Student Number _____

Final Examination in Professional Responsibility
Professor Leslie Griffin, University of Houston Law Center
July 2, 2010, 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 ELEVEN 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 75 minutes on it. Question II is worth 30 points; I recommend that you spend 45 minutes on it. Question III includes 12 multiple choice questions, worth two points each, for a total of 24 points; one short question worth 6 points; and one short question worth 5 points, for a total of 35 points. I recommend that you spend 45 minutes on it. **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, 75 minutes)

Berkman was one of the owners of B & K, a company that imported plumbing products from suppliers and sold the products to customers in the United States. Beginning in 1997, Berkman's attorney was Smith, a partner at Law Firm. In 1998, B & K was bought by Mueller, a publicly owned manufacturer of plumbing fixtures and products. After the acquisition, Berkman continued to work for Mueller as the president of B & K. Law Firm, through Smith, continued to represent Berkman and took on the representation of Mueller.

One of B & K's primary suppliers was Lota, a plumbing manufacturer specializing in valves and faucets. Lota's annual sales to B & K regularly exceeded $10 million. In April 2003, Lota USA was formed to serve as Lota's sales and marketing representative in the North American market. About the same time, Berkman formed Woodland Investment Partnership (WIP), which acquired a 10% ownership interest in Lota USA. Berkman was the managing member of WIP. Law Firm, through Smith, assisted Berkman in forming WIP and Lota USA and advised Berkman regarding how to structure his ownership in light of his employment contract with Mueller. Law Firm billed Berkman separately for the work that Smith performed for him.

Berkman did not inform Mueller about his interest in Lota USA. Copies of e-mails between the principals of Lota USA and Law Firm, relating to agreements entered into by Lota USA, suggest efforts to hide Berkman's interest. For instance, although a March 2003 memorandum initially identified Berkman as the owner of 10% of Lota USA, a later memorandum from May 2003 identified the owner of that interest as WIP. Similarly, Berkman's name and position as agent for WIP were removed from a May 2005 agreement between Lota USA and WIP.

In March 2006, Berkman asked Smith to review Mueller's code of conduct that he had just received, which contained among other things provisions restricting (1) outside financial interests that might affect an employee's decisions, (2) the handling of business opportunities, and (3) competition with Mueller. About the same time, Berkman asked Smith to form NewCompany to compete with Mueller. One month later, Berkman, acting for Mueller, advised Law Firm that Mueller would be retaining a different firm. Law Firm continued to work with Berkman in setting up NewCompany and soliciting investors. In August 2006, Berkman resigned his position with Mueller and began working full time at NewCompany.

In July 2007, Mueller sued Berkman, alleging that he had breached his employment contracts. Mueller alleged that Berkman, through his ownership interest in Lota USA, profited personally and at the expense of Mueller by acquiescing in Lota's efforts to overcharge Mueller for supplies. Mueller thinks Berkman received illegal bribes and kickbacks in excess of $2 million. Law Firm appeared on behalf of Berkman and filed an answer and counterclaim against Mueller and the individual members of its board of

directors.

The parties commenced discovery. Mueller requested that Berkman produce various documents dating from Mueller's acquisition of B & K through the present. The documents at issue include the following: the e-mails between LotaUSA and Law Firm; documents relating to Berkman's communications with Lota and Lota USA; documents concerning the relationship and financial arrangements between Berkman and Lota and Lota USA; documents relating to the legal advice Berkman received from Law Firm about his relationship with Lota USA and the creation of NewCompany, during the time that Berkman was president of B & K; documents relating to the formation and organization of Lota USA and NewCompany; and possible documents relating to any other “side” businesses of Berkman's that Mueller at the present time did not know about, but that might be illegally competing with Mueller and providing illegal kickbacks to Berkman.

1. Law Firm resigned from representing Berkman and was replaced by Attorney Annie. How should she respond to the request for documents? How should Mueller respond to Annie? How should the court rule on the discovery requests?

2. Analyze Smith and Law Firm’s ethical behavior. Did they violate any professional obligations or other law of lawyering? Can you give Smith and Law Firm advice about how they should have behaved?

Question II
(30 points, 45 minutes)

Bluestone Coal and Bluestone Coal Sales are companies engaged in the production and sale of coal. Both Bluestone companies are part of a conglomerate of twenty-nine affiliated closely-held companies owned and operated by James C. Justice. These affiliated companies share one common General Counsel, Mr. Stephen W. Ball, and the majority of these companies, including the two Bluestone companies, are headquartered in the same office building in City, State of Coal. Mr. Justice is ultimately responsible for the corporations' debts and liabilities.

Mountain State owns and operates a coke plant in Nearby City, State of Coal, and purchases coal to convert into coke. On October 5, 2007, Mountain State and Bluestone Coal Sales entered into a coal supply agreement whereby Bluestone Coal Sales agreed to supply all of the coal required by Mountain State's Nearby City coke operations. Bluestone Coal served as the guarantor for Bluestone Coal Sales' obligations under this agreement. The coal came exclusively from the Keystone Mine. When Bluestone Coal Sales failed to deliver the requisite amount of coal in accordance with the agreement's terms, Mountain State filed suit against both Bluestone Coal Sales and Bluestone Coal in the trial court.

The law firm representing Mountain State in the lawsuit is Buchanan Ingersoll, a large, nationwide, law firm. At various times, Buchanan Ingersoll has been retained as counsel for certain of Mr. Justice's twenty-nine affiliated companies, including Dynamic Energy, Inc.; Harlan Development Corporation; James C. Justice Companies LLC; and Sequoia Energy, LLC, for which representation engagement letters were signed. Buchanan Ingersoll began providing legal services for both Mountain State and Mr. Justice's companies in 2005.

The record in the lawsuit does not contain an engagement letter memorializing Buchanan Ingersoll's representation of Bluestone Coal. Buchanan Ingersoll represented Bluestone Coal in the case of *Coal Sourcing and Sales, Inc. v. Bluestone Coal Corporation*. The court record in *Coal Sourcing* demonstrates that Buchanan Ingersoll, through its Attorney Able, appeared as counsel for Bluestone Coal in those proceedings; provided a defense for Bluestone Coal throughout the litigation; and appeared as attorney of record on behalf of Bluestone Coal in that case. *Coal Sourcing* involved a coal supply contract of coal from the Keystone Mine, where Bluestone Coal was sued for failure to deliver coal as specified by Coal Sourcing's coal supply agreements and contract.

During the course of the *Coal Sourcing* litigation, Bluestone Coal asserted a defense of *force majeure* to excuse its nonperformance of the coal supply agreement. Reliance on this defense required Bluestone Coal to reveal its confidential coal supply agreements to Buchanan Ingersoll.

