaries of Wanda's trust, for which Harry was executor, and not of Harry's will, which left everything to charity; 2) because of (1) Smith & Jones may have had an original conflict between Wanda and Harry ; 3) Larry is the executor of Harry's estate and therefore in privity, even in Texas, under *Belt*; 4) the estate would lose economic value if the children's lawsuit against it was successful; 5) that damage accrued when Harry was alive; 6) both the sons and the estate have possible damages; and 7) whether the sons win depends on whether the jurisdiction finds a duty to third party beneficiaries. The Supreme Court of Texas recently found a duty toward the executor on similar facts after the case was initially dismissed on no-duty grounds by the trial court. *Smith v. O'Donnell*, 2009 WL 1817399 (Tex.)

Most of you did well on Question II. It was important to focus on Finite, not Greed; Finite is the party making the motion to disqualify. You should have explained why you thought Finite was a current or former (more plausible) client and then applied the appropriate conflicts rule. The language of the waiver was there for you to argue about. When an exam question gives you that much language, it is smart to use the language of the text itself in deciding if the waiver is valid. As in Question I, it was very important to talk about the facts and not only to write down the conflicts rules. On similar facts, a district court disqualified the law firm in *All American Semiconductor, Inc. v. Hynix Semiconductor*, 2008 WL 5484552 (N.D. Cal. 2008). But the model answer below did not disqualify, proving that it is your argument and not your conclusion that determines your grade.

The answers to the multiple choice questions from Question III are on the following page.

1. B	7. B
2. C.	8. A
3. C.	9. A
4. A.	10. B (III & IV)
5. D	11. D.
6. D	12. A

So many of you challenged question 12 and/or got it wrong that I decided to throw out the question. So if you put down the wrong answer for 12, two points were added to your point total on the front of your exam.

Following are examples of good student answers for Questions I, II and 13.

Question #1

Juan, Dewey, and Troy will attempt to prove their legal malpractice claim by showing that Smith and Jones had a duty to the children as third party beneficiaries of Wanda's Estate. That they breached that duty by misclassifying the ownership of the stock. They also have to show that the breach was a cause in fact and a proximate cause of their loss of money, and that they actually suffered some financial harm.

Larry, as executor of Harry's estate, will attempt to prove his legal malpractice claim by showing that Smith and Jones had a duty to Harry, breached that duty which caused (but for and proximately) a loss to Harry's estate.

The Children:

A. Duty

Under the laws of some states, a lawyer has a duty both to the client for whom he is drafting the will, as well as to the beneficiaries of that will. Some states will also find a duty to the estate, especially if tax considerations were not properly accounted for.

The children will argue that Smith and Jones had a duty to Wanda's estate, and to Harry, in his role as the executor of Wanda's estate, and to Harry personally to properly classify the stock and to gain additional information about that classification, and to seek a declaratory judgment from the courts, and to not prepare a tax return without such a judgment. From there they will add that Smith and Jones had a duty to them as third party beneficiaries of the estate, similar to will beneficiaries.

The children will also argue that Smith and Jones had a duty to require Harry to seek a declaratory judgment before allocating the stock to him, and that relying on an potentially conflicted accountant's analysis was entirely unreasonable. They can argue that the unreasonableness is expanded given the information provided by Harry to the lawfirm that he considered the stock to be his.

B. Breach

The children will argue that Smith and Jones breached that duty to Wanda's estate, and to Harry as the executor of that estate, by not following through on their duty above, and perhaps by not correcting any mistakes while drafting Harry's will. They will likely bring in expert testimony to show what a reasonable attorney would do in such a situation.

C. Causation

The children will have to prove that but for that mistake in classification, they would not have lost money to taxes (or third parties). They will likely show that by a simple analysis of the wills and trust money allotments. The children will show proximate cause in the same way.

D. Damages

The children will have to prove that they suffered monetary damages as a result of Smith and Jones alleged negligence. Presumably they will trace the funds through the entities and get an accountant to testify as to their losses.

