PROFESSIONAL RESPONSIBILITY
Interim Exam - Fall 1999
 # 5013 - Professor Kilpatrick

Exam No.: ________________

INSTRUCTIONS

This exam contains two "brief essay" questions, and comprises 25% of your final grade.

1. **PLACE YOUR EXAMINATION NUMBER ON THIS PAGE OF THE EXAM AND ON THE FRONT OF EACH BLUE BOOK.** The Exam must be returned with your blue book(s).

2. **THE EXAM IS "OPEN BOOK."** You may consult the Brill book of Rules, the Aronson textbook, and any written (hard copy) notes and outlines prepared by you. Computers are not allowed.

3. **READ EACH QUESTION CAREFULLY BEFORE YOU BEGIN.** Briefly list the ethical issues raised by each question. In your response, please cite to the applicable Rule(s) and indicate your reasons for making the connection between issue and Rule.

(continue to next page)

Question 1. Attorney visits his convicted client in prison to discuss client's appeal. The attorney is escorted to an attorney-client interview room in a secured area of the facility. A few minutes after his arrival, his client is escorted to the room and enters. The door closes and the attorney and client sit and begin to converse across a small table. The client has brought a manila envelope with him that contains various papers and documents he believes are of import to his legal situation. During the course of their conversation, the client dumps the envelope's contents out on the table. Falling out with the papers is a small utensil that consists of a crude handle with a razor blade attached at one end. The client makes a poor attempt to palm and hide the utensil in his pants, but the attorney has clearly seen what he believes is a weapon. The client is a very institutionalized, career inmate with a history that includes some crimes of assault.

(a) What should the attorney say to the client?

(b) What should/must the lawyer do with respect to his having seen (albeit never possessed) the "shiv"?

(c) What should the attorney do if, in response, the client says "I just use it to open letters"?

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Question 2. Please discuss the issues of professional responsibility that are raised by the following:

FOR IMMEDIATE RELEASE: **Entrepreneuring Arkansas Lawyer and Founder of "Ask-A-Lawyer.com" Finds Business Niche Answering Simple Legal Questions Via Web and E-Mail**

LITTLE ROCK — Four years ago Albert Barrett Cole started his law practice, but he was always looking for a way to help more people afford legal services. Then the Internet exploded and Albert decided to offer answers to short e-mail questions for $20.00 each.

Cole will answer, to the best of his ability, questions regarding Arkansas Civil Law or Procedure presented by a consumer through the secure page on his new web site "http://www.ask-a-lawyer.com". Attorneys and law students must pay $200.00 for this same service.

Feedback from clients shows that the "Ask-a-Lawyer" concept is an efficient way for a consumer needing answers to simple legal questions or legal counsel to obtain feedback conveniently, without

having to block out extra time for face-to-face meetings and for a very reasonable fee.

For credentials, see: http://www.lawstone.com

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Answer to Problem 1: There is no absolute answer one way or the other with regard to what the attorney should do. The various considerations and rules involved in them are as follows:

Rule 1.6 analysis. Use the language of the rule.

(a) What should the attorney say to the client?

A first question is whether the attorney has any obligation to say anything. Is the lawyer's observation and the "shiv" "information relating to representation of a client"? One view is that attorney is representing client on appeal of a conviction at trial. There is a final judgment and the appeal will be decided by the "record on appeal." The shiv has no relevance to the lawyer's reason for being with the client. Therefore, it is not within Rule 1.6 and the attorney has no obligations whatsoever regarding it — it is not his problem.

(b) What should/must the lawyer do with respect to his having seen (albeit never possessed) the "shiv"?

There is an attorney-client relationship here which, under case law interpretations of Rule 1.6, requires that any communications intended by the client to be "in confidence," should be treated as confidential by the attorney. Did client "intend" to communicate something here? The shiv apparently slipped out of the envelope accidentally. Does his "poor attempt to palm and hide" it indicate a communication that the attorney should just ignore the incident? Probably. Can the attorney do so? It depends.

Confidentiality and loyalty are fundamental duties in the relationship. An attorney must be virtually certain that the client intends to commit a crime before s/he can look to R 1.6(b). This is so because the harm to the client and to the attorney-client relationship would be severe should the attorney decide to reveal the knowledge to prison authorities.

Is possession of the shiv a "crime"? Not clear, certainly there is likely to be a rule against prisoners possessing weapons while incarcerated but it may not be a "crime" under the law (remember that AR distinguishes between different kinds of "fraud" - criminal and non-criminal - in this area). There is no indication that a crime previously was committed with the shiv, although if the attorney was given such knowledge by the client it would be a "past" crime and thus required to be kept "confidential." Is it an

"ongoing" crime? Depends on whether possession prohibition is a rule or a law. There is no evidence of any other crime having been committed.

