#### PROFESSIONAL RESPONSIBILITY

Sections B & M

#### FINAL EXAMINATION

**Professor Tibbles** 

Fall Semester 2000

## Instructions

Place your Final Examination Number, <u>NOT</u> your name, on your Bluebook & in the "ID Number" box for Side 1 of your ParSCORE TEST FORM.

You should bring with you to the Final Examination: your copy of the casebook, Simon, <u>Lawyers & The Legal System</u>, 3d <u>Edition</u> (1994); the <u>1998 Supplement</u> to the Simon casebook; & your copy of Gillers & Simon, <u>Regulation of Lawyers: Statutes & Standards (2000)</u>. These materials may also contain writings that you have placed on the pages or covers. These materials cannot contain additional pages, papers, notes, etc.

You have three hours to complete the examination. You should have only the above books, the ParSCORE TEST FORM, this examination, a Bluebook, & scratch paper issued with the examination in front of you. No other materials are allowed. You may leave the examination room as you wish during the course of the examination. However, you must leave all of these materials on the desk in the examination room & not remove them until you have completed the examination.

When the <u>ABA Model Rules of Professional Conduct</u> is referred to, it is the version amended through August 1999, appearing on pages 3-457 of the 2000 Edition of <u>Regulation of Lawyers.....</u>

When the <u>ABA Motel Code of Professional Responsibility</u> is referred to, it is the version in effect as of August 1982, appearing on pages 459-537 of the 2000 Edition of <u>Regulation of Lawyers</u>.

When the <u>ABA Model Code of Judicial Conduct</u> is referred to, it is the 1990 version appearing on pages 537617 of the 2000 Edition of <u>Regulation of Lawyers....</u>.

The examination consists of <u>VII.</u> Roman Numeral questions on <u>20</u> pages. Begin each Roman Numeral question on a new Bluebook page & place the Roman Numeral in the middle of the top line on the page. Write your answers in blue, blue-black, or black ink. Number your answers precisely as the questions are numbered. The recommended time next to each Roman Numeral question represents that question's proportional value in this THREE HOUR examination. Do not exceed the Bluebook page limitation for the question. Write on every line. One side is one page.

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Roman Numeral I. consists of <u>20</u> multiple choice questions. You are to mark in PENCIL the answers to these multiple choice questions on Side 1 of the ParSCORE TEST FORM. You are to choose the best of the available answers, even though that answer may not be as precise as you would like it to be. If you must erase an answer, please erase carefully & thoroughly.

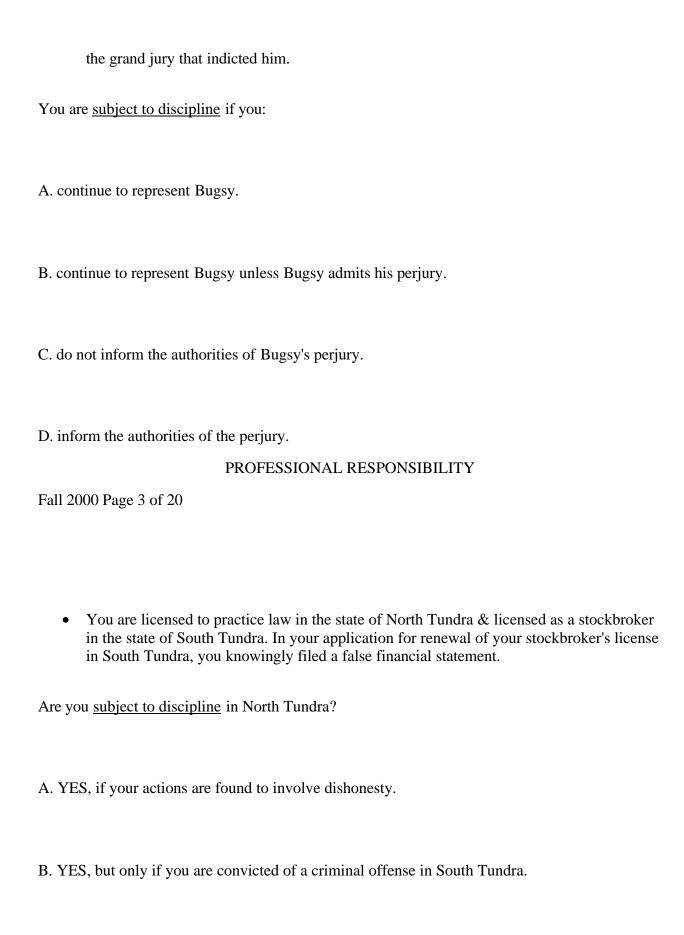
When you have completed the examination, please make certain that your examination number appears in the proper place on your Bluebook & your ParSCORE TEST FORM & place your ParSCORE FORM inside your Bluebook & place them in the designated box near the door of the classroom. You may keep the examination and discard your scratch paper. You may wish to retain the examination because a debriefing memo on the examination (hopefully) will be placed in your student mailbox at the end of the examination period.

I.

(1 hour)

This question consists of 20 multiple choice questions. Assume that you are a licensed attorney in a jurisdiction that has adopted both the <u>ABA Model Rules of Professional Conduct</u> & the ABA Code of Judicial Conduct. Choose the best answer from those available.