Buchanan Ingersoll introduced into evidence in the Mountain States case a letter from Buchanan to Bluestone Industries, in which Bluestone waived any conflicts of interests in future representations by Buchanan Ingersoll of the Ocean States Corporation.

During the litigation initiated by Mountain State, Buchanan Ingersoll, on behalf of Mountain State, requested documents from Bluestone Coal regarding its prior reliance on the defense of *force majeure* before Bluestone Coal had filed an answer to Mountain State's complaint or had indicated what, if any, defenses it intended to assert in response to such claims. In response, Bluestone Coal *and* Bluestone Coal Sales moved to disqualify Buchanan Ingersoll from representing Mountain State.

You are the trial court judge. Write your ruling on the motion to disqualify. Be sure to address both Bluestone Coal and Bluestone Coal Sales.

Question III
(35 points: 12 2-point questions, 1 6-point question, 1 5-point question, 45 minutes)

1. 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.

2. An automobile accident occurred in Sweetville involving a large semi trailer truck. The large truck changed from the center to the right lane without signaling thereby forcing a car to collide with a concrete barricade. Both the car's driver, Diane Driver, and the passenger, Pattie Passenger, sustained substantial personal injury caused by the truck's change of lane. They asked Alice Attorney if she would represent them both in pursuing the negligence action against the company that owned the truck in question.

Which of the below would represent proper conduct by Alice?

I. Represent both the trucking company and Diane and Pattie in this matter with disclosure to both clients.
II. Represent both Diane and Pattie after disclosure confirmed in writing that they could have potential crossclaims against each other and obtaining both clients' consent.
III. If subsequent discovery indicates that Diane and Pattie have crossclaims, Alice should withdraw.

A. None of the above
B. Two of the above
C. Three of the above
D. Only one of the above.

3. Alice and Betty are partners in Everytown Law Firm. Alice has represented Mega Motors for many years and currently is working on the defense of a major product liability case involving defective air bags. Apparently, the air bags in the automobile's dash board suddenly exploded, blinding the driver who lost control, resulting in the car hitting a pedestrian. Five days later, the pedestrian died and the personal representative has asked Betty to represent the pedestrian's estate against the driver.

Is it proper for Betty to represent the pedestrian's estate in this manner?

A. Yes, if Mega Motors gives written consent after full disclosure of all material risk.
B. Yes, if Mega Motors, the driver, and the pedestrian all give written consent after full disclosure of all material risks.
C. No, unless Betty and Alice are both effectively screened from any information the other may have in representing their respective clients and all clients are given notice.
D. No, because the interest of the estate of the pedestrian and Mega Motors are fundamentally antagonistic so the conflict is not consentable.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.

9. Client Christenson asked attorney Alder to prepare some legal papers in connection with Christenson's dissolution of marriage proceedings. In the course of conversation, Alder learned that Christenson intended to develop some beachfront property into condominiums. State law requires the filing of certain environmental impact statements with the State Commissioner of Real Estate and Development as a prerequisite to any development efforts, including advertising and zoning variances. Later Alder learned that Christenson was proceeding with the project and had not yet filed the required statements. Which of the following items are correct?

I. Alder *must* contact the State Commissioner of Real Estate and Development and reveal Christenson's intentions.
II. Alder *may* contact the State Commissioner of Real Estate and Development and reveal Christenson's intentions.
III. Alder *may* contact Christenson and urge him to take appropriate steps to rectify his wrong.
IV. It would be *proper* for Alder not to tell any outsider about his communications with Christenson.

A. I, III, IV only
B. II, III, IV only
C. III and IV only
D. IV only

10. Attorney Aquino defended Dempsey in a criminal assault case. Before trial, Dempsey told Aquino in confidence that he beat up the victim without provocation. Due to Aquino's hard work, coupled with a stroke of luck, the jury found Dempsey not guilty.

Then Dempsey refused to pay Aquino's fee. Aquino wrote to Dempsey as follows: "The jury found you not guilty, but your victim can still sue you for civil damages. If you do not pay my fee, and if I have to sue you to collect it, I will have to reveal the whole truth in open court, to explain why the amount of my fee is reasonable. Think this over carefully. I hope to receive your check by return mail." Which of the following is most nearly correct?

A. Even though heavy-handed, Aquino's letter was *proper* because he was simply explaining to Dempsey the consequences of refusing to pay the fee.
B. If Aquino sues Dempsey to collect the fee, Aquino will be *subject to discipline* because a lawyer is prohibited from using a civil suit to collect a fee.
C. Aquino's letter was *proper* because a lawyer is required to settle fee disputes amicably if possible.
D. If Aquino sues Dempsey to collect the fee, Aquino *may* reveal Dempsey's confidential communications, but only to the extent necessary to establish his claim against Dempsey.

11. Lawyer Ling represented clients Clark and Craddock who were the sole partners in a business joint venture. In that connection, Clark and Craddock met frequently with Ling to discuss confidential matters relating to the business. One day Clark came alone to Ling's office. Before Ling could stop him, Clark disclosed that he had usurped a business opportunity that properly belonged to the joint venture. Ling informed Clark that she could not advise him on that topic. Further, Ling promptly withdrew as counsel to Clark and Craddock. Ultimately Craddock sued Clark for the usurpation. Craddock's lawyer subpoenaed Ling to testify at a deposition about the statements Clark made to Ling. At the deposition, Clark's lawyer asserted the attorney-client privilege on Clark's behalf. Ultimately the court ordered Ling to disclose what Clark said. Which of the following is most nearly correct?

A. It was *proper* for Ling to withdraw as counsel to Clark and Craddock. Further, Ling *must* disclose what Clark said.
B. It was *proper* for Ling to withdraw as counsel to Clark and Craddock. However, Ling will be *subject to discipline* if she discloses what Clark said.
C. Ling is *subject to discipline* for withdrawing as counsel to Clark and Craddock. Further, Ling will be *subject to discipline* if she discloses what Clark said.
D. Even if Ling believes that the court order is correct, she *must* refuse to disclose what Clark said.

12. Linda Litigator is representing Debra Difficult in a complex matter in civil litigation. Eighteen months of discovery on both sides has cost a great deal of money. Debra has become increasingly irritated and is complaining that the discovery is a waste of time and money. She insists that Linda just schedule the matter for trial. Linda is very apprehensive that without further discovery, Debra's claim will not prevail and that the opposing party's counterclaim may be successful. There are other lawyers who have expressed a willingness to take on the representation.

Is it proper for Linda Litigator to ask leave of court to withdraw?

