

Commentaries on the Professional Responsibility Final Examination

December 1998 Exam

Professor Blackmore

General Comment

I think it may be of some help for you to see what I had in mind with regard to the exam in general and to specific questions in particular. If after reading these comments you would like to talk with me, please give me a call at my home telephone 939-1510. For an open book exam I thought the exam was straightforward for the most part, and I truly thought many would complete the exam in two hours. It came as somewhat of a surprise that most everyone was still hard at work nearing the end of the three hours. Perhaps it is a character of an open book exam that there is more time needed than may be necessary.

Essay Question I

This question had to do with a series of television spots for a law firm. The core of the case and at least one of the spots are taken from an actual Ohio case, reported in 2 Ohio Law Weekly 359. It was front-page news and the headline was "Law Firm Reprimanded for Testimonial TV Ads, Commercials accurate but misleading". A principal finding of the Ohio Supreme Court was that failure to disclose the likelihood of litigation costs even if the client lost was in itself a violation of the Code. I added the other variations to raise the matters of objectivity, client testimonials, self-laudation and unreasonable expectation. The last two segments of "Did you Know..." were intended to raise first amendment issues (even beyond "commercial speech") and to raise the matter of a lawyer's right and even responsibility to engage in matters relating to law and its improvement. Buried in the first spot was a possible question of stirring up litigation by urging victims not to settle. And, finally even if the issues were appropriate in a political sense were they, in the final analysis, primarily "commercial" in nature and therefore subject to the rules regarding advertising. Students raised many other fine points and if appropriately raised I went down the student's chosen road.

Question II

I think it should be immediately apparent that all four scenarios of this question, of which you were to choose three, were issues raised in both the casebook and in class. I took these familiar examples and asked a bit different question about them. What I was after was for you to use these familiar examples to compare the ordinary person's ethical expectations with that of the expectations of an adversarial justice system. It seemed to me that the public would think the lawyer's approach to representing a person whom he or she believed to be guilty, or to vigorously cross examine a witness believed to be telling the truth is sacrificing the "right" for trickery or worse. Yet, we know the matter is far less clear and far more complex. On the last two scenarios, arguably, the public might wonder what all the fuss is about. Perhaps the some would find the corporate problem to be a case where two wrongs would make a right. They might say let the CEO go. He's messed things up but the only way the shareholders and the bank are going to win is if he has six more months. Watch him carefully and let it go. Yet, as lawyers, the principal is too grave and important to the integrity of the lawyer client relation. The last item is the "E-mail chat group". Again some lay persons might say, "Come on, what's the big deal? Everyone knew or should have known this wasn't a search for legal answers but was really a support kind of thing." Yet, as most everyone observed our standards must be maintained high and utterly clear so that clients will know when they can count on their lawyers.

This question invited a contrasting and, perhaps, a convergence of thought as to the public's sense of justice and the vehicles to achieve it and those of the legal profession. Most people saw the latter, but not always the former point.

Part B Short answer questions

Not much needs to be said about the first set of short answer questions. Most everyone did just fine on this section. Frankly, since this was open book I was concerned about how challenging this part would be. Some questions did present problems. I was fairly liberal in giving credit or partial credit on this section.

Quest 3: This is the I.O.L.T.A. question. Pretty easy. I hoped you would not confuse trust accounts in general with this very specific account designed to protect clients funds and to help finance legal assistance to the poor at the same time, all without taking a significant earned income entitlement that the client has. Also, I wanted you to recall that the primary source of authority for these accounts, on which regulation of the Supreme Court as to details of lawyer expectation are built, is the Revised Code. Quest. 4 asks you to apply the principles to a hypothetical.

Quest 6. Term identification.

A) Champerty, etc. On these terms I was primarily interested in your understanding that these are common law concepts that governed a mindset about lawyers and litigation that governed attitudes about the adversary system and lawyers for decades. For example advertising, fee splitting and the contingent fee.

B) Commingling no comment necessary.

C) "Chinese wall" To know this you had to have read the text or paid attention in class and probably to have noted it in your notes. It is a legitimate question as it relates to a limited option permitting a law firm not to be tainted by a member of the firm's prior relationship with a client or the opponent by isolating the attorney from any communication with any member of the firm regarding the subject case or client.

Quest 9 and 10. These questions relate to conflict of interest between lawyer and client. Students seem to have a great deal of problems making meaningful, principled decisions in this area. The gift of interest free loan doesn't bother me as much as it does for many of you. Disclosure, yes; advise to seek other counsel yes; putting clients intention in writing a good idea; unethical to accept under any circumstance, no. But 10 is a different matter. A lawyer may not draft a will that includes a substantial gift to him or herself. The lawyer may, however be the executor. The photos probably have no substantial market value.

