

EXAM NO. _____

**PROFESSIONAL RESPONSIBILITY
FINAL EXAM**

PROFESSOR SIMON

SPRING 2007

INSTRUCTIONS

You may bring with you and use two resources in this exam:

1. The supplement assigned for the class, Dzienkowski's *Professional Responsibility Standards, Rules and Statutes* (West 2006); and
2. An outline of the course that you prepared. No commercial outlines, outlines prepared by other students, or other material of any kind are permitted.

You should assume our state has adopted the 2006 versions of the ABA Model Rules and Judicial Code, and the ABA Standards for Imposing Lawyer Sanctions. The state's Supreme Court has also, in a number of cases, looked favorably at the Restatement of Law Governing Lawyers to answer issues not controlled specifically by the rules and has adopted Sections 68-73 as the controlling law governing privilege in a 2005 case.

You may rely on other sources of law we have studied, such as evidentiary rules, statutes and common law, if helpful to your answers. Be sure to identify clearly any such rule or principle to which you refer.

The total time for the exam is 3 hours. Please try to organize your answer carefully. Brevity and precise analysis will be rewarded; rambling answers will not. The point allocations for each question and a rough time allocation, which is based solely on the point allocations, are next to the actual questions.

If any aspect of a question is unclear, or you think something may have been misprinted or omitted, refer to the difficulty in your answer, together with some appropriate assumption if possible. If you think that there is some additional information that would be critical to know, indicate what it is and why it is significant.

Please put your answers in the bluebooks and make sure your exam number is on each. Write only on **one side** of the page and use ink. Although given my own penmanship I am clearly not **the one** to ask this, please try to write legibly. I can't give credit for that which I am unable to read.

If you find yourself running out of time, you might try, at least, to outline the remainder of your answer.

Good luck and thank you for an enjoyable semester.

QUESTION ONE (75 points--1 HOUR) Included in this question are 2 subparts of equal weight; thus 30 minutes and 37.5 points for each)

You are a member of the legal ethics committee of your law firm, Barnes, Butler, and Bucholz (BBB), which specializes in white-collar criminal defense. Fred Francour is a sixth-year associate at the firm and has written the following memo to the BBB legal ethics committee; you have been assigned to draft a reply memorandum to him. Please draft the memorandum, answering each of Fred's questions in turn. Another practice group has been assigned to address any securities law violations, so you should not address those specific claims.

To: BBB Ethics Committee

From: Fred Francour

Date: May 1, 2007

I am writing for ethics advice on a number of troubling questions that have arisen in my representation of XYZ Corporation, a company involved in selling recycled durable medical equipment to hospitals. The General Counsel of XYZ asked BBB to investigate allegations made in an anonymous whistleblower letter to his office, dated November 5, 2006. My supervisor, BBB partner Sandra Simon, asked me to handle the investigation.

The charge involves allegations that XYZ engaged in fraud by publicly claiming that it has business contracts that do not exist. The letter alleges that XYZ made these fraudulent claims in order to hide the fact that it is losing money because of recent news reports that recycled durable medical equipment might not be as safe as originally thought. These news reports claim that germs can persist on the equipment if it is not properly sterilized, which can cause serious infections in patients on whom the equipment is reused.

When I started to investigate, I noticed several problems that caused me concern. First, I couldn't find documentation for about a third of the contracts XYZ reported in its last annual report to shareholders. Second, many of the supposed copies of contracts that I could find were unsigned. Third, some of the contracts that were signed existed in multiple versions, and some of those versions had different dates on them.

I noticed this third problem first. When I pointed out the discrepancies in the dates to XYZ's accounting office and turned over the documents, the accounting office gave me back single copies of each contract, which it claimed reflected the correct information, and told me it had destroyed the other copies pursuant to XYZ's Document Production and Retention Policy.

Then, about two weeks later, when I had satisfied myself that I would not be able to find signed copies of the other contracts XYZ reported in its annual report, I went back to the accounting office and pointed out that I had been unable to locate copies of some of the reported contracts. A day later, the accounting office gave me back identical, signed standard form contracts in place of all the missing documentation. I suspect that at least some of the documents XYZ's accounting office gave me were either doctored or forged.

I told all of this to Sandra. She agreed it seemed a bit irregular, but told me I should give our client the benefit of a doubt in my report to the General Counsel. She said one could read the contracts as showing that "XYZ's success in securing renewals of its contracts with hospitals for the ongoing provision of durable medical equipment has been extremely impressive, signaling its excellent financial health and stability." She also told me that since I had taken the lead on this investigation, she wanted me to be the sole signatory on the letter to the corporation. She indicated taking the lead on this would be viewed positively in my upcoming promotion review.

Another issue that is really bothering me is that, in the course of my investigation, I happened across a file full of complaints from hospitals about patient infections that the hospitals suspect have arisen from the use of XYZ's equipment. When I mentioned this issue to the General Counsel, she told me that this was not within the scope of the investigation she wanted me to do.