• After Bugsy has been indicted for burglary, you are retained to represent him. During a confidential interview, Bugsy tells you that he committed perjury while testifying before



C. NO, because your action was not in your capacity as an attorney.
D. NO, because your action was not in North Tundra.
Questions 3 & 4 are based on the following facts:
Pat Patient, represented by attorney Al, sued Donna Doctor, represented by lawyer Lou, for medical malpractice. The alleged negligence was Doctor's failure to fully inform Patient of all of the significant risks involved in surgery that Doctor performed on Patient. Before Al filed suit on Patient's behalf, Patient told his attorney Al that before the surgery he, Patient, told Doctor, "Don't tell me anything about the operation that will upset me any more than I am now."
Donna Doctor is outraged & emotionally distressed by Patient's lawsuit. Doctor believes that the suit is groundless, but that her professional reputation has been damaged by the mere filing of the suit. Doctor insists that her lawyer, Lou, file suit on her behalf against Patient for intentionally & maliciously inflicting severe emotional distress on Doctor.
• Is attorney Al <u>subject to discipline</u> for filing the lawsuit against Donna Doctor?
<ul> <li>YES, if Al knew that the filing of the suit probably would injure Doctor's professional reputation.</li> </ul>
B. YES, if Al believed that Patient probably would not succeed in the suit.
C. NO, if Patient believed in good faith that Patient should recover from Doctor.

D. NO, if Al believed that there was any chance of recovery under the applicable law.

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•	Is lawyer	Lou subject	to discipline if	Donna Doctor files	s suit against Pat	Plaintiff?

A. YES, unless Lou can make a good faith argument that Doctor has a claim for relief against Patient.

B. YES, unless Lou believes that filing the suit may help in the settlement of Patient's claim against Doctor.

C. NO, because Lou filed the suit at Doctor's insistence.

D. NO, if Lou believes that Patient will lose the suit against Doctor.

• Speedy, who has auto insurance with Insco, an insurance company, is sued by Pete Plaintiff for damages for an auto accident after their two cars collide at an intersection. Pursuant to the insurance contract provision that Insco would furnish a lawyer to defend its insured, Speedy forwards the complaint to Insco, who employs YOU to represent Speedy. After filing an answer, but during preparation for trial, you find that there is some evidence that Client intentionally ran into Plaintiff. Intentional torts are excluded from coverage under Speedy's policy with Insco. Thus, if Speedy intentionally ran into Plaintiff's car, Insco has a "no coverage" defense to all of Plaintiff's claims against Speedy.

Your ethical obligation is to:

A. Withdraw as lawyer for Speedy, but represent Insco in an action against Speedy for a declaration of "no coverage."

- Inform Insco of the evidence that raises the possibility of "no coverage," but continue to represent Client.
- Continue to represent Client & inform the court, but not Insco, of the possible "no coverage" defense.
- Continue to represent Client & not inform either Insco or the court of the possible "no coverage" defense.

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You are employed in the legal department of USA Tonight, a daily newspaper, & represent that company in litigation. USA Tonight has been sued for libel by the subject of a feature story appearing in USA Tonight. Through its general counsel, USA Tonight has instructed you not to negotiate a settlement, but to go to trial under any circumstances, because a precedent needs to be established. You believe the case should be settled if possible.

Do you have an ethical obligation to withdraw as counsel in the case?

- YES, because a lawyer should endeavor to avoid litigation.
- YES, if USA Today is controlling your judgment in settling the case.
- NO, if USA Tonight's defense can be supported by a good faith argument.

• Judge Judy has been assigned to hear a criminal prosecution of Dan Defendant for driving under the influence of liquor. Ten years ago while serving as an assistant prosecutor, Judy initiated a criminal investigation of Dan for suspected securities fraud. The investigation did not establish any basis for prosecution & the investigation was terminated.
Is it <u>proper</u> for Judge Judy to hear the DUIL case?
<ul> <li>YES, unless Judge Judy might be prejudiced against Dan because of the prior investigation.</li> </ul>
<ul> <li>YES, because none of the matters previously investigated is involved in or affects the present case.</li> </ul>
<ul> <li>NO, if Judy has substantial responsibility in determining that the previous investigation did not establish any basis for prosecution.</li> </ul>
• NO, if Judy had substantial responsibility in initiating the previous investigation of Dan.
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• You are a licensed attorney. You have known Al Attorney since law school. He was the Best Man at your wedding. You are the godparent to Al's children. Al Attorney is trying a case in the local court. You see Al Attorney having dinner in a local restaurant with a juror in the case Al Attorney is currently trying.
You should

• NO, because as an employee, Attorney is bound by the instructions of the general

counsel.

- Respect your long friendship with Al & keep this information confidential.
- Caution Al Attorney & the juror not to talk further to each other.
- Wait until the juror leaves & then sharply reprimand Al Attorney for dining in a public place with a juror.
- Report this incident to the judge hearing the case.
- You represent Don Defendant, who is a defendant in a tort action in a state that has adopted comparative negligence, but has retained assumption of risk as a complete defense.

