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MAURER SCHOOL OF LAW
Bloomington

Date: March 18, 2012
From: Professor Henderson
To: All 1L students
RE: Final Semester Presentation

The Final Group Presentations for the Legal Professions class are scheduled for the Week of April 9. The Group Presentations are an opportunity to exercise your teamwork and communication skills while learning and reviewing the course material on legal ethics and professional responsibility.

The Group Presentations are organized around two realistic problems (fact patterns) with a total of nine subparts. In many respects, these problems are very similar to traditional law school examinations, where the core skill is identifying (or “spotting”) relevant legal issues.¹ As such, the problems will serve as an excellent review for the final examination. For the Final Presentation assignment, each Practice Group has two responsibilities: (a) A 1-page summary on the key legal issues contained in the Problem assigned to your Practice Group (all subparts); and (b) a short classroom presentation of your Practice Group’s assigned subpart (12 minutes maximum).

Group Assignments. Please review the Problem subparts. Each corresponds to the ethical issues faced by a specific attorney described in the problem. If your Practice Group has preferences for specific subparts, please email an ordered list to me by Tuesday at 6 pm (wihender@indiana.edu). I will try to accommodate them. The problem subparts will then be assigned by on Wednesday, March 21st. Note: I reserve the right to improve/refine the call of the question for each subpart.

1-Page Summary. For the 1-page summary, it is permissible to share information and collaborate across Practice Groups – indeed, it is encouraged. However, each Practice Group must prepare its own written work product. A draft of your 1-page synopsis of legal issues is due on Tuesday, April 3 at 6 pm. On Wednesday, April 4, we will discuss the primary legal ethics issues raised by both problems. Specific groups will take the lead on specific subparts (not the same one assigned to your Group as a final presentation). With the benefit of this discussion, a final draft of the 1-page written work product is due on Sunday, April 8 at 6 pm.

Assignment Format. What is the point of the in-class review and 1-page synopsis documents? To improve the content of your Final Presentation – a flawed legal analysis cannot be saved by a well organized and well executed presentation (and vice versa). If you and your Practice Group fully engage in the prep work, organization and presentation will be the differentiating factors.

¹ Cf. MR 1.2 Competency, cmt 2 (“A newly admitted lawyer can be as competent as a practitioner with long experience.... Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge.”)

Problem #1: Car Wreck

The following events occurred in the city of Fairfield, which is located in Central County in the state of Midland. The Model Rules govern the ethical duties of Midland lawyers. Prosecutors are bound by the ABA Standards on Criminal Law.

On September 3, 2012 at 1 a.m., Brian Anderson was traveling eastbound on Main Street through the intersection with Elm when his 2011 Buick Enclave (an SUV) collided with a 2002 Toyota Camry. The Camry was driven by Dan Babb, who was accompanied by his friend, Evan Cassidy, who was asleep in the passenger seat at the time of impact. At the time of the accident, the streets were empty. The collision awoke several people in the apartment buildings near the intersection. Police and EMS were then called to the scene.

The cause of the accident is a topic in hot dispute. Babb's car was hit on the driver's side door. Anderson claims that the light at Main and Elm was green and that Babb ran the red light, thus causing the accident. Babb can offer no account of the accident because he lies comatose in a hospital bed. Toxicology information obtained after the accident revealed no alcohol and drugs in Babb. His passenger, Cassidy, suffered a severe broken right arm during the accident with possible permanent nerve damage. Cassidy was interviewed by Central City Police and can offer no account of the accident.

According to police officers on the scene, Anderson's SUV "had an overwhelming smell of alcohol." Anderson claimed that he had several bottles of wine as presents resting on his back seat. There was some evidence on scene to support Anderson's account. Because Anderson was injured and had to be extricated from the car, police officers were unable to administer a breath alcohol test. Blood tests at the hospital showed that Anderson's blood alcohol content (.05 grams of alcohol per 100 milliliters of blood) was below the legal limit (.08), albeit the sample was taken at 3 a.m.

