

PROFESSIONAL RESPONSIBILITY

Section A
Section M

FINAL EXAMINATION
Spring Semester 2002

Professor Tibbles

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; and your copy of Gillers & Simon, Regulation of Lawyers: Statutes & Standards (2002) {the edition with the blue 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, and 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 and 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 2001, appearing on pages 3-461 of the 2002 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 1983, appearing on pages 529-565 of the 2002 Edition of Regulation of Lawyers.....

When the ABA Code of Judicial Conduct is referred to, it is the version appearing on pages 601-645 of the 2002 Edition of Regulation of Lawyers....

The examination consists of VI. Roman Numeral questions on 8 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. NEVER TEAR A PAGE OUT OF YOUR BLUEBOOK.

When you have completed the examination, please make certain that your examination number appears in the proper place on your Bluebook and place it 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(hopefully) a debriefing memo on the examination will be placed in your student mailbox at the end of the examination period.

I. (15 minutes)
(1 Bluebook page)

You are the newly hired associate at a prestigious Ohio law firm. The senior partner gives you your first major assignment. For this assignment, you may assume that the ABA Model Code of Professional Responsibility is in effect in Ohio. The senior partner tells you that a former non-lawyer employee of the firm, Sara Bellum, left the firm about a month ago to take a similar position with the Able & Baker law firm. While at your firm Sara Bellum worked on the *Abbott v. Costello* litigation, which is presently on appeal to the Supreme Court of Ohio. Briefs are due in two weeks and oral arguments are scheduled for next month. Your firm is representing Abbott. The Able & Baker law firm is representing Costello and has represented Costello in many matters over the past decade.

Your senior partner tells you that Sara Bellum was an integral part of the trial team at this firm and was present during all client and witness conferences and at all strategy conferences. She took notes and shared in discussions of the case. Sara Bellum was privy to trial strategy and potential witness testimony. She interviewed several potential witnesses, researched Ohio law, and prepared the exhibits and documents introduced into evidence at the trial. She attended all sessions of the trial and in the evenings participated in the meetings of the trial attorneys who were preparing for the next day's court session.

Your senior partner tells you that he is considering moving to disqualify the Able & Baker law firm. Your senior partner asks you (1) to briefly and clearly state the three-part test to determine whether disqualification is proper when one attorney leaves a firm and joins another firm representing an opposing party as set out in the case of *Kala v. Aluminum Smelting & Refining Company*; (2) to briefly and clearly state the analysis for ruling on a motion to disqualify a lawyer based on that lawyer's employment of a non-attorney once employed by the lawyer representing an opposing party as set out in the case of *Green v. Toledo Hospital*; and (3) to briefly and clearly state the test/analysis that you believe that the Supreme Court of Ohio would use in ruling on a motion to disqualify the Able & Baker firm because of Sara Bellum's moving from your law firm to the Able & Baker law firm.

Perform the requested task.

{Question II. begins on the next page}

II. (25 minutes)
(2 Bluebook pages)

1. **{Limit one Bluebook page}**

You are a member of the “ABA Ethics 2002 Commission” established to study the ABA Code of Judicial Conduct and to make recommendations for any needed changes in the CJC. You are asked to review the limits that the CJC places on what judicial candidates (both incumbent judges and want-to-be judges) can say while running for office and what judges can say while in office about their views on issues of law or public policy. You are asked to (1) briefly identify and summarize the limits stated in the CJC, (2) state which ones, if any, you recommend changing, (3) clearly state your recommended changes, and (4) briefly provide your reasons for your response.

2. **{Limit one Bluebook page}**

In a surprise assignment, your “ABA Ethics 2002 Commission” has also been asked to consider another matter. As you know, there have been recent disclosures of attorneys either advising clients to destroy documents or destroying the client’s documents themselves, i.e., the Enron situation. You are asked to consider whether MR 3.4(a) of the Model Rules of Professional Conduct should be amended to read as follows:

“In representing a client, the lawyer shall not advise or assist in the destruction of documents, records, or other real evidence when the lawyer knows or reasonably should know that they are relevant to any foreseeable, planned or pending action.”

You are asked to: (1) briefly summarize the differences between the existing MR 3.4(a) and this proposed amendment, (2) clearly state whether or not you would recommend is proposed amendment to MR 3.4(a), and (3) briefly provide your reasons for your recommendation.

