

**PROFESSIONAL RESPONSIBILITY**  
**FALL SEMESTER 1998**  
**# 5013 - Professor Kilpatrick**

**FINAL EXAM**

**Exam Number:** \_\_\_\_\_

This exam contains one essay question with several parts (4 pages, including this cover sheet), and comprises 50% of your final grade.

**Instructions (read carefully)**

**THE EXAM IS “OPEN BOOK.”** You may consult ONLY the Brill Rules book, the Aronson textbook, assigned articles, and any notes and outlines you have prepared. You may not conduct any research or consult outside sources on issues raised by this question.

- 1. EXAM PICKUP:** The exam will be available for 24-hour pickup at the Circulation Desk in the Library beginning at 8:00 a.m. on Thursday, December 3, 1998. Since the library is open at different hours over the weekend, it is your responsibility to schedule your exam pickup so that it can be returned within the time period.

The exam questions will be in a folder marked “**EXAMS.**” There also will be exam booklets for those who wish to write their exam. On the front of the folder, a “**sign out**” sheet will be affixed. Exam copies are numbered. When you pick up your exam, please “**sign out**” using (1) your exam number, (2) the number of the exam copy you have been given, and (3) state the time and date.

Your completed answers, plus the exam, must be returned **to the law library** within **24 hours**.

- 2. EXAM RETURN:** Your answer AND the exam must be returned to the Circulation Desk within a 24-hour period that ends at 5:00 p.m. on Monday, December 7. An accordion folder marked “**KILPATRICK PROFESSIONAL RESPONSIBILITY EXAM**” will be held in the “Library Reserve” cabinet. It will contain a “**sign in**” sheet.

When you return your complete answer and exam, “**sign in**” by exam number and indicate the date and time. Insert your copy of the exam and your answer into the manila envelope.

**3. PLACE YOUR EXAMINATION NUMBER ON THIS PAGE OF THE EXAM AND ON EACH PAGE OF YOUR EXAM ANSWER (or on the first page of each exam booklet). THE EXAM ITSELF MUST BE RETURNED WITH YOUR ANSWER.**

**4. YOUR ANSWER SHOULD BE NO MORE THAN NINE (9) PAGES, DOUBLE-SPACED AND TYPED.** Leave one-inch margins and use nothing smaller than the font I used for the exam question. (It must be readable without a magnifying glass and the maximum length limit for handwritten answers applies to computer users.)

If handwritten, please use blue or black ink, write clearly on alternating lines, and calculate the maximum length based on the average number of words per page in your handwriting. Maximum length: 2250 words.

**5. READ THE QUESTION CAREFULLY BEFORE YOU BEGIN.** I do not want only a general discussion of the law or quotes from the rules. Rather, your answer should reflect a discussion of the relevant rules and principles in the context of the facts given. Restrict yourself, to the extent possible, to the facts given. If additional facts are needed to resolve the existing issues, state what they are and why, but do not change the facts.

**7. RETAIN A COPY OF YOUR ANSWER.** The process might fail us.

**8. GOOD LUCK! AND HAVE A GOOD HOLIDAY.**

- # -

## **QUESTION:**

You are an attorney who has been in general practice in Fayetteville for five years. You have built up a small reputation as a good lawyer, but with the stiff competition from other lawyers in Northwest Arkansas, you have struggled a bit for income.

Your office is located in a small house that has been converted to business uses. You have been renting the house for five years and your yearly lease has three months to run. The owner of the building has informed you that he will not renew the lease. In fact, the owner will put the building on the market next week. A client, with whom you have built a friendship, has offered to loan you money at a very favorable interest rate to

purchase the building. Owning your own building has been your dream from the beginning and this location is perfect for your needs. The price is a good one, given the increasing rise in area prices generally.

You have decided that this weekend is a good time to think carefully about buying the building and about some things that are going on in your practice. You have three cases that are causing you some concern.