I would greatly appreciate your advice on the following two questions. I know there are many more issues presented by these facts, but I am comfortable with the answers to those. (Each question will be weighted equally in grading).

1) I am deeply concerned that XYZ may be involved in serious and extensive fraud by representing contracts that do not exist. But I don't know what to do about this. What should I do under the Rules of Professional Conduct?

2) I kept copies of all of the documents I gave to XYZ's accounting office. Should I throw these copies away pursuant to XYZ's Document Retention and Destruction Policy, which would permit destruction of these documents?

QUESTION TWO (75 points--1 HOUR)

Barbara is a lawyer in the general practice of law. Her practice has gradually drifted in the direction of representing older persons. (Her own parents died several years ago, and she was amazed to discover how little planning they had done regarding end-of-life issues.) She has attended a few Elder Law and Estate Planning Continuing Legal Education (CLE) programs, but does not consider herself to be an expert on all Elder Law matters.

Barbara's interest in the legal issues faced by older persons and an advertising campaign in the local newspaper has resulted in considerable growth in her practice. Thus, she recently hired an associate, Jim, a recent law school graduate. Thus far, he has been assisting Barbara on her cases and is hoping soon to handle some on his own.

Recently, Jim was "minding the store"—Barbara was attending a guardianship hearing—when an elderly man (Bill) burst past the office

receptionist and into Jim's office. Bill was obviously disturbed; he demanded to see a lawyer. Jim told him to "tell me what's wrong—sit down." The old man slumped into the chair in front of Jim's desk and said:

"I'm afraid. My son and daughter-in-law are planning to kill me. I have a great deal of money and they want to steal it and put me in a nursing home. They know that would kill me. They want to take me to a lawyer who will help them steal my money and kill me. Help me."

Jim told Bill he would see what he could do—"Go home. Relax. I'll have my appointments secretary fit you in." An appointment was made for the following day when Barbara would be available.

Later that day Barbara rushed back to the office after her hearing. Before Jim could tell her about Bill, she told Jim that she would like him to "sit in on an interview that afternoon and perhaps he could handle it." Immediately thereafter, Bill arrived, ushered in by his son and daughter-in-law.

When they met in the conference room, Bill did not appear to recognize Jim; he just smiled and seemed to be enjoying all the attention he was getting. Bill's son told Jim and Barbara that Bill needed to have a guardian appointed—"he can't take care of himself; he would be better off in a nursing home." Bill's son described the extensive assistance he and his wife had provided to Bill over the last year and the danger that Bill presented to himself and others living near him. They told the lawyers that Bill hordes newspaper and insists on using only candles for light, all of which he perches precariously on the stacks of newspapers that fill every corner of his apartment.

The son indicated that he would pay the legal expenses, but that something had to be done "right away." Barbara responded that she and Jim would draft the necessary documents, and that they should return the next day to "put matters in order."

Barbara told Jim that since Bill did not appear to understand what was going on, they could not just draft a Power of Attorney (POA) to protect him. Such a document is essentially a contract giving the agent (the son) power to manage the older person's affairs, including nursing home placement. To be valid, a POA need only be signed by the person giving the power and does

not require court action; thus it would be, if it could be used, the cheapest way to protect Bill. Since Barbara doesn't think Bill can validly execute a POA, she asked Jim to draft a petition to the Probate Court to appoint the son as guardian. The relevant statute provides:

RSA 464-A:4 Procedure for Court Appointment of a Guardian of an Incapacitated Person.

I. Any relative, public official, or interested person, or any individual in his or her own behalf may file a verified petition for finding of incapacity and appointment of a guardian.

II. A statement shall be filed with the petition for appointment of the guardian containing facts showing the necessity for the appointment of a guardian, including specific factual allegations as to the proposed ward's personal actions or actual occurrences which are claimed to demonstrate his or her inability to provide for personal needs for health care, food, clothing, shelter, or safety.

464-A:6 Right to Counsel.

I. All guardianship proceedings must have a full evidentiary hearing. Since appointment of a guardian will result in a significant deprivation of the proposed ward's rights, the right to legal counsel for any person for whom a guardianship is sought shall be absolute and unconditional. The court shall appoint counsel for the proposed ward immediately upon the filing of a petition for guardianship.

You were Jim's Pro. Rcs. teacher in law school, and he comes to see you for help. What should Jim do? Discuss fully the issues raised and offer your best advice.

QUESTION 3 (75 points--1 Hour)

"The Model Rules openly acknowledge the fundamental tension between client- and justice-centeredness and strike a balance between these two poles. Some provisions focus on lawyers' client-centered duties. Other parts of the rules provide the counterweight of lawyers' justice-oriented duties- to the court, third parties, and the public interest. On balance, the rules are

weighted toward client-centeredness within bounds. A justice-centered view, if codified generally, would require revision of many provisions in order to shift this overall balance away from client-centeredness and toward justice-focused duties to the court and to the public interest."

Please analyze in detail this passage. In your discussion please draw on concrete examples within the Rules.