While Central County prosecutors deliberate over whether to file charges against Anderson, the insurance companies are sorting out liability. Anderson is a senior manager with Carlyle Manufacturing. He was driving his company car. Carlyle is insured by Midland Mutual, Inc., a national insurance company coincidentally headquartered in Fairfield. Midland Mutual is also Fairfield's largest employer. Realizing they had a potentially large legal claim on their hands, Midland executives sent one of their staff attorneys, Elise Daugherty, to interview Anderson. At the time, Anderson was still recuperating in his hospital room. Daugherty informed Anderson that she represented Midland Mutual, which was the underwriter of the Carlyle company policy. With assurances of confidentiality, Daugherty asked Anderson for his account of what happened. Believing that the Midland Mutual attorney was there to help him, Anderson confides that he "had a few glasses of wine" over the course of a four-hour business dinner but that he was not impaired in any way. According to Anderson, who had an accident and ticket-free driving record, "Babb blew through the red light. I had no chance to stop."

Dan Babb was a popular local boy who had played quarterback for Fairfield High School. News of the accident and his perilous medical condition made the front pages of the *Fairfield*



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Herald and quickly produced an outpouring of anger against Anderson, who was—according to anonymous rumors on various social media—reputed to be drunk. A few days after the accident, the Central County prosecutor, Debra Fortney, requested that Midland Mutual send over to her any statements made by Anderson to Midland Mutual officials (including lawyers) that are related to the accident. Without questioning the legal basis for this request, Daugherty turned over the requested documents. Midland Mutual subsequently hired John Gallup, a local Fairfield lawyer with a small insurance defense practice, to represent Anderson.

Fortney subsequently charged Anderson with Driving While Intoxicated (DWI). Under Midland law, a first time DWI offense is a misdemeanor. It is a Class IV felony if it is “the proximate cause” of serious bodily injury to another (6 mos. to 3-year sentence). If the DWI offense results in death, it can be prosecuted as a Class III felony (2 to 8-year sentence). In either case, if the driver’s blood alcohol level exceeds .15, the offense can be prosecuted up one felony level (from IV to III, or from III to II). A Class II felony is punishable by up to 20 years in prison. Anderson’s measured blood alcohol content was below the legal limit. However, Fortney consulted with Jessica Huntley, an expert in metabolic physiology, and based on the accident timeline, Huntley estimates that there is a 90% chance that Anderson’s blood level was between .06 and .15 at the time of the accident. Fortney, who is up for re-election this year, charges Anderson with a Class III felony, threatening to increase it to Class II if Babb dies. The Midland legislature has adopted the ABA Standards on Criminal Justice.

As the criminal procedures unfold, lawyers for all parties prepare for civil litigation. Prior to the accident, Cassidy and Babb lived together in a committed relationship. Cassidy hired a local personal injury attorney, Beth Jackson, to represent both of them in a case against Anderson. Babb is now conscious but suffering from potentially permanent brain damage. According to Cassidy, he has agreed to the representation. Jackson is pleased to have this case because Babb’s injuries alone are sure to meet the Midland Mutual \$5 million per incident policy limit. This turns out to be quite relevant, since Carlyle Manufacturing just filed for bankruptcy the day before the accident.² After Johnson filed the complaint against Anderson alleging negligence, Anderson (represented by Gallup) counterclaimed, alleging that Babb was negligent.

During the discovery process, Jackson got the idea of getting the digital surveillance tape from the 7-11 convenience store parking lot at the corner of Main and Elm. The idea may have been clever, but it was not original. The 7-11 managers told Jackson that someone from the Central Country Prosecutors Office requested a copy a week earlier. Jackson watched the video and, much to her horror, it appeared that Babb did, in fact, roll through a red light as he headed northbound on Elm. Nonetheless, Johnson concludes that Anderson is still at fault because his motor sensory skills were impaired. Moreover, based on the \$5 million settlement offer put on the table by Midland Mutual (the full policy amount), it appears that neither Daugherty nor

² The legal significance of the Carlyle bankruptcy is that it reduces the likelihood that Babb or Cassidy can collect a judgment from Carlyle on a theory of vicarious liability. Anderson was driving a company car and coming home from a business dinner at the time of the accident.

Gallup are aware of (a) the existence of the digital recording, or (b) Huntley's assessments of Anderson's blood alcohol content at the time of the accident.

