MASSACHUSETTS SCHOOL OF LAW
ETHICS 2000 - - FINAL EXAM
Professor Olson
May 23, 2000
Student S.S.# ______________________
Please also write your social security number on
the front cover of your blue book(s).

ESSAY PORTION

All students must answer two essays: all students must answer three of five of the questions (a-e) dealing with the ethical problems confronting the New Hampshire Supreme Court, and all students must answer one essay from the collection of six optional essays. You may write on both sides of the pages in your blue books, but please strive to write legibly. I can’t give you credit for material I can’t read.

REQUIRED ESSAY
(one hour maximum)

Over the last six months to a year, one of the nation’s smallest states has witnessed an extraordinary passion play involving what some would label arrogance on the part of certain state supreme court justices, questionable enforcement actions on the part of the executive branch and a power struggle among the three branches of government. This whole affair, sparked by the ethical lapses of one state supreme court justice, Stephen Thayer, has led some to question the integrity of some members of the New Hampshire Supreme Court. In recent years many had considered New Hampshire’s Supreme Court to be a progressive court, dispensing justice in an even-handed manner to all litigants who appeared before it. Because of the recent developments, some citizens of New Hampshire feel that their suspicions about the conduct of certain members of the state’s highest court have been confirmed.

(a) Stand in the shoes of any two of the following individuals in this passion play:

Attorney General Philip McGlaughlin
Chief Justice David Brock
Justice Stephen Thayer
Justice John Broderick

What ethical/moral considerations do you think entered into their thinking in taking the actions (or failing to take actions) which they took? Be sure to discuss the competing ethical/moral considerations which informed their ultimate decisions to act or to fail to act as they did.
Was their behavior beyond reproach? Why or why not? Be sure to discuss how you think they justified the decisions in their own minds.

(b) The New Hampshire Constitution contains a number of articles dealing with issues relating to the judiciary. These include the following:

**Article 35:** It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit. It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme judicial court should hold their office so long as they behave well. . .

**Article 8:** All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted.

Assume for a moment that you are a disappointed litigant -- six months ago you lost the appeal of your divorce decree before the New Hampshire Supreme Court -- and you are now considering your options. What ethical and/or moral arguments would you raise in an effort to have the judgment in your case overturned? What ethical and/or moral arguments would you anticipate that the opposition would make in the same case? Refer to Articles 35 and 8 in answering these questions.

(c) Attorney Zibel, Clerk of the New Hampshire Supreme Court, essentially blew the whistle on the activities of Justice Stephen Thayer and some of his brethren. In the memorandum he wrote on February 11, 2000, Zibel quoted language from the New Hampshire Revised Statutes Annotated, as follows:

A person is guilty of a class B felony if he: . . . (b) Privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, argument, or other communication with the purpose of influencing that discretion on the basis of considerations other than those authorized by law; or (c) Being a public servant or party official, fails to report to a law enforcement officer conduct designed to influence him in violation of subparagraph (a) or (b) hereof.

In making his decision on whether to reveal what he knew, Zibel was obviously torn by
several different ethical considerations.

1. Briefly discuss what those different considerations might be.

2. Briefly describe the different actions taken by Justices Thayer and Broderick and Chief Justice Brock; what, if any, actions do you think would rise to the level of class B felonies as defined in the statute above? Give reasons for your answers based on the statutory language.

3. Do you think the “plea bargain” taken by Justice Thayer was just? Should Justice Thayer “do time” or possibly be disbarred for his indiscretions, or is it enough that he was forced to resign?

(d) Attorney Zibel also quoted Thomas Jefferson in his memorandum, writing, “man can not be trusted with the government of himself.” When it comes to the New Hampshire Supreme Court, do you agree or disagree with Jefferson’s statement (fully explain what makes you agree or disagree)? In a small state where the members of the practicing bar and the judges and justices generally know each other well, how would you solve the problem of the public’s perception that the Court can not govern itself?

(e) Have developments in the last two months made citizens of New Hampshire more or less confident that questions about the Supreme Court will soon be behind them? Explain what has happened over the last two months, and indicate whether you think these developments bode well or ill for the Court’s future.

**OPTIONAL ESSAYS**

*(one hour maximum)*

1. Georgia Palmer was employed as an assistant general counsel of the National Insurance Company until she was discharged last year. Palmer claims that her discharge resulted from her refusal to give in to sexual advances made by her immediate supervisor, Alan Sindel. Sindel claims that Palmer was let go because she failed to help the company in establishing a division which currently offers life insurance coverage and pre-paid legal insurance in one attractive package. Palmer has brought an employment discrimination and wrongful discharge action against Sindel and National. Dena Landers represents Palmer. Henry McAlpine represents Sindel and National.

