

PROFESSIONAL RESPONSIBILITY

FINAL EXAM

PROFESSOR SIMON

SPRING 2009

INSTRUCTIONS

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

1. The supplement assigned for the class, Martyn, Fox & Wendel's The Law Governing Lawyers (2008-09 Ed.); 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 versions of the ABA Model Rules and Judicial Code in the Supplement. Our state courts have looked to the ABA Standards for Imposing Lawyer Sanctions to set the methodology for discipline.

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, in your answer, 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; the exam has four questions. Please try to organize your answers 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 either follow the registrar's instructions for taking exams on laptops or 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 1 (50 Points; 45 minutes)

In the fall of 2008, a second-year law student (Larry) approached his criminal law professor (Penny) and asked to speak to her about a personal matter. Larry and Penny met after class in her office at the law school. Larry confided that he had been accused of sexual assault by a college student he had been dating, but was no longer seeing. The woman was threatening to go to the police and school authorities. Larry indicated that, though they were both drunk the last time they slept together, he believed that there had been full consent. He also mumbled something about a drug in the drink, but didn't elaborate.

Penny suggested that he look up the definition of rape and consent. She suggested avoiding future contact and giving the young woman time "to work through this." Finally she suggested he meet with his Pro Res professor to see how this might impact his bar application. The student was subsequently indicted on 2 counts of sexual assault.

Larry has indicated through court filings that he will not testify at trial. The prosecutor, from an early interview with Larry, knows he spoke to Penny. Prosecutor serves Penny with a trial subpoena. Larry's counsel moves to quash the subpoena based on the attorney-client privilege. You are a law clerk at the Superior Court. The judge wants you to analyze the issues presented by the motion and to recommend a resolution.

Question 2 (50 Points; 45 minutes)

Martha Heath has a wide reputation for her success in handling medical malpractice cases for plaintiffs. She is in great demand and is rightfully feared by doctor defendants. Her partner is James Worthy. James focuses on family law matters and also is widely respected in this specialty.

Recently, Linda Parker came to Heath with a claim against Dr. Charles Abraham. Heath investigated the facts, found that they seemed sound, and proceeded to go to work on the matter. Unbeknownst to Heath, Worthy, about five years earlier, had represented Dr. Abraham in the routine adoption of his new wife's children. He has done no work for the family since then. The adoption file had improperly been opened under the children's pre-adoption last name.

Dr. Abraham was furious when he found out who was representing Linda and stated that "of all people-my own lawyers are suing me." More to the point, he had his malpractice defense counsel move to disqualify Martha Heath from handling Parker's claim.

You are the judge. Rule on the motion to disqualify and provide your reasoning.

Question 3 (50 Points; 45 minutes)

A well-known local psychiatrist has a contract claim for about \$100,000 against a local building contractor. The matter appears to be of average complexity. She has brought her case to attorney Paul T. Novak. "I'll take your case," Novak says. "My fee will be only 44 per cent of

the amount recovered.” Shocked, the psychiatrist says that she has never heard of even psychiatrists charging such high fees. “One-third is average,” Novak tells her. “I am giving you a bargain. I am only charging you one-third more than the going rate and I am at least twice as good as the average lawyer.”

Novak also has agreed to represent a plaintiff in a personal injury suit for a “discount” contingent fee of one-third of the amount recovered. The other side has offered, before Novak begins work, to pay his client \$15,000. Based on what he knows about the case, Novak believes the actual damages that a jury would award would be more like \$60,000, but it would take him about 200 hours or work to recover that amount, and, of course, the client might not recover anything at all. Novak has concluded that it is best to recommend to the client that he accept the \$15,000 immediately so that Novak can pocket a \$5,000 fee with little effort and go on to the next case.

When a prospective client asked Novak about his willingness to charge a fee on an hourly-rate basis, Novak simply laughed and said he would never agree to charge fees on any basis other than one that let him share in any good result. Novak added that other lawyers charge hourly fees and the prospective client could always go there.

You are associate disciplinary counsel for our state. Because of budget cuts in the office staff, chief counsel has asked you to bring only ONE charge in this case. She wants you to select the violation you feel is the most egregious (and which would likely draw the most serious sanction). You may only discuss one claim in your answer. She would like you to analyze the chances of success in the claim you choose to bring and indicate why you selected this one.

Question 4 (50 Points; 45 minutes)

Our state’s legislature is considering a bill to regulate the legal profession. The bill would establish a Lawyer Review Board with control over licensing and discipline. This three member Board would be made up of a representative from business and consumer groups and would have one lawyer designated by the Supreme Court. The Board would scrap the Rules of Professional Conduct and replace them with a set of rules that allow broad competition among lawyers and nonlawyers. If you were a legislator would you support such a bill? Provide your analysis.