**I’ANSON-HOFFMAN INN OF COURT**

**FEBRUARY 10, 2016 MEETING**

**PUPILAGE GROUP IV**

1. **CIVIL LAW GROUP HYPOTHETICALS**
2. BIG Corporation has locked horns with DEAL Corporation in contentious civil litigation. The parties are neighbors and have longstanding dealings, which has led to longstanding disputes. The parties agree to mediate with an impartial, and well-paid, third party neutral. The settlement conference begins at 8:30am to get a head start on the day, as both parties have entrenched in their respective positions. Several terms are at issue as the parties attempt a global settlement to resolve all disputes and litigation, pending and prospective. Among the considerations at issue: (1) transfer of an easement across DEAL Co. property in favor of BIG Co.; (2) cash payment from BIG Co. to DEAL Co.; (3) transfer of property from BIG Co. to DEAL Co.; (4) waiver all current and future claims known to parties; and (5) confidentiality of this agreement. Around 10:30 p.m., BIG Co. offers to transfer 5.4 acres of its property to DEAL Co., to which DEAL Co. agrees on the condition that BIG Co. test for and remediate any environmental contamination. BIG Co. agrees without hesitation, boasting that testing and remediation is standard company protocol for any land transfer. Negotiations continue on other points until reaching a final settlement at 1 am. Consider the following circumstances and questions:
3. Imagine first that the parties draft and sign a written settlement agreement that night, memorializing the terms of their agreement, around 1 A.M., and the agreement includes the transfer of 5.4 acres from BIG to DEAL, but does not stipulate BIG will test for, and remediate any environmental contamination. Counsel for DEAL calls counsel for BIG the next morning and asks for that provision to be inserted into the written agreement. Does counsel for BIG have an obligation to amend the settlement contract?

1. Instead of the parties memorializing a settlement that night, counsel for DEAL drafts up a full length settlement agreement the following day which includes the conveyance of the 5.4 acres from BIG to DEAL but fails to include any requirement that BIG test for and remediate any environmental contamination. Does BIG’s attorney have an ethical obligation to point out the omission to counsel for DEAL, even if doing so will be to the detriment of her client?
   1. Assume instead that the written agreement includes the provision requiring environmental testing and remediation, and that the parties agree to give BIG a year from the date of the agreement within which to complete testing and remediation. However, after the parties have reached an agreement but before a written document is prepared memorializing it, the party representative of BIG boasts, unprovoked, that although not obligated to remove his equipment from and return the 5.4 acres until a year has elapsed, his crews are expeditious and industrious and can do so within two months. The recorded agreement drafted by counsel for DEAL the next day reflects nothing to amend BIG’s duties regarding the originally scheduled transfer of possession. Does counsel for BIG have a duty to raise this omission to DEAL’s attention?
2. Government Agency hires outside counsel, Perry Mason, to represent it in an eminent domain action against Landowner for the acquisition of part of Landowner’s property for a public park. Perry Mason and Landowner’s counsel, Ben Matlock, engage in settlement negotiations and proceed to reach an agreement as to the amount of compensation, with letters evidencing Landowner’s settlement proposal and Government Agency’s acceptance of that settlement proposal. Perry Mason’s letter to Ben Matlock accepting the offer indicates that Mason received authority from his client, Government Agency, to accept, and that Mason will draft the written settlement document to memorialize the parties’ agreement. He does so and sends it to Matlock for Landowner to sign.

Landowner signs the written settlement agreement and Ben Matlock sends it to Perry Mason for Government Agency’s representative to sign. Months pass and one day Matlock gets a call from Mason, who explains that his client has advised that it will not sign the written settlement agreement, because Government Agency is claiming it does not have the authority to settle for the amount of compensation indicated. Mason tells Matlock that he drafted the settlement agreement to accurately reflect what he understood the settlement was, but that Government Agency is taking the position that Mason did not have authority to settle on the terms as indicated in the agreement.

1. Assuming that Mason is fired by Government Agency, can Matlock call Mason as a witness to testify at the upcoming hearing on Landowner’s motion to enforce the settlement agreement? What duties does the Mason have to his former client? Can he disclose any privileged information if questioned by Matlock? If Mason is called to testify by Government Agency’s new lawyer at the hearing, do his ethical obligations change?