{Question III. begins on the next page}

III. (45 minutes)

(2 Bluebook pages; there are 9 subparts to this question)

1. Professor Simon says that the bedrock of the attorney-client relationship is _____, and this rests upon two things: (1) _____ and (2) _____. In your Bluebook, fill in the missing words in Professor Simon's statement.

2. **{Limit 25 words}**

What is the principal significance of MR 1.6 Comment [16] in the ABA Model Rules...?

3. **{Limit 25 words}**

The ABA Ethics 2000 Commission in its proposed amendments of MR 1.7, Conflicts of Interest, Current Clients, and MR 1.9, Duties to Former Clients, makes a major change for clients' consent to a conflict. In 10 words or less, what does the E2K propose?

4. The first sentence of MR 3.3(a)(4) of the ABA Model Rules... includes a critical, but undefined term "false evidence." Two distinct meanings can be given to this term, both well established in the law. Briefly and clearly state the two distinct meanings.

5. According to the "Table Comparing Restatement of the Law Governing Lawyers to ABA Model Rules of Professional Conduct" which rule in the Model Rules is most comparable to the Restatement of the Law Governing Lawyers §111?

6. Ray Rogue, a licensed attorney, is arrested for adultery. (1) What is the provision (section and subsection) in the Model Code of Professional Responsibility that arguably makes adultery a violation of the Code? (2) What is the closest comparable provision (section and subsection) in the Model Rules of Professional Conduct? How does the Comment to this rule distinguish the provision in the Model Code from the provision in the Model Rules?

7. Your senior partner tells you that he is concerned about what the Model Rules of Professional Conduct say about the duties of a partner in a law firm to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the disciplinary rules. He asks you to: (1) to identify the rule, if any, that states such a duty; (2) tell him if there was a direct counterpart in the Model Code of Professional Responsibility; (3) whether there is a substantially similar duty stated in the Restatement of the Law Governing Lawyers and, if so to identify the section and subsection number; (4) and to tell him if the Ethics 2000 Commission proposed to expand these duties &, if so, to whom. Perform the requested tasks.

8. (1) As discussed in class, what is the difference in DR 7-102(B)(1) in the Model Code of Professional Responsibility and DR 7-102(B)(1) in the Ohio Code of Professional Responsibility? (2) Even though the Model Code's DR appears to be more qualified than Ohio's DR, what exception to the Attorney-Client Privilege may limit the qualification that was added to the Model Code?

9. With the arrest in California of the actor Robert Blake for the murder of his wife, Los Angeles police (who are not lawyers) have made many statements that they expect the media to communicate to the general population. Some people who hear these statements may be in a jury venire that may be empaneled from which a jury may be selected in Mr. Blake's murder trial. One may suspect that some of the police statements are meant to gain an early public acceptance of the key allegations of their case against Mr. Blake.

Mr. Blake's attorney may want to issue his own statements to the media in order to neutralize the effects of the adverse police media statements and begin to put Mr. Blake's defenses before the public. Assume that Mr. Blake's attorney is exceedingly thorough. As he contemplates what he might say without violating legal ethics, what Rule in the Model Rules, what DR in the Model Code, and what section in the Restatement of the Law Governing Lawyers should he review carefully?

{As you know, California has its own unique Rules of Professional Conduct. At the time of the arrest of O.J. Simpson, California was the only state in the country without a rule restricting extrajudicial statements by lawyers. The story about California's new rule coming out of the Simpson case is related on pages 746 - 747 of the 2002 Edition of Regulation of Lawyers. You may be interested in reading this story after the examination.}

IV. (1 hour 10 minutes)
(4 Bluebook pages)

1. On pages 19 - 24 of the casebook is a "Secrecy Scenario." On page 21 is the following question: "Is your conversation with Don Grimm covered by the attorney-client privilege? Is it protected by Rule 1.6? Are your notes of the conversation protected by the work product doctrine?" Answer this question briefly with your reasoning.

2. On page 27 of the casebook, Professor Simon has "Pop Quiz I."

{In D.3. of the quiz be sure to correct the sentence to read: 3. "What did ~~Smith~~ Thomas say to you at the accident scene?"}

For each of the nine statements in quotation marks, i.e., A., B.1., B.2., B.3., C.1., C.2., D.1., D.2., & D.3., state either that it is "Privileged" or that it is "Not Privileged."