(1) In an unusual move, you have been asked to defend the Division of Youth Services, in the Department of Human Services, in a class action suit claiming that conditions at its facilities violate federal statutory law and the constitutional rights of juveniles. When you discuss the matter with the agency's director, you are told that the agency cannot do anything about the problems because the state legislature has not provided sufficient funds for the department. You are asked to do what you can in defending the case, although it has no real chance of winning, to give the agency time to pursue some funding sources.

(2) A new client came in to last week to complain about her lawyer. The litany of attorney actions (or inactions) related by the client are somewhat shocking, since you've known the attorney since law school where you were good friends. Client was being threatened with suit by a creditor and went to the lawyer, Mary Barrister, about eight months ago. Mary had quoted an hourly rate of \$125.00 to negotiate with the creditor. If trial preparation and/or trial were required, the hourly rate would be \$200.00.

Client did not hear from Mary for about six months, although she received statements monthly, which she paid within two weeks. The first monthly statement totaled \$375.00. After the second monthly statement, which totaled \$500.00, Client began calling Mary to learn what was happening with the negotiations. At first, Mary's secretary spoke with Client at length, telling her about the phone calls and meetings Mary had had with the creditor and how hard Mary was working on the matter. Soon, however, the secretary stopped talking with Client except to say that she would give the message to Mary. The monthly statements continued. After about six months, Mary returned one of client's calls, saying that the creditor was being difficult but that she (Mary) was certain an accommodation could be reached. Client has not spoken with Mary for two months now. By the time Client walked into your office, she had paid \$1,875.00 to Mary. Client's total debt to the creditor is \$3,350.00. Client brought you copies of Mary's monthly statements, but had no other documents. The statements contain merely a total amount, with the words "For services rendered."

(3) You have represented Robert on a number of occasions. He has come to rely on you not just as a lawyer but also as an advisor and counselor. Last week Robert came to see

you. It seems that Robert's physician had diagnosed Robert as having an advanced stage of pancreatic cancer. Pancreatic cancer is incurable. The diagnosis was confirmed when Robert went to the Mayo Clinic.

Robert has always been a proud, independent person. He told you that he does not want to cause his wife and children significant grief by a prolonged illness, nor does he wish to subject his family to the extensive financial costs of a prolonged illness.

You told him that you could help him by drafting legal instruments that would instruct his physicians not to engage in heroic efforts to prolong his life when his cancer begins to impair his day-to-day activities. You also began to tell him about "Do Not Resuscitate" instructions when Robert cut you off. "I've considered all that," he said, "but I've decided on a more direct approach." It seems that Robert had contacted Dr. Dan, a physician who believes in euthanasia. Dr. Dan has constructed a machine that enables a person to self-administer a fast acting sedative and poison that enables a person to commit suicide painlessly. Dr. Dan sells the machine for \$25,000.

Robert wants you to represent him in two ways: First, Robert wants you to handle the purchase of the suicide machine from Dr. Dan. Robert would authorize you to pay up to \$25,000 for the machine and to draft and review all necessary legal documents. Robert told you that Dr. Dan insists that the sale include a "hold harmless" clause, a waiver of liability and remedy for any resulting death or injury resulting from the intended use of the machine, and a general release. These documents would prevent Robert's wife and children from recovering against Dr. Dan for Robert's wrongful death. Robert told you he was agreeable to these demands by Dr. Dan.

Second, Robert wants you to draft a will for Robert that will leave all his property to his wife and children. He also wants you to prepare the necessary documents so that his life insurance will be paid to his wife. Because the insurance policy was taken out years ago, Robert had initially named himself as the beneficiary. The change will enable Robert's wife to obtain the life insurance free of probate.\*

Assume that Arkansas' Penal Code has the following statute: "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."

You told Robert that you wanted a few days to think about his requests.

---

\* You are to assume that the life insurance will be paid even if Robert's death is deemed to be self-inflicted.

#5013 - Professional Responsibility  
Final Exam - Fall 1998 - Kilpatrick

**Being an organized person, you have written out the above facts and now proceed to “discuss” with yourself (in writing) the professional responsibility issues these various matters present. You are proud of being an attorney and don’t want to “make waves” that could damage your reputation.**

###

**Answer Key:**

The maximum possible points on this exam were 50. In allocating points on your answers, I doled out 100 points, assigned them, then divided by 2 to reach the maximum of 50.