You believe that the evidence at trial is likely to establish that (1) Don was negligent, (2) the plaintiff was partially at fault, & (3) perhaps plaintiff may have voluntarily assumed the risk involved in the activity. However, it is your professional judgment that to assert the defense of assumption of risk would be a bad trial tactic because, if the jury did not accept it, they might also find that the plaintiff was free from fault & render a much larger verdict than they would if they found that the plaintiff was partially at fault.

Is it <u>proper</u> for you not to plead assumption of risk as a defense?

- YES, if you determine that it is in your client Don's best interests not to plead assumption of risk.
- YES, because you are responsible for determining trial strategy & tactics.
- NO, if a good faith argument can be made that, under these facts, the assumption of risk defense is applicable.
- NO, unless you first fully inform your client Don of the risks & benefits of all permissible litigation strategies & Don consents to the strategy.

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While an assistant prosecuting attorney, you were in charge of presenting to a grand jury
evidence that led to the indictment of 10 defendants for conspiracy to sell controlled
drugs. Shortly after the grand jury returned the indictments, you resign from the
prosecutor's office & become an associate in Sandy Beach's law practice. Beach is the
attorney for Mugsy, one of the indicted co-defendants.

Is it <u>proper</u> for Sandy Beach to continue to represent Mugsy?

- YES, if you do not reveal to Beach any confidence or secret learned while a prosecutor.
- YES, because a prosecutor must make timely disclosure to the defense attorney of any exculpatory evidence to the defense attorney.
- NO, unless you agree not to participate in representing Mugsy.
- NO, because you had substantial responsibility for Mugsy's indictment.
- You were Client's attorney in Client's breach of contract action against Defendant. Client
  made certain false statements of material fact to you, which you unknowingly included in
  the complaint that you filed against Defendant. At trial, your Client testified as set forth
  in the complaint. Client received a verdict judgment against Defendant.

Later Client wrote you a letter marked "Confidential Client Communication With Attorney," in which Client told you that she had lied to you & had testified falsely at trial.

Defendant complains to the disciplinary authority that you knowingly used false testimony against her at trial. Disciplinary proceedings are brought against you.

Is it proper for you to use Client's letter to you as a defense in the disciplinary proceedings?

- YES, if it is necessary to do so in order for you to defend yourself in the disciplinary proceedings.
- YES, because a lawyer must report his client's past fraud.

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- NO, because you learned the facts from your Client in confidence.
- NO, if your disclosure could result in Client's prosecution for perjury.
- NO, because you are responsible for the untrue statements in the complaint.
- You serve on the state intermediate appellate court. In several controversial cases, you wrote the majority opinions for a divided court holding that the 14<sup>th</sup> Amendment of the U.S. Constitution does not guarantee due process protections to state prison inmates who are disciplined by prison authorities for violating the prison's rules of conduct. You are now a candidate for a vacancy on the state supreme court. You are opposed by organizations concerned with the conditions under which prison inmates are incarcerated. You will be interviewed tonight on televison & questions about your attitudes about prisoners' rights are certain to be asked.

Which of the following is it <u>proper</u> for you to say during the interview?

- "If elected, I will faithfully & impartially perform the duties of the office."
- "A state supreme court justice has a duty to uphold the law regardless of her

personal views."

- "If elected, I will devote considerable attention to making improvements in court administration."
- "In my opinion, incarceration for committing a crime carries with it a loss of civil liberties in prison discipline proceedings."
- "I am convinced that I was right in those cases & I will make the same decision in similar cases in the future."
- "Prison inmate Sluggo's recently filed suit against the prison system should be summarily dismissed."

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- 1. only.
- 1., 3., & 5.; but not 2., 4., or 6.
- 2., 4., & 6; but not 1., 3., or 5.
- 1., 2., & 3,; but not 4., 5., or 6.
- 1., 2., 3., & 4; but not 5. or 6.

Questions 13 & 14 are based on the following facts:

You were employed by Insurance Company as a lawyer solely to handle fire insurance claims.

You investigated Sparky's fire loss claim against Insurance Company. You now leave the employ of Insurance Company & you are in private practice.

• Assume that Sparky's claim has not been settled & Sparky consults you and asks you either to represent him or refer him to another lawyer for suit on has claim.

Which of the following is/are proper?

- You may refuse to discuss the matter with Sparky.
- You may refer Sparky to an associate in your law firm, provided that you do not share in any fee.
- You may represent Sparky, but only if Insurance Company consents.
- You may represent Sparky without asking for Insurance Company's consent.
- You may give Sparky a list of lawyers who you know to be competent in handling such claims.

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- 1. Only.
- 1. & 2.; but not 3., 4. & 5.
- 1., 3., & 5; but not 2 & 4.
- 1., 4., & 5.; but not 2. & 3.

- 2., 3., & 5.; but not 1. & 4.
- Assume that Sparky's claim has been settled. One year after you left Insurance Company, Sparky slips & falls in Insurance Company's office. Sparky now asks you to represent him or refer him to another lawyer for suit on the "slip & fall" claim.

Which of the following is/are proper?

- You may refuse to discuss the matter with Sparky.
- You may not represent Sparky because a lawyer cannot represent a client if the representation of that client will be directly adverse to another client.
- You may represent Sparky, but only if Insurance Company consents.
- You may represent Sparky without asking for Insurance Company's consent.
- You may give Sparky a list of attorneys who you know to be competent in handling such claims.
- 1., & 4.; but not 2., 3., or 5.
- 1., 4., & 5.; but not 2. or 3.
- 1., 2., & 5.; but not 3. or 4.
- 1., 3., & 5.; but not 2. or 4.
- 2. & 5.; but not 1., 3., or 4.