3. On pages 319 - 321 of the casebook is "C. Another Meeting of the Firm's Conflicts Committee." On page 320 is "Item E. Hiring a new Associate." Answer the question asked in Item E. Identify the rules upon which you rely.
4. On pages 343 - 345 of the casebook is "C. Another Meeting of the Firm's Conflicts Committee." On page 344 is "Item D. Representing co-plaintiffs in an auto accident case." What are the conflicts in this scenario?
5. On pages 343 - 345 of the casebook is "C. Another Meeting of the Firm's Conflicts Committee." On page 344 is "Item E. Representing business competitors." What are the conflicts in this scenario?

V. (20 minutes)
(1 Bluebook page)

Consult the material on Ch. 15 in the casebook supplement pages 87 - 101. You represent Pepsi Cola in trade mark matters. Assume that Pepsi Cola owns both Taco Bell and Kentucky Fried Chicken so that all three corporations are "affiliates." Pepsi is considered the "parent" corporation and Taco Bell and KFC are "subsidiaries." Consider the question, "If you represent Pepsi Cola, may you ethically represent some other client, Bob, against Taco Bell without getting Pepsi Cola/Taco Bell's consent?"

1. If an affiliate (say Taco Bell) is a "client," state in one sentence what subsection of what rule in the Model Rules of Professional Conduct applies, for what reason, and whether Taco Bell can veto your representation of your other client, Bob.
2. If an affiliate (say Taco Bell) is not a "client," state in one sentence what subsection of what rule in the Model Rules of Professional Conduct applies, for what reason, and whether your other client (Pepsi) can veto your representation of your new representation of Bob.
3. In one or two sentences state the conclusion of the ABA Formal Opinion 95-390 (1995). You may quote one or two consecutive sentences directly from the ABA Opinion if you find one or two consecutive sentences that you think clearly state the Committee's conclusion.
4. In his dissent, Lawrence Fox argues, "Thus, in one unfortunate opinion the majority has turned a Rule of Professional Conduct designed to protect clients into one that can be used to permit lawyers freely, and without consultation, to take positions which destroy traditional notions of client loyalty and client concern." {Supplement page 97.} In one sentence state who you believe has the better argument, the majority or Mr. Fox, & state why.

VI. (5 minutes)
(2 lines)

When Mr. Scott Mote was a guest lecturer in the class, he and the reading materials that he presented outlined the principal characteristics of a disease as follows:

Primary Disease

The disease itself causes the drinking or drug use. It is not secondary to some other disease of mental illness, etc.

Chronic

There is no cure for the disease, but it can be treated and controlled.

Progressive

The disease always gets worse, it does not get better and there is no turning back and beginning all over again as if one never drank or used.

Fatal

This is a fatal disease if not controlled. It always leads to premature death and serious health problems even if the death certificate indicates the cause of death to be one of the complications of the disease, e.g., heart problems, liver failure, bleeding ulcers, cancers, etc.

Treatable

The disease can be controlled if the drinking or drug use is stopped. It is much like diabetes in the sense that if body chemistry is stabilized by not drinking or using then the alcoholic may lead a normal life. Recovery rate among the general population who have undergone appropriate treatment is around 70% and among some professional groups as high as 90%.

1. What is the name of the disease?

{Question VI. continues on page 8}

The Ohio Code of Professional Responsibility was recently amended to add DR 1-103(C) which reads as follows:

“Any knowledge obtained by a member of a committee or subcommittee of a bar association, or by a member, employee or agent of a non-profit corporation established by a bar association, designed to assist lawyers with substance-abuse problems shall be privileged for all purposes under DR 1-103, providing the knowledge was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or non-profit corporation.”

2. Mr. Mote’s organization is covered by this provision. Name his organization.

END OF EXAMINATION

PROFESSIONAL RESPONSIBILITY
DEBRIEFING STATEMENT

Spring 2002

Professor Tibbles

I.

1. Kala

(1) Is there a substantial relationship between the matter at issue & the matter of the former firm's representation;

(2) If there is a substantial relationship between these matters, is the presumption of shared confidences within the former firm rebutted by evidence that the attorney had no personal contact with or knowledge of the related matter; &

(3) If the attorney did have personal contact with or knowledge of the related matter, did the new law firm erect adequate & timely screens to rebut a presumption of shared confidences with the new firm so as to avoid imputed disqualification.

2. Green v. Toledo Hospital

(1) Is there a substantial relationship between the matter at issue & the matter of the nonattorney employee's former firm's representation?

(2) Did the moving party present credible evidence that the nonattorney employee was exposed to confidential information in his or her former employment relating to the matter at issue?