A. Yes, because Debra Difficult's insistence on foregoing discovery makes it unreasonably difficult for Linda Litigator to represent the client effectively and completely.
B. Yes, because a lawyer may discontinue representation in civil litigation at any time before trial.
C. No, unless Debra Difficult consents to the withdrawal.
D. No, because Linda must follow the client's instructions.

13. (6 points) How should the Texas State Commission on Judicial Conduct rule on the case of Judge Keller? Why?

14. (5 points) Smith was walking home from work late at night when Jones walked toward him, baseball bat in hand, and Smith shot him. Four witnesses tell Prosecutor that Jones, who was on his way home from an evening game of ball with his friends, was practicing his baseball swing and walking slowly and casually when Smith pulled out his gun and shot him. Another witness told Prosecutor that she saw Jones run toward Smith while Jones was swinging the bat aggressively and yelling. Jones was convicted of tax fraud two years ago. Smith told the police that he shot Jones in self-defense when Jones ran at him swinging the bat. What should Prosecutor do?

Exam Memo, Professional Responsibility
Professor Griffin, Summer 2010

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.

90-100	A	(5)
77-89	B+	(21)
70-76	B	(27)
66-69	B-	(3)
60-65	C+	(4)
Below 60	C	(2)

You are welcome to pick up your exams and answers at the front desk of the Health Law & Policy Institute. You will need to know your exam number in order to get the exam. You must sign out your exam and you do not need to return it. Please read over this memo and your exam before asking me any questions about your grade.

For Question I, it was important to talk about attorney-client privilege and not about confidentiality, as the question involved a legal request for documents. A key part of your analysis should have involved the *Bevill* test, CB 517, 522, applied in the *Grand Jury Subpoena* case (Roe and Moe), CB 513. This analysis was necessary to figure out if the privilege belonged to Berkman or Mueller. It was also necessary for Annie to assert the Fifth Amendment privilege about the "side" businesses request and for you to go through the Fifth Amendment case law. Mueller should have asserted the crime-fraud exception to the privilege and argued that some documents never acquired the privilege.

Question I was based on Mueller Industries v. Berkman, 927 N.E.2d 794 (2010), in which the court concluded that the corporation owned the privilege, the crime-fraud exception applied, and Berkman had not been specific enough about identifying the documents enjoying Fifth Amendment protection, so in camera review was necessary on remand. (My question beefed up the facts so that a Fifth Amendment defense was more likely.) The court also observed that although only one set of requests—the legal advice to Berkman—obviously involved ACP, it was possible that other documents contained communications between Berkman and his lawyer—so it was smart for those of you who suggested you wanted to review the documents to do so! As always for the exam it was the argumentation about the issues, not the conclusions you reached, that mattered. The model answers below made strong arguments that everything was privileged. Some of you were more worried about withholding documents in violation of the law, and it was perfectly acceptable to argue that Annie had to turn over some of the materials because there was no reason to believe they contained communications between Berkman and Law Firm. I included the model answers below because they discussed the law as well as the facts.

Most of you did well on Part 2 of Question I, recognizing that Smith and Law Firm had failed to meet their obligations to Berkman and Mueller, should have warned the two of possible conflicts of interest, should not have participated in any fraud and likely should have resigned when the conflict became real.

For Question II, most of you did well with the Bluestone Coals part of the question, applying the former client rule for conflict of interest. You got most of the points if you identified the rule and

did a thorough job fitting in all the facts of the question to your answer. YOU HAD TO TALK ABOUT THE FACTS OF THE QUESTION AND NOT JUST REACH A CONCLUSION. This included commentary on the waiver. Ocean States was not a typo. You should have said that this waiver couldn't apply because it named Ocean States and not Mountain States!

The BCS part of the problem was more difficult. I accepted answers comparing these facts to *Westinghouse* because it showed that you were trying to figure out creative ways to disqualify BI from BCS. Under the facts it was possible to apply the current clients rule to do so. Most of you lost sight of what would happen in the real case. Here is BI, representing Mountain States against BC and BCS. The disqualification should be pretty clear for BC, a former client whose confidential information is being given away. But how would BI continue to represent Mountain States while being disqualified against BC? Consider how the court analyzed this issue in Bluestone Coal Corp. v. Mazzone, 2010 WL 2560023 (WVA), on which my exam question was based:

> Likewise, in the instant case, allowing BI to represent Mountain State with respect to its claims against Bluestone Coal Sales would require Mountain State to retain two law firms to prosecute this action: one law firm to represent Mountain State against Bluestone Coal and BI to represent Mountain State against Bluestone Coal Sales. In practice, those two law firms would be prohibited, due to BI's disqualification as to Bluestone Coal, from cooperating in their representation of Mountain State thus depriving Mountain State of fully-informed advocacy by its joint counsel.
>
> Moreover, this Court previously has held that, "[u]nder the *Code of Professional Responsibility*, a lawyer may be disqualified from participating in a pending case if his continued representation would give rise to an apparent conflict of interest or appearance of impropriety based upon that lawyer's confidential relationship with an opposing party." Under the facts of the case *sub judice*, we find that BI's continued representation of Mountain State against Bluestone Coal Sales, following its disqualification from prosecuting claims against Bluestone Coal Sales' sister company, Bluestone Coal, creates an apparent conflict of interest and a definite appearance of impropriety.

In other words, you should think through all the possibilities after BI is disqualified in one case. Many of you did not think of how BI could zealously represent Mountain States after being disqualified for BC only. But zealous advocacy is the whole point of allowing a lawyer to represent a client!

For Question III, the multiple choice answers are as follows.

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

For Question 13, you lost points if you didn't identify any judicial canons or law under which Judge Keller could be sanctioned. For Question 14, the best answer was that you needed to investigate more—in the facts as stated no one has died! That should affect your decision to charge and the possibilities of *Brady*.

The best student answers to Questions I and II are included below.

Model Answer 1, Question 1

Part 1

HOW SHOULD ANNIE RESPOND TO REQUEST FOR DOCUMENTS:

As the new attorney, Annie's first inclination should be a concern with the attorney client privilege between Berkman and those who he dealt with. Furthermore, she must also concern herself with Berkman's potential invocation of his right to claim the Fifth Amendment privilege against self incrimination because of the potential for criminal charges being levied against him.

Attorney Client Privilege

Annie should first be interested in deflecting the initial request for documents by invoking the attorney client privilege on behalf of Berkman. The attorney client privilege is an evidentiary privilege, arising out of the common law, that allows an attorney or client to refuse to produce documents or testimony protected by the privilege (hereafter AC).

In order to invoke the AC, one must establish four elements. The elements are 1) communication 2) by privileged persons 3) in confidence 4) for the purpose of obtaining legal advice.

