STUDENT EXAM ID NUMBER: ______________________

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THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

EXAMINATION – DECEMBER 16, 2014

LAW 468 - 004
ETHICS AND PROFESSIONALISM
(Wood and Armour)

TOTAL TIME ALLOWED: 120 MINUTES
(Including reading time)

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NOTE:
1. This is an open book examination.
2. The examination counts for 80% of the grade in this course. The other 20% is based upon in-class participation.
1. Select two of the following topics (10 marks each).

(i) Just before the commencement of a mediation for which detailed, written statements of position had been exchanged some weeks earlier, counsel for the Plaintiff learns that the client’s injuries appear to have resolved completely as a result of the Plaintiff’s participation in an experimental test involving saltwater injections. The Plaintiff’s mediation outline placed a value on the claim of $30,000, relying heavily upon a report from the Plaintiff’s family doctor in which the doctor concluded that the Plaintiff’s injuries were probably chronic and unlikely to ever resolve completely. Because of this happy and wholly unexpected turnaround, the Plaintiff has now instructed the lawyer to accept anything greater than $10,000.

   a. Is it ethical in such a situation for the Plaintiff’s lawyer to continue to rely on the report, and what obligations, if any, arise in the circumstances?

   b. Now assume that before you have decided upon whether or how you should react, counsel representing the Defendant’s insurance company advises you as Plaintiff’s counsel that his client is prepared to offer $25,000 because of the insurer’s high regard for this particular family physician. Discuss how you might address the issue in a way that might lessen, avoid or resolve the ethical puzzle you face.

   (10 marks – 5 marks for each of (a) and (b))

(ii) In her treatise Ethics of Ambiguity, Simone de Beauvoir rejects the proposition that there is any absolute moral imperative that exists on its own, and postulates that values come only from the process of making choices. Discuss at least two of the ethical directives within the BC Code (or the Federation’s Model Code), referring to the values or principles that are in effective competition and providing a rationale for the choices that ultimately prevail in the Code provisions you have selected.

   (10 marks)

(iii) Discuss the ethical propriety of the following comment by a lawyer during preparation of a prospective witness:

   “If you are asked that question on cross-examination, I think it would be better if you were to leave out the part about having been at a bar and drinking that night. I’m worried that, by saying you were drinking, you
will be less credible to the judge or jury. Instead, just say you were out with friends – it’s still true isn’t it?”

(10 marks)

(iv) Professor Brent Cotter says that lawyers should be required to provide a modest portion of their time, or money's worth of time, to support a pro bono program.

a) Explain why you agree or disagree with him.

b) If lawyers fail to meet such requirements, should they be penalized in some way?

(10 marks – 5 marks for each of (a) and (b))

2. SCENARIO 1 (20 marks)

Eva Rice is one of the associates in your firm. As it happens, she is also married to your nephew.

Eva practises in the field of securities law, where she is most frequently retained to assist in taking companies public. She has developed a particular niche practice related to 'reverse take-overs', a process whereby the shares of an existing but largely non-operational public company with no significant assets is acquired by an investor who then injects value (such as a promising mineral claim) with a view to then selling shares to the public to raise development capital. The clients look to Eva to assist them in vetting, acquiring and re-structuring the public shell companies for this purpose.

One means Eva typically employs is to refer her clients to brokers who specialize in locating the sorts of public shell companies that might appeal as reverse take-over candidates. Most of these brokers charge a substantial fee (often in the range of $100,000), which her clients pay directly to the broker involved.

Eva is respected within the firm for her business acumen, and her practice has certainly shown remarkably strong growth, which makes her an almost certain choice for early partnership. She is ambitious, and has made no secret of her desire to make a lot of money. Amongst the other associates, all of this has earned her the nickname 'Avarice'.

A significant factor in the rapid rise of Eva’s practice is attributable to the fact that she offers to lawyers and others within the securities industry a 10% share of any fees she generates from clients referred by them.
Early one evening, while working late, you happen to notice a document on the desk of Eva’s assistant, marked ‘CONFIDENTIAL’. You glance at it and discover that it is a contract between Eva and one of the brokers that provides for payment of 20% of the broker’s fee to Eva if her client ‘X’ acquires a particular shell company. The money is directed to be paid to Eva personally.