McAlpine took Palmer’s deposition during discovery. At the deposition, McAlpine asked a variety of questions about Palmer’s sex life, including whether she had ever had an affair with a married man or woman. Palmer answered “no” to this question. A few days after the deposition, Palmer called Landers and told her that she needed
to tell her something about the deposition. She said that when she was in graduate school, she had had an affair with the professor who supervised her master’s thesis. When she broke off the affair, the professor insisted on continuing the affair. She finally contacted the dean and was assigned another professor as her advisor. She says that she didn’t mention the matter during the deposition because she never brought formal charges, because it was embarrassing, and because she didn’t want to harm the professor, who is married.

During a conversation between McAlpine and Sindel, Sindel admitted that other he has approached other present and former employees about sexual favors. Some have accepted and others have rejected his advances. Sindel doesn’t know whether this information will have a harmful affect on McAlpine’s representation of National, but he wants to make sure that he will be protected.

After discovery was completed in the case, the parties engaged in substantial settlement negotiations. Defendants mad a case settlement offer that Landers considered to be very favorable. Palmer, however, found the offer unacceptable. Palmer insisted that she would not accept a settlement offer that did not include reinstatement in her job and that did not provide for Sindel’s discharge. Landers told Palmer that National was unlikely to offer Palmer her job back. She said that Palmer might be able to obtain reinstatement to her job if she was successful at trial, but that she would not be able to obtain relief that involved Sindel’s discharge. Palmer, however, insisted on pursuing these issues. The case has been scheduled for trial, but Landers has just learned that the judge who has been assigned the case was a member of the law firm that represented National Insurance until the judge was appointed to the bench 18 months ago.

Discuss the issues of professional responsibility; make sure to discuss both the pros and cons of the various parties’ positions.

2. Ellen Grady of the firm of Genufect, Mumchantz, & Regurge is outside counsel representing Swindel Automotive Associates. Swindel owns and manages more than 50 automobile dealerships in several states. Swindel’s treasurer, Marcus Aurus, came to Grady and told her that he had learned that Dick Swindel, the company’s CEO and a major shareholder, had been paying bribes to officials of several automobile manufacturers to obtain favorable treatment in distribution of vehicles. Aurus asked Grady’s advice. Grady told Aurus that he must not become involved in any bribery and must not engage in any misreporting of Swindel’s finances.

Swindel’s bribery has now been exposed, and the automobile manufacturers have brought suit against Swindel Automotive and Swindel personally. Martha Peterson is class counsel for the manufacturers. After filing suit, Peterson calls Aurus and asks for an appointment to discuss Swindel Associates’ procedures for obtaining exclusive
dealings. Aurus refuses to meet with Peterson because Grady has instructed him not to give any information about the case to Peterson or anyone else.

Peterson has filed various discovery requests including a request for production of all documents relating to the dealerships. In reviewing documents to prepare a response to the discovery request, an associate in Grady’s firm, Brenda Norton, discovers a memorandum by an outside accountant that questions some of the procedures followed by Swindel Automotive in attempting to obtain dealerships. Norton informs Grady of this document and asks whether it needs to be produced. Grady directs Norton not to produce the document. Grady tells Norton that in her opinion the document does not “relate” to the dealership issue because it was prepared by an outside accountant who was hired to do an independent audit for IRS purposes.

Swindel has now retained his own attorney. The manufacturers have taken Aurus’s deposition and learned that he had informed Grady that Aurus knew of Swindel’s bribery. The manufacturers have informed Grady that they are considering adding her as a party to the case, claiming that she should have disclosed to the manufacturers her knowledge of Swindel’s fraud.

Discuss the issues of professional responsibility with respect to all the parties and counsel.

3. Marilyn Anderson came to you for legal help. “They have taken away my children,” she told you bitterly. “I have a right to them, don’t I? I am a good mother, but the welfare department has put my babies in a foster home.”

You were moved by Mrs. Anderson’s sincerity and agreed to take the case. In the course of your subsequent investigation, however, you discovered that Mrs. Anderson had not told you all the facts. The children, Mary, age 7, and Billy, age 3, were removed from the home based on a finding of both abuse and neglect. Social workers at Mary’s school became suspicious when the little girl appeared bruised and malnourished after several days’ absence. The social worker’s questioning of Mary revealed that Mrs. Anderson sometimes hit the children and sent them to bed hungry. Mrs. Anderson also often left them at home for hours at a time leaving no adult to care for them.

