

## PROFESSIONAL RESPONSIBILITY

Section A FINAL EXAMINATION Professor Tibbles  
Section M Fall Semester 2001

### Instructions

You should bring with you to the Final Examination: your copy of the casebook, Simon, Lawyers & The Legal System, 3d Edition (1994); the 1998 Supplement to the Simon casebook; & your copy of Gillers & Simon, Regulation of Lawyers: Statutes & Standards (2001) {the edition with the gold cover}. 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, this examination, a Bluebook, a ParSCORE TEST FORM, & 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 ABA Model Rules of Professional Conduct is referred to, it is the version amended through August 1999, appearing on pages 3-463 of the 2001 Edition of Regulation of Lawyers.....

When the ABA Model Code of Professional Responsibility is referred to, it is the version in effect as of August 1982, appearing on pages 527-605 of the 2001 Edition of Regulation of Lawyers.....

The examination consists of V Roman Numeral questions on 20 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.

## PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 2 of 20

Roman Numeral V. Consists of 20 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 and thoroughly.

When you have completed the examination, please make certain that your examination number appears in the proper place on your Bluebook and your ParSCORE TEST FORM and place your ParSCORE FORM inside your Bluebook and 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.

## PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 3 of 20

### I. (15 minutes) (1 ½ Bluebook pages)

1. In "Conclusion. Can It Be Fixed? What Can We Do?", pages 231 - 246 of their book, The Moral Compass of the American Lawyer, [On Reserve] Richard Zitrin & Carol Langford set out "general prescriptions that might make our legal system more responsive to the needs of the clients who use it and to the society in which it operates."

In 50 words or less, identify the suggested change that you think is either the absolute best or the absolute worst of those set forth by Zitrin and Langford, and clearly state your reasons for your conclusion.

2. From the "Chair's Introduction and Executive Summary" to the Ethics 2000 Commission Report, in 50 words or less, identify the proposed amendment to the Model Rules of Professional Conduct that you think is either the absolute best or the absolute worst and clearly state your reasons for your conclusion.

3. From the "Buried Bodies" case as it was presented in the casebook, in the class vignette, and in the video presented in class, in 100 words or less, clearly state what, if anything you would have done differently than attorney Frank Armani did in his representation of Garrow on the criminal charge and your reasons for your conclusion. You may cite authority to support your position.

### II. (25 minutes) (1 ½ Bluebook page)

You are a licensed attorney who just passed the bar examination and you have begun working for a law firm.

1. The senior partner in your law firm takes you aside and says, "You just finished your Professional Responsibility course so you are familiar with all of the ABA Model Code of Professional Responsibility. My daughter-in-law has taken and passed the state bar examination, but she had to take the MPRE a second time and she is now awaiting word that she had passed it this time so that she can be admitted to practice. In the meantime there is a preliminary hearing tomorrow on a minor

## PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 4 of 20

misdemeanor charge against a client of this firm in a municipal court in some rural county two hours from here. Does the Model Code have a Disciplinary Rule stating whether I can have my daughter-in-law appear at the preliminary hearing solely for the purpose of entering a not guilty plea? If so, tell me the rule number, including the appropriate subsection if applicable, without analyzing it. If there is such a rule, is there a comparable provision in the ABA Model Rules of Professional Conduct? If so, identify it for me, including the appropriate subsection if applicable, without analyzing it. Is there a comparable provision in the new Restatement of the Law Governing Lawyers? If so, identify it for me without analyzing it."

Perform the three requested tasks.

1. Impressed with your knowledge, the senior partner then takes you further aside and asks, "Do the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, or the Restatement of the Law Governing Lawyers have anything to say about the following problem? I have not been making contributions to the campaign committees for the local judges and I have not been getting any lucrative court appointments. Should I consider making contributions to the local judges campaign committees in order to increase my chances of obtaining lucrative court appointments?" Identify for the senior partner the most applicable provisions including subsections, if any, of the Model Rules, the Model Code, and the Restatement. Just cite the appropriate provisions, if any, do not analyze them.

Perform the three requested tasks.

1. The senior partner tells you that she is considering running for a judge's position on the local trial court. She asks you, "If I was to run, do I have to comply with the applicable Code of Judicial Conduct? Is there an applicable provision in the Model Rules of Professional Conduct? What about the Model Code of Professional Responsibility? What about the Restatement of the Law Governing Lawyers?" Just cite the appropriate provisions including subsections, if any, do not analyze them.

Perform the three requested tasks.

