Exam	No.

# Professional Responsibility Final Exam, December 14,1998 Professor Blackmore

# **Instructions**

This is an open book exam. The exam is three (3) hours. You may use your rules supplement (you are encouraged to do so), your casebook and your notes. No other outside material is permitted. Please use your blue books to answer the essay portion and enter all short answers directly on the exam. Be sure to place your exam number on both blue book and the exam. Unless the Ohio Code of professional Responsibility is set forth assume it is the same as the Model Code. Recall, however that the rules governing the bar go beyond the model code, e.g. admissions, procedure, etc.

#### Part A Essay

- 1. (25 points) Consider all issues even if one or more may be dispositive of the primary question.
  - The personal injury law firm of Kechum and Fleesem, located in a major metropolitan area of Ohio, carried a series of television commercials including the following:
- I A former client appears on the screen and states, "They fought my case all the way to the Supreme Court of Ohio and won." The client was an actual client whose case had been successfully appealed.
- 2. Another spot has a client saying, "They settled my case within two months from the date I first consulted them." The statement is accurate.
- 3. In a third commercial Ms Kechum, a senior partner, sitting in her palatial office, with two "clients" obviously anxiously waiting in the background, says into the camera, "At Kechum and Fleesem there is no charge unless we win your case".
- 4. Yet a fourth spot features Mr. Fleesem. He sits behind his desk with several law books open and presents a "did you know" segment as follows:
  - a. "Did you know that according to the National Institute of Compensation Research that 60% of claims filed by injured victims in auto accident cases in which claimants are not represented by counsel are settled for less than total out of pocket expenses?" Assume the Institute referred to is a legitimate research organization funded by the American Trial Lawyers Association

and that the figures are part of their findings as claimed, (neither of which is true in real life).

b. "Did you know that, in the famous McDonald's "hot coffee" case so-called "tort reformers" use to show need for limiting your rights to compensation, the plaintiff was in her 70s and, after receiving her coffee, she pulled into a parking space to drink it. In trying to get the lid off she spilled it in her lap that resulted in first, second, and third degree burns requiring extensive skin graft surgery". And that McDonald's had had numerous complaints about the temperature of both the coffee and the hot chocolate, which was maintained at the same temperature. So be wary about tort reform. It is your rights they seek to take away."

Ohio Disciplinary counsel has received several complaints about these spots. He has asked you to draft a memorandum exploring all aspects of the possible ethical violations together with the anticipated response of the Kechum firm and conclude with your specific recommendations. In your analysis and recommendations refer to specific Code or Rules provisions. Be sure to indicate which you are using.

# II (25 points)

I have spoken both in and out of class about the intersection of legal ethics and ones personal code of ethics and morality. Sometimes the convergence is congenial, sometimes it is not. The foundation of our entire legal and justice structure is the adversarial system and, in this highly role oriented system, street or day to day ordinary ethics doesn't work. Consider three of the four following issues in this context of societal and legal ethical convergence (three only!):

- 1. Representation of a person you believe to be guilty, or, if a civil case, liable, and this belief is based either on the unmitigated statements of your client, or upon cogent facts arising from your investigation prior to trial.
- 2. Cross examination of a witness who is fragile and whom you believe is telling the truth but other witnesses for the opposing side you genuinely believe were lying but you were unable to bring out these falsities in cross of those witnesses.
- 3. Corporate client's CEO confesses to serious misrepresentation of financial statements to you and is committed to continuing the deception for six more months in order to get the corporation back on its feet.
- 4. An otherwise harmless and casual E-mail exchange of non-lawyers and you, a lawyer, results in an off-the-cuff opinion by you and two or three others in the group to a participant with a particularly difficult problem. As a result you are cited for ethical violations arising out of the exchange based on your casual remarks. Others are not held accountable for their comments.

### Part B (Short answer)

- I. (25 points) Questions may not be of equal weight.
  - 1. What has been the primary contribution of the American Bar Association in the development of a cohesive system of ethics and regulation of lawyers? Be specific.
  - 2. On the same issue, what has been the role of the courts? In Ohio, under what authority has this?
  - 3. The A.B.A. Judicial Code establishes rules of conduct for judges but, because the courts are constitutionally or statutorily created can only be advisory or aspirational. Do you agree? Explain briefly.
  - 4. Briefly explain I.O.L.T.A. In Ohio what are the sources of authority for the use and governance of I.O.L.T.A.?