But that was only the beginning of the story. Mrs. Anderson herself told you that her husband, John, has frequent violent episodes during which Mrs. Anderson sometimes leaves the house and the children because she literally fears for her life. John has a job, but he is paid in cash and the family cannot rely on how much will be left in the pay envelope after he gets home. Mrs. Anderson had been employed as a hospital aide before Mary was born, but she has enjoyed staying home with the children.
A particular irritant in the Andersons’ relationship has been the situation of Mrs. Anderson’s mother. She is alert and lives in her own house, but she is lonely. Marilyn wants to invite her to come live with the family, but whenever she suggests it, John flies into a violent rage.

You wonder whether or not Marilyn Anderson should win the upcoming custody hearing. Although you sympathize with her situation, you hesitate to use all the skill and resources at your command to overwhelm the overworked counsel for the Department of Children and Family Services. If you do restore custody to Mrs. Anderson, you worry about the children’s future.

(a) How should you see your role on behalf of Marilyn Anderson in this case?

(b) What can you as a lawyer do to help Mrs. Anderson? How about as a person?

(c) Are there limits on the advice a lawyer may give? Should a lawyer be permitted to give advice to a client knowing that the client will use the advice to commit a crime or fraud or to try to avoid punishment for doing so?

(d) What creative solutions can you come up with to deal with Marilyn Anderson’s family situation?

(e) Should the lawyer’s bottom line simply be that the lawyer will do what the client directs, regardless of the wisdom of the action?

(f) Now, focusing directly on the custody matter, if Marilyn Anderson has rejected your advice and you have concluded that she should lose the custody hearing for the good of the children, what may and what should you do?

4. Martha Heath has a wide reputation for her success handling medical malpractice cases for plaintiffs. She is in great demand and is rightfully feared by doctor defendants.

Recently, Linda Parker came to Heath with a claim against Dr. Charles Abraham. Heath investigated the facts, found they seemed sound, and proceeded to go to work on the matter. Until she had worked on the matter for about 90 days, Heath had not recalled that about five years earlier, she had represented Dr. Abraham in the routine adoption of his wife’s children.
Heath might have forgotten Dr. Abraham, but he had not forgotten her. When he learned through the grapevine that Heath was considering filing a complaint, he called her and screamed, “How could you of all people - - my own lawyer - - consider suing me?”

Feeling a trifle conflicted and overworked, Heath instructed an associate to file the complaint with the court. However, she did not instruct the associate about the necessity of obtaining and serving the defendant with a summons to properly effect service.

Abraham’s lawyer has now told his malpractice defense counsel to move to dismiss the complaint based on failure to effect service; furthermore, he has had his new counsel move to disqualify Heath from handling Parker’s claim.

Discuss the issues as they relate to the various parties. Remember to consider the different potential bases for dealing with attorney misconduct in your discussion.

5. You are the lawyer in a private firm. Morris Cannell, an elderly man whom you had never met before, came to you complaining about the handling of his investment account by a local broker. Cannell told you that the broker invested over $200,000 of Cannell’s pension money in speculative stocks and the account’s value has now been reduced to less than $20,000. Cannell claimed that the broker engaged in a great deal of buying and selling of stocks, with the result that the broker made a lot in commissions while the client sold when the stocks were low and purchased when they were high. Cannell told you in no uncertain terms, “I want you to throw the book at my broker. He showed me no mercy and I don’t want you to show him any.”

Subsequent to this conversation, you have learned that the broker, Snidely Woebegone, is both a licensed dealer-broker and a licensed attorney. You have also learned that his firm engages in a wide range of services; the firm employs accountants, investigators, broker-dealers, an annuity sales force and a number of other attorneys.

Before deciding whether to take the case, you spent 22 hours researching the problem; you had no previous experience dealing with the sometimes arcane world of securities. During your research, you developed several theories including: the broker engaged in illegal churning (excessive buying and selling), and that he violated federal rules relating to an investor’s suitability (what stocks are suitable to meet a given investor’s objectives, here safety and income). With respect to both theories, you planned to focus on Cannell’s lack of sophistication and thus his reliance on Woebegone.