Quest 11. This one throw a lot of people. It surprised me because I thought we had talked quite a bit about the "other" vehicles in the law that might apply to an attorney in his or her capacity as a lawyer. Malpractice actions in tort or contract--common law or statute; client-attorney privilege--the rules of evidence; unauthorized practice of law- criminal statute; Internal Revenue Service-administrative regulation, etc.

Part B Multiple Choice

Now for the big ones. These were a bit difficult and required careful analysis. As you may see on your exam, I gave partial credit for some answers and I gave an option of two answers for full credit on one. Let's look at them.

Quest 1 The best answer is G- all of the above. With this question I was hoping you would see the interaction of civil rule 11 and the code of ethics. Rule 11 is not primarily an ethics rule, but is a civil rule designed to discourage frivolous and groundless claims, defenses and motions, but since the supreme court approves rules of civil procedure and rules of ethics there is no constitutional incompatibility in these rules. In federal cases the same trial judge who may rule on a rule 11 case will also govern the practice of the attorney in his

or her district so quite consistent. And finally Rule 11 is quite consistent with the ethics rules on bringing actions or making groundless, frivolous or harassing claims or defenses. If you didn't choose G, I gave you one point for any other answer.

Quest. 2. This fact pattern arises out of an actual case decided in Pennsylvania. The best answer is C; however, on analyzing D I decided that it was too fine a "parse" to argue the "Chinese wall" point so I decided to give full credit for either C or D. The actual case is precisely on these points. Choice A is incorrect because this is a malpractice action, not a disciplinary one. So the court is not limited to whether the Pennsylvania ethics code authorizes this course by the law firm and the Pa. Court so held. Choice B is not a good one because it is obvious that Black's resignation came only after the Corporation announced its intention to sue, To little, too late.

C is in direct contrast to A. This is the best answer.

D. But this isn't a bad answer either. I originally thought R was worth positing an adequate screening by the firm. On reflection I decided to accept this answer under this statement of facts.

By extension of the reasoning above E, F and G are not correct.

Quest. 3. F is the Best answer. I gave half credit either B or D. This is the crazy client and attorney withdrawal case in a contingent fee type of case.

A is not correct. The court has authority over counsel of record in any type of case.

B is correct, especially since it talks about the power of the court to take action, not that the court would take the requested action. The refusal to let counsel out and to let client fire her attorney are very different issues.

C is designed to raise the issue of attorney fees earned prior to dismissal. What I wanted you to see in this answer is the effort to convert the "reasonable" attorney fee simply into a contract action, which is definitely not the rule.

D is also correct. The case from which this fact pattern was taken represents the overwhelming number of jurisdictions on this point.

Quest. 4. Dracula and Victor. The correct answer is H. I gave half credit for D or E. Obviously this question challenges the tension between an attorney's obligation to his client and the obligation as an officer of the court. Of all of the choices A is the worst. We talked in class on several occasions about the overriding duty of confidentiality as to past acts of the client.

B is a closer call, but not that close. If an attorney goes running to the court every time a client says an intemperate thing, the system would crash. The threats about witnesses is dearly conditional and there is plenty of time remaining during which counsel may have a calming effect upon the client. Too soon, don't blab yet!

C says turn over the handkerchief. Here again, we have a denial from the client that the handkerchief was Victor's and only the letter V on the handkerchief to suggest it belongs to Victor. You need to know more before blowing the whistle.

D is a correct statement, directly presenting the opposite view of A. B. and C.

E is a correct statement or at least an acceptable course. You don't want to keep the evidence, you don't have sufficient evidence from the clients own mouth or otherwise to link the evidence for sure to Victor, so, give it back. Maybe a small sermon might be in order as to what Dracula should do with it.

So, that makes H the best answer.

Quest. 5. The best answer here is G. Again, half credit for C or D. This entire question relates to the attributes of a so-called "noisy withdrawal."

A is clearly an incorrect statement of ethics. Withdrawal maybe, but breaking the duty of confidentiality requires much more.

B is also incorrect. It is not the attorney's choice. The grounds for a noisy withdrawal are a matter mandated by the Code or the Rules. And that leads to C. and D.

C correctly states that a -noisy withdrawal is required if there is future crimes, unethical or fraudulent conduct involved. Then, the discretion of the attorney now comes into play as to how "noisy the withdrawal has to be, whom is informed and to what extent.

Quest 6. This question was intended as a gift. But, it does relate to a principal theme throughout the course and it was presented in class. So, for the more than 2/3 of the class who answered the question correctly you received 4 points. For those who missed it, I counted only 2 points off and all scores were computed accordingly.

That's my take on the exam. If you wish to call please do. Best wishes in your final year and in the practice.