LARRY as EXECUTOR OF HARRY's ESTATE

A. Duty

Larry will argue that Smith and Jones had a duty to Harry of diligence and to provide him sound legal advice. Larry will argue that there is direct privity. Larry will also argue that Harry considered himself personally a client of Smith and Jones and that is sufficient legal grounds to create privity.

B. Breach

Larry will argue that Smith and Jones breached that duty when they mis-stated the true ownership of Harry's stock on their tax return, and failed to obtain a declaratory judgment in behalf of Harry. Larry will argue that because Smith and Jones was representing two clients with actual adverse claims, the measure to seek the judgment should be mandatory and not permissive.

C. Causation

Larry will argue that had Smith and Jones given correct legal advice, the estate would not have to pay legal fees for a lawsuit, nor possibly pay damages to the sons from Wanda's estate.

D. Damages

Larry will argue that damages have occurred in the form of legal fees, and further damages are pending the outcome of other litigation.

TEXAS:

Duty:

Texas, however, has a stricter privity rule which precludes a lawsuit by third party beneficiaries to a will. In Texas the children's lawsuit would likely be dismissed due to the lack of any duty element. Larry's lawsuit would likely stand because Harry is reasonably in privity with Smith and Jones both personally and as an executor of Wanda's estate.

Other Legal Theories:

The case might be resolved through a negligent misrepresentation claim, which would proceed on similar grounds, showing a duty to properly represent the stock, a breach of that duty, that breach causing in fact and proximately a loss, and an actual monetary loss.

The result would be the same as the malpractice claims.

The case can also be resolved through courts of equity by a post facto reassignment of ownership of the stock.

Defenses for Smith and Jones

Smith and Jones have several defenses, by category they include:

Duty:

Smith and Jones can argue, based on state law, the extent of their duty, and whether or not the children have standing to pursue their claims under privity rules.

Furthermore, Smith and Jones can argue that Harry refused to file the action and that such was his choice, and not the duty of the lawyers, and that since Harry made that choice, it was proper for them to file Wanda's estate return as they did.

Additionally, Smith and Jones can argue that their duty ran only to Wanda's estate, not to Harry personally on this specific matter, and if they had a duty to Harry, it was properly discharged by relying on the advice of his accountant.

Breach:

Smith and Jones have a very strong argument that not getting a declaratory judgment and instead relying upon Harry's statement and the analysis of an accountant was a reasonable discharge of their duty to both clients. They can argue that the accountant was not conflicted either and had a duty to both Harry and the Estate.

They will likely bring in an expert witness who will also testify that they discharged their duty in a reasonable manner. They may also cite caselaw which would compare the community property ownership law to the RAP and show how even if they did make a mistake, it was a reasonable mistake because of the complexity of the law.

Causation:

Smith and Jones have strong arguments in the causation issues as well. All the possible routes the money could have flowed need to be traced, and the specifics of Harry's will might indicate that he might have precluded his children from getting the money in the first place.

Further, they may argue that the accountant was really the one at fault, and that their allocation was correct based on the information he provided.

Additionally, they may argue that they are not the proximate cause of Harry's estate's loss because Harry made his own decisions contrary to the advice of Smith and Jones.

Damages:

Smith and Jones also have strong defenses to the damages claim. They can argue about the true extent of the loss as well as bring in causation arguments to show that the children's losses are only speculative, and therefore should be lower.

Smith and Jones can also argue that Harry's Estate's losses are only speculative at this stage of litigation.

My Rewrite of the Law

If I could re-write the global rule for the law of malpractice, I would limit the duty to the client for whom the will is drafted, and his subsequent estate. However, in my view, the avoidable losses an estate sustains to taxes (the government), which traditionally gives grounds for a malpractice lawsuit, is identical to the losses that an estate suffers when money goes to another third party that was not intended by the client. Both are "avoidable" donations to a third party, one mandated by law, the other mandated by the nature of the will.

Accordingly, while limiting the privity, I would allow the estate to sue the lawyer who drafted the will for malpractice if the estate can prove by clear and convincing evidence that unintended donations were made by the will in direct opposition to the

lawfully attainable intent of the client.