The presumption of shared confidences that is at the core of Kala is inappropriate for nonattorneys.

In cases involving nonattorney employees, the party moving for disqualification may not rely on any initial presumption, but instead must present evidence that the former employee has been exposed to confidential information in the relevant case. Once evidence has been presented, the court must hold an evidentiary hearing in which the party moving for disqualification has the burden of proving that the nonattorney has been exposed to relevant confidential matters.

(3) If such evidence was presented, did the challenged attorney rebut the resulting presumption of disclosure with evidence either that (a) the employee had no contact with or knowledge of the related matter or (b) the new law firm erected & followed adequate & timely screens to rebut the evidence presented in prong (2) so as to avoid disqualification?

3. In Kala, the attorney switched firms, the court uses the presumption of shared confidences in the old firm, & also imposes the "appearance of impropriety" test to trump the entire analysis.

In Green, a legal secretary switched firms, the court does not use the presumption of shared

confidences in the old firm. Instead, the party moving for disqualification, the old firm, must present “credible evidence” that the legal secretary has been exposed to confidential information. But that should not be an unduly difficult burden for the old firm.

In Green the court reasons that most nonattorneys at a law firm are not regularly exposed to confidential information. To expose nonattorneys to the same presumption of shared confidences in the old firm would unfairly taint them & make it more difficult for them to change employment. Nonattorneys seeking employment with a lawyer or law firm in sparsely populated towns & counties would be especially hard hit by the presumption because their former employment would raise the specter of disqualification. The former attorney/employer argued that Kreps was an “integral part of the trial team, was present during all client & witness conferences & strategy sessions, & took notes & shared in discussions. The secretary said that she was not involved in trial preparation meetings or assisting witnesses; she did little except for typing letters. The trial court believed the secretary.

In our case, Sara Bellum was present during client conferences & strategy meetings, interviewed witnesses, researched law, & prepared exhibits. She acted much more like an attorney & much less like a secretary typing letters. Does a “paralegal” like this need the employment protection that the court gives a legal secretary changing jobs? Will the court use the presumption of shared confidences in the old firm to relieve the old firm of the necessity of presenting evidence that the “paralegal” has been exposed to confidential information & treat Sara Bellum like an attorney rather than a clerk/typist? Will there be a trend to treat “paralegals” more like lawyers for other issues, i.e., confidentiality, competence, trial publicity, responsibilities of a subordinate lawyer, direct contact with prospective clients, reporting professional misconduct, misconduct?

The difference in procedure – a presumption of shared confidences without showing more, placing the burden of going forward on the new firm v. the new firm having to present “credible evidence” – would seem to be a matter of the functions that the “paralegal” performed (legal research, interviewing witnesses, involved in litigation strategy v. typing documents). Is that how the Supreme Court of Ohio will view the issue when it has to decide a case on those facts?

II.

1. Identify by Canon number & summarize the limitations on the speech of judicial candidates.

(1) CJC Canon 3.B.(5) – ...without bias or prejudice...by words or conduct...

CJC Canon 3.B.(9) – while a proceeding is pending or impending a judge shall not make any public comment that might reasonably be expected to affect its outcome or impair its fairness or any nonpublic comment that might substantially interfere with a fair trial. Exception for public statements in the course of official duties or explaining for public information the procedures for the court.

CJC Canon 4.B. – judge may speak in extrajudicial activities concerning the law, the legal system, the administration of justice & non-legal subjects.

CJC Canon 4.C.(1) – judge shall not appear at a public hearing or an executive or legislative body of official except on matters concerning the law, the legal system, or the administration of justice.

CJC Canon 4.C.(2) – judge shall not accept a governmental position that is concerned with issues of fact or policy other than the improvement of the law, the legal system, or the administration of justice.

CJC Canon 5.A.(3)(d) – a candidate for judicial office shall not (i) make pledges or promises of conduct in office other than the faithful & impartial performance of the duties of the office; (ii) make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.

CJC Canon 5.A.(3)(e) - a candidate for judicial office may respond to personal attacks or attacks on the candidate's record.

CJC Canon 5.C.(1) - a judge or candidate subject to public election may (a) at any time (i) ...political gatherings; (ii) contribute to a political organization; (b) when a candidate for election (i) speak...; (ii) appear...; (iii) ...campaign literature...; (iv) publicly endorse or publicly oppose other candidates for the same judicial office.