You take the document and head straight to Eva’s home, where you confront her as she is sitting down to a late dinner with your nephew and a neighbouring couple. You express your upset over what you perceive to be a wrongful diversion of money that should be paid to the firm. In the course of the exchange that follows, Eva acknowledges that this is not the first file on which she has obtained a similar kick back, although she explains that certain brokers are more amenable to the arrangement than others. She agrees that she is not accounting for this collateral revenue to the firm, but feels justified because “it has nothing to do with the delivery of legal services to ‘X’ or any other client”. She points out that she is already generating huge revenues for the firm, and describes the arrangement as nothing more than a side benefit, negotiated privately between her and the broker. She emphasizes that it has no impact upon the amount ultimately paid by her clients for her services. It is no different, she says, than the gifts that are often made to the other lawyers in the firm by various consultants they have hired on behalf of clients.

The meeting does not end well. Eva maintains her ground and your nephew is clearly upset by both the disruption of their dinner and your suggestion that Eva may be doing something inappropriate.

IDENTIFY AND DISCUSS ANY ISSUES RELATED TO LEGAL ETHICS OR OTHER PROFESSIONAL RESPONSIBILITIES THAT ARISE FROM THESE CIRCUMSTANCES.

(20 marks)

3. SCENARIO 2 (20 marks)

PART A.

You are a young lawyer valiantly trying to build your practice. Deb has been one of your earliest clients but down on her luck. She is a hard-working single mother for whom you are handling a civil claim related to a leaking roof that somehow escaped the attention of the home inspector she had hired before completing the purchase of her home. The whole matter has been somewhat of a disaster for her on several fronts, including insurance coverage issues.

Deb’s only son, Hank, has just turned 19. He dropped out of school at 15 and has been the source of endless challenges for her over the years. She has confided in
youthat she also believes he is developmentally disabled but she has never sought to have him properly assessed.

Deb calls you in a state of considerable anxiety early one Saturday morning. She isn’t sure what Hank has done, but he has just come home looking particularly troubled, and has mentioned that perhaps he needs to call a lawyer. Deb has no other details because Hank did not want to tell her more. She implores you to come by and speak with him.

You make it clear that although you will drop by, you will not represent Hank (if that is needed) unless you are retained with at least a $2,000 payment. (Some of your inherent sympathy for Deb has been diminished by her unfulfilled promises of payment in the past.) You arrive at the home to find Hank waiting for you in the living room. He provides information with great difficulty. Your understanding is that he has been aspiring to become a member of the Hells Angels. Recently, as a ‘test’ he had been assigned the task of collecting money from a drug addict. At this point, you ask Deb to come in to the room to join you and Hank.

With Deb’s assistance, you extract more details. You determine that Hank administered a severe beating to the addict within the last 2 or 3 hours in a remote section of Stanley Park. He tells you that he believes the victim was unconscious when he left. He asks you this question:

“I am not saying I did, but suppose I used brass knuckles on the guy. Should I get rid of them?”

Deb then asks you to go out of the room with her alone. She wants to know what Hank told you before she joined you. She also advises you that she has no money available for a retainer, but wants you to do all you can to help Hank. She promises that you will eventually be paid for any assistance.

(Back in law school, you resolved never to represent someone associated with the Hells Angels. This is the first test of that vow.)

You are not sure what to do. You speak to Hank and explain that you need to think this over. At that point, he hands you an envelope in which he says there is some money for you. Once you are in your car, you open the envelope and discover that it contains $300 in small bills. You also notice that there are some marks on one side of the envelope which appear to be dried blood.

IDENTIFY AND DISCUSS ANY ISSUES OF ETHICS OR PROFESSIONAL RESPONSIBILITY THAT ARISE FROM THIS FACT PATTERN.

