

Legal Ethics-Final Exam
Spring, 2009
Professor Cross

This is a 3 hour exam. There are 5 questions. At the beginning of each question, the value of the question is given (the number of points), along with a suggested time frame for answering the question. The maximum number of pages that you may use for your written answer to each question is also given.

You are to assume that you are in a jurisdiction where the ABA Model Rules of Professional Conduct apply. Otherwise, this is an open book exam.

Please number your blue books (1 of 2; 2 of 2, etc.). Please write your Student Identification Number (not your name) on each of your blue books. Please also write "Cross" on each of your blue books.

Please keep in mind that your task is to extract the ethical issues from the fact patterns and/or questions posed. I am looking not only for your conclusions but also for an organized and concise analysis that leads to such conclusions.

GOOD LUCK!

Question 1 (25 points; suggested time 50 minutes, 6 pages maximum)

Part I You are an associate attorney working with a senior partner on a medical malpractice action against a physician/surgeon and the hospital that employs the physician. The alleged malpractice occurred during the recent surgery of your client. During the course of the surgery, an anesthesiologist, three nurses and a scrub technician were present. You are aware that the hospital administrator has interviewed all of these employees concerning the incident in question. Your boss, the senior partner, wants to know from you:

Can you obtain any written summaries that may exist of such interviews? You assume but are not sure that the interviews were conducted at the direction of the hospital's in-house counsel. Does this make a difference?

Can you interview the employees yourself? The senior partner wants to avoid any costly formal depositions at this point. Please read entire question before you answer.

You have learned that the anesthesiologist, although not a party to the action, has initiated communication with the hospital's in-house counsel, presumably to seek legal advice on his own regarding the lawsuit. Does this present a problem?

In addition, one of the three operating room nurses has retained independent legal counsel. Despite this, she recently called your office and left a message that she wants to speak "off the record" about what happened during the surgery. How should you respond?

Can you interview the hospital administrator?

You anticipate that the defendant hospital will oppose any effort on your part to interview its employees. If this occurs, what recourse do you have?

Part II As an alternative to the above, assume that you are in-house counsel for the hospital. Instead of a malpractice action, assume that a grand jury is investigating the hospital administrator for allegedly defrauding various health insurance providers over a period of several years. The grand jury has subpoenaed certain documents from the hospital. The hospital administrator is now seeking to prevent the hospital from delivering the documents. He claims that as in-house counsel, you represent him and that the documents are privileged. What is your response?

The senior partner is not only looking for answers to these questions but also a concise analysis from you. Time is of the essence!

Question 2 (20 points; suggested time 35 to 40 minutes, 5 pages maximum)

You are a law clerk for Judge Art Hammer, an Associate Justice of the Massachusetts Superior Court Department. Judge Hammer has received a motion to disqualify plaintiff's counsel in one of his pending cases. He wants you to refresh his memory regarding the applicable law in this area, focusing particularly on the Rules of Professional Conduct. The motion to disqualify, the opposition to the motion, and other related pleadings filed with the Court set forth the following facts. Approximately three years ago, Attorney Judith Jones represented a Dr. Payne before the Board of Registration in Medicine. The complaint against Dr. Payne involved several instances of overbilling both patients and their various health insurance providers. When all was said and done, the overbilling was the result of some inadequate record-keeping on the part of Dr. Payne, as well as his archaic and disorganized method of billing. Attorney Jones worked with Dr. Payne to implement an entirely new office management system, including new billing practices. The complaint against Dr. Payne was ultimately dropped. Thereafter, Attorney Jones assisted Dr. Payne with a relatively minor problem involving the town's local zoning board. The problem revolved around the use and ownership of several parking spaces adjacent to Dr. Payne's office building. The matter was resolved in Dr. Payne's favor. Attorney Jones also did some tax work for Dr. Payne. All of these matters have since been completed. Recently, however, Attorney Jones' former law partner, Attorney Kevin Devries, filed a medical malpractice action against Dr. Payne, alleging negligence during the course of surgery. When Dr. Payne first learned that he was being sued for malpractice, he called Attorney Jones and asked her to represent him in the matter. Attorney Jones declined to take the case. Attorney Jones also informed Dr. Payne that both she and Attorney Kevin Devries had been law partners during the same time period when Attorney Jones previously represented Dr. Payne. Thereafter, Dr. Payne retained Attorney Wayne M. Davis, who immediately filed a motion to disqualify Attorney Kevin Devries, alleging a conflict of interest. Attorney Devries has filed an affidavit with the Court in opposition to the motion stating that he and Attorney Jones had completely dissolved their law partnership prior to the filing of the malpractice action against Dr. Payne, that Attorney Jones had taken all of her case files and related materials with her, and that the former office secretary had also departed with Attorney Jones. Attorney Devries further states in his affidavit that he did not work on any of Dr. Payne's cases. The motion to disqualify is scheduled to be heard by Judge Hammer in two days. How will you advise Judge Hammer? What standards apply? What do the Rules of Professional Conduct require?

