

Legal Ethics-Final Exam
Spring, 2005
Professor Cross

This is a 3 hour exam. There are 4 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.

You are to assume that you are in a jurisdiction where the ABA Model Rules of Professional Conduct apply. You may use the Model Rules (and any part of the book containing the Rules referred to as Statutes and Standards-2004 or 2005 editions). This is the Rules book that we used in class. As discussed in class, if you have annotated or written in your Rules book, you may refer to such written notes.

Please number your blue books (1 of 2; 2 of 2, etc.). Please write your Social Security 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 (20 points; suggested time 35 to 40 minutes)

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.

You have learned that the anesthesiologist, although not a party to the action, has retained his own independent counsel. Does this present a problem?

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?

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 (30 points; suggested time 50 minutes)

You are a solo practitioner specializing in the areas of family law, estates, and professional responsibility. Your office is in Andover, Massachusetts.

Recently, you have been contacted by an attorney, Stuart Monk, who has an ethical problem. Upon graduation from law school in 1999, Monk took a job with the law firm of Ryan and Kirkpatrick (R&K) in Springfield, Massachusetts. R&K currently has 20 attorneys. Approximately three months ago, Monk left the firm and took a new job with the law office of Kane, Grossman & Rossi (KGR) in Boston. KGR employs over 200 attorneys, and Monk has been assigned to the firm's estate department.

For the past two years, R&K has been handling a products liability case against Admiral Industries. The plaintiff in the action is a consumer who alleges that she suffered severe burns as a result of a defect in one of Admiral's toasters. KGR is defending Admiral in the lawsuit and has been involved in the case since it was originally filed.

When Monk was interviewed by KGR for his current position with the firm, he was asked whether he had worked in any manner or in any capacity whatsoever on the Admiral case. Monk truthfully answered no. His work for R&K was limited to the estate area. Monk was then asked whether he had attended any staff meetings at R&K, formal or informal, at which time the Admiral case was discussed. Again, Monk answered no. Monk was hired and, up to recently, was doing well at KGR.

Approximately one week ago, KGR received a motion from R&K to disqualify KGR from the Admiral case. The basis of the motion is that Monk was working for R&K while the firm was handling the claim against Admiral. KGR attorneys are opposing the motion and have prepared an affidavit for Monk to sign. The affidavit states, in part, that: 1) while with R&K, Monk did not work on the Admiral case, 2) in addition, while working for R&K, Monk acquired no knowledge and/or confidential information relating to the Admiral case, and 3) the motion to disqualify, therefore, is frivolous.

Monk confides in you, however, that there is a problem. When Monk was at R&K, his good friend and former law school classmate, Attorney Kevin Devries, was substantially involved in the Admiral litigation. Kevin was assigned to the case by the firm. He has entered his formal appearance with the Court. As friends and colleagues, Monk and Kevin spent a great deal of time together outside of the office. In fact, when Monk and

Kevin both began working for the firm, the two shared an apartment. Unfortunately, Kevin talked nonstop about the Admiral case. Monk knows all about the Admiral case, albeit his information has been obtained on a purely informal basis from his friend, Kevin.

Monk has called Kevin, and Kevin is “pretty sure” that no one else knows about these conversations. Kevin has confided in Monk that the motion to disqualify is just another tactical maneuver in the case on the part of R&K. Monk’s plan is to sign the affidavit as drafted. Based upon the affidavit, he anticipates that the motion to disqualify KGR will be denied, and Kevin and Monk will have no further communications about the case. Monk tells you that he will not share any of the information that he has about the Admiral case with members of his current firm. Neither the plaintiff, therefore, nor the defendant will be harmed. And Monk will be able to keep his job.

Monk wants your opinion about all of this. How will you advise him? Based upon your advice, what do you think is a likely outcome regarding the motion to disqualify KGR?