Fortney took a very hard bargaining stance with Gallup, intimating that the state's experts would reveal Anderson to be very drunk and a menace to the community. Fearing that Babb might eventually die from his injuries and the charges against him would be increased to a Class II felony, Gallup agreed to a plea deal for the Class III felony. Later that day, Gallup met with Anderson and repeated Fortney's strategy, concluding, "we really had no choice." In the civil case, Babb and Cassidy took the advice of Jackson and accepted the \$5 million settlement offer. After Jackson received her 30% contingency fee, Babb received \$3.25 million and Cassidy received \$250,000. Not wanting to upset Cassidy, Jackson never informed him about the existence of the 7-11 store digital recording.

Groups 1-4. Prepare a one page document that summarizes the key ethical issues of the following attorneys: Daugherty, Gallup, Fortney and Jackson. Thereafter, each group is responsible for presentations on the following topics:

- (a) **Group 1.** Analyze and discuss the conduct of attorney Daugherty. Has she lived up to her ethical duties and obligations under the law of Midland?
- (b) **Group 2:** Analyze and discuss the conduct of attorney Gallup. Has he lived up to his ethical duties and obligations under the law of Midland?
- (c) **Group 3.** Analyze and discuss the conduct of prosecutor Fortney. Has he lived up to his ethical duties and obligations under the law of Midland?
- (d) **Group 4.** Analyze and discuss the conduct of plaintiffs' attorney, Jackson.



Problem #2: Environment Leak

The following events occurred in the city of Warren, which is a large urban center in Warren County in the state of Midland. The Model Rules govern the ethical duties of Midland lawyers. Prosecutors are bound by the ABA Standards on Criminal Law.

Acme Incorporated is a privately held corporation that runs sewage treatment plants throughout the United States. Acme was founded in 1981 by John Koch, an engineer turned businessman who made a small fortune during the 1980s and 90s buying waste facilities from small and medium-sized municipal governments. Because Acme runs several dozen treatment facilities in northern and central Midland, Acme has economies of scale and scope that could not be achieved by small governmental units. John Koch recently died. Koch's three sons and two daughters inherited 100% of Acme stock (20% each). None of the five have any interest in running Acme, so they instructed the CEO, Dan Latermore, to hire an investment bank to sell the company. Per the employment contracts negotiated by the late Koch, when the company is sold, Latermore will receive a "golden parachute" of 10% of the total sale price of the company. The Acme general counsel and vice-president, Archana Mehra, is working with the investment bank and their primary outside counsel, Smith & Castle, to pull together the information needed to conduct a proper valuation of the company.

Although Acme is privately held, its operations are heavily regulated by state and federal governments. The statutes and regulations provide that breaches of the rules can be sanctioned through civil fines. However, "willful and knowing" breaches can be treated as criminal conduct.

Midland Administrative Code (MAC) § 51.120 focuses on the operation and maintenance of sewage treatment facilities.³ These regulations require that the plant operator check the exterior of pipes for microscopic cracks four times a year. If the cracks are of a certain size relative to the pipe diameter (which run from 3" to 24") or if there are a certain number of cracks within any 25-foot stretch of pipe, the affected pipes must be replaced "as rapidly as operations permit." Another set of regulations deals with the number of pipes. The regulation requires that a plant of Acme's size must maintain a minimum of five conforming pipes with a minimum 6-inch diameter (to avoid backup of sewage during periods of peak volume). Fortunately, the plant that Acme operates has seven pipes. And Acme has been diligent in checking those pipes for cracks.

MAC § 51.150 also requires a sewage plant operator to self-report to the Midland EPA whenever there has been a "material" failure to abide by the regulations. The term "material" is defined to include "any incident in which untreated or partially treated sewage results in

³ Untreated sewage is a breeding ground for a wide array of harmful bacteria, parasites and viruses. When a significant quantity seeps into an urban environment, the associated pathogens can cause sickness and disease. Seepage can often be difficult to detect because the most common symptoms (nausea, abdominal pain, diarrhea) are common to many maladies and tend to subside relatively quickly. Persistent seepage, however, can be lethal, especially for those with underdeveloped or compromised immune systems, such as the young and the elderly.

runoff to neighboring watersheds.” “Runoff” is a technical term measured in a variety of ways. But according to subsection (e) of the regulation, leaks or cracks beyond the minimum threshold set in MAC § 51.120 are presumed to be causing runoff and thus in violation of § 51.150.