1. Assume instead that Government Agency doesn’t terminate Mason, but instead he continues to represent it in defending against Landowner’s motion to enforce settlement. Can Mason be called as a witness at the hearing on Landowner’s motion to enforce the settlement?
2. **CRIMINAL LAW HYPOTHETICALS**
   1. In a petit-third case where there's a triable issue, Commonwealth verbally offers a reduction to petit larceny with a favorable sentencing deal.  At the time, defendant has a pending larceny in another jurisdiction, which is listed in the pre-trial risk assessment, and also is displayed on the CCRE.  Defendant verbally accepts the offer, through his attorney, and waives preliminary hearing.  Defendant had arranged for a court reporter to be present at prelim. Because defendant is incarcerated, defendant agrees to waive indictment. On the day before the Circuit Court plea, Commonwealth tells defense attorney that he discovered that Defendant has a new larceny conviction. Commonwealth says he was not aware of the pending larceny during the plea discussions and says he can no longer agree to the misdemeanor. Is the Commonwealth bound by verbal agreement?
      1. What if Commonwealth offers to nolle pross the charge and immediately re-charge in GDC so Defendant can have a preliminary hearing?
3. Defendant verbally accepts an offer for plea agreement in a Circuit Court distribution case.  During discussions with defense attorney, the attorney runs guidelines to show Defendant, who is being held without bond.  The criminal history listed in the discovery response does not contain any violent felonies.  Defense attorney presents the guidelines showing Defendant is a Category Other.  Defense attorney provides the caveat that probation will run the official guidelines, and if they find convictions from other states or a juvenile record, that may alter the guidelines.  Defendant accepts the offer and defense attorney relays the acceptance to the prosecutor, who calls off the witnesses. Defense attorney again visits defendant to go over written plea agreement and colloquy.  When they get to the question regarding the sentencing guidelines, Defendant reveals that he remembered having a burglary finding as a juvenile.  Defendant is old enough that it would not show on the CCRE Commonwealth relied on in discovery.  This substantially increases the guidelines (category 2 triples the points on the drug guidelines) and Defendant says he no longer wants the deal (he hasn't sign the agreement).  Defendant learns that Commonwealth called off the witnesses and demands that defense attorney not agree to continuance.

* + 1. Must Defense Attorney object to the continuance? Does Commonwealth have an argument that Defendant is bound by the deal?

