ETHICS 2004  
Professor Olson  
FINAL EXAM -- MAY 18, 2004  

Student Social Security #:  

INSTRUCTIONS  

1. This exam is "OPEN BOOK." You may consult ONLY the Rotunda Rule Book, the Rotunda textbook, and any notes or outlines you have prepared. You may not consult any commercial outlines or case notes.  

2. You must write your social security number on the line provided above, and you must write it on the front cover of any blue books. You may not use more than two (2) bluebooks to complete the exam. You may have one additional bluebook for scrap purposes only.  

3. You must also write your class section on the front covers of your bluebooks: If you attended class on Tuesday & Thursday at 7:30 p.m., write "Evening Section" on your bluebooks; if you attended class on Mondays at 4:30 p.m., write "Day Section" on your bluebooks.  

4. Write on **only** one side of each sheet in each bluebook.  

5. When you have completed the exam, insert this test booklet inside one of your bluebooks and then insert the bluebook inside your other bluebook. If you use only one bluebook, insert this test booklet inside the bluebook. Hand the completed package to the instructor, and HAVE A WICKED NICE SUMMER!!!  

LONG ESSAY QUESTIONS (50 points each)  
(Choose **only** one of two.  
Suggested time: 1 hour, 30 minutes)  

To obtain the most points possible for your essay answer, use the following as a guide:  

1. Follow the IRAAC method in constructing your answer. This means you should begin by identifying the first issue (each fact pattern will contain at least 8 separate issues) that the fact pattern suggests.
2. You should next identify the applicable rule. This does **not** mean that you should write rule numbers unless you're absolutely sure you've identified the correct one. If you are wrong about the rule number, you can lose points.

3. You should then explain how the **facts** in the fact pattern relate to the rule you've identified. In other words, what would be the result if a disciplinary authority or a court decided to apply the rule to the **facts** in a particular way. On the other hand, how might a court or disciplinary authority apply the rule if the decision maker decided to apply it in a different way. Always consider . . . "on the one hand" and "on the other hand."

4. You should next explain what policy considerations might support the application of the rule in a particular way. On the other hand, what policy considerations might support the application of the rule in another way.

5. Next, you should conclude. Although this is the least important part of developing a high-scoring IRAAC answer, you should devote a couple of lines to predicting what you think the outcome is likely to be.

6. Finally, if any of the fact patterns contain any conflicts situations, you should refer to the Conflicts Typology handout. A good way to score points with judges is to use language from their opinions; a good way to score points with ethics instructors is to use language from their handouts. In fact, in the latter case, it is really the only sure way to score points.

**QUESTION ONE**

Adam is a plaintiff's personal injury attorney in Lawrence, Ma. Since graduating from Mass. School of Law, he has never engaged in any other form of practice. One day earlier this year, his friends Bob and Carol, a married couple, came to him with a business proposition they wished to organize. Bob and Carol wanted to form a tax-sheltered
limited partnership to own and trade commodities futures in an offshore commodities market from which the commodities would later be imported into the United States. In this case, the market concerned was located in the Cayman Islands. Adam agreed to represent Bob and Carol in doing the legal work to set up the partnership and establish and document it and, thinking this was going to be a marvelous investment, also agreed to put $50,000 of his own money into the deal as an investor. (His practice had been doing very well.)

In fact, Adam thought so highly of the deal that he suggested to his friend, Doug, another plaintiff's personal injury attorney, that Doug ought to invest too, and also ought to help Adam prepare the necessary partnership papers. Adam wanted Doug's help because Doug had recently done his first such deal and Adam had never done one at all.

After reviewing the information Adam had obtained in his meeting with Bob and Carol, and especially the financial arrangements Bob and Carol wanted to make, Doug began to suspect that the "commodities" Bob and Carol wanted to buy and import included the dread cannabis sativa (marijuana). Although Doug did not convey his suspicions to Adam, he told Adam that before Adam or he got involved, they should ask Bob and Carol for a substantial advance retainer — $15,000 — for Adam and Doug's time, expenses and costs. They did so, and shortly thereafter a man identifying himself as "Earl" appeared in Adam's office carrying a suitcase. Earl handed the suitcase to Adam, saying "This is for Bob and Carol." Adam opened it to find $15,000 in $100 bills. Adam deposited the money in his trust account and on his office accounting records opened an account card in Bob and Carol's names, showing a $15,000 credit to them. Adam also mailed them a receipt for the $15,000.