- 5. You have just closed a real estate matter and are serving as escrow agent. You have \$150,000 to distribute after 72 hours. Must you use your I.O.L.T.A. account? Can you deposit it in your account and simultaneously draw a cashier's check for distribution? What alternative, if any?
- 6. Identify or define the following terms:
  - a) Champerty, barratry and maintenance
  - b) Commingling
  - c) "Chinese wall"

- 7. Under the Code of Professional Responsibility, disciplinary action cannot be taken against a lawyer for violation of an ethical consideration (E.C.). True or false or part true and part false? Briefly explain.
- 8. If you wish to practice law only in the area of worker's compensation in Ohio in what ways may you use to advise the public of this intention?
- 9. Your long time client knows you are purchasing an old farm home and offers to provide a loan on the property interest free for ten years. May you accept his generosity and, if so, under what conditions?
- 10. Same client as 9 above. This time he wants you to write his will and asks you to be his executor and that you serve as attorney for the estate as he has no immediate family and no particular association with distant relatives, all of whom live out of state. Further, he wants to include in his will cancellation of the mortgage indebtedness on your property, if any is due, and to bequeath photographs of your house made at the turn of the century (1900). What, of all of this, is permissible, and under what circumstances?

- 11. Indicate the source of governing law relating to the client/lawyer relationship in the following:
  - a) Ethical relations
  - b) Client-attorney privilege
  - c) Malpractice actions
  - d) Unauthorized practice of law
  - e) Internal revenue practice
- 12. Distinguish the concept of professionalism from that of legal ethics. Draw an example from the Ohio Supreme Court statement on professionalism and the Model Code.

# B. Multiple choice (25 points) These questions are not of equal weight.

Select the best answer in the following questions and circle the letter of your choice on the exam paper. There is only one best answer to the question. If you discover a flaw in any question do your best to give the best answer and note what you consider the flaw to be and if I agree, I will toss out the question for everyone, and, like so many questions of ethics, your reward will be in heaven.

- 1. Rule 11 of both the Ohio and federal Rules of Civil Procedure requires, in effect, the attorney of record to sign all pleadings and motions filed, and, in so signing, the attorney certifies that the instrument is not frivolous or asserted merely for purposes of delay. Sanctions that the trial court may impose on the offending counsel include assessment of attorney fees incurred by the opposing side in fighting the subject instrument.
  - A. As part of the rules of civil procedure, rule 11 is subject to approval by the Supreme Court and therefore is not a usurpation of the exclusive jurisdiction of the Supreme Court regarding regulation of the bar.
  - B. The purpose of Rule 11 is not primarily "disciplinary".
  - C. In the federal judicial system, trial court rule 11 powers are consistent with the plenary authority a trial court has over lawyer discipline.

D.	Rule 11 in state court is consistent with comparable disciplinary rules either in Model Code or Model Rules jurisdictions.
E.	A. and B. above.
F.	C. and D. above.
G.	All of the above
2.	The Pennsylvania law firm of Black and More represented Mariglobe, an international corporation with headquarters in Pennsylvania. Mariglobe changed counsel and Black and More began representing several small corporations that were in competition with Mariglobe. Until Green Corporation became a client, Mariglobe had consented to the firm's representation of its competitors. As to Green, Mariglobe said no. Mr. Black had handled all of the legal work for Mariglobe and was the only person in the firm who had knowledge about Mariglobe in any significant sense. The firm continued to represent Green, having put into place a "screen" around Black all of which was in strict accordance with the Pennsylvania Rules of Professional Responsibility. Through his representation of Marigold, Black had full knowledge of the company's financial condition, its operating procedures, and its marketing objectives. Mariglobe sued Black and More seeking damages and an injunction against the firm from representing Green.
	A. If Black and More were in full compliance with the Pennsylvania Rules of Professional Responsibility by virtue of its genuine efforts to "screen" Black, the court must find for the defendants.
	B. If, after, learning of Mariglobe's intention to sue, Black resigns from the firm, under the Model Rules the conflict is removed and the firm may continue to represent Green.

C. The court may find a duty to protect the confidentiality of clients that go beyond compliance with the rules of ethics.

D. Notwithstanding the Pennsylvania special rule, under either the model code or the model rules there is an irreparable

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conflict.