The documents at issue are as follows: "documents relating to the formation and org of Lota USA and New Company; possible docs relating to any other side businesses; legal advice Berkman received from Law Firm about his relationship with Lota USA and the creation of NewCompany; documents concerning the relationship and financial arrangements between Berkman and Lota." (See Facts)

First, we analyze whether all the comunications between Berkman and Law Firm are within the universe of the attorney client privilege, and secondly whether the attorney client privileges protects someone like Berkman who was only a constituent of the organization.

Here, the communications are all likely privileged by the AC. All fit into being communications that are expressions. Further, they were between the lawyer and Berkman. Third, they were in confidence. Lastly, it appears that they all concerned the obtaining of legal advice.

Here, Berkman will argue that his communications with Smith were all confidential based on the AC. One case that is illustrative concerns the *Bevill Test* and the ability of a constituent of a company to invoke the attorney client privilege to prevent communications from being discovered. Similar to that case, Annie must first realize that for example, "documents relating to the legal adice Berkman received from Law Firm about his relationship with Lota USA and the creation of New Company, during the time that Berkman was president of B&K" were likely communications that were in the form of his status as an individual consulting with Smith as his individual attorney. Annie must be sure to argue that they werent' corporate AC communications.

To further substantiate the claim, Annie must articulately perform the Bevill Test. First, Berkman was clearly speaking to Smith in his personal capacity as his personal lawyer. As the facts clearly state, Smith had been the lawyer for Berkman while he owned B&K for a number of years. There relationship had continued over the years in the new Mueller enterprise, but the personal and most importantly "independent relationship" had pesristed. Second, Smith was happy to speak with Berkman in an independent non-constituent capacity. This is evidence by how Smith assisted and "ADVISED (emphasis added Berkman regarding how to structure his ownership in light of his employment contract with Mueller ... Law Firm billed Berkman separetly for work that Smith performed for him." This clearly smacks of a willingess on both Smith's part and Berkman's part to have an attorney client relationship apart from Berkman's role as the top executive of either B&K and subsequently Mueller. Furthermore, the advice that Berkman sought from Smith was not related to his status as being President. This is evident from the advice and counsel provided by Smith and Law Firm in creating the Woodland Investment Partnership. This is all evidence of a relationship OUTSIDE of Berkman's status as a constiuent of Mueller.

5th Amendment and invocation of that right against self incrimination:

Annie must also be aware of the need to use Berkman's right against self incrimination as the facts clearly indicate that "Mueller thinks Berkman received illegal bribes and kickbacks." The appropriate framework for discussion revolves around the two cornerstone cases for document production and the Fifth Amednment: notably Fisher and Hubbell.

In Fisher, the Supreme Court held that in an investigation by the IRS of certain persons, that the attorenys must comply with discovery requests (where the attorneys were compelled to turn over accountings records documents, among others) because while the attorneys were being "compelled" to produce those documents to the authority, the attorneys were not being "incriminated" in so doing. Furthermore, the documents in questions were all prepared outside of the attorney client relationship (pre-existing documents). The elegance of Fisher was that the Supreme Court crafted a test whereby the client was being incriminated (but not compelled), and the attorney was being compelled (but not incriminated).

In Hubbell, the Supreme Court held that a document request of a client could be BOTH incriminating and compelled if the information so provided essentially gave the government the "what" and the "where". In short, this means that when the client provides information that the other side doesn't know of with reasonable particularity, then the compelled production of such materials can be considered "incriminating" under the Fifth Amendment.

Here, a strong argument exists that the forced disclosure of the documents would be incriminating and compelled. For that reason, under Hubbell, Berkman may have an argument for not having to produce such documents.

HOW SHOULD MUELLER RESPOND TO ANNIE?

Mueller must establish that while indeed many of the documents were made under the attorney client privilege, several exceptions require that the materials still must be disclosed.

The Crime Fraud Exception - even assuming some of the communications were privileged, does the crime fraud exception "evaporate" the privilege?

Even assuming some of the communications requested for discovery are privileged to Berkman as an individual, can the Law Firm still be forced to hand over the documents. It appears likely. The crime fraud exception is an exception to the attorney client privilege that states that the privilege will simply not apply if the attorney has been used to perpetuate an ongoing or future fraud. It should be noted that the exception does not apply to past conduct. However, here, while it may superficically appear like "past conduct," it's actully ongoing. In short, the facts state that "Mueller thinks that Berkman received illegal bribes and kickbacks in excess of $2million." Mueller substantives their allegations by noting that it alleged that "Berkman, through his ownership interest in Lota USA, profited personally ... by acquiescing in Lota's efforts to overcharge Mueller for supplies." Here, it is likely that the 2 step crime fraud exception would be appropriate. The first step in the exception is to apprise a court that there is a reasonably likelihood based on non-privileged information that would lead the court to believe that Berkman's use of the attorney client privilege was to continue a criminal enterprise. Upon a reasonable show, for example the evidence of the overcharging of supplies, the court would then perform an "in camera review" that would allow the documents to be disclosed. For a further example, please see US v. Chen which has a similar applicatoin of the crime fraud exception.

Waiver

The company has waived the attorney client privilege and therefore Berkman must disclose the documents. Under the case law, the Bevill test goes against Berkman's use of the attorney client privilege. In short, MR 1.13 makes it clear that Berkman is merely a constituent of the company, and therefore the company rather than the constituent can decide whether to waive the attorney client privilege.

The Lota deals concerned Mueller because of the business that was generated. Therefore, all of the communications between them are not able to be hald from the company.

As one important case we read states, a waiver to one is a waiver en toto.

HOW SHOULD THE COURT RULE ON THE DISCOVERY REQUEST?

The Court should grant the discovery request. I believe that the crime fraud exception is the strongest argument. As Justice Cardozo noted, once you abuse the privilege it leaves you (paraphrased from textbook). Here, it is clear that Berkman abused his relationship with his attorney to perpetrate an ongoing fraud that likely resulted in the bilking of his company of millions and millions of dollars. Doing so waives the privilege. Furthermore, as Mueller laid out above, there is

a strong chance that in camera review will show that the attorney client relationship was being used in an ongoing fraud.

This discovery request is also further buttressed by the reprehensible behavior of the law firm in continuing to perform transactions with New Company espite the "uproar" that was likely ongoing.

Part 2

Smith and Law firm acted reprehensible at numerous stages of this fact pattern.

Why no conflicts check?