The Minnesota provision goes further & prohibits a judge or judicial candidate from announcing his or her views on disputed legal or political issues.

(2)

(3)

(4) Do any CJC Canons violate state or federal constitutional free speech rights? Prevent a judicial candidate from stating that a particular court ruling was wrong? Or that he or she would change it? Do CJC Canons restrict judicial candidates in ways that other political candidates are not restrained? If so, is that a violation of the First Amendment? Or equal protection? What is it that the public needs to know about a judicial candidate? Does the CJC prohibit a candidate from communicating information?

Judges make law! But they make it in a different manner than do elected legislators (statutes) & elected executives (administrative regulations). What pledges or promises that legislative & executive branch candidates legitimately make while running for office are inappropriate for judicial candidates to make while running for office?

Does the CJC prohibit only the rhetoric, promise making, & distortions that are used in campaigns for other elective offices? Is there a significant difference between elected judges & elected legislators & executive officials so that the campaigns should be run differently? Is what the CJC prohibits only campaign speech that would prevent the judicial candidate from being a fair decision maker after the election or create the impression of prejudice? Are such restrictions necessary to maintain an independent judiciary?

CJC Canon 3.B.(9) restriction on a judge's speech is limited to "while a proceeding is pending or impending." CJC Canon 4.B. permits a judge to "speak in extrajudicial activities concerning the law, the legal system, the administration of justice & non-legal subjects." CJC Canon 5.A.(3)(d) prohibits (i) "pledges or promises of conduct in office," (ii) statements committing or appearing to commit the candidate on "cases, controversies or issues that are likely to come before the court, & (iii) knowing misrepresentations. CJC Canon 5C.(1) permits speaking, media advertisements, campaign literature, & publicly endorsing or opposing other candidates for the same judicial office. Precisely what speech is prohibited by the CJC that should be permitted? Can a judicial candidate comment generally on rules of civil procedure? Rules of criminal procedure? Rules of evidence? Needed judicial procedural reform? The current status of negotiable instruments law?

One interesting argument surfaced in the oral arguments in the Supreme Court involving a Minnesota judicial canon. It was suggested that if a judge can write an opinion & express her views on the issues in deciding a case before her court, it is strange that a judicial candidate cannot express his views on a case before he has read the briefs & heard the oral arguments. Is this a persuasive argument?

Probably CJC Canon 5A.(3)(d)(ii) is the most controversial & the one that you most need to address: "A candidate for judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court."

This issue is covered at casebook pp. 69-70. The proposed amendment of MR 3.4(a) before your Ethics 20002 Commission is the original version of MR 3.4(a) by the Kutack Commission. It was rejected in favor of the present MR 3.4(a).

(1) The present MR 3.4(a) only prohibits a lawyer from "**unlawfully**" altering, concealing, or destroying documents or other evidence, or advising or assisting another to do so. As Professor Simon points out, that does not go very far. Enron's lawyers have not violated the present MR 3.4(a) unless they acted "unlawfully" when they altered, concealed, or destroyed.

The original version, the one now before your Commission, would have prohibited a lawyer from advising or assisting the client to destroy relevant evidence at any time, even if the evidence is relevant only to threatened or possible future proceedings.

(2)

(3) Professor Simon asks “Is the adversary system imperiled because the existing rule allows those possessing evidence to destroy it? If there was a broader prohibition, would lawyers get around it by advising clients that they (the clients) have a legal right to destroy documents?”

Note MR 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client & may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.” {emphasis mine}

Does MRPC 3.4(a) in its current form go far enough or too far.”

Does the current Enron situation give us any additional insight into this problem?

III.

1. Casebook p. 9 “The client’s trust of the attorney rests on two things: (1) *secrecy*, and (2) *loyalty*. To understand lawyers and the legal profession, you must understand secrecy and loyalty...”

2. According to the majority in ABA Formal Opinion 92-366 & others, MR 1.6 Comment [16] allows **noisy withdrawal** “where the lawyer’s withdrawal is ethically *required* because of the client’s intention of using the lawyer’s services (absent effective withdrawal) in a continuing or future fraud.”

3. MR 1.7(a)(2) “each client consents after consultation.” E2K MR 1.7(b)(4) “each affected client gives informed consent, confirmed in writing.”

MR 1.9(a) “...unless the former client consents after consultation.” MR 1.9(b)(2) “unless the former client consents after consultation.” E2K MR 1.9(a) “unless the former gives informed consent, confirmed in writing.” E2K MR 1.9(b) “unless the former client gives informed consent, confirmed in writing.”