This standard would allow some room for the estate to recover losses, but recognizes that in malpractice lawsuits over wills, the main witness is dead, and the will may have been drafted many years previous.

Under my law, only the children's case would be dismissed for lack of standing. Wanda's Trust's executor(? legal head) would have grounds to sue Smith and Jones for improper allocation on the tax return, but not the children who are the beneficiaries of the trust.

The executor of Harry's estate may have grounds to sue if it can show a loss to Harry's estate. The estate through Harry has direct privity with Smith and Jones. While the allocation was for Wanda's estate, Harry as a person was also a client (they drafted his will) and should have discovered that mistake.

However, even here, a lot would hinge on the reasonableness of the accountant's mistake as well.

Professional Discipline

The issue here is very fact dependant, and it is not clear whether or not the law, in combination with the analyst's evaluation, requires the attorneys to act in one way or another.

However, not realizing that there was a conflict of interest between the executor of the estate and the estate itself is a serious issue which led to representing two clients with interests adverse to each other. While there was not a lawsuit, and presumably the stock had legally discernable owners, a rule was violated and they should be subject to discipline for a lack of diligence in their representation.

Question #2

Order from the Northern District of Somewhere, Judge X Presiding:

Overview:

This is a pricefixing lawsuit by Affiliated Semiconductors (Semi) vs. Finite Technology (Finite). Light and Dark (LD), through the partner Ms. Light, represented Finite's CEO, Mr. Greed in a criminal trial related to anti-trust claims from the DOJ, and Finite the company, in the same DOJ anti-trust suit and other related matters of civil litigation from 2004 to 2006. Before this court is the issue of disqualification of the Cloud Law Firm (Cloud), attorneys for Semi in Semi, because of an alleged imputed conflict arising from Cloud's recent acquisition of the LD law firm.

Legal Standard:

An attorney has a duty of confidentiality towards his client. MR 1.6. An attorney may not represent a current client against a former client on a substantially related issue without that former client's informed written consent. MR 1.X. Conflicts of a lawyer are generally imputed to the law firm, with some exceptions. See MR X.

Modern case law also recognizes that clients can waive some measure of that duty of confidentiality and conflicts of interest if they given informed, written consent. See Tech Case (allowing a waiver of conflicts to stand because of the highly precise, forward looking nature of the waiver, and because the waiver gave informed consent). But see Z Case (declining to extend Tech Case on grounds that the waiver was not precise and did not fully inform the client).

Analysis:

In this case, Finite argues that Ms. Light and perhaps other attorneys and staff have confidential information about the criminal anti-trust case which is a subject matter substantially related to the ongoing price fixing claims brought by Semi. Finite also argues that the other related matters that LD and Ms. Light were working on contain highly sensitive, confidential, and privileged information about both Mr. Greed and Finite's legal strategy. Finite also alleges that the information is highly relevant and related to the case at hand, and that confidential information used in preparation for Mr. Greed's 2006 deposition is still highly relevant to Semi's litigation.

Finite contends that Light's conflict should be imputed to Cloud, and that no ethical wall could ever suffice. Finite also contends that Cloud knew or should have known about this conflict and that it took the risk upon itself to bring LD into the firm. Finite also notes that several months passed from the time that LD came into the firm (Jan 08) until the time that the Ethics Wall was implemented (Oct. 08), which in and of itself should disqualify Cloud.

Finite argues that the JDA signed by them was not specific and that LD failed to get Finite's full and informed consent. Finite also argues that no corporation would ever consent to waiving such a conflict as this one, one that threatens the very existence of the company. Finite also cites Z Case, in an attempt to distinguish the JDA from the T case, noting that Finite's JDA is far more similar to the generic one rejected in the Z case, because it lacks specific names of corporations or firms towards whom the conflicts of interest are waived. Furthermore, Finite argues that they were only informed of "general conflicts" which "cannot be identified at the present time" which by its very nature precludes the possibility of informed consent. And on the same lines, argues that the standard for informed consent should be drawn very strictly.