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 5 of 20

1. Dazzled by your proficiency with the lawyer disciplinary codes, the senior partner asks, "Do the Model Rules have a provision guiding me when I am working for a client and dealing with a person who does not have a lawyer. If so, cite the provision without analyzing it. Does the Model Code have a direct counterpart to this provision? If so, cite the provision without analyzing it. Does the Restatement of the Law Governing Lawyers have a provision about dealing with an unrepresented nonclient? If so, cite the provision without analyzing it.

Perform the three requested tasks.

1. Word of your virtuosity with the lawyer disciplinary codes spreads throughout the firm. The managing partner comes to you and says, "The engagement letter that this firm has used for many years contains a provision limiting our liability to the client because of our negligence. Cite, but do not analyze, provisions including subsections, if any, in the Model Code, the Model Rules, and the Restatement that speak directly to this point."

Perform the three requested tasks.

1. The managing partner also says to you, "We often charge the client a fee that is based on what other law firms in the area are charging even when it results in a substantial profit for us. Is there a specific provision in either the Model Rules or the Model Code that speaks to this fee-setting practice? If so, cite me the provisions including any applicable subsections. Also, is there any general guidance in either the Model Rules or the Model Code about setting fees? If so, cite me the guiding principle and where it is found, including subsections if applicable, in both the Model Rules and the Model Code."

Perform the requested tasks.

1. The managing partner thinks that he will stump you with this one. He says, "I have been told that the Model Code EC 2-23 sets the aspiration of attempting to resolve controversies over fees amicably by being very restrictive on suing a client over fees. Does the Model Code refer you to a Comment to a rule in the Model Rules to the same effect? If so, cite the rule and comment number without analyzing them."

Perform the requested task.

PROFESSIONAL RESPONSIBILITY

III. (30 minutes)  
(2 Bluebook pages)

Assume that you are the chair of the Conflict Committee of the law firm representing Stratagem Development Corporation in the litigation set forth on pages 366 - 369 of the casebook. Assume further that your jurisdiction has adopted the Model Rules of Professional Conduct, EXCEPT on the issue of corporate affiliates and attorney conflict of interest. On this issue the disciplinary rule on conflicts of interest in your jurisdiction has recently been amended to accept the position of the majority opinion in the ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 95-390 set out on pages 87 - 101 of the casebook Supplement.

It becomes clear that it may soon become necessary for Stratagem Development Corporation to file suit against Heron International in its dispute about the termination of their joint venture. Because your law firm not only represents Stratagem Development Corporation, but also represents Fidelity Service Corporation, a wholly-owned subsidiary of Heron International, the litigation department of your firm asks for your opinion about whether your firm needs to obtain Heron International's consent to file suit against it on behalf of Stratagem Development Corporation. Provide your firm with your opinion by applying the majority opinion of Formal Opinion 95-390 to your situation.

IV. (30 minutes)  
(2 Bluebook pages)

All of the following events take place in Ohio in 2001. Assume for purposes of this question that Ohio has adopted the ABA Model Code of Professional Responsibility {so that you can use the Model Code, which you have with you, rather than the actual Ohio Code, which you do not have with you}. Lynda Lawyer is an associate specializing in environmental law with the I. M. Humble law firm. For the past year, the Humble law firm has been representing a client, Sandy Beach, who is in litigation with Warren Peace, represented by the Day & Knight law firm. This litigation involves a land sale contract. Lynda is not part of the team handling this litigation for the Humble law firm. However, before filing suit, a member of the Humble law firm, who had responsibility for this litigation, talked to Lynda about the

## PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 7 of 20

Environmental Protection Agency's policy on waste water runoff on the property. But since that conversation, Lynda has not talked with anyone or received any information about the land sale contract suit.

During the pretrial phase of the land sale contract suit, Lynda begins negotiations with the Day & Knight law firm about making a lateral transfer to that firm. Today, three things happen. First, the trial in the land sale contract suit begins with great media exposure in an Ohio trial court. Second, Lynda Lawyer and the Day & Knight law firm agree that Lynda will become the chair of Day & Knight's environmental law department. Third, the Day & Knight law firm immediately screens Lynda from all information about the land sale contract suit. The screen established around Lynda contains all of the timely screens that professor Simon talks about in Chapter 18 of the casebook and all of the timely screens that the Duvin firm set up in Kala v. Aluminum Smelting & Refining Company case.

In the land sale contract suit in the Ohio trial court, the Humble law firm moves to disqualify Lynda Lawyer and the entire Day & Knight law firm, alleging a conflict of interest and citing the Kala case.

You are the trial judge in the land sale case. In a written opinion, decide how to proceed and then decide the motion to disqualify (grant it or deny it, in whole or in part) with your reasons.

QUESTION V. BEGINS ON THE NEXT PAGE!