E. A and B above.

F. A and D above.

G. E and G above.

- 3. Charlene (client) retained Arnold (attorney) in a personal injury matter. The firm has a standard 33 1/3% contingent fee agreement signed by the client providing for no fee, other than out of pocket expenses, in the event of no recovery and the contingent fee percentage regardless of when the case was resolved, before or after trial. The case has been a protracted one requiring a great deal of pre-trial work. The relation between client and attorney has become difficult and Albert often does not return telephone calls from Charlene. Albert has completed extensive discovery, participated in unsuccessful mediation of the case with the insurance company lawyers, completed pretrial work and has developed a trial strategy, but he hasn't called the client. Charlene writes a scathing letter to Albert accusing him of being in "cahoots" with defense counsel. The same day Albert received Charlene's letter he received notification of a trial date three weeks hence. In a moment of frustration Albert writes Charlene and withdraws as counsel, saying he is "no daggone utility". Charlene files a motion with the court seeking an injunction preventing Albert from withdrawing citing the upcoming court date as the reason. The court agrees and denies Albert the right to withdraw. Two days before trial, having found counsel who is willing to take on the case even at this late date, fires Albert. Albert, having reconsidered the stakes now asks the court to deny Charlene the right to fire him and, in the alternative asks the court to award him 25% of any recovery achieved at trial or settlement. He thought this quite generous to his troublesome client.
  - A. The court erred in not permitting Albert to withdraw in the first instance because this is not a criminal case.
  - B. The court may permit Charlene to fire her attorney even at the last moment before trial because a client always has the right to fire an attorney and the prior court order prohibiting Albert to withdraw was a measure protecting her, a protection she now obviously does not want.
  - C. If the judge overrules Albert's request to continue as counsel, at least he is entitled to the benefit of the contingent fee agreement and his offer to reduce the fee to 25% is generous and ought to be allowed especially since the case is so near completion.
  - D. Under the prevailing rule, the reasonableness of attorney's fees must be established by evidence of time and effort expended and cannot be in the form of a percentage contingency, however if there is no recovery Albert is entitled to no fee.
  - E. A and C above.
  - F. Band D above.
  - G. A. B and C above.

- 4. You represent Dracula in a homicide case involving the brutal murder of Victor. In the course of your conversations, Dracula confesses to other similar offenses even though he denies involvement in the pending charge. He, also, indicates that if he is convicted there will be another homicide clearly referring to witnesses against him. Unintentionally, when Dracula leaves your office he leaves behind a handkerchief that has bloodstains on it and that also contained the victim's monogram. He had denied having any contact with Victor.
  - A. As an officer of the court you have a duty to disclose the past offenses related to you by your client, but not the threat about witnesses.
  - B. As an officer of the court you must immediately disclose the threat but not the past offenses.
  - C. As an officer of the court you must turn in the handkerchief immediately.
  - D. As Dracula's attorney you must at this time maintain confidentiality as to all three matters.
  - E. As Dracula's attorney you should first confront him with the handkerchief and if he denies that it is Victor's, you should give it back to him.
  - F. A and C above.
  - G. B and C above.
  - H. D and E above.
- 5. A "noisy withdrawal":
  - A. Arises whenever the attorney's withdrawal is due to illegal or unethical conduct of the client.
  - B. Is an option the attorney at her discretion may elect to do on withdrawal due to illegal or unethical conduct of the client.
  - C. Is not an option, but is required under certain circumstances in which the attorney must withdraw because of illegal or unethical conduct of the client, but only if the conduct would have some significant impact in the future.
  - D. The determination of how "noisy" the withdrawal must be is a matter of discretion of counsel so long as the legitimate objectives of a "noisy" withdrawal are accomplished while at the same time protecting the confidentiality of the client to the extent possible.

- E. A, C and D. above.
- F. B, C and D above.
- G. C and D above.
- H. B and D above.
- 6. Themis is:
  - A. A Greek concept meaning pride and arrogance.
  - B. The Greek Goddess of justice and manners.
  - C. A Hebrew concept meaning whale.
  - D. The greatest lawyer of ancient Greece.

Have a joyous holiday season, remember that adversarial and hostile are not intended to be synonyms and really effective lawyers respect human beings and treat all with civility. Remember, also, the profession of law is a noble one and calls us all to nobility.