4. As discussed in class, taken from Hazzard & Hodes, The Law of Lawyering, 3d Edition §29-12 “..., Rule 3.3(a)(4) actually sets forth two distinct duties. The first sentence – virtually identical to DR 7-102(A)(4) – prohibits a lawyer from knowingly offering false evidence. This sentence is not qualified in any way; it flatly prohibits a lawyer from ‘offering’ evidence she ‘knows’ to be false. The duty applies whether the false evidence will come from a client or from others. The second sentence of Rule 3.3(a)(4) posits a corrective duty: if the lawyer has innocently offered evidence which she only later comes to know was false, she must take ‘reasonable remedial measures.’ This duty only applies if the evidence in question was ‘material,’ and of course it only applies when the lawyer has *knowledge* that the evidence was

false; even well-founded suspicions are not enough.

“Unfortunately, the clarity of the first sentence – and hence the whole Rule – is marred by the inclusion of a critical but undefined term: ‘false evidence.’ Two distinct meanings can be given to this term, and both are well established in law. In one meaning, evidence is deemed to be false if it is objectively erroneous or untrue; the other meaning is that evidence is deemed to be false only if it is a deliberate falsehood known to be such *by the witness*. These variant meanings can yield quite different effects of the Rule.”

5. MR 3.3

6. (1) DR 1-102(A)(3) Engage in illegal conduct involving moral turpitude.

(2) MR 8.4(b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.

MR 8.4 Comment [1] “Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’ That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.” {emphasis mine}

(1) MR 5.1

(2) There was no direct counterpart to this Rule in the Model Code.

(3) Yes. Restatement of the Law Governing Lawyers §11. Actually all subsections.

(4) E2K proposes to expand. MR 5.1 (a) “and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm”; (c)(2) “or has comparable managerial authority”.

8. (1) DR 7-102(A) contains the exception: “except when the information is protected as a privileged communication.” This amendment to the Model Code was not adopted in Ohio & the Ohio Code of Professional Responsibility contains no such exception for either fraud on a court or fraud on other individuals.

(2) Arguably the “Crime-Fraud Exception” to the attorney-client privilege prevents statements of an intent to commit fraud by a client to her attorney from being protected by the attorney-client privilege.

9. MR 3.6

DR 7-107

Restatement of the Law Governing Lawyering §109

IV.

These (except for #2) are the legal analysis questions that ask you to apply the appropriate law to the facts & reason to a conclusion. This Roman Numeral question is worth 1 hour 10 minutes of a 3 hour exam with a limit of 4 bluebook pages. There are 5 major questions: that is about 15 minutes & 4/5 bluebook page for each question. Because #2 is obviously easier & shorter, that means that the other 4 questions assume additional importance.

1. "C. A Secrecy Scenario" on casebook pp. 19 - 24 was included in the assigned material on the course syllabus. It was also specifically assigned in class. In class we discussed a few of the individual vignettes. In addition a special class handout contained answers to all of the individual vignettes in the secrecy Scenario. The crucial issue in this vignette is "Whose Privilege Is It?" We spent considerable class time working with this issue. It occurs when the lawyer while representing one existing client (Mr. Raymond here) has a conversation with another person (Mr. Grimm here) who may think the lawyer can represent him or may ask that the lawyer represent him. Whose privilege is it?

"Is your conversation with Don Grimm covered by the attorney-client privilege? Is it protected by rule 1.6? Are your notes of the conversation protected by the work product doctrine?"

A conversation with a witness is not protected by the attorney-client privilege because it is not a communication with a client. But it is protected by MR 1.6 because the information relates to the representation. The notes are protected by the work product doctrine because they are made by the lawyer in anticipation of litigation or for trial.

But, what about Grimm's question to the lawyer, accompanied by a confession about serving too much liquor? That part of the conversation might be privileged – a potential client was communicating in confidence with a counselor for the purpose of receiving legal counsel. But you have already identified yourself as George Raymond's lawyer. Can Grimm reasonably think that you might become his lawyer? Can he reasonably think a communication to another person's lawyer is confidential? If so, you could not use the communication against him, and could not reveal it even to your client. But it is doubtful that his belief would be reasonable as long as you have identified yourself as George Raymond's lawyer.