In its efforts to modernize the Warren sewage treatment plant, Acme overhauled the entire electrical system. All that work served to delay the quarterly inspection of pipes. In the most recent inspection, which was conducted six weeks late, Acme discovered that three of its pipes were non-conforming. Two of those pipes had too many cracks—albeit cracks that were smaller than the regulations forbade. The third had very few cracks, but those cracks were bigger than the regulations permitted.

The Warren plant manager, Ryan Nelson, knows quite a bit about the state and federal regulatory schemes. He orally reported to Kerry Olson, vice president of Acme operations, and Latermore that there might be a problem with the pipes. He shut down the pipe with the larger cracks but did not shut down the two pipes with numerous tiny cracks. He told the executives that, unless the electric work was suspended (at enormous expense to Acme), it would take several months to repair the pipes.

Nelson also told the executives that he was aware that there were some other regulations that may be on point. When the Midland legislature last revised their regulations, they had intended to replace the old regulations with the new regulation that required a minimum of five pipes. However, for whatever reason, a chapter of the older regulations had never been deleted and was still officially published in the Code of Midland Regulations (CMR). The older regulations did not specify how many pipes were necessary, but rather had a formula for calculating the number of pipes based upon the amount of water that was flowing in the plant. Nelson suggested to the executives that the business rely upon those regulations, that it slightly reduce the amount of water flowing through the pipes so that only four pipes were required to be conforming; and that Acme should conclude that it did not need to self-report the situation to the regulators.

Nelson also noted that the various regulations had been based upon the tolerances of the types of pipes that were commonly used in the industry. But Acme’s pipes were of a newer generation of technology and were considered safer and stronger than the older generation, even when the newer pipes did have some cracks. Thus, according to Nelson, there isn’t a significant threat or danger to the surrounding community. Nelson concluded that the two pipes with numerous cracks be taken off-line but kept in a state of readiness so that they could be used in an emergency, should an emergency (e.g., a torrential rain storm that results in flooding) arise before they could be replaced.⁴

Mary Zuckerman is a fifth-year associate at the firm of Smith & Castle. Zuckerman studied environmental law in law school, interned one summer at the Sierra Club, and then

⁴ Query: Nelson is clearly an expert in his field. However, would you worry about his objectivity if his compensation were tied to his attainment of various cost containment measures at the plant?



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took a job doing environmental compliance work at Smith & Castle. She recently received a telephone call from the partner from whom she gets most of her work. That partner, Terry O'Boyle, has a large number of clients and is well regarded in the legal field. There were times when O'Boyle's decisions were more aggressive than Zuckerman was comfortable with, but Zuckerman trusted O'Boyle and hoped to become a partner who worked closely with O'Boyle and O'Boyle's clients.

During the phone, O'Boyle said to Zuckerman that there was a series of issues at Acme related to the Warren plant. Acme needed to know whether it could rely upon the older set of regulations that had inadvertently not been deleted from the CMR; whether its plan for maintaining the plant until it could be repaired was a legal one; whether it had a duty to self-report the situation to the regulators; and wanted some advice on whether it was necessary to seek the regulators' pre-approval of the use of the older regulations.

On that last point, Acme was worried that the recently appointed Midland officials have been mounting a campaign to enforce regulatory schemes above and beyond what was actually in the regulations themselves. According to O'Boyle, Acme fears that it would be made a scapegoat if it reported the situation to the regulators. So Acme also wanted a little bit of prudential advice from Smith & Castle about the odds that the situation would be detected by the regulators in the event Acme did not self-report. People in the industry sometimes called this the "audit lottery." That is, clients sometimes wanted to know how frequently the regulators inspected plants and reviewed the paper records and what the odds were that a violation would go undetected.

Zuckerman told O'Boyle that this was a very thorny set of issues. O'Boyle agreed. "Given the politics within the regulator these days, it's not impossible that they would severely overreact and shut down the plant. And right now, the Koch family is trying to sell the company. But, at the same time, the regulations reflect legitimate safety concerns. The good news is that Acme has a long history of taking safety very seriously." Zuckerman was glad to hear that.

O'Boyle added, "There's one more wrinkle here, Mary. The client suggested that we look at these issues and if our recommendations are negative—that is, if we recommend that Acme's plan won't fly—then we don't put anything in writing. On the other hand, if we bless the plan, Acme will probably want a memorandum from us that they can keep in their back pocket, so to speak. That way, if the regulators do pounce, Acme can say that they had reputable lawyers vet the plan."