Question 3 (30 points; suggested time 50 minutes)

You work as Assistant Bar Counsel for the Board of Bar Overseers in your jurisdiction. Your job is to analyze and investigate complaints against attorneys (from whatever source) and, when necessary, to initiate and prosecute formal disciplinary actions. The following situation has been brought to your attention:

Approximately one year ago, a married couple went to an attorney, Wayne M. Davis, Esq., and stated that they wished to obtain a divorce. The parties told Attorney Davis that they had a complete agreement and handed him a handwritten paper to this effect. The parties' informal agreement included the following: 1) the future sale of the marital home for no less than \$350,000 (with 60% of the sale proceeds to go the wife; 40% to the husband), 2) an equal division of all monies in a checking account and two savings accounts, 3) an equal division of assets in a money market account, 4) alimony to be paid to the wife by the husband in the amount of \$250.00 per week, 5) a detailed division of personal property, and 6) separate ownership of the parties' two automobiles, as previously agreed upon. There were no child-related issues, since the parties' two children are adults and fully emancipated. After reviewing their informal agreement, Attorney Davis stated to the parties that he would be involved only to the extent of preparing the necessary paperwork for the parties' divorce. According to Attorney Davis, it was understood that the parties would represent themselves at the time of the divorce hearing.

Following the initial interview, Attorney Davis turned the entire matter over to his paralegal, Ms. Valerie Meicher. Ms. Meicher prepared a standard joint petition for divorce and related pleadings. She also drafted a formal separation agreement, which included all of the items listed above. Ms. Meicher mailed to each of the parties a financial statement, which is another required Court form. The parties filled out the financial statements by hand and mailed them back to Ms. Meicher. She then typed the parties' individual financial statements, including all of the information that the parties had provided. The husband, however, neglected to include on his financial statement his pension and his income from a second, weekend job.

The parties had a follow-up meeting with Attorney Davis for the purpose of executing the separation agreement and signing all of the other necessary forms, including the typewritten financial statements. Attorney Davis' name did not appear on any of the paperwork. After the meeting, the parties took all of the original paperwork (plus two copies) with them and went directly to the Courthouse to file for their divorce. Within a

couple of weeks, Attorney Davis sent each of the parties a bill for \$7,500 (for a total of \$15,000). Both of the parties promptly paid Attorney Davis.

When the parties appeared in Court, they represented themselves, as planned. The divorce was routinely allowed. Following the divorce, the wife joined a support group. At one of the group's meetings, a lawyer appeared as a guest speaker. During the course of the lawyer's presentation, the wife learned for the first time that she was entitled to a share of the husband's pension and possibly to a portion of his second income.

The wife immediately retained her own attorney, Kevin Devries, Esq., who filed a motion to vacate the divorce judgment. The motion was allowed, with an additional finding by the Court that the husband had committed a fraud upon the Court by failing to list his pension and income from his second job on his financial statement. The wife continues to be represented by Attorney Devries and has filed a new divorce action, which is now pending before the Court. Attorney Devries has also demanded that Attorney Davis return to the wife her entire \$7,500 fee.

As Assistant Bar Counsel, what is your assessment of this fact pattern in terms of the Rules of Professional Conduct? Has Attorney Davis engaged in any misconduct?

Question 4 (20 points; suggested time 40 minutes)

You have represented Mr. Smith, an elderly client, for a number of years. Prior to his retirement, you represented him in various business and commercial transactions. You have also drafted a comprehensive estate plan for him.

Both Mr. Smith and his spouse, Mrs. Smith, now reside in an elderly housing complex. Recently, Mr. Smith has been failing, physically and mentally. At the urging of various staff members at the elderly housing complex, Mrs. Smith has approached you about obtaining a guardianship for Mr. Smith.

Your personal belief is that Mr. Smith is incapable of handling both his personal and financial affairs. Despite his apparent incapacity, however, Mr. Smith has expressed to you a strong preference against guardianship. During your last conversation with him, you realized that Mr. Smith is confused about what a guardian actually is and/or does. For example, Mr. Smith believes that a guardian will “steal” his money.

Mrs. Smith has now taken the position that if you are unwilling to proceed with a guardianship, she will hire another attorney to petition the Court. This concerns you. Given your past involvement as counsel for Mr. Smith, you feel that you can best protect his interests and manage his affairs.

In addition, you know that if you represent Mr. Smith as his attorney in opposition to a guardianship petition and then subsequently lose the case, the Court-appointed guardian will, in all likelihood, discharge you from the matter altogether. In fact, a recent appellate case addressed this very issue, upholding a lower Court’s decision to strike the appearance of counsel for the ward after the appointment of a guardian.

You are about to have one more meeting with Mrs. Smith. You want to explain to her in a clear and detailed manner just what your ethical obligations are at this point. You also want to protect Mr. Smith. Do the Rules of Professional Responsibility provide you with any guidance? What will you tell Mrs. Smith?

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This is a 3 hour exam. There are 6 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 each question is also given. As discussed in class, the front and back of a page in your blue book(s) constitutes two pages.