1. Pursuant to a plea agreement with the Commonwealth, defendant is afforded first offender status on a felony possession of a controlled substance.  After the time when he was charged with possession of a controlled substance and before he pled to first offender status, he was charged with a burglary.  At the time of his plea on the possession of a controlled substance, the Commonwealth was fully aware of the burglary charge (as was the defendant).  As part of his first offender plea agreement he was required to do 100 hours of community service and to enroll in and complete ASAP before the date that his deferred disposition came up for review a year later.  He was unable to fulfill those conditions; he remained in jail because of his burglary charge for the whole year and made no progress on the aforementioned conditions.  As a consequence, he faced an allegation that he had failed to comply with the terms of his first offender disposition.  His contention is that under the contractual principle of "impracticability" he should have been released from his obligations under the plea agreement.  What is the result?
2. Defense and the Commonwealth enter into an agreement on a felony, which they reduce to writing.  The written document contains several terms, but omits a sentencing cap that the parties discussed and agreed upon.  The judge accepts the plea agreement at the plea date and continues the case over for sentencing so that a presentence report can be prepared.  At the sentencing date, the defense attorney mentions (and the Commonwealth agrees) that the parties had contemplated a sentencing cap and that it had been the inducement that caused the defendant to plead guilty.  The judge responds that he is not bound by that version of the agreement because it was not reduced to writing.  Is that correct?
3. The Commonwealth prepares, and the defendant signs, a plea agreement in a felony case that includes the following terms: A.) The parties agree that a sentence between the range of one (1) day to six (6) months is an appropriate disposition in the case; B.) The proposed sentence is within the sentencing guidelines.
   * 1. The judge decides that she requires a presentence report to determine an appropriate sentence in this case.  When the parties return on the date of sentencing, it turns out that the guidelines prepared by probation actually give a range much higher than 1 day to 6 months.
     2. What is the result?  Does the agreement to keep the sentence within one day to six months control, or does the agreement to keep the sentence within the guidelines control?  What are the defendant's options?
4. **EMPLOYMENT LAW HYPOTHETICALS**
5. Plaintiff’s lawyer has sued Corporation X for the seventh time. In- house counsel for Corporation X is tired of plaintiff’s lawyer’s face and wants to be rid of her. The seventh case is in settlement negotiations and in-house counsel has the brilliant idea of putting into the settlement agreement that plaintiff’s lawyer may not sue Corporation X for the next five years on any similar matter. The seventh case involves a Fair Labor Standards Act claim for unpaid overtime. In-house counsel is aware that there are at least fifty other potential plaintiffs in the same position as the current plaintiff. Knowing that the potential plaintiffs likely will be talking to each other, in-house counsel wants to keep plaintiff’s lawyer from representing them. As a term of the settlement agreement, in-house counsel wants to offer plaintiff’s counsel substantial additional money in return for an agreement not to accept these future cases.
6. Can in house counsel make such an offer and require such a term in a settlement agreement?
7. Can the plaintiff’s attorney accept this term as a part of settling her client’s case?
8. What are the options for these parties to settle the case?
9. Plaintiff’s counsel sends demand letter to employer corporation alleging that employer corporation violated Title VII of the Civil Rights Act of 1964 based on gender and race. Plaintiff provides various facts in support of these allegations and at the end demands a sum of $250,000. During settlement negotiations employer corporation informs plaintiff’s counsel that plaintiff signed a mandatory arbitration agreement requiring arbitration of plaintiff’s employment claims. Plaintiff’s counsel responds by saying the arbitration agreement is unenforceable and that plaintiff intends to file suit in federal court. Employer corporation’s attorney thereafter preemptively files a petition to compel arbitration in federal court citing plaintiff’s lawyer’s contention that the arbitration agreement is unenforceable and that he intends to file his Title VII claims in federal court. Upon receipt of the petition, plaintiff’s counsel is outraged that employer corporation has used what he deems to be private confidential settlement communications in a public forum. Accordingly, plaintiff’s counsel calls employer corporation’s counsel and demands that these confidential statements be withdrawn from the petition. Plaintiff’s counsel alternatively states his opposition will vehemently point out that these statements were improperly used in violation of Virginia’s statute governing confidential settlement communications.
10. Has employer corporation’s attorney committed an ethical violation in citing the communications of plaintiff’s lawyer regarding the arbitration agreement?
11. **FAMILY LAW HYPOTHETICAL**
    * + 1. Husband and Wife are going through a divorce. Wife owns a successful business which is the sole source of income for the family. Wife has managed the family finances, while Husband has stayed home raising the family’s children. Prior to their separation, Husband had an affair for several months. Wife has evidence of Husband’s affair, but it is questionable whether she has enough evidence to prove adultery at trial. Wife has a “secret” bank account in which she has accumulated over $100,000 during the marriage. A divorce action is filed, with equitable distribution and spousal support for the Husband being significant issues. The parties agree to attend mediation.

During the opening session of the mediation, Husband apologizes for his behavior in a way that makes it clear he had engaged in an affair. Specifically, he admits to having made mistakes and references his paramour by name.

Throughout the mediation, the parties exchange proposals, written and verbal, regarding the division of their assets and support. There is a clear expectation by the mediator and Husband’s attorney that the negotiations involve the entirety of the marital estate, but no one directly asked Wife or her attorney whether all assets had been disclosed. Neither Wife, nor her attorney, disclose her “secret” bank account. The parties are ultimately able to reach a settlement resolving equitable distribution and spousal support. The “secret” bank account is not included in the agreement, and there is no “Omitted Property” clause that would apply to the account.

1. Was the lawyer for Wife ethically obligated disclose the existence of the bank account?

2. Was the lawyer for Wife ethically permitted to disclose the existence of the bank account?

3. Would the answer change if the lawyer or Wife had been asked directly whether there were any additional assets?

4. Would the answer change if discovery had been issued?

5. Assume that Husband is able have the agreement set aside and the divorce proceeds to trial, can Wife testify regarding Husband’s apology at the mediation?

6. If Husband had actually admitted adultery, could Wife testify to his admission?

7. If, as part of his apology (and without telling his attorney) Husband hands the Wife copies of several previously undisclosed emails between he and his paramour in which they discuss their adulterous actions, are those emails admissible?

8. Assume, Husband admitted adultery during the mediation. At trial, Husband takes the witness stand and denies having committed adultery. Can Wife testify to his prior inconsistent statement at the mediation? What are the responsibilities of Husband’s attorney?

9. If Husband admitted adultery while he and Wife were sitting down attempting to negotiate a settlement without attorney’s present, could Wife testify to his admission?