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 8 of 20

V. (1 hour 20 minutes)

Answer the following 20 multiple choice questions on your ParSCORE TEST FORM. Assume for purposes of all of the multiple choice questions that you are in a jurisdiction that has promulgated the ABA Model Rules of Professional Conduct.

1. In the 1995 Supreme Court case of Florida Bar v. Went For It, the Court's majority opinion distinguished the case of Shapero v. Kentucky Bar Association (1988) in which one of the following ways:

A. In Shapero the state justified its regulation on the special dangers of overreaching inherent in targeted solicitations; in Went For It the state justified its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests.

B. In Shapero the state justified its regulation as a measure undertaken to prevent lawyers' invasions of privacy interests; in Went For It the state justified its regulation on the special dangers of overreaching inherent in targeted solicitations.

C. In Shapiro the state was regulating targeted newspaper advertisements; in Went For It the state was regulating direct mail, targeted solicitation.

D. In Shapero the recipients were injured accident victims; in Went For It the recipients were facing foreclosure of their homes.

1. Bugsy has been indicted by the grand jury for burglary. After the grand jury hearing Lois Lawyer is retained to represent Bugsy. During their first interview, Bugsy tells Lawyer that he committed perjury while testifying before the grand jury that indicted him.

Lawyer is subject to discipline if she:

A. continues to represent Bugsy.

B. continues to represent Bugsy unless he admits his perjury.

C. does not inform the authorities of Bugsy's perjury.

D. informs the authorities of Bugsy's perjury.

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 9 of 20

1. Lou Lawyer is Paul Plaintiff's attorney in Plaintiff's breach of contract action against Donna Defendant. Plaintiff makes certain false statements of material fact to Lawyer, which Lawyer includes in the complaint that he drafts and files against Defendant. At trial, Plaintiff testifies to facts as set forth in the complaint. Plaintiff receives a verdict and judgment against Defendant.

One month later Plaintiff writes a letter to Lawyer marked "Confidential Client Communication With Attorney," in which Plaintiff tells Lawyer that he has both lied to Lawyer and has testified falsely at trial. In addition, Defendant now files a complaint with the disciplinary authority that Lawyer used false testimony against him at trial. Disciplinary proceedings are brought against Lawyer.

Is it proper for Lawyer to use Plaintiff's letter to Lawyer in Lawyer's defense in the disciplinary proceedings?

- A. NO, if Lawyer's disclosure could result in Plaintiff's prosecution for perjury.
- B. NO, because Lawyer is responsible for the untrue statements in the complaint.
- C. YES, because a lawyer must report the past fraud of his client.
- D. YES, if it is necessary to do so in order for Attorney to defend himself in the disciplinary proceedings.

QUESTION V. CONTINUES ON THE NEXT PAGE!

1. Alice Attorney represented Husband and Wife in their purchase of a business, which was financed by contributions from their respective separate funds. After the acquisition, the business was jointly operated by Husband and Wife. Five years later, a dispute arose over the management of the business. Husband and Wife sought Attorney's advice and the matter was settled by an agreement drawn by Attorney and signed by both Husband and Wife. Later Wife asks Attorney to represent her in litigation against Husband for fraud and misrepresentation in the negotiations for the settlement agreement.

Is it proper for Attorney to represent Wife in this matter?

- A. NO, because Attorney previously had acted for both parties in reaching the agreement now in dispute.
- B. NO, unless Husband is now represented by other counsel.
- C. YES, if all information relevant to the litigation was received by Attorney in the presence of both Husband and Wife.
- D. YES, if there is reason to believe that Husband misled both Wife and Attorney at the time of the prior agreement.

1. Larry, Curly, and Moe are indicted for armed robbery. Larry and Curly request that Anne Attorney represent them. Attorney interviews Larry and Curly separately. Each tells Attorney that Moe committed the robbery while they sat in Moe's car unaware of what Moe was doing. Attorney agrees to represent both Larry and Curly.

One week prior to the trial, Larry tells Attorney that he wants to plea bargain and would turn state's evidence and testify that Curly had given Moe the gun used in the robbery and that Larry, Curly, and Moe all shared in the proceeds of the robbery.

{Question V. 5. continues on the next page.}

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 11 of 20

Is it proper for Attorney to:

- I. request court approval to withdraw as lawyer for both Larry and Curly.
- II. continue to represent Larry and Curly, but not call Moe as a witness.
- III. continue to represent Larry and, with court approval, withdraw as Curly's lawyer.
- IV. continue to represent Curly, and with court approval, withdraw as Larry's lawyer.

- A. I only.
- B. I and II.
- C. II and IV.
- D. All of the above.
- E. None of the above.