You are to assume that you are in a jurisdiction where the ABA Model Rules of Professional Conduct apply. You may use the Model Rules (and any part of the book containing the Rules referred to as Regulation of Lawyers, Statutes and Standards-2005 or 2006 editions). This is the Rules book that we used in class. As discussed in class, if you have annotated or written in your Rules book, you may refer to such written notes.

Please number your blue books (1 of 2; 2 of 2, etc.). Please write your Social Security 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. **In addition, before you begin to write your answers to Questions 4, 5, and 6, please first read all three of these questions.**

GOOD LUCK!

Question 1 (20 points; suggested time 35-40 minutes, 5 pages maximum)

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.

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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?

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Question 2 (20 points; suggested time 30-35 minutes, 4 pages maximum)

You work as Assistant Bar Counsel for the Board of Bar Overseers in your jurisdiction. Your job is to analyze and investigate complaints against attorneys (from whatever source) and, when necessary, to initiate and prosecute formal disciplinary actions. The following complaint has been assigned to you:

Approximately one year ago, a married couple went to an attorney, Wayne M. Davis, Esq., and stated that they wished to obtain a divorce. The parties presented Attorney Davis with a fully executed separation agreement. The parties also gave Attorney Davis their individual financial statements, which they had completed and signed under the pains and penalties of perjury. The separation agreement had been prepared by a well-known domestic relations practitioner in the Boston area, who had mediated the case with the husband and wife over a period of several months. The parties requested that Attorney Davis now draft for them all of the other necessary paperwork for an uncontested divorce. In order to save costs, the parties expressed their intention to represent themselves at the time of the divorce hearing.

Attorney Davis indicated that he would pursue the matter upon the following terms: that he would review the separation agreement and the financial statements and then make an independent determination as to whether the separation agreement was complete in all respects and fair and reasonable. If everything checked out, he would draft all of the remaining paperwork. His fee would be \$3,000 to be split evenly by the parties. However, if he had any problem with the separation agreement, he would have no further involvement with the matter, would charge no fee, and would recommend to the parties that they each retain separate counsel. Both the husband and wife agreed to this arrangement.

Attorney Davis went over the separation agreement and financial statements in detail. Pursuant to the various provisions of the separation agreement, the wife was to receive both alimony and a greater proportion of the marital assets (60% to wife and 40% to husband), due to the fact that the husband had a slightly higher income. The husband also had a substantial pension, which was to be split fifty-fifty upon his retirement. The wife had a modest pension, 100% of which she would keep. There was no child support provision, as the two children of the marriage were fully emancipated. In addition, the parties would continue to be responsible for their own health insurance. The remaining

provisions of the separation agreement included, in main part, the usual boilerplate language.

Satisfied with the agreement, Attorney Davis prepared all of the other required paperwork for an uncontested divorce. He met with the parties for a second time and gave them his opinion that their separation agreement was well-drafted and fair and reasonable. He then gave them the entire divorce package, which they proceeded to file with the Court. Shortly thereafter, a hearing was held, at which time the Court approved the separation agreement and divorced the parties. At the time of hearing, the parties appeared pro se.

Attorney Davis billed the parties separately, and the husband promptly paid his portion of the fee. The wife, however, failed to pay her share, despite repeated requests from Attorney Davis to do so. Attorney Davis, therefore, proceeded to sue the wife in the local District Court for \$1,500 plus costs and interest. The case is now pending.

After the District Court action was commenced, the wife filed a complaint with the Office of Bar Counsel, alleging that Attorney Davis had a conflict of interest in representing both the husband and wife in the divorce matter and that he should, therefore, be required to forfeit any fee whatsoever for his services. The wife also states in her complaint to the Office of Bar Counsel that if she had been advised to retain independent counsel at the outset, she might have fared better.

As Assistant Bar Counsel, what is your assessment of this fact pattern in terms of the Rules of Professional Conduct? Has Attorney Davis engaged in any misconduct?

Question 3 (15 points; suggested time 25-30 minutes, 4 pages maximum)

You are a solo practitioner with an office in Andover, Massachusetts. You have recently been retained by Attorney Judith Jones, who has the following problem. Several months ago, Attorney Jones was hired by a Ms. Priscilla Smith. Ms. Smith was divorced in May 2005, and, at that time, was represented by another attorney. The divorce judgment required, in part, that Mr. Smith, the former husband, pay Ms. Smith \$300,000 in cash as a part of the Court's overall division of the marital assets. The payment was to be made forthwith. Mr. Smith, however, failed to make such payment.