Question 3 (20 points; suggested time 20-25 minutes, 5 pages maximum)

You are a solo practitioner with an office in Boston, Massachusetts. Among other things, you specialize in the area of professional responsibility/legal ethics. You have recently been retained by Attorney Laura Baker, who has the following problem. Attorney Baker is one of two in-house attorneys for a large Boston company that makes cement. She is the Assistant General Counsel and reports directly to Attorney Kevin Devries, the company's recently-hired General Counsel. The company presently has a major contract with the Commonwealth of Massachusetts to supply cement for highway and tunnel projects. Attorney Baker negotiated the contract and is responsible for any and all issues regarding its interpretation and enforcement. Up to this point, she has enjoyed her work and made good money. Recently, however, one of the company's mid-level managers confided in her that the company's CEO, several other top company officials, and Attorney Kevin Devries met privately together and made a decision to start supplying the Commonwealth with substandard cement. In effect, old cement will be watered down to make it look like new upon delivery and pouring. Records required by the Commonwealth's inspectors regarding the mixing and quality of the cement will be falsified. Attorney Baker knows that the substandard cement may pose some real risks, particularly in tunnel projects. She also knows that this is a money-making scheme, pure and simple. From the information that she has obtained so far, she is not sure whether the company has ever supplied substandard cement in the past or whether this fraudulent and likely criminal activity is about to begin in the immediate future. Attorney Baker's plan is to confront Attorney Devries and the company officials involved for the purpose of strongly advising them against such activity. She will spell out in no uncertain terms both the risks and the potentially severe legal consequences. If they fail to remedy the problem, she will approach the company's Board of Directors and report the illegal activity to them. She will carefully document everything in writing. If the Board of Directors fails to take action (which she anticipates, given the current composition of the Board), she intends to immediately tender her resignation. She tells you, however, that she does not want to be the "whistleblower" in this situation. She will take every measure within the company to remedy the problem but otherwise intends to leave quietly. She will be happy though if someone else steps up to the plate. Attorney Baker has already consulted with a criminal attorney. What she wants to know from you is whether her plan will pass muster under the Rules of Professional Conduct. In her no-nonsense and very direct manner, Attorney Baker tells you that she is not interested in your personal view. She is looking for a strict interpretation of the rules. As her attorney, how will you advise her?

Question 4 (20 points; suggested time 35 minutes, 5 pages maximum)

Several weeks ago, you were retained by Mr. Smith, an elderly client. Mr. Smith, who resides in an assisted living complex, requested that you prepare a comprehensive estate plan for him. Mr. Smith has never executed a will nor done any other type of estate planning.

At the initial interview, which was held at your office, you were struck by the fact that Mr. Smith appeared to be extremely frail. He was accompanied by his son, his sole heir. Mr. Smith's spouse died several years ago. During the course of the interview, Mr. Smith described for you how he wanted to distribute his estate: 1) an initial \$10,000.00 bequest to Massachusetts School of Law and 2) the remainder of the estate to his son. The estate is valued at approximately one million dollars, and Mr. Smith receives \$75,000.00 per year from his pension. During your conversation with Mr. Smith, he also stated to you: "If I ever get sick or something or reach the point where I can't handle things, I want my son to take over for me."

Following your initial meeting, you immediately began drafting the various estate documents that you discussed with both Mr. Smith and his son, including a trust, a will, a durable power of attorney, and a health care proxy. Unfortunately, however, before you were able to complete your work, Mr. Smith suffered from a serious stroke and is now failing, both physically and mentally. Based upon your lengthy discussions with Mr. Smith's son and his treating physicians, you have concluded that Mr. Smith is clearly incompetent. In fact, due to his stroke, he is presently unable to communicate in any manner whatsoever.

Given this situation, you have now advised Mr. Smith's son that he should pursue a guardianship for his father. Medical treatment decisions need to be made immediately, and someone needs to manage Mr. Smith's assets. Mr. Smith's son agrees with your recommendation and is willing to serve as guardian.

Time is of the essence, and your plan is to start with a temporary guardianship. Despite all of this, you know that the Office of Bar Counsel/Board of Bar Overseers has expressed an opinion about bringing this type of action. You intend to proceed with the guardianship anyway and firmly believe that you can legitimately protect Mr. Smith's interests and help manage his affairs on an ongoing basis.

If you represent the son and pursue his appointment as guardian, what will be your argument/response to a possible future inquiry and/or complaint from the BBO?

Question 5 (15 points; suggested time 20 to 25 minutes, 4 pages maximum)

You are an Assistant Bar Counsel working for the Office of Bar Counsel/Board of Bar Overseers. The following matter has been assigned to you. For the past several months, Admiral Industries has been under the threat of litigation from a consumer who alleged that she suffered severe burns as a result of a defect in a toaster manufactured by Admiral. Because of the severity of the injuries, Admiral stood to lose millions of dollars and have its reputation damaged, perhaps irreparably, among consumers. In-house counsel for Admiral was handling the negotiations for settlement, but, as a precaution, they brought in G. Dewitt Devries, a 'top gun' who specializes in corporate litigation. In exchange for a \$100,000.00 "nonrefundable retainer/minimum fee," Devries was: 1) to be available to Admiral on a 24-hour basis and 2) would handle any litigation that might be commenced if the settlement discussions broke down. In the event of litigation, it was understood that the \$100,000.00 was then to be considered a standard retainer to be spent down and applied against Devries' hourly fee, and Devries would charge his usual \$1500.00 dollars per hour to represent Admiral. The agreement was reduced to writing after careful review by both Devries and Admiral's attorneys. Thereafter, Admiral paid Devries the \$100,000.00 retainer. As fate would have it, the products liability case settled in its entirety within the next two weeks. Following the settlement, Admiral demanded that Devries return the \$100,000.00, stating that Devries did no work on the case whatsoever. Devries refused, citing the written fee agreement. Devries also states that because Admiral's attorneys floated his name to plaintiff's counsel, plaintiff folded. Admiral's attorneys have now filed a complaint with the BBO. As Assistant Bar Counsel, how will you proceed?