Adam and Doug prepared the partnership papers and Bob and Carol went into business offering to potential investors limited partnerships in "Caribbean Commodities Ventures, Ltd." for $100,000 each. Adam became one of the limited partners but Doug never did invest in the deal. Adam and Doug billed Bob and Carol $15,000 in fees, expenses and costs, took the money out of Adam's trust account, and split it between the two of them. Doug spent
his $7,500 on gambling and parties; Adam used his to make the down payment on a condominium in Florida.

When Bob and Carol first started selling the partnerships, some of the investors asked them about the partnership's assets. Bob showed them an uncertified list of assets prepared by his accountants from information he had furnished them. Bob said these assets were owned by the partnership, including a gold mine in Ecuador. One of the documents supporting his stated value for the gold mine was a report from a mining engineer on the value of the gold ore lode available to that mine. These investors asked for an opinion of counsel regarding this list of assets; Bob asked Adam for such an opinion and Adam, relying on Bob's good faith, prepared a letter stating that in his opinion the assets of the partnership were worth what Bob said they were and further stating that he himself had relied on these representations of value in buying his own partnership interest.

Bob left with Adam the file supporting this list of assets, including his accountants' workpapers, correspondence and memos to and from him and the accountants, and to and from him and the engineer, and the engineer's report. Adam put this file in his case file on the partnership's organization.

The Drug Enforcement Administration has arrested Bob and Carol. The U.S. Attorney has obtained from the Federal Grand Jury an indictment for conspiracy to import marijuana, naming Bob, Carol, Adam and Doug as co-conspirators. The indictment also charges criminal RICO violations and seeks the seizure and forfeiture of all proceeds of the criminal enterprise. The U.S. Attorney has subpoenaed Adam to produce all records of his employment contract, retainer and payments by Bob and Carol. The State Commissioner of Financial Institutions had initiated an investigation of Caribbean Commodities and has obtained a court order directing Adam to turn over all records showing any assets held or claimed to be held by the partnership.

Adam and Doug have come to see you (another attorney in Lawrence) for advice concerning their situations. Adam tells you during this meeting that he never knew of any criminal wrongdoing. He believes that the file on Bob and Carol in his office will show that he was never informed of and never had any reason to suspect any illegalities. Doug,
also during that meeting, tells you that from the beginning he did suspect that Bob and Carl were dabbling in smuggling but that he never told Adam about this.

**What should you do or say? Advise Adam and Doug.**

**QUESTION TWO**

James Smith is licensed to practice law in the state of Massachusetts. During his ten years in Brighton, he built a lucrative plaintiffs' personal injury and consumer bankruptcy practice.

Many of his personal injury clients were referred to him by his cousin, Karen Chap, who works as an emergency medic for AMCARE, a private ambulance service jointly owned by Smith and his wife. When Chap rendered aid at the scene of an auto accident involving substantial personal injuries she would telephone Smith, who promptly sent Snoop, Smith's investigator, to take photos and interview witnesses. Several days later, Smith would write offering to represent the party whom the investigator deemed the victim with a legal claim against another. The letter would state that, based on Smith's preliminary investigation into the accident, he believed that the other party was legally responsible for the resulting damages, "which could amount to a substantial recovery for you. Do not let the insurance company tell you what your claim is worth. The insurance adjuster's primary interest is getting you to settle for peanuts. You pay no fee if no recovery is gained for you." Smith kept track of the clients referred to him in that manner, and gave Chap generous birthday presents reflecting the value of those cases. Last year, Smith gave Chap an all-expense-paid trip to Hawaii for her birthday.

Beth Mulnick was seriously injured when a car driven by Driver struck her while she crossed Robinson Street in downtown Brighton with her friend Patti Kibel. When interviewed by Snoop at the accident scene, Kibel said the women were hurrying back to work after a long lunch, and began crossing the street outside the crosswalk to catch the walk light; she believed they were just outside the crosswalk at the time of impact. Snoop diagrammed the intersection showing point of impact within the crosswalk, and inaccurately summarized Kibel's statement as reflecting that they were at the outer edge of the crosswalk when Mulnick was hit.
Mulnick contacted Smith to represent her, and signed an agreement agreeing to pay 1/3 of any recovery before trial, 40% if the case went to trial, and 50% if recovery occurred and an appeal was filed. Because Mulnick's injuries prevented her from working, she was tightly strapped for money. The retainer agreement provided that Smith would arrange with Mulnick's physicians to insure they would be paid for her medical expenses directly from any recovery. It also provided that Smith would advance any litigation expenses, and gave assurance that Mulnick would only have to reimburse him in the event of recovery.