2. A. Not Privileged

B.1. Not Privileged

2. Privileged

3. Not Privileged

C.1. Not Privileged

2. Not Privileged

D.1. Privileged

2. Not Privileged

3. Not Privileged

3. What are the conflicts? If Earlham personally worked on any of Control Data's matters – and certainly if he worked on the defense of the Video-Phone suit – then he is personally disqualified under MR 1.9(a) and DR 5-105 unless he can get Control Data's consent. He is presumed to have confidential information (presumption of shared confidences).

What if Earlham did not personally work on any of Control Data's matters? Then the question under MR 1.9(b) is whether he learned anything relevant to the suit, even if he learned it at lunch or in an elevator at his old firm. If he has any confidential information about Control Data that would be relevant to the suit against them, i.e., if Video-Phone's suit against Control Data is "substantially related" to the matters Earlham handled at his old firm – then he is disqualified on that ground unless he gets consent.

Under Mr. 1.10(a) and DR 5-105(D), the whole firm is disqualified if Earlham personally is disqualified, unless the firm can escape the conflict by building a screen. Can it? The states are split. Neither the Model Rules or the Model Code authorize screens in this kind of setting.

What are the conflicts? The passenger may blame the driver. At this point, the passenger probably will say that she has no intention of blaming the driver. But later investigation may show that the driver was partially at fault. Also, if the other driver (the drunk) is uninsured or underinsured, the passenger may have no source of recovery except the driver's policy. (The driver may have "guest" coverage or uninsured/underinsured motorist coverage that would cover a passenger.)

MR 1.7(b) 2d sentence states the rule when representing multiple clients in a single matter. Comment [7] speaks of simultaneous representation of co-plaintiffs or co-defendants in a civil action. MR 1.8(g) is the rule for a lawyer representing two or more clients & aggregate settlements.

At this point the passenger may think that she will not sue the driver, but things can change. We do not know how serious the injuries are, or what the relationship is between the driver & passenger. They may be close friends or they may be two people who barely knew each other. Some jurisdictions have adopted a per se rule against representing a driver and passenger. The firm probably should not accept both people. The firm should interview only one person and refer the other to another law firm that we have worked with before.

5. What are the conflicts? The obvious conflict is that every advantage for one client may be a disadvantage for the other client. Conversely, and less obvious, a blunder in negotiating one client's contract with the union may set a bad precedent for negotiating the other client's contract with the union.

Ordinarily, conflicts of this nature do not pose a problem under MR 1.7(b). MR 1.7 Comment [3] says that "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic interests, does not require consent of the respective clients." But lawyers must be aware that some courts will prohibit simultaneous representation of arch competitors, especially if one factor (such as labor costs) is pivotal to the fortunes of both companies.

We do not know what kind of labor matters the firm has been working on for Capital Tool & Die, or when Capital's contract with the union is up for renewal, or whether it is the same union. If it is the same union, we do not know whether the two companies might benefit by using a coordinated strategy against the union. And we do not know which client would be a better client for the firm in the long run.

The firm could take the new client, Argon, without consent from Capital Tool & Die. But if Capital is a good client, it might be a good idea to seek consent as a practical matter. If Capital objects, we can either refer Argon to another firm, or we can offer to build a screen and see if that satisfies Capital. If nothing satisfies Capital, let's find out now. Then we can decide whether to turn away Argon and keep Capital, or accept Argon and let Capital go elsewhere.

V.

1. If the affiliate (say Taco Bell) is a "client" then MR 1.7(a) applies because the suit is "directly adverse" to a client, and that client can veto the representation. {Supplement p. 87}

2. If the affiliate is not a "client" then MR 1.7(b) applies and your other client (Pepsi) cannot veto the new representation unless your existing representation of Pepsi may be "materially limited" by your representation of Bob. {Supplement p. 87}

3. Supplement pp. 88-89: "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."

Supplement p. 94: "We conclude, then, that although in situations involving an unrelated suit against an affiliate of a corporate client, the client may be adversely affected, that adverseness is, for purposes of MR 1.7, indirect rather than direct, since its immediate impact is on the affiliate, and only derivatively upon the client.

4. Majority, Supplement pp. 91-92: "While competent general counsel can be expected to be familiar with the corporate family and the expectations of one member as to the treatment of other members, outside lawyers who are performing only a limited role for a single aspect of the business, no matter how well-intentioned, should not be expected to be current on all of the names, relationships and ownership interests among a [Fortune 500] client's varied and sometimes far-flung business interests. A lawyer who has no reason to know that his potential adversary is an affiliate of his client will [should] not necessarily violate MR 1.7[(a)] by accepting the new representation without his client's consent."