First, there should have been a potential conflict of issue analysis performed as soon as "Law Firm ... continued to represent Berkman and took on the representation of Mueller." This is demonstrated in the Yablonski Case rather well. In that case, the various union-persons were represented at various times by Williams and Connolly, while Williams and Connolly also represented the company itself. In that case, the court disqualified Williams and Connolly from representing either! Here, the Law Firm should take note of that case and realize that once it becomes involved in this it becomes very sticky. For one, is it ever possible to truly understand "who is your client" from the perspective of the law firm. As we learned in 1.13, typically the corporation is the client of the lawyer and not its constituents. Here, we are put in the backward situation of a constituent having a prior relationship with the Firm and it just becomes a mess.

In addition, the facts state that "Law Firm appeared on behalf of berkman ... and filed ... against the individual members of its board." This is a clear concurrent conflict of interest that is "non-consentable" based on MR. 1.7.

Why no up the ladder reporting, you know it's required by MR 1.13(b)?

Second, the law firm failed in its obligation to "report up the ladder." MR 1.13 (b) states that when a lawyer is representing an organization and 'knows' that a person in the organization is engaged in wrongdoing, he must do what's "in the best interests of the organizatoin." Some explanation is required here. "Knows" can be inferred from the circumstances and "the best interests of the organization" typically require the attorney to take remedial action. That remedial action is to speak with the person doing the wrongdoing (unless it's just grossly wrong or criminal) and the attorney typically must report to a higher authority in the company like a board of directors unless the attorney believes it is "reasonably not in the best interests of the company to do so." Here, the tell-tell signs were obvious. For exmaples,
" copies of e-mails between the principals ... relating to agreements netered into ... suggest efforts to hid Berkman's itnerest." In many ways, this is tantamount to what Jordan Mintz was accused of doing. Mr. Mintz was accused of not disclosing on the proxy statement concerning how much the CFO Andrew Fastow was making. As applied here, Smith and his law firm should have spoken to the higher management of Mueller and sorted it out. Unfortunately, the conflict of interest analysis discussed above likely clouded there judgment.

Why no MR 1.6(b)(2) or (b)(3) disclosure?

Third, while the attorney client privilege is sacrosanct. There can be "other information" that is not covered by the attorney client privilege that "may be disclosed" by Smith or his Law Firm in certain circumstances.

Under the "fraud provisions" of MR 1.6(b)(2) or (3), the attorney may reveal client information to the extent he reasonably believes necessary to prevent the client from engaging in fraudulent or criminal conduct (that's basically subsection (2)), or in order to rectify, ameliorate the fraud that is occurring or will occur in the future (that's basically subsection (3)). While Smith and Law firm were under an ethical duty not to disclose information relating to the attorney client privilege, there may have been situations where they would have been allowed to disclosed based on the duty of confidentiality and exceptions to that rule. Specifically, the informatio concerning how "Berkman asked Smith to form NewCompany to compete with Mueller...." This could be information that perhaps could havfe been disclosed. Further, there were other situations where confidential information could be disclosed as well.

Potential obstruction of justice and fraud

Smith may have engaged in some "Nancy Temple-like" behavior in its representation of Berkman. In many ways, Smith cast aside his personal ethics in order to continue to get the business.

In some ways, I think Smith can be analagized to the OPM Case whereby the attorneys helped the company to perpetrate the fraud, even go so far as noting that their "client must be doing something illegal" (paraphrased) but continuing to represent them and [thereby generating more and more fees].

Smith, in his capacity as a partner at a law firm, is putting his partners at risk of liability by his negligent assistance of Berkman in his schemes, side-businesses, and bribery schemes.

Conclusion:

As can be seen, the conduct of Smith and his firm was reprehensible and he violated a wide number of ethical and legal norms. As we have learned in professional responsiblity, the attorney must be careful to tread water amongst the environment (legal, model rules, ethical, and moral). It appears that Smith and his law firm drowned amidst this environment in their ruthless pursut of fees.

Model Answer 2, Question 1

1. Request for Production

1. Are Emails between Lota US and Law Firm discoverbale?

Annie's Response:

Annie should repond to a request by claiming attorney client privilege to the emails that Mueller is requesting.
Communications are privileged if (1) the are a communication (2) between privileged persons (attorney and client/attorney and enabler of representation and client) (3) made in confidence and (4) for the purposes of getting legal advice.
Since the documents being requested are sent to an attorney they covered by attorney client privilege. Lota USA made communications with Law Firm with the purpose of seeking legal advice. Court's have held that emails are concidered confidential communications. Lota USA may be considered a client of Law Firm since Smith helped Berkman form WIP and Lota USA. Saving that, since Berkman owned WIP which owned 10% of Lota USA, those emails could potentially be from Berkman himself as an owner of Lota USA which would be privileged. If those emails were disclosed to the other side and the otherside read those emails without informing their counsel, Annie may seek disqualification.
Annie must provide a privilege log unless there is some agreement between the parties not to log.

Mueller's Response:

Mueller should respond to Annie's arguments by stating that Lota USA is not a client of Law Firm. Since privileged communications can only be between the attorney and thier client, the communication would not be subject to attorney client privilege.
Lota USA is its own separate entity which is not Berkman or WIP and cannot be considered a client of Law Firm and can therefore not claim attorney client privilege.
Also, Mueller could argue that the documents pursued are not covered by attorney client privilege because they were used to obtain assitance from legal counsel to perpetrate a fraud on Mueller. Communications that are made to perpetrate a fraud are not privileged. (Chen) It does not mater if the attorney knew that they were being used for that purpose, only what the client's intent was in obtaining the legal advice. (Chen)
Finally, Mueller would argue that since Smith and Law Firm represented Mueller and the advice was sought during the time that Berkman was an employee of Mueller, the advice was sought as if the corporation was the client and is therefore not privileged as to the corporation. (In re Grand Jury Subpoena)

Court's Ruling:

The court would hold that since Mueller made a prima facie case that the documents were in furtherence of a fraud upon Plaintiff, an in camera review would be conducted and those documents pertaining to the corporation and to the fraud would need to be produced to Mueller but

those documents that solely concern the representation of Berkman as an individual, seeking advice as an individual and complying with the 5 factor test ((1) that the communication occured between the privileged persons (2) the person disclosed that they were seeking information individually (3) the communications were confidential (4) they were to get legal advice and (5) they did not concern the corporation's activities (In re Grand Jury Subpoena)) would be withheld on the basis of attorney client privilege.

2. Are Documents relating to Berkman's communications with Lota and Lota USA discoverable?

Annie's Response:

Annie should object to this request as overly broad and burdensome. Requests should be reasonably calculated. Also, "Documents relating to communications" is vague and could potentially include documents that are subject to attorney client privilege as a client (either Lota USA, Lota, or Berkman) may have sought legal advice in relation to communications between Berkman, Lota USA and Lota.

