

UNIVERSITY OF MARYLAND  
SCHOOL OF LAW

LEGAL PROFESSION  
(3 Hours)

Evening Division  
Professor Conclin

Wednesday, May 11, 1994  
6:30 p.m. - 9:30 p.m.

No. \_\_\_\_\_

Signature: \_\_\_\_\_

Printed Name: \_\_\_\_\_

INSTRUCTIONS:

Sign and print your name in the blanks above. Put the exam number on the outside cover of each of your blue books and on your envelope. Do not put your name on the blue books or envelope at any place. Upon completion of the examination put your answers in the envelope, fasten it, write the course and instructor names on the outside, and hand it in to the exam administrator. Be sure to enclose all of your answers - - you will be graded only on what is inside the envelope. Hand in the exam questions separately.

There are three questions, weighted equally, and you should allocate your time accordingly. Following your comments in the last class, I have decided to keep the fact patterns brief, leaving out a lot of the detail found in my past exams. This means that the questions usually suggest issues more than develop them and require you to "run with" the facts as much as possible. Do not hesitate to be imaginative, discussing as many contingencies as you reasonably can foresee happening. When in doubt, err on the side of including a point rather than leaving it in your head. Avoid descriptive statements about law or ethics rules in general. This is a test of your ability to analyze problems, not a test of your knowledge of legal rules.

**ASSUME THAT THE AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT APPLY THROUGHOUT. ALL REFERENCES TO ETHICS RULES ARE TO THE MODEL RULES. YOU NEED NOT DISCUSS THE EQUIVALENT PROVISIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY OR PARTICULAR STATE MODIFICATIONS OF THE MODEL RULES.**

**THE EXAM IS OPEN BOOK. YOU MAY BRING ANY MATERIALS YOU LIKE INTO THE EXAM WITH YOU.**

I.  
(1 hour)

Albert and Enid taught together in the Poughkeepsie, New York, school system for more than a decade, and in the process became close friends. Albert taught two of Enid's children, one of whom, Wallace, also became Albert's friend. Wallace graduated from law school and joined a civil practice firm in New York City. When he started with the firm he gave Albert his card and told him that if he ever needed "legal help" he should not hesitate to call. A few years later Albert called. In a low monotone, somewhat distraught but coherent, Albert said he had just killed someone, that he could not square it with God, and that he was about to kill himself. Incredulous, Wallace told Albert that suicide would not square anything, and that he should sit put until he (Wallace) got there. Wallace asked if there was someone nearby who could stay with Albert in the meantime, and Albert suggested Zimet, the local rabbi. Wallace said he would call Zimet. He also told Albert that the police should be called, and Albert seemed to agree, saying only that he would like to have both Wallace and the rabbi present before the police arrived. He thanked Wallace for "being my lawyer," to which Wallace replied that he could not represent Albert himself because he did not practice criminal law, but that he would find someone good who could.

Wallace tried several times to call Zimet but without success. He then called Enid, told her of Albert's situation, asked her to keep trying to reach the rabbi, and in the meantime, to go to Albert's house and stay with him. Enid agreed, but wanted to verify that there was a real problem first. She called Albert herself, asked what had happened, and was told the substance of what Wallace had said to her. During her conversation with Albert, Enid insisted that the police be called, saying something like "You must call the police" or "I am going to call the police if you don't." She understood Albert to agree to this, though she does not remember his exact words, or whether he said he wanted to wait until Wallace and the rabbi arrived first. When she still could not reach Zimet after several additional tries, and fearful for her friend's life, Enid called Wallace to tell him that she was going to call the police immediately. Wallace agreed, but cautioned her to be discreet in what she said, limiting her remarks to the fact that there may have been a shooting at Albert's house, and that there was some fear that Albert might commit suicide. Enid called the police and reported the events, using Wallace's words.

The police found Albert sitting next to an open window, from which he beckoned them to come in. Once inside, they discovered the body and physical evidence linking its death to Albert. Albert was given **Miranda** warnings, and thereafter declined to talk until his "attorney Wallace" arrived. The police agreed to wait. Wallace arrived an hour and a half later. He told the police that he was not a criminal lawyer and thus would not be representing Albert, but that one of his colleagues, Peter, had agreed to so, and would be contacting them shortly. Thereafter, Peter telephoned the police and instructed them not to question Albert. They had not, and they did not.