In response, Semi (through its attorneys in the Cloud Law Firm) argues that most of, if not all, the information obtained during the criminal trial of Mr. Greed is irrelevant, and largely public at present, and that other information about civil litigation is also very dated, likely irrelevant, and largely public. Cloud notes that the civil litigation was limited to preparing Mr. Greed for a deposition. Cloud notes differences in claims

brought by Peet Industries and those brought by Semi.

Cloud argues that even though the firewall was not erected for several months, that Cloud's attorneys and LD were aware of the conflicts and MR 1.6 and did not disclose any information. Cloud also argues that the motion to disqualify is untimely and prejudicial because LD has been merged with Cloud for over 18 months and the merger was publicly announced. Cloud argues that the ethics rules, while important, are subservient to the prejudice incurred to Semi's claims by dismissing LD at this state of the lawsuit.

Cloud also argues that this case is more similar to the Tech Case because the JDA specifically notes that the conflict of interests are completely waived in "any other proceeding arising from or relating to the above Investigation." Cloud notes that this phrase is highly specific, and gives the precise informed consent necessary, absent the exact name of the party involved. Cloud argues that this factor sharply distinguishes it from a more generic waiver and that the Tech Case allowing a waiver in similar situation should apply. Cloud also calls for a wider construction of informed consent because almost all consent documents are forward looking by their very nature, and because a strict interpretation would segment firms and harm the quality of representation available to the public.

Cloud also notes that ethics walls and restricted documentation are a normal and accepted part of big firm representation and have gained recognition in the model rules as being one means of dealing with conflicts of interest. Cloud notes that all the old case files are encrypted and only IT staff, not attorneys, can open the documents. Cloud also emphasizes the compartmentalized nature of law firms and that they act as independent groups within a corporate umbrella.

Conclusion

The most pressing issue before this District Court is the weight of case law before it. The Court finds that the Tech Case is most similar to the JDA at issue here because the JDA specifically contemplates future actions arising out of the price fixing and antitrust investigation. The Z Case, while similar, lacks this precise element which made the Z Case agreement incapable of yielding informed consent. While this decision may slightly expand the line of informed consent, the court notes that the inherent precision of the document and the sophistication of the parties involved.

While the lack of an Ethics wall for 8 months is disturbing, the court notes that the wall was not specifically mandated by JDA. Furthermore, any prejudicial effect caused by the lack of the wall for 8 months is offset by the prejudicial effect that dismissing Cloud at this stage of the lawsuit would have on Semi's interests.

Additionally, the Court finds that while the information gained by LD during the Investigation and trial is likely relevant, and some remains confidential, the conflicts in a scenario just like this were specifically waived by the JDA.

Having evaluated the evidence and weighed the arguments before it, this Court finds that the motion to disqualify should be DENIED.

Question 13. My rule would be substantially similar to MR 1.13.

An attorney employed by a corporation, trust, or other nonpersonal entity owes his or her duty of loyalty to that entity. The duty does not extend to that entity's agents, employees or other associated individuals. Where the attorney is aware of or reasonably believes there to be activities or conditions counter to the interests or security of that entity, the attorney may withdraw OR disclose such activities or conditions:

- 1) first, to the proper and designated ethical or internal monitoring authority of that entity;
- 2) secondarily through the chain of management up to and including the Board of Directors;
- 3) third to either:
 - a) the stockholders or stakeholders:
 - i) whose interests are at risk because they are closely tied to the interests of the entity; AND
 - ii) who may intervene in the aggregate to override the board of directors OR
 - b) to the government agency or tribunal responsible for monitoring or regulating that entity AND
- 5) finally to the general public

insofar as such disclosures are reasonably necessary to prevent serious financial harm or legal risk to the entity, and insofar as the potential damage reasonably certain to result from disclosure does not outweigh the financial harm done through inaction. Ongoing fraud or misrepresentation is be presumed to risk greater harm through inaction than disclosure.

This rule gives clear guidance in action steps, where current MR 1.13 is somewhat vague. It gives clear guidance in a standard for selecting problems that are large enough to merit its invocation. It allows the attorney's discretion by being a "may" rule so that the attorney does not feel compelled to disclose things if he or she is not comfortable standing up and making noise within the organization.