Shortly thereafter, Smith filed suit on Mulnick's behalf against Driver. Driver's insurance carrier, ALCOV, retained Susan Leeson, who concentrates her practice on insurance defense work. Leeson scheduled a deposition of Kibel.

A few days before the scheduled deposition, Smith invited Kibel to his office to discuss her testimony. She accurately stated what she told Snoop during the interview at the time of the accident. Smith suggested her memory may have faded over time, and showed her Snoop's report, which clearly stated they were in the crosswalk. Smith then explained to her the law of negligence, and that Mulnick's recovery would be reduced because of her comparative negligence if she were outside the crosswalk. After some discussion, Kibel agreed to testify that Mulnick was crossing the street with the light and within the crosswalk at the time of impact. Kibel did testify to that effect, and proved to be a very credible witness.

Following the deposition, Leeson made a settlement offer of $70,000. Without contacting Mulnick, Smith rejected the offer and demanded $120,000. Smith accepted when Leeson agreed to pay $100,000. Smith telephoned Mulnick to advise her of the settlement when the check and release arrived, and arranged for her to come into the office to sign the release and receive disbursement. He promptly deposited the settlement check in the client trust account, and withdrew $38,333 for his fees and expenses which he deposited into his office account. When Mulnick visited the office, Smith presented her with a written statement of how the money was disbursed:
$5,000 expenses (copying, deposition transcript, secretarial and investigation costs, photographs, overhead);

$12,000 payment to Mulnick's physician and physical therapist;

$33,333 attorney's fees;

$49,667 to Mulnick.

Mulnick questioned the expenses and the attorney's fees, which she considered excessive given that Smith only worked on the case for six weeks before reaching settlement. Smith conceded he hadn't worked more than 100 hours on the case, but nevertheless insisted on his contract right to the contingent fee. Smith refused to release any payment to Mulnick unless she signed the disbursement letter indicating approval of the payments. It is now six months later and neither Mulnick nor her health care providers have been paid.

For about one year Smith has been under investigation by the Justice Department for alleged collusion with insurance defense counsel, whereby they reached "friendly agreements" to pay inflated medical and personal injury claims, with Smith making secret payment for the defense lawyer's cooperation. Wiretaps on Smith's office phone produced evidence that the lawyers involved would arrange for face-to-face meetings in a local restaurant, and after reaching agreement on the settlement amount, would complete the transaction through correspondence that, on its face, appeared customary.

Smith's consumer bankruptcy practice picked up dramatically when he placed an ad in the Greater Boston Yellow Pages. The ad featured an American flag with the following words in large print (actual size shown):

BANKRUPTCY

Keep Everything!

(Under state exemptions)

Pay Back Nothing!
(In most instances)

Same Day Service!

Payments!!

FREE VISIT James Smith

669-4357 (NOW-HELP) 3131 Soldiers Field Road, Brighton

Within three months after the new directories were distributed, 250 new clients retained Smith. Smith would meet with each new client for approximately fifteen minutes, and then would have Marilyn Jones, his secretary, gather basic information about the client's assets and debts. He instructed Jones routinely to prepare a Chapter 7 bankruptcy petition listing all personal assets as "exempt" under state law, without Smith independently evaluating whether specific items fairly fit within the state exemption system. (Chapter 7 of the Bankruptcy Code distributes all non-exempt assets to the outstanding creditors. In a "no asset" case, where there are no non-exempt assets, the creditors receive nothing and the debtor is discharged from any obligation to pay the debts listed. Bankruptcy Rule 9011 parallels F.R.C.P. Rule 11.) At the end of each day, Smith would quickly review and sign the petitions Jones prepared for that day's new clients. Each client paid $250 for Smith's services in filing the petition, attending the meeting of creditors, the discharge hearing, and other incidental matters arising in the case.