At the time of the initial interview, Ms. Smith told Attorney Jones that she had not communicated with her ex-husband since the divorce trial. She did hear from a mutual acquaintance that he had left the country and had very likely gone to Saudi Arabia. In addition, a couple of months ago, Ms. Smith called Mr. Smith's former employer, a major corporation in Boston, but no one there would help her. Ms. Smith also related to Attorney Jones that her divorce had been extremely adversarial. Based upon this information, Attorney Jones agreed to take the case upon a contingent fee basis, with Attorney Jones to receive one-third of any recovery.

After their meeting, Attorney Jones began her own investigation as to Mr. Smith's current circumstances. Posing as an old friend of Mr. Smith, Attorney Jones also called the husband's former employer. The employee she talked to readily gave out detailed information regarding Mr. Smith, including the fact that he had taken a job with another company in Worcester, Massachusetts. Attorney Jones immediately hired a constable, who served Mr. Smith at his place of employment with a complaint for contempt prepared by Attorney Jones, as well as a standard contempt summons. Mr. Smith retained his own attorney, and following a two-week period of on-and-off negotiations over the telephone, Mr. Smith paid the entire \$300,000. In order to settle the matter without going to Court, Ms. Smith waived any interest, although Attorney Jones strongly advised her against this.

Attorney Jones handled the entire matter/transaction for Ms. Smith. Upon receipt of the \$300,000, Attorney Jones deducted her one-third share and wrote a check to Ms. Smith for \$200,000. Ms. Smith has now filed a complaint against Attorney Jones with the Office of Bar Counsel claiming that Attorney Jones' fee is excessive. As her counsel, how will you advise Attorney Jones in this matter?

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

For the past two years, you have represented the plaintiff in a car accident case. Liability on the part of the defendant was clear from the outset, and the only disputed aspect of the case has been the extent of your client's damages, including a back injury. After lengthy negotiations with the defendant and his insurance company, the case has finally settled for \$250,000. A check for this amount was recently sent to you by the insurance company. The check has now cleared, and you are ready to deduct your fee and disburse the remaining funds to your client. In fact, this morning, your associate, who has assisted you throughout the matter, filed with the Court a standard stipulation of dismissal of the case, with prejudice. A few minutes ago, however, your client called you and gave you some very disturbing information. He admitted to you that during the course of his deposition, taken over a year ago, he lied. At the deposition, he testified that he had never been in an accident before and never had any previous injuries to his back. He has now admitted to you that two months before the car accident, he hurt his back in a fall at a shopping plaza. He did not make a claim for the earlier injury and didn't mention it at the deposition because he was afraid that the information would harm his case. Your client does not want you to disclose the prior accident or injury and requests that you now send him his portion of the settlement proceeds. How will you proceed?

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

You work as an attorney in a mid-sized law firm in Springfield, Massachusetts. One of your corporate clients is looking to borrow money, and the lender wants an opinion letter from you as to the corporation's overall status. Specifically, the lender wants you to verify that:

- 1) no lawsuits are pending against the corporation;
- 2) no investigations are being conducted by any governmental, regulatory agency;
- 3) the detailed, financial information provided by the corporation is complete, accurate, and current.

Based upon the information provided to you by the corporation's CEO and accountants, you issue an opinion letter on behalf of the corporation that addresses and confirms all of the above. Shortly thereafter, you learn from one of the accountants, who was recently discharged by the corporation, that the financial information provided to you is false and that the corporation is, in fact, on the verge of bankruptcy. The loan transaction has not yet been completed. As the attorney issuing the opinion letter, how do you intend to proceed at this point?

Question 6 (15 points; suggested time 20-25 minutes, 4 pages maximum)

You are in-house counsel for a large Boston company that makes cement. The company has a major contract with the Commonwealth of Massachusetts to supply cement for highway and tunnel projects. In fact, you negotiated the contract. You enjoy your work, and you make good money. Recently, one of the company's mid-level managers confided in you that a decision has been made by top company officials 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. You know that the substandard cement may pose some real risks, particularly in tunnel projects. The employee giving you the information asks that you keep it strictly confidential. He tells you, "We're making money hand over fist with this contract. If this gets out, we're finished." From the information that you have obtained so far, you are 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. What is your obligation at this point? How will you proceed?