1. Loan from client. [Eight (8) points] Raises conflict of interest (Rule 1.7) concerns, particularly Rules 1.8(a) (business transactions with client), and 5.4 (independence of lawyer's judgment). A thorough discussion of Rule 1.8(a) would include (a) whether the "very favorable interest rate" was "fair and reasonable;" (b) the agreement was in understandable language and in writing; (c) the client was given an opportunity, and encouraged, to seek independent advice from another lawyer; (d) client signed a written consent acknowledging his/her understanding of all this; and (e) client might be "in the business of providing loans" - Comment [1]. The second concern, Rule 5.4, would require discussion of whether client might make unreasonable/illegal/unethical demands regarding your services to him or other clients, or otherwise interfere with your law practice, because of his position as creditor. Whether or not you would take advantage of the loan offer was not an issue; the rules allow it if all concerns are resolved so your own feelings about the matter will be the final determinant. Most of you were more skeptical than you needed to be regarding an attorney's ability to clearly document such a loan situation. It is legitimate for someone, for personal reasons, to make less than they might on an investment. As long as they've thought about it, been advised, are in their right mind, etc., and it's all properly documented, you'll probably be okay. The potential interference issue is treated similarly, *i.e.*, the burden on the attorney is high, but not impossible, to clearly establish that client no "right to interfere" in the practice or with attorney's judgment.

2. Representing State agency. [Eighteen (18) points] Raises issues of proper investigation (1.1), scope of representation/counseling (1.2, 2.1), improper delay (1.3, 3.2), communication (1.4(b)), frivolous defenses (3.1), organization as client (1.13) potential violations if you followed director's instructions (3.4 - fairness to opposing party and counsel; 3.3, FRCP Rule 11 - candor toward the tribunal; 4.1 - truthfulness in statements to others; FRCP Rule 26 - discovery), 8.4, and rejection/withdrawal depending on circumstances (1.16).

3. Mary Barrister. [Twenty-four (24) points] Raises issues of conflict of interest (1.7(b)) and duty to client; whether or not you were required to report Mary to the bar disciplinary authorities (8.3) for violation of various rules (1.1, 1.2, 1.3, 1.4, 1.5, 3.2, 5.3). For your own actions, you needed to give consideration to whether you have violated rules in creating a relationship with client and the effect of Rules 1.6, 4.2, and 8.4.

4. Robert. This matter raised four central issues:

A. May you assist Robert in purchasing the machine and/or drafting his will and changing his insurance beneficiary?

- Robert
- B. May you disclose Robert's plan to his wife and/or others to prevent his suicide?
  - C. Do you owe any duties to Robert's wife and/or others to prevent from entering into the contract with Dr. Dan?
  - D. What is your role as Robert's lawyer in counseling and advising Robert regarding his stated intentions?

A. Machine purchase:

(1) [Eight (8) points] While assisting a person to commit suicide was a crime, facts were silent whether committing suicide was a crime. Many jurisdictions do not treat suicide as a crime. If it is not a crime, is a lawyer — a person who acts as the client's legal facilitator — liable as an aider? All Robert asked you to do was *facilitate* the purchase. Should lawyers be excluded unless they become actively involved in the act itself? (That is what has "saved" Kevorkian thus far.) Does/should the lawyer's special role provide an immunity that would/should not apply to non-lawyers? Is legally advising, counseling and assisting a client different from conduct that "encourages" another to commit a criminal act? All of you concluded that assisting in acquiring the machine would violate the statute under 1.2(d), 8.4. I would have liked to see more analysis of the statute and more "advocacy" on Robert's behalf by closely interpreting/questioning whether the statute applied to you (what the statute required) (whether or not you morally agreed with Robert's intent).