Albert was indicted for murder. (Suicide is not a crime in New York, and thus neither is an attempt, though apart from his statement to Wallace, there is no evidence that Albert ever attempted to kill himself.) Peter, on Albert's behalf, filed a motion to dismiss the indictment, arguing that it was based on evidence made inadmissible by section 4503 of the New York Civil Practice Law. Section 4503 provides that "evidence of a confidential communication made

between an attorney or her/his employee and a client in the course of professional employment...and evidence resulting therefrom shall not be disclosed by any governmental agency in any proceeding."

**Should the indictment be dismissed? Why or why not?**

II.  
(1 hour)

For ten years Salt, Jefferson & Blankets (SJB), a large Philadelphia law firm, represented the Monitor Tug & Barge Company (MOTB), also from Philadelphia, in all of its labor relations matters. During that time it had access to all of MOTB's financial and business records. In the middle of this ten year period SJB also undertook to represent several of MOTB's smaller New York area competitors, also on labor relations matters. After MOTB objected to the representation of its competitors SJB agreed, with MOTB's consent, to construct a "screen" between the attorneys working on MOTB matters and those working for MOTB's competitors, and not to acquire any more competitors as clients. This arrangement seemed to work well (MOTB never complained about it), for several years. Then, a little over a year ago SJB terminated its representation of MOTB altogether. Last month it hired Gorecki, a labor lawyer from another firm, who among other things, does all of the pension and benefits work for the Merrimack Tug & Barge Company (METB), MOTB's largest competitor. Gorecki brought METB with her as a client to SJB. This hiring prompted MOTB to file a civil action against SJB, alleging breach of the common law fiduciary duty of undivided loyalty. (Assume that there is such a common law duty and that its elements are identical to the provisions of the conflict of interests sections of the Model Rules, that is, a violation of any of the conflicts rules is a violation of the common law duty.) The trial court issued a preliminary injunction prohibiting SJB "from acting as counsel for any of MOTB's competitors." The court found that SJB had not revealed any confidential MOTB information up to that point, but issued the injunction to make sure that the situation did not change until MOTB's case had been decided on the merits. The case is now before the court for decision on the merits.

**How should the court rule? Why?**

III.  
(1 hour)

Defendant, a single mother of two pre-adolescent children, agreed to take in Ronnie, a one year old foster child. Ronnie suffers from AIDS, Down's Syndrome and chronic asthma. After a few months in the defendant's custody Ronnie's health deteriorated. When a medical examination revealed nine bone fractures of the limbs at various stages of healing, Ronnie was removed from defendant's care. Shortly thereafter, Children's Protective Services (CPS), the state agency charged with administering the foster care program, filed a petition in state Juvenile Court alleging that defendant had abused Ronnie physically, and asked the Court to remove defendant's two natural children from her home because of the risk of similar abuse to them.

Steuer, an experienced public defender, was appointed to represent defendant. Steuer's medical experts concluded that Ronnie suffered from a congenital bone and muscle disease that made his bones more fragile than normal, and that the daily physical therapy CPS instructed defendant to give Ronnie was too rigorous and thus the likely cause of the fractures. After a contentious trial, in which Steuer presented a defense based on the above medical testimony, the Juvenile court found insufficient evidence to conclude that defendant had abused Ronnie or was a danger to her natural children, and dismissed the petition.

Subsequent to the Juvenile Court proceeding, the local State's Attorneys Office, committed to "getting tough" on child abuse, brought the case before a Grand Jury using the same testimony that had been unsuccessful in the removal petition, and defendant was indicted on nine felony counts of Aggravated Assault (one count for each of the fractures).

Before the criminal trial began, defendant told Steuer that she thought she knew what really had happened to Ronnie. Her two biological children had recently admitted to her that they beat up Ronnie on a regular basis, and the beatings probably caused Ronnie's injuries. Nonetheless, defendant did not want her children involved in the case. She was adamant about wanting to testify in her own defense, but equally adamant about limiting her testimony to the question of whether the CPS physical therapy caused the injuries. Steuer refused to examine her on the physical therapy topic, however, "now that it was clear that it would be false testimony," and threatened to tell the court as much if she put the testimony in without his help. He also convinced her that it would be better not to take the stand at all, than to testify and have no explanation for how Ronnie's injuries occurred.

After a trial of several weeks, in which she did not take the stand, defendant was convicted of two of the nine assault counts, and sentenced to seven years in the state house of correction. The conviction was affirmed on appeal. Defendant has now filed a habeas corpus petition in federal district court, asking that her conviction be set aside. She argues that Steuer's refusal to help her present the physical therapy testimony, and his threat to tell the court that it was false if she presented it herself, violated the Model Rules, and that this violation constituted ineffective assistance of counsel.

**How should the federal court rule on her petition? Why?**