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• Client consults you & asks you to represent him on a personal injury claim. You tell Client that you will not accept the case unless Client executes an agreement containing the following provision:

"The attorney has full authority to (1) reject any settlement offer if in the attorney's opinion, it is inadequate & (2) accept a settlement offer, provided the net recovery to Client, after payment of the attorney's fee & all costs & all litigation expenses, appears reasonable to the attorney."

Is your proposes agreement <u>proper</u>?

- YES, because you are in a better position than your lay client to evaluate settlement offers.
- YES, if you first fully inform Client of the effects of the provision in the agreement.
- NO, because the provision asks Client to surrender his right to accept or reject settlement offers.
- NO, unless your fee is not contingent on the amount of the recovery.
- You are the judge presiding over a difficult antitrust case. You receive an unsolicited letter from Guy Wire, a local practicing attorney with 30 years experience in antitrust litigation. You know that Wire does not represent either party in the case. You read Wire's letter &, without mentioning its receipt to the lawyers in the pending case, file the letter in your general antitrust litigation file.

Later, after reading the trial briefs in the pending antitrust case, you conclude that Wire's letter better explains the law applicable to the pending antitrust case than either of the trial briefs or your own file notes. You follow Wire's reasoning in formulating your decision in the case.

Was it proper for your to consider Wire's letter?

- YES, because you did not initiate the communication with Wire.
- YES, if Wire did not represent any client whose interests could be affected by the outcome of the pending case.
- NO, unless prior to your decision, you communicate the letter's contents to all counsel & give them an opportunity to respond.
- NO, because Wire is a recognized antitrust authority & has greater expertise in the area than you or the two counsel of record.

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- Chemical dependency in the legal profession is best defined as:
- A purely psychological condition involving defects in the ganglia of the spinal nerves of lawyers.
- A social problem involving the need for lawyers to exercise will power.
- A moral problem that is best left to the religious tenets of each lawyer.
- A disease recognized by the American Medical Association as being primary.
- All of the above.
- Cocaine is a drug that:

All agree is totally harmless.
• Is a great way for attorneys to relax.
• Primarily affects the pleasure center of the brain.
• Should be used prior to taking this examination.
• All of the above.
• Chemical dependency is:
A treatable disease.
Characterized by defined symptoms.
Fatal if left untreated.
A substantial factor in many lawyer discipline cases.
All of the above.  PROFESSIONAL RESPONSIBILITY
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The Ohio lawyer disciplinary cases considered early in the semester illustrated:
They usually involve lawyers who faced difficult moral dilemmas.
• Lawyers never invent law suits to deceive clients.

<ul> <li>Sanctions imposed on lawyers who are found to have violated disciplinary rules usually seem unduly harsh.</li> </ul>
• Lying to the disciplinary body or failing to cooperate with it is usually a good way for the lawyer to confuse the disciplinary body and cause it to dismiss the complaint & go away.
• None of the above.
{Question II. begins on the next page.}
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II. (20 minutes)
For each of the 20 numbered items in the left column, select the correct matching lettered item from the right column. You should pair each lettered item in the right column with its most appropriate numbered item in the left column. In your Bluebook for Question II, you should print the numbers 1 - 20 to the left of the vertical line on the left side of your Bluebook page. You should then print the correct matching letter from the right column beside its matched numbered item in the left column.
1. is to be held separate from the lawyer's own property
2. is ethically required to withdraw from representation

3. a lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness of a lawyer in other respects	
4. may refer not only to law, but to other considerations such as moral, economic, social, & political factors, that may be relevant to the client's situation	
5. unless there is a basis for doing so that is not frivolous	
6. requires competent representation	
7. a lawyer shall continue representation notwithstanding good cause terminating the relationship	
8. a lawyer shall not neglect a legal matter entrusted to her	
9. shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct	
10. whether to accept a settlement offer	
11. a lawyer may offer evidence that the lawyer reasonably believes is false	
12. proposals to limit when there is no issue of liability or when ultimate recovery does not exceed defendant's settlement offer	
13. applies in judicial & other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client	

14. applies in situations other than those where evidence is sought from the lawyer through compulsion of law
15. prevent lawyers from volunteering what they know
16. prevent lawyers from being compelled to tell what they discussed with their clients
17. prevent lawyers from being compelled to reveal information that they created for purposes of litigation
18. the attorney-client privilege is non-existent
19. the attorney-client privilege is qualified
20. the attorney-client privilege is absolute
a. rules of procedure
b. Model Rule 1.1
c. In re Grand Jury Proceedings

d. a lawyer who is fired
e. client-lawyer confidentiality
f. abide by a client's decision
g. rules of evidence
h. shall inform the appropriate authority
i. Swidler & Berlin v. United States
j. a lawyer shall not bring or defend a proceeding
k. attorney-client privilege
l. law firm partner

m. contingent fee	
n. rules of ethics	
o. property of clients or third parties	
p. obligation of diligence	
q. In re Grand Jury Subpoena Duces T	Гесит
r. when ordered to do so by a tribunal	
s. a lawyer rendering advice	
t. Model Rule 3.3	
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#### (15 minutes)

# (1Bluebook page)

You are a licensed attorney who just passed the bar examination & began working for a law firm.