Zuckerman went back to her office and thought about the matter. She wondered about the ethical limits of counseling. How far could she push? How aggressively could she interpret regulations? Did it matter that she was not in an adversarial setting and that there was no opposing party looking over her positions and interpretations? Was it appropriate to give legal advice about the "audit lottery"?



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In addition to Acme's environmental compliance issues, O'Boyle was assisting on the sale of Acme. David Yellen is a second year associate who is working with O'Boyle and Mehra on "due diligence."⁵ Yellen is given a CD with ten years' worth of Midland EPA compliance reports on the company's many sewage treatment plants. Reviewing these documents over a period of two weeks, Yellen concludes that the environmental record is pretty spotless. However, he is missing the Acme MEPA compliance forms for the third and fourth quarters of 2012. In an e-mail, Yellen informs O'Boyle of the spotless compliance record but flags the missing Warren facility records. O'Boyle replies, "Yes, we are working on resolving that."

While having lunch with his associate mentor, Zuckerman, Yellen mentions the due diligence project and the slight snag on the missing compliance reports. Zuckerman replies, "Yes, that's on my plate." Zuckerman then explains her dilemma.

The following week, Yellen is invited to a negotiation session with XF Renewables, a conglomerate that specializes in environmentally friendly treatment facilities. During the course of the conversation, O'Boyle alludes to Acme's spotless environmental record, "which Yellen has recently documented." This gives Yellen pause, but he does nothing. The following day, Acme and XF Renewables announce a tentative sale agreement. Yellen goes to O'Boyle's office and divulges his conversation with Zuckerman. "Based on this additional information, I would not be comfortable characterizing Acme's environmental record as spotless. According to Mary, they may be one really bad rainstorm away from a serious environmental issue." O'Boyle replies, "I hear you. But Latermore has all the facts, and he is the client. He prefers Nelson's approach. A month after the sale closes, all those nonconforming pipes will be replaced. Mary and I told them it wasn't a good idea. But it's the client's call."

The deal closes; Acme is merged into XF; Latermore and Nelson retire; another firm now represents XF; Zuckerman takes a job with the MEPA; Yellen gives up corporate law and takes a job with a plaintiffs' side personal injury firm, Reiter & Tuttle, which specializes in mass tort litigation.

Several months later, a torrential rainstorm travels through the Midwest, producing substantial flooding. The Warren sewage plant is overwhelmed. All seven pipes are placed into service, but one of them bursts. XF immediately reports to the MEPA. An astute newspaper reporter makes a connection between the incident and the large number of children and the elderly who have been hospitalized, including three reported deaths. Reiter & Tuttle has been asked to represent several victims in a suit at XF Renewables. The MEPA is also commencing civil actions against the company; a decision on criminal actions is currently under deliberations. Zuckerman works for the criminal division.

⁵ "Due diligence" encompasses a wide range of activities meant to assess the reliability of various assumptions and representations that form the basis for entering into a transaction, such as the purchase of a company. Often times a seller will engage in "sell side" due diligence to expedite a transaction and/or increase its sale price.

- (a) **Group 5.** Analyze and critique the actions of partner O'Boyle, who was the relationship partner for Acme Inc. Were his discussions with Latermore and Nelson confidential? Are they protected by the attorney-client privilege? Was Latermore his client? What key facts are you missing?
- (b) **Group 6:** Limiting yourself to her time at Smith & Castle, analyze the ethical dilemmas facing attorney Zuckerman. What was she required to do under the Model Rules? What options were in her discretion?
- (c) **Group 7.** Limiting yourself to his time at Smith & Castle, analyze the ethical dilemmas facing attorney Yellen. What was he required to do under the Model Rules?
- (d) **Group 8.** Assume that general counsel Mehra was fully apprised of all the facts in Problem #2, including Zuckerman's and O'Boyle's advice that the Nelson plan was neither wise nor legal. Critique Mehra's conduct (or inaction). What were Mehra's duties under the Model Rules? What is or is not protected by the attorney client privilege?
- (e) **Group 9.** Conduct a conflicts analysis for the representations that follow Zuckerman's and Yellen's departures from Smith & Castle.



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