Mueller's Response:

The request is not overly broad and burdensome as it asks for a specific period of time between Mueller's acquisition and the present and asks for documents that have specific persons involved. To the extent that attorney client privilege may attach, Defendant should prepare a privilege log.

Court's Ruling:

The request is not overly broad and burdensome and Plaintiff must comply with it to the extent that it does not violate attorney client privilege.

3 and 4. Are Documents Concerning the relationship and financial arrangements between Berkman and Lota and Lota USA and Documents relating to the legal advice Berkman received from Law Firm about his relationship with Lota USA and the creation of NewCompany, during the time that Berkman was president of B & K discoverable?

Annie's Response:

Since Smith was consulted by Berkman and Lota USA and Lota when the firm set up the structure of the company the documents conerning the financial arrangement are protected by attorney client privilege. Berkman communicated with the Smith to obtain legal advice in confidence. Therefore the documents are subject to attorney client privilege and are not discoverable.

Mueller's Response:

Smith was the attorney Mueller at the time that Lota USA was set up and Berkman was an employee of Mueller so all communications between Berkman and Smith are not subject to attorney client privilege because Berkman was communicating on behalf of the corporation.

Furthermore, the communications were sought to purpetrate a fraud on Mueller and fall under the crime fraud exception of attorney client privilege.

Court's Ruling:

Berkman has failed to show how these communications were protected by attorney client privielege as he was an employee at the time of the communications. He did not show that the information was sought as an individual and therefore cannot claim a attorney client privilege for these communications.

5. Are Documents relating to the formation and organization of Lota USA and NewCompany discoverable?

Annie's Response:

These documents are also subject to attorney client privilege because the attorney was consulted by these companies concerning formation an organization in the persuit of legal advice and in confidence. They are protected by attorney client privilege.

Mueller's Response:

The documents fall under the crime fraud exception as the creation of these companies defrauded Mueller since the investors and employee, Berkman, was an employee of Mueller at the time of the formation.

Court's Ruling:

The court will conduct an in camera review of the documents since Lota USA and NewCompany both sought legal counsel from Smith in the formation and organization of the companies. If they are found to be communications in furtherance of a crime or fraudulent act, then they are not subject to privilege and Berkman will be compelled to produce them.

6. Possible documents relating to any other "side" business of Berkman's that Mueller at the present time did not know about, but that might be illegally competing with Mueller and providing illegal kickbacks to Berkman

Annie's Response:

Any response to this request would violate Defendant's 5th amendment rights against self incrimination. Hubbell stands for the proposition that if the actual producetion of the documents themselves is incriminating then the Defendant does not have to produce them, i.e. if the production requires the defendant to "provide a combination" as opposed to a "key" to open a safe. Since the request asks for the defendant to produce documents that would evidence bribery and kickbacks it would require self incrimination by Berkman of any "side deals" that he has made. (Hubbell)

Mueller's Response:

This request is not 5th amendment incrimination because the documents

were already in existence before the request and can therefore not be testimonial in nature. (Fisher) Since Mueller is not requesting the defendant's personal papers, or other documents that are testimonial, there is no compelled self incrimination. The request only seeks documents that were in existence that evidence the transactions stated in the request.

Court's Ruling:

Production of the documents would require Defendant to testify against himself since he would be responding to a request that asks for documents evidencing an illegality. If the existence of those documents in the possession of the defendant and subsequent production in response to the request tends to show that Defendant engaged in illegal activities, and Plaintiff cannot more particularly describe documents in a way that doesn't require Defendant to incirminate himself, then the request cannot be honored due to constitutional concerns of the 5th amendment. (Hubbell)

2.

Conflict of interest

Between Berkman and Mueller

Lawfirm had a concurrent conflict of interest under MR 1.7 when Smith represented Mueller after the acquisition and Berkman at the formation of WIP and Lota USA. Law Firm has a continuing duty to re-evaluate any conflicts that may arise during the course of the representation. (Garrity female prisoners case) Even though at the outset, Berkman and Mueller did not have a conflict, when Berkman formed companies that were competing with Mueller and that had an interest in charging higher prices to Mueller, there was material adversity. (1.7)

Law Firm may have been able to get informed consent from Mueller and Berkman at the outset, when Berkman was president of B & K, but as the relationship progressed, there seemed to be an unconsentable conflict similar to that of Boyle and Yoblanski because of repeated representation. Smith owed its duty to the corporation, not Berkman and by counseling Berkman on the side deals he violated that duty of loyalty and therefore created unconsentable conflict of interest because he could not diligently represent both Berkman and Mueller. (1.7; UMWA)

Between Lota USA and Mueller

Smith could not have represented Lota USA and Mueller in the manner that they did since they had adverse interest. Since Lota USA was attempting to get the most money for its product and Mueller was attempting to get the least expensive prive for its product, their interest were inherently in conflict. Under MR 1.7 this was an unconsentable conflict because Smith could not have diligently represented both in the matter that it did.

Between WIP and Mueller

Smith's assistance in forming WIP also created a conflict of interest.

This conflict probably could have been consented to if both clients were informed. 1.7 Most likely the bare formation of WIP did not violate any of the unconsentable provisions of 1.7 (b)(1-3- effect diligence in representation, law forbidding, or same litigation.) To the extent that Smith consulted and furthered efforts to hide Berkman's interest, that would create a conflict that would most likely trigger the withdrawal provisions under 1.16.

Withdrawn- 1.16 allows an attorney discretion to withdraw if the client is seeking his advice in furtherance of a crime. After the code of conduct was revealed to Smith, Smith was on notice of the fraud that was being committed against Mueller. Although the withdrawal is discretionary, the Law Firm should have withdrawn from both representations at that point at the very least.

Reporting

Smith should have taken Berkman's proclivities to a higher authority. As Jorden Mintz did in the Enron scandal, if the issue is about how to avoid disclosure then there is probably some ethical issue that needs to be addresseed. Smith should have taken the information to Berkman's supervisors or Mueller executives when Smith was an attorney for the corporation. If disclosures needed to be made, then Smith should have made that apparent to higher executives. Smith and Law Firms duty was foremost to the corporation and Smith should not have let his loyalty to Berkman sway him from that duty.

Model Answer 1, Question #2

To: Parties
From: Trial Court Judge
Re: Motion to disqualify

Overview

THE MOTION TO DISQUALIFY IS GRANTED. IT IS SO ORDERED.

In this motion to disqualify, the court is faced with the potential disqualification of the Buchanan Ingersoll law firm from its representation of Mountain State in its breach of contract claim against Bluestone Coal Sales and Blue Stone Coal. Based on the following statement of facts and analysis, I GRANT the motion to disqualify Buchanan Ingersoll from the reprentation of Mountain State based on a conflict of interest.