1. Lois Lawyer represents Classic Corporation in a number of small debt collection actions. Willie Worker asks Lawyer to represent him against Classic Corporation in a breach of contract action.

Is Lawyer subject to discipline if she represents Worker against Classic Corporation in the contract action while also continuing to represent Classic Corporation in the debt collection matters?

- I. NO, if the breach of contract action and the debt collection matters are not substantially related.
- II. NO, if Lawyer reasonably believes that she can adequately represent Worker and Worker consents after full disclosure of the conflict.
- III. YES, because of the appearance of impropriety.

{Question V. 6. continues on the next page.}

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 12 of 20

- A. I only.
- B. II only.
- C. III only.
- D. None of the above.

1. At the request of Husband and Wife, Leslie Lawyer prepares wills for each of them. Each will leaves his or her property to the surviving spouse for life, and upon the death of the survivor, one-half to Husband's son by a prior marriage and one-half to Wife's daughter by a prior marriage. Six months after the wills are executed, Wife calls Lawyer and requests her to prepare a new will for Wife that will leave all of Wife's property outright to her daughter.

Is it proper for Lawyer to:

- A. Refuse to prepare the will as Wife requests and not inform Husband of Wife's intent to change her will.
  - B. Refuse to prepare the will as Wife requests, but inform Husband of Wife's intent to change her will.
  - C. Prepare the will as Wife requests, and after it is executed, inform Husband about it.
  - D. Prepare the will as Wife requests, have it executed, and not tell Husband about it.
1. Topsy is being prosecuted for driving while intoxicated in a jurisdiction in which there is an increased penalty for a second offense. Topsy is represented by Larry Lawyer. Topsy tells Lawyer that Topsy's driver's license was obtained under an assumed name because his prior license had been suspended for driving while intoxicated. Topsy asks Lawyer not to disclose Topsy's real name during the course of the representation and tells Lawyer that if he is called as a witness, he will give his

{Question V. 8 continues on the next page.}

assumed name. Lawyer informs Topsy that, in order to properly defend the case, Lawyer must call Topsy as a witness.

Lawyer calls Topsy as a witness and, in response to Lawyer's question, "What is your name?", Topsy states his assumed name and not his true name.

Is Lawyer subject to discipline?

A. YES, because Lawyer knowingly used false testimony.

B. YES, if Topsy committed a crime when he obtained the driver's license under an assumed name.

C. NO, because Lawyer's knowledge of Topsy's true name was obtained during the course of representation.

D. NO, unless Topsy's real name is an issue in the proceeding.

1. Louise Lawyer is representing Sluggo on a charge of armed robbery. Sluggo claims that the prosecution witness is mistaken in her identification. Sluggo tells you about Warren Peace who will testify that Sluggo was at a political rally with him in another city when the robbery occurred. Lawyer knows that Warren Peace really believes that Sluggo was at the political rally with him. However, Lawyer knows that Sluggo sent his identical twin brother, Burpo, to the political rally to be seen by Warren Peace. Sluggo insists that Peace be called as a witness.

Is Lawyer subject to discipline if she calls Warren Peace as a witness and asks him if Sluggo was with him at the political rally?

A. YES, because Lawyer knows that Warren Peace's testimony, although truthful, will be inaccurate because of Sluggo's devious act.

B. YES, unless before calling Warren Peace, Lawyer informs the court of her belief.

C. NO, because Sluggo has a right to the truthful testimony of a witness.

D. NO, because Warren Peace will be testifying truthfully and is subject to cross examination by the prosecution.

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 14 of 20

1. C.P. Account, a certified public accountant, proposes to Lars Lawyer, a recognized specialist in the field of tax law, that C.P. Account and Lawyer form a partnership for the purpose of providing clients with tax-related legal and accounting services. Both Account and Lawyer have deserved reputations of being competent, honest, and trustworthy. C.P. Account further proposes that the announcement of the proposed partnership, the firm stationery, and all public director listings clearly state that C.P. Account is a certified public accountant and that Lawyer is an attorney.

Is Lawyer subject to discipline if he enters into the proposed partnership with Account?

- A. YES, because Lawyer would be receiving fees paid for other than legal services.
  - B. YES, because one fo the activities of the partnership would be providing legal services to clients.
  - C. NO, if Lawyer is the only person in the partnership who gives advice on legal matters.
  - D. NO, because the partnership will assure to the public high-quality services in the fields of tax law and accounting.
1. Alex Attorney serves as outside counsel to Microfirm, a corporation. Attorney discovers what he reasonably believes to be a material misstatement in a document she has drafted at the direction of the Board of Directors and that she is about ready to file with the Secretary of State. Attorney advises Microfirm's Board of Directors that filing the document probably is criminal. The Board disagrees that there is any material misstatement and directs Attorney to proceed with the filing. When Attorney states his intention to resign, Microfirm argues that a resignation at this time would send a signal that there is a problem with the filing.

