Prof. Fortune
Part II Essay Questions -- Fall 94

Open book, rules and notes no commercial outlines, hornbooks, etc. One side of the page and every other line please.

Question 1 (30 points)

The problem is based on alleged pollution of the Rapid River. The characters are:

Adam Allquest, plaintiffs' counsel
Jerry Jones, President of Toxichem
Stone E. Wall, vice-president and general counsel
Steve Swifty, engineer (recently retired)
John Smith (engineer under Swifty)
Gary Green (Smith's friend)

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Background: Stone E. Wall is corporate counsel to the Toxichem Company. Last year he was told by Steve Swifty, Toxichem sanitation engineer, that waste treatment was inadequate and that dangerous chemicals were being discharged into the Rapid River. Wall told Swifty to work on the problem but in the meantime to trash any smoking gun records. Swifty then destroyed all records reflecting the dangerous discharge and instructed engineers working for him to quit sampling the discharge from the treatment plant.

It is now 1995 and Farmer has decided that the smell in the Rapid River may be attributable to the upstream Toxichem plant. He hires Allquest to represent him.

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Allquest letter to Jones: My client's cattle are sick and the Rapid River smells foul. My client thinks you're dumping waste in the Rapid River and I want to talk to your employees.

Jones letter to Allquest: You'll have to go through our corporate counsel, Stone E. Wall.

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Letter from Stone E. Wall to Allquest: This is to notify you that I represent Toxichem Co. and all its employees in this matter and that you are not to talk to any employees without my consent about possible dumping of waste into the Rapid River. I will consider any reasonable requests for interviews.

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Memo from Attorney Wall to all Toxichem employees: I will be conducting an investigation into possible dumping of waste into the Rapid River. You are to give me your complete cooperation. In the meantime you are not to talk with anyone, including government investigators, about this unless I am present.

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John Smith (current engineer) oral statement to Wall in response to memo: I was in charge of monitoring the waste that was going into the Rapid River. For years there were high concentrations of heavy metals. I reported all this to Mr. Swifty. Last year he told me to destroy all the records I could find -- which I did except for these copies which you should have. I quit monitoring the waste at Swifty's direction.

Wall: Thanks John. I'll keep these records in my office safe. Now not a word to anyone. Understand?

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Letter from Wall to Steve Swifty, who retired from Toxichem at the end of 1994:
Dear Steve,

You may be contacted by a lawyer for Farmer maybe by an EPA Attorney. Don't talk to anyone without checking with me. Your conversations with me last year about dumping waste into the river are protected by the attorney client privilege. You understand that.

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Wall statement to Jones. Jerry, we're engaged in active damage control. There has been considerable pollution of the Rapid River but it should be stopped within a month. In the meantime we got rid of the smoking guns. Now, don't tell anyone about this --especially the Board of Directors. It'll hit the press for sure. Jones response: You can count on it.

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Allquest to investigator: Screw these guys. Get out there and find out what you can.

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Allquest's investigator will attempt to talk to four people without Wall's consent or knowledge:

1) Jones, the plant manager and president;
2) Smith, the engineer who tested the waste, knew it to be inadequately treated, and who ceased testing it at Swifty's direction.
3) Green, Smith's drinking buddy, who has nothing to do with waste disposal. After a few beers one night Smith told Green about the dumping.
4) Swifty, the former engineer, who knew of the dumping and discussed it with Jones and corporate counsel.

Consider the evidentiary and ethical issues raised by this fact situation, specifically the conduct of Allquest and Wall and the application of the Attorney Client privilege.

Question 2 (10 points). Acme Corporation is a supplier of parts to Bendit Corporation; Bendit experienced financial problems and fell behind in its payments to Acme. Green is a member of the firm of Jones and Holt, retained counsel for Acme. Before joining Jones and Holt, Green represented Cooper, president of Bendit, in personal matters (sale of a residence, tax advice, divorce and property settlement, etc.), though he is not presently doing any work for Cooper. Acme asked Green to negotiate with Cooper to work out a payment schedule for the Bendit debt, which would include a note and security agreement signed by Cooper personally. Green called Cooper who willingly agreed to discuss the matter with an old friend. Over the next few weeks Green and Cooper had several lengthy conversations during which Cooper was candid about his depression over business and personal failures. Green recommended psychiatric help, and otherwise tried to act as a friend and good counselor. Cooper was never represented by separate counsel the issue wasn't raised by either Cooper or Green. At one point Cooper stated, "I don't want anyone to know this but I'm thinking of taking bankruptcy." Green said nothing at the time but is now agonizing over Cooper's revelation. Green has told no one. What should he do and why?

Question 3 (10 points) On the facts of (2) assume that Green negotiated a payment schedule, and Cooper signed a note on behalf of himself and Bendit with liens on his personal property, including his home, to secure the debt. Bendit ultimately defaulted, and suit was brought by the firm of Jones and Holt on behalf of Acme against Bendit and Cooper. Wilson, litigation counsel for Jones and Holt, will try the case for Acme. Cooper's answer states that he relied on Green's oral promise in the negotiations that Acme would never attempt to "take his home." Green denies any such promise. Cooper has moved to disqualify Jones and Holt based on Green's "past and present role as counsel for Cooper and his role as a witness." Discuss the issues.