- Your senior partner asks you," Is there a rule in the <u>Model Rules</u> about a lawyer talking about his or her ability to improperly influence a government agency or official? If so, cite me the rule number (do not analyze or quote the rule). Was there a similar "Disciplinary Rule in the <u>Model Code</u>? If so, cite me the DR number (do not analyze or quote the rule)." Perform the requested task.
- Your senior partner hands you a check & says, "This check is from a client as retainer for work that we will begin next week. Deposit this check in the firm checking account (the same one from which we pay the rent and the secretaries' salaries). Or is there something in your precious Model Rules or Model Code about this? If so, cite me the appropriate provision in either the Model Rules, the Model Code, or both if it appears in both, without analyzing or quoting it." Perform the requested task.
- Your senior partner storms into your office & shouts, "I have been reading EC 2-4 in the Model Code, is there a comparable provision in the Model Rules? If so, identify it for me without analyzing or quoting it." Perform the requested task.
- Clearly impressed with you knowledge of the lawyer disciplinary rules, your senior
  partner asks you to come to the office early on a Saturday morning & says, "The local
  lawyer disciplinary authority wants to depose me about some improper conduct of Judge
  Bore that I might have observed. Do either the Model Code of the Model Rules say that I
  must comply? If so, identify the appropriate provision including subsection in each
  without analyzing or quoting it." Perform the requested task.

{This question continues on the next page.}

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• Your senior partner, now desperate to stump you says, "I do not understand Model Rule 1.6. Please give me a one word answer to my following questions.
a. "Does MR 1.6 allow a lawyer to reveal a client's distant intent to kill someone?"
b. "Does MR 1.6 allow a lawyer to reveal a client's imminent intention to destroy someone else's uninhabited property?"
c. "Does MR 1.6 allow a lawyer to reveal a client's imminent intention to commit a financial crime or fraud?"
d. "Does MR 1.6 allow a lawyer to reveal a client's imminent intention to perform a non-criminal act that may endanger another person, such as marketing an unreasonably dangerous product?"
e. "Does MR 1.6 ever require a lawyer to disclose information?"
f. "What is the comparable DR in the <u>Model Code</u> to MR 1.6? Should I recommend that my jurisdiction (1) keep MR 1.6, (2) return to the comparable DR, or (3) promulgate a new MR 1.6? Why or why not in 50 words or less."
Perform the requested tasks.
{Question IV. begins on the next page.}

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IV.

(25 minutes)

(2 Bluebook pages)

For questions 1 & 2, assume that you are in a state that has adopted the <u>ABA Model Code of Judicial Conduct</u>.

- You are representing the defendant in a criminal case before Judge Boresh, who discloses on the record the fact that 21 years ago, before she was a judge & on a matter totally unrelated to the present criminal charge, she had a confrontation with the defendant. Judge Boresh invites you to move that she recuse herself.
- What provision of the <u>ABA Code of Judicial Conduct</u> did Judge Boresh probably use to disclose this information on the record?
- What provision of the <u>ABA Code of Judicial Conduct</u> would you most likely cite to move that Judge Boresh recuse herself?
- If, after disclosing on the record the confrontation 21 years earlier, Judge Boresh had wanted to have the parties consider waiving the disqualification, under what provision of the ABA Code of Judicial Conduct would the Judge have acted?
- Under the <u>ABA Code of Judicial Conduct</u>, could Judge Boresh's disqualification have been waived by the parties? Why or why not in one sentence. Cite the appropriate section.

• In the O.J. Simpson murder case, the defense listed Los Angeles police captain Peggy York as a potential witness. They wanted to question her about her working relationship with the police officer who allegedly found a bloody glove in the defendant's house. Her testimony might impeach both the veracity & the character of Officer Mark Fuhrman, who was to be a key witness for the prosecution. Officer York is the spouse of Judge Ito, to whom the case had been assigned. This situation raised some concern in the legal community. Why? Cite & quickly analyze the provision of the <u>ABA Code of Judicial Conduct</u> upon which you would rely to resolve the issue.

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- a. What <u>Model Code</u> provision covers division of fees between lawyers who are not in the same firm? What <u>Model Rules</u> provision? Does either provision require that the client be informed of the fact of fee splitting? Explain in no more than two sentences.
- Other than for purposes of law firm management, does either the <u>Model Code</u> or the <u>Model Rules</u> permit a lawyer to share a fee with a nonlawyer? Answer in one sentence & cite the appropriate provision in both documents. In one sentence, what do you think is the value that is sought to be served by the <u>Model Code</u> & <u>Model Rules</u> provision?
- a. In the <u>Model Rules</u>, the basic rule relating to confidentiality states four express exceptions to its general rule of confidentiality. Identify, but do not analyze, the basic rule by number & identify the four express exceptions.
- Identify, but do not analyze, the one common law exception to this basic rule of confidentiality.
- There is only one provision in the <u>Model Rules</u> that expressly overrides the <u>Model Rules</u> basic rule of confidentiality. Identify, but do not analyze the provision.
- Simon says that the attorney-client privilege applies only when "5C's" are present. Identify, but do not analyze, the five C's.
- Define a "noisy withdrawal" in one sentence.