Microfirm urges Attorney to continue her representation, but offers to use in-house counsel to complete the work on the filing. Although he does not know for certain that filing the document is illegal, Attorney reasonably believes that it is. In any event, Attorney is personally uncomfortable with the representation and wants to withdraw.

{Question V. 11. continues on the next page.}

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 15 of 20

May Attorney withdraw from his representation of Microfirm?

A. YES, because withdrawal is permitted but not required when a client insists on conduct that the lawyer reasonably believes, but does not know, will be criminal.

B. YES, because withdrawal is required when a client insists on conduct that the lawyer reasonably believes, but does not know, will be criminal.

C. NO, if the withdrawal cannot be accomplished without material adverse effect on the interests of the client.

D. NO, if Microfirm is correct that withdrawal will breach confidentiality by sending a signal that the filing is problematic.

1. Clara Client asks Ann Attorney to represent her in a divorce action against her husband. Attorney informs Client that she charges for her time on an hourly basis. Attorney also tells Client that she requires a non-refundable retainer of \$10,000 for taking the case, and that she also will be entitled to a bonus of \$5,000 if she is successful in obtaining alimony for Client.

A. Attorney is subject to discipline for charging a nonrefundable retainer. Attorney is also subject to discipline for charging Client a bonus for obtaining alimony for Client.

B. Attorney is subject to discipline for charging a nonrefundable retainer. But Attorney is not subject to discipline for charging Client a bonus for obtaining alimony for Client.

C. Attorney is not subject to discipline for charging a nonrefundable retainer. But Attorney is subject to discipline for charging Client a bonus for obtaining alimony for Client.

D. Attorney is not subject to discipline for charging a nonrefundable retainer. And Attorney is not subject to discipline for charging Client a bonus for obtaining custody of Client's minor children.

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 16 of 20

1. Abby Attorney represents Spike, the defendant in a criminal armed robbery case. Spike has admitted to Attorney his involvement in the crime. But Spike insists on taking the stand and presenting an alibi defense that he was in Ann Arbor watching the Buckeyes beat the Wolverines when the robbery occurred.

Which of the following statements are true?

I. Spike's Sixth Amendment right to effective assistance of counsel will be infringed if Attorney tells Spike that Attorney will move to withdraw if Spike testifies falsely.

II. Attorney is subject to discipline if Spike testifies that he was in Ann Arbor and Attorney does nothing in response to Spike's perjury.

III. Attorney is subject to discipline for breaching her duty of confidentiality if, after Spike commits perjury, Attorney unsuccessfully attempts to have Spike correct his testimony, and Attorney then informs the court that Spike has testified falsely.

A. I. only.

B. II. only.

C. III. only.

D. I. & III., but not II.

E. I., II., & III are correct.

1. Lester Lawyer represents Hal Husband before the United States Tax Court in connection with an assertion by the Internal Revenue Service that Husband underpaid his taxes in the most recent tax year. Mary, Hal Husband's spouse has asked Lawyer to represent her in a marriage dissolution action against Harry Husband in state court.

{Question V. 14. continues on the next page.}

PROFESSIONAL RESPONSIBILITY

Fall 2001 Page 17 of 20

May Lawyer accept this representation?

- A. YES, if both Hal Husband and wife Mary consent after consultation.
- B. YES, because the subject matter of each representation is total unrelated to the other.
- C. NO, because Lawyer's relationship with each client probably will be adversely affected by the other representation.
- D. NO, unless the Tax Court and the state court each give its approval.

1. Lois Lawyer represents Dodger Dart, who is a defendant in a personal injury action arising out of an auto accident in which Paula Plaintiff was driving Dart's car. Plaintiff asserts that when she attempted to stop the car, its brakes failed. Dart's position is that Plaintiff had driven the car negligently. Lawyer sent her investigator, Paul Drake, to examine the wreck of Dart's car, which had not yet been examined by Plaintiff's experts. Investigator Drake reported back that the line carrying brake fluid to the front wheels was cracked with age and split open in several places and the brake fluid reservoir was empty. The garage containing Dart's car is hit by lightning and burns completely destroying Dart's car before Plaintiff's expert can examine it.