Statement of the Facts (please ignore if you feel so inclined)

In this litigation, the parties are intertwined. Mountain State owned and operates a plant that requires coal. It therefore entered into an agreement with Bluestone Coal Sales, gauranteed by Bluestone Coal. After Bluestone Coal Sales failed to deliver the requisite coal as required by the contract, Mountain State sued both parties.

Mountain State aquired the legal services of the nationwide firm, Buchanan Ingersoll (hereafter "Buchanan Firm") as its counsel. However, Buchanan Firm has also represented Bluestone Coal in a case before that

conerned a "coal supply contract of coal from [the same mine as in this dispute] where Bluestone Coal was sued for failure to deliver coal as specified by Coal Sourcing's coal supply agreements and contract." As part of a special defense, the Buchanan Firm learned confidential information concerning "confidential coal supply agremeents."

In Buchanan's defense, it has introduced into evidence an advanced conflict waiver whereby "Bluestone waived any conflicts of interests in future representations by Buchanan Ingersoll of the Ocean States Corporation."

SUCCESSIVE CONFLICTS OF INTEREST ANALYSIS

Analysis of Bluestone Coal and Buchanan Firm

In short, this disqualification motion is based on the presence of a successive conflict of interest. Successive conflicts of interest are analyzed under Model rules 1.9. Once it is established that a successive conflict of interest exists, we must ascertain whether that conflict may be consented to (as a note, successive conflicts always allow for "informed consent" in contract to concurrent conclicts which require "consent-plus").

A successive conflict of interest exists when there is a material risk that the attorney's representation of new client in the same or a substantially related matter with that of a former client will lead to a representation where the attoreny's represtntation of the new client be materially adverse to the former client. Here, Bluestone Coal is the former client because there is no ongoing litigiation where the Buchanan Firm is representing Bluestone Coal and there is also no "engagement letter" that would memorialize Buchanan's ongoing representation of Bluestone Coal. Thus, we are clearly in the universe of "successive conflicts."

The matter at hand is subtantially related to Buchanan's prior representation of Bluestone Coal in the *Coal Sourcing and Sales, Inc Case*. Typically, the "substantially related" test is a function of what type of confidential information the attorney likely came upon in his representation of the former client, whether the two matters are similar, and whether the attorney may be able to glean some advantage with his new client by the use of confidential information (as per MR 1.6) that he obtained in his representation of his old client (hereafter, Buchanan Coal). As the facts clearly indicate, Bluestone Coal was "sued for failure to deliver coal as specified by ... agreements and contract." This is the exact same factual situation and thus would meet the "substantially related" test based on the "old matters and new matters" being so similar. Second, there was confidential information obtained in Buchanan's representation of Blue Coal that would be useful in the current litigation, specifically the asserted defense of "force majeure" which was Blue Coal's "excuse [for] its nonperformance of the coal supply agreement." In the litigation, Mountain State is actually requesting documents pertaining to the defense that Buchanan Firm used on behalf of Blue Coal. In a sense, Buchanan is asking to see it's own work (the defense) that it employed in its prior litigation of Buchanan Coal. In a word, preposterous.

Furthermore, this information would be "materially adverse" to the

interests of Buchanan Coal based on the "head-start" it would give to the Buchanan Firm in effectively disintegrating any defense that Blue Coal might offer related to the Force Majeure. As an example, in *Brennan's*, there was a similar material adverse-ness because the lawyer had represented the parties previously and was privy to lots of information, similar to this situation.

While there is clearly a successive conflict, in theory, Bluestone Coal could give informed consent that would allow for the Buchanan Firm to continue to represent Mountain State. Informed consent would require the Buchanan firm to carefully delineate all the reasonable and likely outcomes and conflicts that would arise, the informed consent would be in writing, and would have to be all encompassing. As the facts illustrate, there is no affirmative expression of consent by Bluestone Coal. However, there is an advanced waiver of conflicts that must now be discussed.

An advanced waiver of a conflict of interest is used by law firms like Buchanan that seek to represent many companies. Here, it appears that an agreement has been signed by Bluestone on behalf of all of the "Ocean States Corporation" which by inference includes Bluestone Coal, Bluestone Coal Sales, as well as the other entities mentioned in the facts like Harlan Development, Sequori Energy, and Dynamic Energy. From the facts, there is no documentation of the conflict waiver. That being said, purely on the basis of the all encompassing nature of the waiver, it would likely be held invalid. First, "open ended" waivers are generally unenforceable. Second, the advanced waiver must apprise the waiver of the likelihood of future conflicts and meaningfully examine their nature. Here, it is difficult to imagine that they could have taken place. For these reasons, the advanced waiver is ineffective and of no consequence to my analysis.

I now must ascertain what effect is the above when all that Bluestone Coal acts for in relation to the current matter is <u>"merely"</u> the guarantor. As the lawsuit currently stands, the relationship of Bluestone Coal is merely as the quarantor in the case that perhaps Bluestone Coal Sales fails to pay the required amount. Here, the case has nothing to do with the facts of BlueStone Coal's failure (as opposed to the failure of Bluestone Coal Sales' failure) to deliver the coal. As the facts clearly indicate, "Bluestone Coal" was sued for failure to deliver coal as specified by Coal Sourcing's coal supply agreements and contract." Nonetheless, I infer from the facts before me that due to the fact that the same mine is involved, this case likely involves facts that are VERY SIMILAR to the *Coal Sourcing Sales* litigation. As a result, it is my belief that the defense that Bluestone Coal used in its litigation in *Coal Sourcing and Sales* will likely be the same defense that would be used by one of its "brother entities" in the current litigation. The prospect is far too great that Buchanan will be able to used confidential information obtained by the representation of Bluestone Coal and I must therefore grant the request.

<u>*BlueStone Coal Sales and Buchanan Firm*</u>

From a superficial vantage point, it appears that there is no conflict of interest. Having said that, we must first inquire into the caselaw of Westinghouse. In that case, a large respected law firm represented a

group called ASI which comprised numerous oil companies. While the large law firm asserted that there was no conflict of interest despite the law firm taking a position opposite some of the members of ASI in subsequent litigation, the court held that indeed there was a conflict of interest and ruled against the large law firm.

I see the association of Bluestone Coal Sales as connected to Bluestone Coal. This is seen by the letter that was sent from "Bluestone Industries."

Imputation

Under 1.10(a), the imputation of one lawyer at a firm leads to the disqualification of the entire firm. That would be the case in this scenario as well.