- Simon talks about the problems involving "phantom" clients. Name three categories of "phantom" clients.
- According to Simon, a "Chinese Wall" usually has five components. Name them.

{This question continues on the next page.}

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- You represent Sluggo, who is out on bail on a criminal assault charge. Sluggo comes to your office & hands you a blackjack & asks you to hide it from the police. What specific subsection of the <u>Model Code</u> & of the <u>Model Rules</u> guide your decision about what to do with the blackjack?
- a. In <u>The Florida Bar v. Went For It, Inc</u>, casebook supplement page 203, what form of lawyer advertising or solicitation was the state regulating?
- What was the state's justification for its regulation?

V.

(20 minutes; 1 ½ Bluebook page)

• a. Tex W. Shrub, who has been sued for conversion of his neighbor's calf, says to you, his lawyer, in confidence & to seek legal advice, "I just tossed a rope around the neck of my cow that had wandered into my neighbor's pasture the year before, & this calf followed us home. Is it my calf?" Tex is being cross-examined at trial & the opposing counsel asks, "Did you tell your lawyer that you took your cow from my client's pasture & allowed this calf to follow you home?" Do you have a valid objection? Why?

- In the same facts as a., suppose the opposing counsel asks Tex, "Did you take your cow from my client's pasture & allow this calf to follow you home?" Do you have a valid objection? Why?
- In <u>Upjohn Company v. United States</u>, (Simon p. 43), suppose that you are the attorney for Upjohn. You are talking with Tony, who works in the shipping department. Tony surprises you by suddenly implicating himself & two of his co-workers & exonerating Upjohn's executives. When you provide this information to Upjohn's board of directors, the board directs you to tell the FBI everything you know. If you disclose the information to the FBI, can Tony claim violation of confidentiality, a violation of the attorney-client privilege, or some breach of duty that you owed Tony? Does MR 1.13 help Tony?

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VI.

(20 minutes, 1 ½ Bluebook pages)

For this question, assume that you practice in a state with the Model Rules.

- You are representing Joe in acquiring land for shopping malls. Paula comes to your office for the first time & claims that Joe is now liable to her on a note that Joe signed as surety for Bill. Paula needs the money now. But Bill forgot to pay the note before he went to Florida to retrieve a bag of ballots that had been swallowed by an alligator. Paula asks you to represent her in her attempt to have Joe immediately pay the note as surety. You really want to handle Paula's case because she is likely to bring other legal matters to you. But Joe is such a good client that you do not want to risk losing him. Briefly explain how you would analyze this problem. Cite & apply the applicable disciplinary rule provisions.
- Joe has now switched law firms & no longer uses your legal services. Pat consults you claiming that Joe's excavation for a shopping mall has removed required lateral support from Pat's land. Pat wants you to file suit for her against Joe. Briefly explain how you would analyze this problem. Cite & apply the applicable disciplinary rule provisions.

## VII.

# (10 minutes; 1 Bluebook page)

- Without the State, there is no law. The State uses its police power to prevent those who have not acquired a license from the State from providing legal services. When you are licensed to provide legal services, you are given a monopoly or at least an oligopoly (few sellers) in the market place. The State delegates the authority to grant these licenses to people to whom it previously has granted a license to practice law. In no more than ½ Bluebook page set out what obligations, if any, you believe this situation imposes on you that may not be present for providers of good & services that do not require a State license.
- On page 76 of the Casebook, there is a paragraph entitled "Secrecy & Morality", which relates to the "Buried Bodies Case." In the last sentence of the paragraph Simon asks, "...what should be the role of <u>your</u> personal moral beliefs when you implement (or refuse to implement) the rules of legal ethics?" [Emphasis mine.] Answer Simon's question in no more than ½ Bluebook page.

## ENDOFEXAMINATION

Happy Trails!

# PROFESSIONALRESPONSIBILITY DEBRIEFING STATEMENT

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I.

- 1. D
- 2. A
- 3. D

- 4. A
- 5. D
- 6. C
- 7. A
- 8. D
- 9. D
- 10. D
- 11. A
- 12. D
- 13. C
- 14. B
- 15. C
- 16. C
- 17. D
- 18. C
- 19. E
- 20. E

П.

- 1. O
- 2. D
- 3. H
- 4. S
- 5. J

- 6. B7. R8. P9. L10. F
- 11. T
- 12. M
- 13. K or G
- 14. E or N15. N or E
- 16. G or K
- 17. A
- 18. Q
- 19. C
- 20. l

III.

- MR 8.4(e) DR 9-101(C)
- MR 1.15(a) DR 9-102(A)
- MR 7.3
- MR 8.1(b) "shall not fail to respond to a lawful demand for information from an admissions or disciplinary authority,..." {does not specifically mention discipline of judges}

MR 8.3(b) "...having knowledge that a judge has committed a violation...shall inform the appropriate authority." {does not specifically mention fail to respond to a demand for information}

DR 1-103(B) "...knowledge or evidence concerning...a judge shall reveal fully...upon proper request of a tribunal or other authority..."