Lawyer:

- A. Must reveal the information obtained by her investigator regarding the brake system of Dart's car in order to avoid perpetrating a fraud upon the court.
- B. Must reveal the information obtained by her investigator regarding the brake system of Dart's car in order to avoid assisting Dart in the perpetuation of a fraud upon Plaintiff.
- C. May reveal the information obtained by her investigator regarding the brake system of Dart's car, because it is not subject to the duty of confidentiality.
- D. Must not reveal the information obtained by her investigator regarding the brake system of Dart's car, because to do so would violate the duty of confidentiality.

1. Marion Haste enters Abby Attorney's office and asks for legal assistance. Haste informs Attorney in confidence that he has just robbed a bank of \$5,000 in cash and has hidden the cash in a freshly poured cement sidewalk a few blocks from the bank, troweling smooth the still pliable cement after he pushed the wad of bills into it. Haste then dies from gunshot wounds he had kept concealed beneath his raincoat. Attorney has been called before a grand jury investigating the disappearance of the stolen \$5,000, where testimony has been presented that Haste robbed the bank of \$5,000, that Haste arrived at Attorney's office five blocks distant 15 minutes later, and that no money was found on Haste's body as it lay slumped in Attorney's office. In front of the grand jury, the prosecuting attorney asks Attorney, "Isn't it true that Haste gave you the \$5,000, which you then agreed to conceal for him?"

Should Attorney reveal where Haste concealed the \$5,000?

- A. YES, because Haste is now dead and the attorney-client privilege dies with the client.
  - B. YES, because it is necessary to respond to the prosecuting attorney's charges made in front of the grand jury that Attorney concealed the money.
  - C. NO, because to do so would violate the duty of confidentiality.
  - D. NO, because Haste has not been convicted of robbing the bank.
- 
1. Chemical dependency is:
    - A. A treatable disease.
    - B. Characterized by defined symptoms
    - C. Fatal if left untreated.
    - D. A substantial factor in many lawyer disciplinary cases.
    - E. All of the above.

1. The Ohio lawyer disciplinary cases considered early in the semester illustrate:
  - A. They usually involve lawyers who face difficult moral dilemmas.
  - B. Lawyers never invent law suits to deceive clients.
  - C. Sanctions imposed on lawyers who are found to have violated disciplinary rules usually seem unduly harsh.
  - D. 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.
  - E. None of the above.

Questions 19 and 20 involve the following situation.

For purposes of these two questions, there is no statute relating to the attorney-client privilege in this jurisdiction. Luke Lawyer represents Harry Husband in a divorce action in which Husband seeks custody of his 12 year old daughter. During the representation, Husband tells Lawyer that in the past he sexually abused his daughter.

1. Is Lawyer subject to discipline if Lawyer does not inform the authorities that Husband has engaged in child abuse?
  - A. YES, because the welfare of children is always the primary value in family court matters.
  - B. YES, because Lawyer's continued representation is a fraud on the court.
  - C. NO, unless Husband's acts are a violation of the state's Sexual Predator Law.
  - D. NO, because the information is confidential.

1. If Luke Lawyer is morally outraged at the prospect of continuing to represent a client who has committed child abuse, which of the following approaches is consistent with his ethical obligations?
- I. Under MR 2.1, Lawyer can urge Husband to seek counseling or take other steps to deal with his problem.
  - II. Under MR 1.16(b)(3), Lawyer can move to withdraw.
  - III. Under MR 1.6(b)(1), if Lawyer believes that the abuse is ongoing, rather than a past act, Lawyer has the discretion to reveal the information.
- A. II only.
- B. I & III, but not II.
- C. I, II, & III.
- D. Not I, II, or III.

END OF EXAMINATION

PROFESSIONAL RESPONSIBILITY  
DEBRIEFING STATEMENT

Fall 2001 Professor Tibbles

I.

- 1.
- 1.
- 1.

II.

- 1. DR 3-101(A)  
MR 5.5(b)  
Restatement §4
- 1. MR 7.6  
No Model Code provision directly applicable.  
No Restatement § directly applicable.
- 1. MR 8.2(b)  
DR 8-103  
No Restatement § directly applicable.
- 1. MR 4.3  
No Model Code provision directly applicable.  
Restatement §103
- 1. DR 6-102(A)  
MR 1.8(h)  
Restatement §54(2)
- 1. Fee Customarily Charged in the Locality  
MR 1.5(a)(3)  
DR 2-106(B)(3)  
  
General Guidance on Fees  
MR 1.5(a)  
DR 2-106(A)
- 1. MR 1.5 Comment [5]

### III.

In ABA Standing Committee on Ethics & Professional Responsibility Formal Opinion 95-390 (1995), casebook supplement 87-101, the Committee is asked “whether a lawyer who represents a corporate client [Fidelity Service Corporation in our problem] may undertake a representation [of Stratagem in our problem] that is adverse to a corporate affiliate of the client [Heron International in our problem] in an unrelated matter, without obtaining the client’s [Fidelity’s] consent.”