Smith hired Jones both for her superb clerical and administrative skills, and for her beauty. Shortly after hiring Jones, Smith began asking her out. She dined with him once. He then pursued her actively, making suggestive comments at work, and leaning against the wall in the narrow office hallway so that she was forced to brush up against him in order to pass by. Several times, he stood behind her desk chair, ostensibly to supervise her preparation of a bankruptcy petition. On those occasions, he leaned over her and placed his hands on her desk in such a way as to press his torso onto her back. Jones asked him to stop this behavior. When it continued, she resigned her employment and filed a complaint with the Equal Opportunity Commission alleging unlawful sexual harassment. Since then, Marilyn has received numerous phone calls in which a disguised voice makes obscene or threatening comments. A
tracer by the telephone company has determined that the calls were made from phone booths near Smith's home, office and country club. One call originated from his home telephone. Her teenage daughter received a sexually suggestive birthday card in the mail with a condom enclosed. She then filed a complaint with the local police and with the Massachusetts Board of Bar Overseers.

Meanwhile, the federal investigation continued. Mole, a good friend from law school employed as a staff attorney in the Justice Department, warned Smith of the federal investigation and provided him with a copy of the confidential report summarizing the evidence obtained thus far. Smith quickly referred all of his outstanding tort cases to Wesson, another law school friend who just left a large firm to become a sole practitioner. Wesson was an experienced criminal defense lawyer, but had relatively little experience with personal injury matters. By written agreement, Wesson agreed to pay Smith one-third of all fees she received on behalf of the referred clients. Smith also retained Wesson to represent him in any criminal charges that might be filed, paying $10,000 in cash as advance payment of fees. To that end, he gave Wesson possession of all his office files on closed cases for safekeeping, and the confidential Justice Department memo.

Smith then left the jurisdiction, telling no one but Wesson that he was going to Florida. He laid low for six weeks, then discreetly opened a law office, handling minor business matters for local merchants, and a few personal injury cases. When he needed to represent a client in court he would file an application for admission pro hac vice. Periodically, he would call Wesson from a pay phone to get a status report on the criminal investigation, and tell Wesson where to wire his share of the attorneys' fees on referred cases. The Justice Department does not know his current whereabouts and demands that Wesson disclose this information. It also has obtained a subpoena to examine all files in Wesson's offices that had any connection to Smith. Wesson is challenging the subpoena in federal court. She had not yet been formally charged with any crime.

Briefly discuss all issues raised by the fact pattern, using the method described above.
SHORT ESSAY QUESTIONS (30 points each)
(Choose only one of three.
Suggested time: 1 hour)

QUESTION THREE

Mega Corporation is a publicly-traded clothing manufacturer. Its Board of Directors, as is usual for a large public corporation, includes persons who are executives in other, unrelated, businesses. Two of Mega’s outside directors are Michael Chadwick and Harry Borne. Chadwick is a senior executive with McCorkle Investments. Borne is President of Sigma Partners. Chadwick and Borne serve on Mega’s Internal Audit Committee.

Two years ago, Mega Corporation was pushed into bankruptcy proceedings by an internal accounting scandal. At that time, the highly-experienced bankruptcy department of ABC Law Firm was hired by a committee of Mega Corporation's outside directors to investigate the accounting irregularities in the company. ABC's report after investigation resulted in the firing of two senior Mega officials and the reversal of $50 million in the company's stated earnings.

Since then, a team of ABC's lawyers has represented Mega Corporation in the bankruptcy proceeding. On the team is senior associate Kenneth, who came to ABC from a clerkship with U.S. Bankruptcy Magistrate Haynes.

Also on ABC's client list are McCorkle Investments and Sigma Partners. Neither company has been in bankruptcy, but ABC's trial department has represented McCorkle and Sigma in a number of suits against the companies by investors.

The U.S. Trustee in bankruptcy, on the basis of complaints from some of Mega’s creditors, has filed a motion to disqualify ABC from representing Mega Corporation in the proceedings. The Trustee states that ABC failed to disclose conflicts of interest, as required by the Rules of Professional Conduct. The motion will be heard by Magistrate Haynes; senior associate Kenneth will be involved in drafting the motion papers but will not argue the matter on behalf of ABC.