Dissent, Supplement p. 100: "The majority...thinks this conflict result can be ameliorated because the client who learns its lawyer is suing a member of the corporate family can simply fire the lawyer for this unfortunate conduct. However, as all lawyers recognize, firing one's counsel is rarely a satisfactory solution and often an impossibility, given the pressures of time and the extraordinary costs associated with hiring a new counsel. Moreover, the last thing

this Committee should ever condone is a device which would permit lawyers, who wish to take on a new, more lucrative engagement from which they are precluded because of some conflict, to place their clients in a position where they have a Hobson's choice of waiving the conflict or firing their lawyers."

VI.

1. Ohio State Bar Association, Substance Abuse in the Legal Profession pp. 3-4: "Alcoholism is a primary, chronic, disease with genetic, psycho-social and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences and distortions in thinking, most notably denial...What are the principal characteristics of the disease?...."

2. The Lawyers Assistance Committee of the Ohio State Bar Association
or
The Ohio Lawyers Assistance Program, Inc. (OLAP)

GENERAL COMMENTS ON EXAMINATION WRITING TECHNIQUES

Carefully following instructions is very important in law school examination writing & bar examination writing, as well as in the practice of law. Of necessity litigation & administrative law practice must have a large stable of instructions, procedures, & rules that lawyers must follow. Otherwise the system would collapse under its own weight. So learning how to carefully follow instructions not only benefits you on law school & bar examinations, it also benefits both you & your clients in the practice of law. If the instructions say begin each Roman Numeral question on a new bluebook page & place the Roman Numeral in the middle of the top line of the page, you should do that – for every Roman Numeral question. If the instructions say number your answers precisely as the questions are numbered, you should do that. If there is a page limit for a question, you should abide by it.

Your writing should be large enough so that it can be easily read. Think of the person who is reading your examination. After reading 50 bluebooks before he or she sees yours, how will the reader react when he or she sees the size of your handwriting? Is that the mood that you want the reader to be in when he or she begins to read your examination? Be careful with abbreviations. You may save yourself a little time & space, but it may come at a price. If the reader is not immediately familiar with your abbreviation & he or she has to stop reading & think about it for awhile – it is likely to interfere with the reader's appreciation of your analysis. What you really want is for the reader to appreciate the cogency of your analysis, not the originality of your abbreviations.

When in doubt, give your reasoning. A statement that there is a conflict of interest without at least a brief analysis of why there is a conflict may not be of much help to the reader. Unless it is clear that the question calls only for a conclusion, you are best advised to make your thinking process transparent – show the reader how you reached your conclusion. The standard formula is: apply the relevant law to the facts & reason to a conclusion. A sentence containing the word "**because**" usually gets my attention. When the writer uses the word because he or

she is likely to be stating some type of reasoning. “The communication is protected by the attorney-client privilege **because**.....” Do not use the wimpy word “since.” Be assertive, especially if you know what you are talking about. “The attorney is personally disqualified under MR 1.9(a) **because**.....” If you deliberately use the word “because” at the key point in your sentence, it is likely to force you to state your reasoning.

If the ultimate issue in a question is one of imputed disqualification of a firm, you need to give your reasoning as to whether or not the entire firm is disqualified. The mere statement that a firm is vicariously disqualified is not of much help. But prior to that, you need to identify the lawyer whose possible personal disqualification may be imputed to the firm. Again you need to show your reasoning as to why the lawyer either is or is not personally disqualified. The mere statement that a lawyer is personally disqualified does not help much either. “If lawyer Earlham has confidential information about Control Data, he is personally disqualified from representing Video-Phone under MR 1.9(b) {or DR 5-105} because..... Your entire firm may be vicariously disqualified from representing Video-Phone under MR 1.10 {or DR5-105} because.....”

Remember the two basic rules on examination writing from your very first semester in law school. (1) Don not repeat the facts. (2) Do not simply repeat Blackletter Law principles in the abstract. This is true even if the Blackletter Law is from Professor Simon’s excellent outlines.

If you have your Rule Book in front of you when you are writing your answer & I have my Rule Book in front of me when I am reading your answer, there are no points given for quoting the Rule. Do not restate the Rule. Get right to the business of applying the Rule to the facts & reason to a conclusion.

Happy Trails!