The ABA Committee states its conclusion as:

“It is the Committee’s opinion that the Model Rules of Professional Conduct do not prohibit a lawyer from representing a party adverse to a particular corporation merely because the lawyer (or another lawyer in the same firm) represents, in an unrelated matter, another corporation that owns the potentially adverse corporation, or is owned by it, or is, together with the adverse corporation, owned by a third entity. The fact of corporate affiliation, without more, does not make all of a corporate client’s affiliates into clients as well. Nonetheless, the circumstances of a particular representation may be such that the corporate client has a reasonable expectation that the affiliates will be treated as clients, either generally or for purposes of avoidance of conflicts, and the lawyer is aware of the expectation.

“In any event, although the ethical propriety of a given representation will depend on the particular circumstances, the Committee believes that as a general matter, in the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client’s consent before the lawyer undertakes a representation adverse to its affiliate.”

The ABA Committee provides its rationale by asking and answering three questions:

“(1) Is the corporate client’s affiliate [Heron] also a client, or entitled to be so treated for purposes of Rule 1.7?” The Committee’s answer is NOT ALWAYS.

The client-lawyer relationship is principally a matter of contract—express or implied. A corporate affiliate must be treated as a client if the lawyer has agreed so to treat it, regardless of whether any actual work has been or is to be performed for the affiliate. ....whether the circumstances are such that the affiliate has reason to believe, from the nature of the lawyer’s dealings with it, that it has a client-lawyer relationship with the lawyer. The nature of the lawyer’s dealings with the affiliate of the corporate client may be such that they have become clients as well. The lawyer’s relationship with the corporate affiliate may lead the affiliate reasonably to believe that it is the lawyer’s client. The affiliate may have imparted confidential information to the lawyer with the expectation that the lawyer would use it in representing the affiliate.

“(2) If the affiliate [Heron] is not a client, is the representation adverse to the affiliate [Heron] also ‘directly adverse’ to the corporate client [Fidelity] so as to bring it under Rule 1.7(a)?” The Committee’s answer is NO.

“(3) If Rule 1.7(a) is not applicable, will the lawyer’s [your firm’s] responsibilities to one or the other client [Stratagem or Fidelity] nonetheless materially limit the lawyer’s representation so as to bring Rule 1.7(b) into play?” The Committee’s answer is that even if under the Committee’s new view MR 1.7(a) does not bar a particular representation, the lawyer must also be sure that the representation does not violate MR 1.7(b).

The ABA Committee concludes “...although in situations involving an unrelated suit against an affiliate of a corporate client [Heron], the client [Fidelity] may be adversely affected, that adverseness is, for purposes of Rule 1.7, indirect rather than direct, since its immediate impact is on the affiliate [Heron], and only derivatively upon the client [Fidelity]...”

After concluding that the conflict is not a “direct conflict” governed by MR 1.7(a), which would have required that you obtain Fidelity/Heron’s consent to your representing Stratagem in a suit against Heron, the ABA Committee also advises that “...the lawyer must also be sure that the representation does not fall afoul of Rule 1.7(b)...”

Let’s apply MR 1.7(b) to representing Stratagem in a suit against Fidelity’s corporate affiliate, Heron. MR 1.7(b) provides:

“(b) A lawyer [you] shall not represent a client [Stratagem] if the representation of that client [Stratagem] may be materially limited by the lawyer’s [your] responsibilities to another client [Fidelity] or to a third person, or by the lawyer’s own interests, unless: (1) the lawyer [you] reasonably believes the representation [of Stratagem] will not be adversely affected; and (2) the client [Stratagem] consents after consultation...”

Comment [4] to MR 1.7 discusses the language “may be materially limited by the lawyer’s responsibilities to another client.”

“[4] Loyalty to a client is also impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client...”

Your client, Stratagem, will sue Heron over a dispute in their joint venture to purchase land & construct a building. You represent your other client, Fidelity, a wholly-owned subsidiary of Heron, in labor matters unrelated to the Stratagem-Heron joint venture. You can reasonably conclude that your representation of Stratagem, even if the may be materially limited, will not be adversely affected by your representation of Fidelity in its labor matters. Under the ABA Committee’s Opinion, Stratagem’s consent is the only consent you need. Fidelity/Heron’s consent is unnecessary.

However, you should keep in mind the ABA Committee's advice that, even under its new & still minority position on this issue, the better course is often for a lawyer to obtain the corporate client's consent undertaking a representation that is adverse to its affiliate.