ABC responds that no conflict exists because neither McCorkle nor Sigma are creditors, shareholders, or
otherwise parties in interest in the bankruptcy proceedings. ABC also points out that the creditors who made the original complaints have since sold their interests to others (who have taken no position on ABC's representation). ABC argues that disqualification at this point would irreparably harm Mega Corporation and its existing creditors. At stake in the result are an estimated $5 million in attorney's fees.

What are the considerations that the Bankruptcy Court Judge should take into account? What questions would you want answered? What should be the decision on the Trustee's motion? Has ABC violated any Rules of Professional Conduct? If so, which ones (you need not refer to them by number)? Discuss.

QUESTION FOUR

In 2001, Client George hired Attorney Kate to represent him in a breach of contract case. George paid a retainer fee of $500, and agreed to pay Kate a 30% contingent fee on any recovery. Kate filed suit, but then refused to do anything more unless the fee agreement were converted to a straight hourly rate. George agreed to the change.

Six months later, Kate moved offices and failed to notify George of her new location. George was able to send a message to Kate through her daughter, but Kate refused to disclose her new address, telling George he could continue to communicate with her by leaving messages with her daughter.

Between 2001 and 2003, Kate continued her activity in the case, and George paid an additional $23,000 in fees. During that time, there were numerous occasions on which George left messages for Kate asking for information on progress of the case. He received a response to about one of every three messages he left, and he was never clear on exactly what Kate was doing. George did receive copies of the various documents Kate and her associate generated. The file indicates the following: (1) that three of the four original claims in the complaint were dismissed by the court for failure to state a cause of action; (2) that Kate had been sanctioned after a motion to compel answers to interrogatories by the defendants; and (3) that the court had ordered Kate personally to pay $3,000 for deliberately
violating discovery rules and not to pass this cost on to her client.

Trial was set for September 2003, and in late August, Kate asked for an additional $15,000 in fees before she would commit to representing George at trial. George paid the $15,000. At trial, judgment was granted for the defendants, primarily because Kate could not rebut the defendants' interpretation of the contract's terms.

George has complained to the Massachusetts Board of Bar Overseers. You have been assigned to investigate the matter. What are the potential issues that you see? What Rules of Professional Conduct might be involved (you need not state the rule numbers)? What potential remedies are available to George? Discuss.

**QUESTION FIVE**

You are a criminal lawyer. Sam Adams is a prominent lawyer in town. He calls you one day and wants to retain you to represent his 16 year old son, Jack, who has been arrested for possession of 2 ounces of marijuana. Jack had been stopped for running a red light, and, while Jack was going through the glove compartment to find the car's registration, the bag of marijuana had fallen out into plain view. Sam explains that his son is a star student with a bright future and wants you do your best to keep him out of jail, but to make sure that Jack is taught a lesson.

You take the case and Sam sends you a retainer to cover your fee. It should be easy enough to keep Jack out of jail, but he will probably have a conviction on his juvenile record. While you are interviewing Jack, he asks if he will have to testify. You tell him that he does not have to testify and that you recommend that he not take the stand.

"Good," says Jack. "I was afraid if I had to testify, I'd have to tell the truth and explain that the dope belonged to my father. I don't mind taking the fall for this, because I know I'll get off easy. But my Dad is an ethics professor. If the truth came out it would ruin him.

What ethical problems do you see in this hypothetical, and how should you handle them?
SHORT ANSWER QUESTIONS (10 points each)
(Choose only two of the following five statements and write two short essays taking positions on the policy issues they raise. You should not use the IRAAC method to respond to these policy issues. Suggested time: 30 minutes)

1. Lawyers should not be required to withdraw from representation of criminal defendants who commit perjury.

2. The ABA Model Rules should be amended to prohibit defendants from requiring lawyers to waive their claim for attorneys fees as part of a settlement agreement.

3. Law firms are growing so large that it is becoming impossible to do the conflict-of-interest checks expected under the Model Rules. Accordingly, Model Rules 1.7 and 1.10 should be amended to provide that a lawyer working for a particular law firm should not undertake representation of a client if the representation of the client will be directly adverse to another current client of another lawyer in the same law firm only if the two lawyers are working for the SAME OFFICE of that law firm.

4. Comment 2 of ABA Model Rule 4.1 should be deleted because lawyers should have the same duties of truthfulness in negotiations as in any other context.

5. It is infeasible to develop international ethical standards for law practice because the conditions, history, traditions and rules for law practice in different parts of the world are too diverse.