When you told Cannell the results of your analysis, however, he was angry and
wanted you to more. “He must have a license,” Cannell said. “Do everything you can to get him suspended. See what you can do to tie up his bank accounts, and see what you can do about bringing in his firm - - they must be doing something wrong. The statute of limitations was about to run on all state and federal claims, and you told Cannell you would only represent him if you would be required to raise no more than the churning and suitability issues. You refused to seek to suspend him or to seek to harass him financially. You informed Cannell that you lacked the resources to take Woebegone’s entire firm. Cannell reluctantly agreed and signed your retainer agreement.

You entered an appearance as Cannell’s attorney and filed suit on his behalf. Now, however, after several months, you have grown tired of dealing with Cannell and want to withdraw from the case.

(a) How is the lawyer-client relationship formed? Was there a magic moment when Cannell became your client?

(b) Were you within your rights in refusing to take the case unless Cannell agreed to limit the issues you would raise in representation?

(c) In the course of the representation, what issues are for the client and what issues are reserved to the attorney?

(d) May the lawyer withdraw when the client becomes a pain in the neck; or, if not, what is required?

(e) What issues do you see raised with respect to Woebegone’s firm? Discuss these in a global context.

6. Base most of your answers (you will need to include some material based on your own knowledge of the Model Rules of Professional Conduct) to this question on the material contained in the two videos from MSL’s Question of Law television program (dealing with morals/ethics in the law and the attorney/client privilege).

Assume that a client, Bob Newton, has called you for advice on estate planning for a friend of the family. You have provided legal representation for Newton on a number of matters in the past, including establishing a corporation for him and pursuing a remedy for a wrongful discharge.

Newton comes to your office on a recent Monday morning and tells you the following: “My family’s friend, Walter Mitchell, lost his wife after a long illness this past weekend. My family’s friend would like to leave his entire estate to me when he passes - - including real property and other assets, it is probably worth more than
$500,000. Walter has relatives of his own, but they live in other parts of the country and he says they have never treated him very well. I would like you to draw up Walter's will, naming me as the sole beneficiary."

You tell Bob you don't think you should be drawing up Walter's will, but you suggest a friend of yours who does a lot of estate planning work and who also happens to live in the same part of the state as Walter. Your friend's name is Margo Atwater. Bob agrees that you can call Atwater to see if she would be willing to draw up Mitchell's will.

Atwater agrees, and she goes to meet with Mitchell on Wednesday. When Atwater calls you back, she tells you she has already received two telephone calls from Newton asking her about the conversation she had with Mitchell. She wants to know if Newton is always this inquisitive, and she tells you she doesn't feel comfortable sharing this information with Newton (So far, she has refused to reveal any part of what she and Mitchell discussed.) Meanwhile, Newton has also been calling you, instructing you to put pressure on Atwater to get Mitchell to sell his house, to file for bankruptcy, to get him declared incompetent to handle his own affairs and to quickly draft the will naming Newton as sole beneficiary.

Atwater also tells you that when she arrived at Mitchell's residence, she detected the strong odor of gas upon entering the house. She asked Mitchell about this, and he told her he had been thinking about suicide. He said he had turned on the gas for the oven, but he had intentionally not lit the pilot. He said he had been planning on sitting in the kitchen with all the windows and doors closed; he would then await the inevitable. When Atwater asked Mitchell why he had done this, he replied that he was depressed about the death of his wife and about the pressure Newton had been putting on him to sell his house, declare bankruptcy and quickly draft a will naming Newton as sole beneficiary.

After about a week passed, Atwater called you back to say that Newton had been besieging her office with telephone calls, wanting to know if she had been able to convince Mitchell to file for bankruptcy, if she had been able to convince him to sell his house, and pressuring her to complete the will drafting.

Discuss the following:

(a) How much information should you give to Atwater about your communications with Newton? Which should take precedence - - your own moral world view, or the constraints of the attorney/client privilege?

(b) How much information should Atwater share with you about her
conversations with Mitchell? Will the answer be the same under both Rule 1.6 of the ABA model rules and your own understanding of the attorney/client privilege? Should Atwater reveal any of Mitchell’s confidences with Newton?

(c) Should Atwater attempt to communicate with Mitchell’s relatives - - if so, how much information should she share with them?

(d) Based on your understanding of the moral/ethical issues surrounding this problem, how would you proceed? Should you honor Newton’s requests to be continuously updated on Atwater’s progress?

(e) Would your answer to question (d) change depending on your own moral sense as opposed to what you consider to be the correct ethical answer? Should the ethical rules place any limits on your pursuit of your client’s goals (remember that Newton has been one of your best paying clients)?