(15 marks)
PART B: (Six months later)
It turned out that the victim of the beating died. Hank has been charged with murder based in part upon the evidence of a jogger who happened to have observed the incident from a distance. You are now just days from the start of trial and you have still received no further retainer, despite numerous requests on your part and repeated promises from both Deb and Hank of imminent payment. You tell them that if you don’t receive at least $2,000 by noon the next day, you will withdraw. When no payment is forthcoming, you then courier a letter to the Crown Counsel advising that you are withdrawing as Hank’s counsel because of his non-payment of fees.

IDENTIFY AND DISCUSS ANY ISSUES OF ETHICAL AND PROFESSIONAL RESPONSIBILITY THAT ARISE.

(5 marks)

4. **SCENARIO 3** (20 marks)

A. You are in house counsel for ABC Co which has been systematically dumping harmicide behind their plant for years. ABC is being sued by an environmental advocacy group. ABC is represented in the litigation by Mary Litigator of Big Firm LLP.

Your company was somewhat dilatory in producing documents to the plaintiff in the litigation. As a consequence, the plaintiff obtained a court order requiring ABC Co to produce all relevant documents by the end of last week. As a result of the court order, you made renewed efforts to cajole all company officials to grant you access to all parts of the company. As a result, you uncovered and produced further relevant documents to the plaintiff.

Yesterday a file arrived mysteriously on your desk. You opened it to find a technical report commissioned by the CEO. It predates the commencement of the litigation and does not appear to have been obtained in contemplation of litigation. Rather, it is a scientific assessment of the long term consequences of the dumping authored by a highly reputable expert in the field. The report is very detailed and compelling. Based on correspondence attached to the report it is clear that no lawyers were involved in the commissioning or preparation of the report.

A read of the report tells you it is highly relevant to the litigation. It is also very prejudicial to the company insofar as it details the company’s many breaches of environmental laws and, more importantly, it concludes that the harmicide was finding its way into groundwater. You know that multiple studies have linked harmicide to cancer. The report made it clear that changes needed to be made as soon as possible to bring the company into compliance with its legal requirements and to
mitigate the risk of significant health issues. You know that those changes have not been implemented.

You immediately took the report to the General Counsel to whom you report and told her that it had to be disclosed in the litigation. You also said that the company needed to make the changes outlined in the report as soon as possible. The General Counsel told you she heard something about that report awhile ago. The CEO told her he didn’t agree with the conclusions, and had decided the company didn’t need to act on them. The General Counsel told you to refrain from producing the report at this time, given the upcoming examinations for discovery of company officials. She said that you could consider producing the report at a later date if the litigation continued.

Meanwhile, Mary Litigator sends you an email. Attached to the email is an opinion letter marked “Privileged and Confidential” to the plaintiff from her counsel. As Mary gleefully points out in her email, plaintiff’s counsel has told their client that their case is very weak based on the evidence gathered thus far. She recommends that her client consider settling now to avoid the costs of the examinations for discovery. Mary tells you that the opinion letter, while addressed to the plaintiff, was somehow sent to her. She says that they should approach the plaintiff’s counsel and suggest settlement discussions prior to the examinations for discovery in the hopes of getting a quick and beneficial settlement without letting the plaintiff’s counsel know about the letter.

IDENTIFY AND DISCUSS ANY ISSUES RELATED TO LEGAL ETHICS OR OTHER PROFESSIONAL RESPONSIBILITIES THAT ARISE FROM THIS SCENARIO.
WHAT SHOULD YOU DO?

(15 marks)

B. You do not want to continue working for ABC Co. You are actively looking for another position. From your private practice days, you have been able to list an impressive array of previous clients on your resume.

Mary Litigator is a big fan of yours. You have told her you are looking for a new position. She has gone to the head of the environmental group at Big Firm LLP and told him they should do whatever they can to lure you away from ABC.

IDENTIFY AND DISCUSS ANY ISSUES RELATED TO LEGAL ETHICS OR OTHER PROFESSIONAL OBLIGATIONS THAT ARISE FROM THESE CIRCUMSTANCES.

(5 marks)

END OF QUESTIONS