(2) Will and insurance policy. [Four (4) points] Is there a distinction between the purchase of the machine and the preparation of the will and change of beneficiary? Most of you concluded that a distinction could be made, some appropriately noting the use of limited representation under Rule 1.2. Many of you noted that these acts were necessary to Robert's legal health under the circumstances.

(3) Attorney-client relationship/withdrawal. [Eight (8) points] Most of you discussed the issue of withdrawal under Rule 1.16, but few raised the question whether an attorney-client relationship existed, given that this is essentially an *initial* interview, *i.e.*, Robert has not *assumed* you will act for him. If he is not, you could simply decline the representation. If you brought in Rule 1.16, you should have discussed *why* you believed a formal attorney-client relationship existed.

Several of you stated you would withdraw because you found his intentions "repugnant" and/or "imprudent," but didn't discuss what that meant. Don't the terms of the rule envision more than mere disagreement with the client goals?

B. Disclosing Robert's plans. [Twelve (12) points] Most of you raised the issue of the lawyer's duty to maintain confidences (1.6). The discussion should have acknowledged the difference between the *privilege* and the ethical duty of *confidentiality*. Other considerations were issues of your *reasonable belief* that Robert would commit a crime, the *imminence* of the action, etc. (he might reconsider after purchase, particularly if

you counsel him). A key issue in this discussion was whether suicide was a crime. If not, Rule 1.6(b) does not apply; you cannot disclose the information. If you decided the Rule applied, you needed to discuss how much disclosure should be made (remember, only as much as is required to achieve your legitimate goal of preventing crime). Many of you were ready to disclose to Robert's plan to his wife; several were ready to disclose to law enforcement. Would the latter be appropriate, or overkill?

C. Duties to third parties. [Eight (8) points] There were several approaches you could have taken here: (1) did the prior representations also involve the wife, so that you owed a duty to her as a client (1.7, 1.9); (2) if Robert is the sole client, your role may require the infliction of some harm on others in carrying out his legitimate wishes (so that any harm to the family by the proposed contract is not legally significant, similar to a decision to disinherit a spouse or child); (3) perhaps Robert owed a fiduciary duties as a spouse or parent and the family could reasonably expect you to look after their "entity" interest, although that is a long shot and would significantly burden attorneys.

D. Duty to advise and counsel. [Ten (10) points] Most of you correctly referred to Rules 1.2 and 2.1 regarding your role as advocate, advisor and counsellor. Robert should have been told that his plan would subject Dr. Dan to criminal liability and *might* implicate you as his lawyer. If Robert didn't know that, he might be deterred from causing that particular harm to others.

A number of you cited Rule 1.14 (client disability), which was fine, but no one raised the issue of client autonomy (versus societal paternalism). Even if you don't believe in euthanasia, how do you balance your views against those of the client? (Gets us back to the issue of "repugnance/imprudence.") Before assuming he was disabled, didn't you need to determine *whether* that was the case? Robert may be suffering depression etc., or he may have made a well-considered, deeply held, authentic and reasoned decision?

**Oops!** Some matters arose that need correction: (1) Changing the beneficiary on the policy to avoid probate is not fraudulent or illegal. (2) Several of you got lost in discussing whether you did or could owe a duty/represent Dr. Dan (not under the facts as stated). You might have asked Robert whether he wanted you to represent he and the Dr; if so, a joint client issue would have arisen (*e.g.*, who pays fee, etc.) It was appropriate to note that you would be required to treat Dan as an *unrepresented* party if you dealt with him; if you assume Dan had his own lawyer, Rule 4.2 was applicable. (A maximum of two (2) extra points were given for this.) (3) A couple of you thought you were using your own \$25,000 to purchase the machine. That was not in the facts, you were merely told your *negotiating authority*. (4) Finally, some seemed to believe that you were under a duty to protect Robert's wife because she would be a beneficiary of his estate. While most states will require a duty of care with regard to some third parties, including will beneficiaries, that duty is limited to assuring that the *client's intent* is carried out (and that no harm results from the attorney's negligence). Under those circumstances, the wife would be arguing that you failed to carry out Robert's wishes.