CONCURRENT CONFLICTS OF INTEREST ANALYSIS

The effect of the Buchanan Firm's representation of other entities (Dynamic, Harlan, etc.)

Based on the facts which use the language of the "Ocean States Corporation," it is furthermore arguable that there is also a concurrent conflict of interest that presents itself in this litigation.

A concurrent conflict of interest exists when an attoreny's representation of one client will be directly adverse to the other client, or alternatively that the representation of one client will materially limit the attorney's represntation of another client.

Here, if we take that the Ocean States Corporation is one entity, there is a clearly conflict of interest under "directly adverse." MR 1.6 makes it clear that a law firm cannot represent one party against another party even if the cases are totally unrelated. Here, the facts clearly state that Buchanan Ingersoll has been retained as counsel for certaon of ... Justice's twenty-nine affiliated companies." This makes it clear that it is ongoing represntation on behalf of both Whiteside as well as Ocean States Corporation as an entity.

It should also be noted that even "informed consent" cannot cure the type of conflict of interest discussed immediately above.

Furthermore, there is also a materially limited concurrent conflict of interest. A materially limited conflict of interest arises when the representation of one client by the attorney will lead to a limitation in the attorney's relationships to a former client, current client, third party, or personal relationship. Here, it is the current client context. In short, how would Ocean States Corporation feel if Buchanan effectively bankrupts two of its entities in this litigation. The result would be a disaster.

CONCLUSION

To conclude, the motion is GRANTED. The Buchanan firm is DISQUALIFIED.

Model Answer 2, Question 2

In the District Court of City, State of Coal
Honorable District Judge Prosiding.

Mountain State v. Bluestone Coal and Bluestone Coal Sales

Came to be heard on this day, Defendants Bluestone Coal and Blueston Coal Sales (collectively referred to as "Defendants") Motion to Disqualify Buchanan Ingersoll as counsel for Plaintiff, Mountain State, after due consideration, the court finds the following:

Overview:

Counsel for Defenats move this court to disqualify Buchanan Ingersoll (hereinafter "IB") from representation of Mountain State (hereinafter "Plaintiff").

Defendants cite rule 1.9 for the proposition that counsel may not represent a client where a former clients interest are the same or substantially similar without consent of the client. Bluestone Coal argues that IB has formarly represented Bluestone Coal in a proceeding captioned "*Coal Sourcing and Sales, Inc. v. Bluestone Coal Corporation*" and that former representation concerned the same mine that is at issue in the current litigation and the same claim of breach of contract. Since the litigation at bar is substantially similar to the litigation that occured in *Coal Sourcing*, IB should be disqualified.

Bluestone Coal also cites violations of rule 1.6 regarding confidentiality. The duty of confidentiality owed to the client continues after the representation has ceased. IB has breached this duty of confidentiality by using information that Bluestone Coal revealed to IB concerning its supply agreements. This information is now being used against Bluestone Coal in the current litigation as discovery request have already commenced regarding the defense used in that case that was brough about as a result of the revalation of that information.

Bluestone Coal also cites public policy against representation of a former client as it promotes distrust in the legal system. The early discovery request shows the impropriety of IB, in that they have not only begun to represent a client that has materially adverse interest but has used confidences learned in the former represenatation against Bluestone Coal.

Counsel for Bluestone Coal Sales cite Westinghouse for the proposition that if a firm represents a association of companies in litigation then a conflict will arise when the firm takes a position adverse to companies in the association in a substantially related matter. Bluestone Coal Sales is associated with a conglomerate owned by Mr. Justice which has engaged IB for representation of companies within the conglomerate. Since Bluestone Coal Sales is part of Mr. Justice's Conglomerate and IB has represented the Conglomerate, IB has engaged in representation that is conflicted under MR 1.9 as they have not received consent of Bluestone Coal Sales to engage in the

representation in the suit at bar. IB is also conflicted under 1.7 to the extent that it continues to represent Mountain State and the conglomerate owned by Mr. Justice.

Governing Legal Standard:

MR 1.7 governs concurrent client representations that form a conflict of interest. The rule states that a conflict of itnerest is created when a firm represents clients who are directly adverse or materially adverse at the same time. This conflict may be "cured" if (1) the attorney can competently and diligently represent both clients (2) the law does not prohibit the representation (3) the clients are not in the same litigation and (4) the firm obtains informed consent of both clients. Comment 6 of the rule states that a firm may not represent parties that are adverse in any matter, unrelated or not, without consent of both clients.

MR 1.9 governs successive representations that form a conflict of interest. The rule states that a conflict of interest is created when a firm represents a party that has taken an adverse position against a former client in the same or a substantially related matter. That conflict may be "cured" if the attorney obtains informed consent from the former client.

Westinghouse stands for the proposition that where an attorney client relationship is formed between a company and the firm, even when the firm is representing an association of companies, a representation that is directly adverse to the individual companyies' interest will create a conflict of interest.

Application to Facts:

The court finds Bluestone Coal's arguments persuasive. Bluestone Coal was a former client of IB in a substantially related matter. Although there is no engagement letter, IB made an appearance on behalf of Bluestone Coal and formed an attorney client relationship through providing defenses and taking information from Bluestone Coal to effectuate those defenses. There is no doubt that an attorney client relationship existed.
By IB's discovery request, it is obvious that IB even anticipates the same exact defense in this case as they arged in the former case. It appears to the court that IB has used information obtained in the previous representation to the disadvantage of Bluestone Coal in direct violation of rule 1.6.
Finally, IB did not obtain consent for this representation. Consent would have cured the conflict but, as evidenced by the Motion before the court, it is not likely to be obtained.

As to Defendant Bluestone Coal Sales, the court finds its arguments to be unpersuasive. Bluestone Coal Sales urges the court to take much to expansive a view of Westinghouse. In Westinghouse, the companies individually formed an attorney client relationship and information was given to the firm by those companies and those companies were under the impression that they were seeking legal advice. In the case at bar, Bluestone Coal Sales has not proven that they formed any type of attorney client relationship with IB and cannot claim to be its former client. Furthermore, they have produced no evidence to the court in

support of their Motion that IB is currently representing any of the companies under Mr. Justice's conglomerate umbrella.
There is no showing of an exchange of Bluestone Coal Sales confidential information was revealed to IB in the course of IB's representation of Mr. Justice's conglomerate which is what this rule seeks to protect.

Conclusion:

After due consideration, and for the foregoing reasons, the court finds that as to Defendant Bluestone Coal, Defendant's Motion to Disqualify is hereby GRANTED and as to Defendant Bluestone Coal Sales, Defendant's Motion to Disqualify is hereby DENIED.
The actions will be severed and tried separately.