#### IV.

Neither the Model Rules, the Model Code, nor the Ohio Code of Professional Responsibility provide for "screening" to avoid imputing disqualification of all of the lawyers in the new firm of a lawyer who is changing law firms. MR 1.10; Ohio DR 5-105(D). However, the recent Ohio case of Kala v. Aluminum Smelting & Refining Company, 81 Ohio St. 3d 1 (1998) {specifically assigned & analyzed in class} appears to hold (or is it just dicta?) that a law firm should not be "automatically disqualified from representing a party when an attorney leaves his or her former employment with a firm representing the opposing party....If applied properly, screening mechanisms to insulate a quarantined attorney from the rest of the firm can protect client confidences while allowing for attorney mobility & the right of a client to choose counsel." But the Supreme Court of Ohio held that under the circumstances of that case "the appearance of impropriety was so great that Duvin's erecting a Chinese wall was insufficient to overcome the appearance of impropriety."

Let's use the Kala court's analysis:

Kala says that in ruling on a motion for disqualification of either an individual (primary disqualification) or an entire firm (imputed disqualification) when an attorney has left a law firm & joined a firm representing the opposing party, a court must hold an evidentiary hearing & issue findings of fact using a three-part analysis:

(1) Is there a "substantial relationship" between the matter at issue & the matter of the former firm's prior representation? YES, it is the same case.

(2) If there is a substantial relationship between these matters, is the presumption of share confidences within the former firm rebutted by evidence that the attorney had no personal contact with or knowledge of the related matter? Tough call! PROBABLY NOT. Although Lynda did not formerly represent the client, Sandy Beach, (therefore not covered by MR 1.9(a)), it appears that she may have acquired confidential information about the individual client, Sandy Beach, while at her former firm (therefore covered by MR 1.9(b). {Keeping in mind that Ohio has not adopted the Model Rules.) All we know is that Lynda, who was not part of the team handling the Sandy Beach litigation for the Humble law firm, was asked by a member of the firm's litigation team about the EPA's policy on waste water runoff on the property in question. We do not know the extent to which Lynda learned confidential information about her firm's client or about the property. It is a close question as to whether Lynda is personally disqualified.



(3) If Lynda did acquire confidential information about the client or the property while at the Humble law firm, did the new law firm, Day & Knight, erect substantial & timely screens that will be recognized as rebutting the presumption of shared confidences with the new firm so as to avoid imputed disqualification of the entire firm from continuing to represent Warren Peace? The facts state that the Day & Knight law firm set up timely & substantial screens as described by Professor Simon in our casebook & set up by the Duvin law firm in Kala. Thus, if screening is to be permitted, then in terms of timeliness & substantiality these screens meet both Simon's & Kala's requirements.

In Kala, the court found that, although the screens probably were erected as soon as possible & probably were adequate to isolate the contaminated lawyer, the lawyer (1) formerly represented the client & (2) while representing the client negotiated for a position with the opposing law firm. The court found that this was an unacceptable "appearance of impropriety" apparently under Canon 9 of the Ohio Code of Professional Responsibility.

But in our case, Lynda never represented the client while at her old firm. If she is contaminated, it is only because she may have acquired confidential information about the client early in the case, before she began negotiating for employment with the new firm. Lynda never represented the client & was not otherwise involved in the case at the time that she began negotiating for employment with the new firm.

Both law firms are large law firms (of what relevance?)

Sandy Beach is an individual client, not a corporation (of what relevance?).

Lynda's involvement in the case was entirely internal within the Humble law firm, probably not even known by the firm's client Sandy Beach, apparently was not known to the public, & probably known by the Day & Knight firm only because Lynda told them during the employment negotiations.

Lynda's involvement in the case was before the suit was filed, long before Lynda began employment talks with Day & Knight, the law firm representing the opposing party, & even longer before the trial of the case began.

Lynda's involvement appears to be limited to the policy of the EPA on waste water runoff.

Is this lesser involvement in this case sufficient for the Ohio Supreme court to permit screening at the new firm so as to avoid imputed disqualification of the entire firm. Or would the Ohio Supreme court find that this situation also had an unacceptable "appearance of impropriety"? If the latter, what kind of case would satisfy the Ohio court? Those are the issues for you, the judge, to decide on Sandy Beach's motion to disqualify the entire Day & Knight law firm.

V.

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|-------|-------|
| 1. A  | 11. A |
| 2. D  | 12. A |
| 3. D  | 13. B |
| 4. A  | 14. C |
| 5. A  | 15. D |
| 6. D  | 16. B |
| 7. A  | 17. E |
| 8. A  | 18. E |
| 9. A  | 19. D |
| 10. B | 20. C |

Happy Trails!