- a. NO b. NO c. NO d. NO e. NO Simon 104
- f. DR 4-101 (1) keep MR 1.6, (2) return to DR 4-101, or (3) new MR 1.6?

Change MR 1.6 to <u>allow</u> any of (a) - (e)? To <u>require</u> disclosure of any information? IV.

• a. CJC Canon 3. E. (1) "impartiality might reasonably be questioned"

Perhaps more specifically CJC Canon 3. E. (1) (a) "personal bias or prejudice"

Unfortunately this question was poorly drafted. Credit was given for almost any citation to a relevant Canon & Section of the Code of Judicial Conduct

- b. CJC Canon 3. E. (1) (a) "personal bias or prejudice"
- c. CJC Canon 3. F.
- d. NO. CJC Canon 3. F. "...disclosure of any basis for disqualification other than personal bias or prejudice concerning a party,..."
  - CJC Canon 3 E. (1) (d) (iv) The judge shall disqualify himself where the judge's spouse is to the judge's knowledge likely to be a material witness in the

proceeding. The defense wants to attack Officer Mark Fuhrman's character & veracity on the "bloody glove" issue by Officer York's testimony; that seems material. York's veracity could be enhanced with the jury because she is Judge Ito's spouse. If Fuhrman & York's testimony is contradictory, who does Judge Ito believe?

• a. DR 2-107(A) MR 1.5(e)

YES. DR 2-107(A)(1) "Client consents to employment of the other lawyer after a full disclosure that a division of fees will be made."

But MR 1.5(e)(2) only provides "client is advised of...the <u>participation</u> of all the lawyers involved;" It does not appear to require the client be informed that the lawyers want to divide the fee

b. DR 3-102(A) MR 5.4(a)

MR 5.4 **Comment** "...These limitations are to protect the lawyer's professional independence of judgment."

- a. MR 1.6
- (1) Client Consent; (2) Implied Authority; (3) Preventing Serious Crime; (4) Self-Defense
- b. Attorney-Client Privilege
- c. MR 3.3(b)

d. (1) Client (2) Communicates (3) Confidentially with (4) Counsel (i.e., a lawyer) to obtain (5) Counsel (i.e., to obtain legal advice)

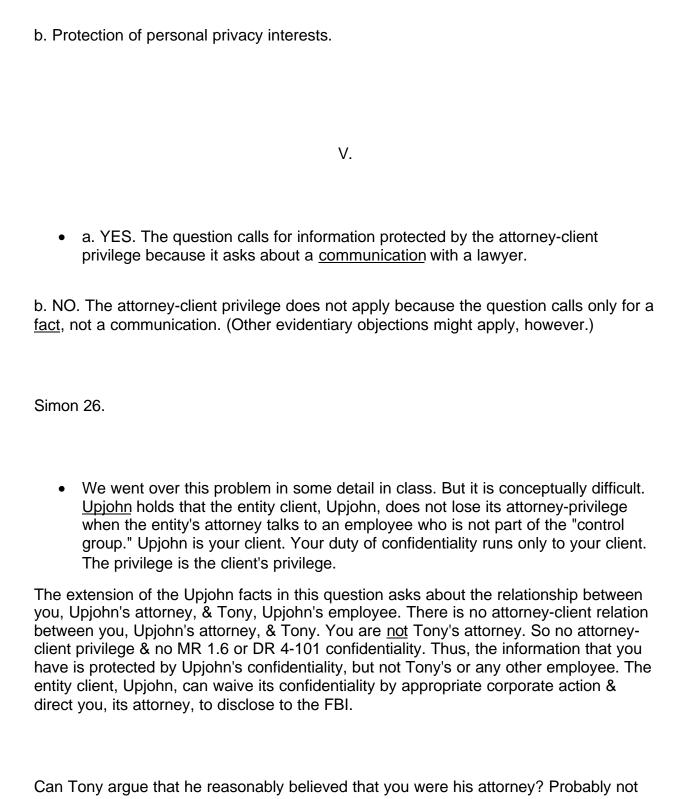
- "NOISY WITHDRAWAL" A withdrawal accompanied by an explicit disaffirmance
  of work product prepared by the lawyer in the course of the representation to
  ensure that those to whom it is communicated understand that the lawyer will no
  longer take responsibility for the contents of the documents that were prepared in
  reliance on the client's representations. See footnote 9, Simon 118.
- (1) Trade association members; (2) Co-parties; (3) Affiliates, Subsidiaries, Parents, Divisions; (4) Potential Clients interviewed but did not retain the firm; (5) Partners in small partnerships or officers employees, or shareholders in small corporations. Simon 347.
- (1) Restrictions on the disqualified lawyer. (2) Restrictions on other lawyers. (3) Enforcement measures. (4) Timing.

Ok, the joke is on me. In earlier drafts of his casebook, Professor Simon listed <u>five</u> components of a screen - he listed "Inaccessible Files" as a separate component. He now lists it as a part of "enforcement measures." If you named the four, you nailed the question.

 DR 7-109(A) "shall not suppress any evidence that he or his client has a legal obligation to reveal"

MR 3.4(a) "unlawfully obstruct another party's access to evidence or unlawfully...conceal a document or other material having potential evidentiary value."

What does it mean to "unlawfully" obstruct another party's access to evidence or "unlawfully" alter, destroy, or conceal material having potential evidentiary value? The answer depends on whether the lawyer is subject to state or federal law, & whether the materials have been subpoenaed. Simon 67 - 69.



a. Direct mail, targeted solicitation.

merely from the fact that you are the attorney for his entity employer, Upjohn. Perhaps if you said that you were an attorney, did not indicate that you are representing Upjohn, & either did not reject Tony's offer to hire you as his attorney or otherwise somehow led Tony to reasonably believe that you would represent him. Under this theory, Tony would have to reasonably believe from all of the circumstances that you & he had begun an attorney-client relationship. No facts given suggest that you have created an attorney-client relationship with Tony.

Under the theory in the Perez v. Kirk & Carrigan case, Simon 137, can Tony claim that, although there was no attorney-client relationship created between you & him, your conduct created a fiduciary duty to Tony by wrongfully representing that an unprivileged statement would be kept confidential? If so, then Tony might be able to obtain an injunction preventing you from disclosing the statement or, if you have already disclosed the statement, damages resulting from the breach of your fiduciary duty. No facts given suggest that you have created a fiduciary duty to Tony to keep the statement confidential.

Does MR 1.13 help Tony? MR 1.13(d) states that in dealing with your entity client's employee, "...a lawyer [you] shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents [Tony] with whom the lawyer is dealing." When was it apparent to you that Upjohn's interests were adverse to Tony's? Probably not until Tony had implicated himself. MR 1.13(d) puts no duty on you to identify your client until then. Even if you violated MR 1.13(d), it is only a disciplinary violation. It does not give Tony a cause of action. The Model Rules "Scope" provides:

"[6] Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers & to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist is a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.

"[7] Moreover, these Rules are not intended to govern or affect judicial application of

either the attorney-client or work product privilege...."

Of course an attorney with good judgment would likely make exceedingly clear what her role is & who she represented at the very beginning of the conversation with Tony.

VI.

Representing Paula will be directly adverse to present client, Joe. Under MR 1.7(a) you cannot oppose a current client in any matter even if it is totally unrelated to your current client's matters, unless (1) you reasonably believe that the representation will not adversely affect the relationship with Joe & (2) Joe consents after consultation.

Can you even ask Joe to consent? Comment [5] to MR 1.7 says that when a "disinterested lawyer would conclude that the client should not agree" to be opposed by his own lawyer, then the lawyer cannot properly ask for his client to consent. You cannot ask for consent unless a disinterested lawyer would advise your client to consent. Simon 308.

Given the nature of the surety suit, can you reasonably believe that the suit will not affect your relationship with Joe? Joe probably does not claim that Paula should not be paid on the note, only that payment should come from Bill & that Paula should wait until Bill returns. In addition, even if Joe is compelled to pay the note now, Bill probably will willingly repay Joe when he returns from Florida, now that the incomplete & inaccurate vote count has been certified.

Is Joe now a Former Client?

Do you need the consent of former client, Joe? MR 1.9(a) says that you cannot oppose a former client in a matter that is "the same or substantially related" to the former representation unless the former client consents. Is the lateral support matter

substantially related to the land acquisition work that you did for Joe's shopping centers? Three "substantially related" tests: (1) Legal issues are the same (narrow); (2) Earlier matter gave insight about how client operates (broad); & (3) Information acquired in one matter is relevant to material issues in the other matter (relevancy). Simon 315. (In Ohio, <u>Harsh</u>, Court of Appeals case, finds matters are substantially related if there is some "commonality of issues" or a "clear connection" between the subject matters.)

If Joe is already represented by his new law firm in this matter, then you cannot communicate directly with Joe, because that would violate MR 4.2's ban on direct communication with an opposing party represented by counsel. Simon 316

VII.

- Your response might take a different view, but I might respond: If the State both creates law & restricts the number of people who are permitted to perform necessary legal services, what are the moral obligations of both the legal profession as a whole & individual lawyers to provide legal services to those who (in part because of the State's restriction on who can provide legal services) do not have access to necessary legal services?
- Your response might take a different view, but I might respond: To say that your personal moral beliefs should never come into play in your lawyering, probably is too simplistic. Your personal moral beliefs form the basis of all of your conduct in all areas of your practice (& your life). Also might there be a time when you personal moral beliefs flatly contradict the disciplinary code? What does your personal moral code require of you when your client lies to you so that you inadvertently assert a non-truth, your client unexpectedly commits perjury, or your client now claims that she was following your advice when she destroyed evidence, committed perjury, hid her assets, fled the jurisdiction, etc.? Will you continue to protect your client's interests (against your own) as thoroughly as the disciplinary codes seem to require?

Be well, do good work, stay in touch.

Unfortunately since we last met I believe that events have made our professional obligations much more difficult. We are likely to face an increased cynicism about the integrity of the legal system. I quote from Justice Stevens' dissent in the December 12<sup>th</sup> case of Bush v. Gore:

"What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality & capacity of the state judges who would make the critical decisions if the vote count were to proceed. Otherwise, their position is wholly without merit. The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of judges throughout the land. Its is confidence in the men & women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law."