Does the client's possession of the shiv create such a likelihood of "future" crime that the attorney might "reasonably believe[] (revelation is) necessary: (1) to prevent the client from committing a criminal act;"? What does the attorney "know"? (a) that a shiv can be dangerous (razor blades can harm) and (b) that the client has a history of violent behavior. Is that enough to overcome the lawyer's duty of loyalty and confidentiality? Perhaps, if other knowledge (*e.g.,* that the client's violent crimes occurred using sharp blades, that the client has a trigger-edged temper, client has made threats about a guard or another prisoner, etc.) also is available. Possession may not "equal" intent to commit a crime with it.

If Rule 1.6 is not involved, does attorney have any special obligation (professional or personal) to report any observations? While the Preamble talks about a "special responsibility for the quality of justice," no rule enforces that in any way. It certainly does not displace R 1.6. [Rule 3.3 applies when a lawyer is facing a tribunal - not our case. Rule 3.4 applies when there is an opposing party and counsel - not our case. Rule 4.1 applies "in the course of representing a client" - here, observation of the shiv in client's possession has nothing to do with the lawyer's representation of the client on appeal. (Some students used 4.1 to create a duty to disclose to avoid assisting in a crime, but 4.1 also states "unless disclosure is prohibited by Rule 1.6," so 1.6 controls the situation.)

The lawyer may feel a "moral" obligation to do something about the shiv, although that raises considerations outside the RPC. If the lawyer decides that he has sufficient knowledge to "reasonably believe" a crime will occur (bringing in sub-section (b)(1), the lawyer "may" disclose, but is required to do so in a way that causes the least adverse results to the client. Anything other than "telling on the client" would require the client's cooperation. Certainly, if there is a strong chance that the shiv might be used against innocent persons, *e.g.,* prison guards, there is impetus to reveal and prevent harm, although the cases in the text indicate that the belief has to be very strong. Someone suggested that if the only persons likely to be harmed were also prisoners, it was less compelling. There are downsides to acting on a moral imperative: the client will suffer for the "potential" acts he might have committed, the trust within the attorney-client relationship

will be broken, and the attorney's actions may affect his ability to secure future clients (although this consequence should not be a determining factor if the knowledge is truly compelling).

Whether or not the attorney decided to report the shiv to authorities, he will want to consider withdrawal under R 1.16. (See below)

(c) What should the attorney do if, in response, the client says "I just use it to open letters"?

This response goes to the "reasonable belief" issue under 1.6(b). It may reduce concern on the part of the attorney; it may not. (Personally, I would have been more reassured had the client said he had it for self-protection, since that seems reasonable under the circumstances (although against the rules) and the implication is that he will not use it except if threatened.

Rule 1.2 analysis. The applicable sections are (d) and (e). With regard to (d), the client has not "proposed a course of conduct" that necessarily triggers the lawyer's option ("may") to discuss consequences. If the lawyer wants to do so, nothing prevents it, but it is not clear that anything that has happened requires it. If the lawyer decides to pursue the matter, he may give voluntary advice that the possession is unwise, could worsen the client's chances of getting out if he hurts someone else. The lawyer may offer to take the shiv, although there may be some personal downside/danger to the lawyer in having possession should it be discovered by prison guards. (He could not turn it over to them without implicating his client or ruining his reputation.) There also may be some personal danger in confronting, however nicely, the client (given his history of violent behavior and his current possession of something that could be used as a weapon).

To assume that the client "intends" illegal conduct is only that, an assumption, without sufficient facts to support it. There is a case, in another context, that says mere assumption based on no expressed statements is not sufficient to trigger the right of an attorney to withdraw. The attorney takes a chance if he acts on that assumption and is considered precipitous. Then, he has violated 1.6. Comment [7] seems apt, and states that when the course of action (here, possession of shiv) is ongoing, "lawyer is not permitted to reveal the client's wrongdoing, except where permitted by Rule 1.6."

Looking at (e), there is nothing to indicate the client "expects" "assistance not permitted by the rules of professional conduct or other law." At most, the client is expecting lawyer to remain silent. Without more, Rule 1.6 also expects that.

Rule 1.16 analysis. If the attorney decides that the justifications contained in Rule 1.16 exist, he may attempt to withdraw from representation (or use his withdrawal as a "threat" to convince the client to discard the shiv). However, the client cannot suffer harm as a result of that withdrawal, *e.g.,* if the deadlines for the appeal are near. The client may "fire" the lawyer if he feels that even a suggestion that he discard his only protection in prison is disloyalty, but since attorney is "of record" in the court of appeal, a motion will be needed. Depending on the facts, the court may or may not allow him to leave (or the client to fire him).

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Answer to Problem 2. Here, I asked for brief discussion of issues raised by this press release/newspaper story. There was not enough information to truly answer the question, but there were facts that should have been used in the analysis.

Rules 7.1-7.3 analysis. Is this an ad? The "FOR IMMEDIATE RELEASE" suggests it and that Cole has disseminated it to gain publicity for his website. If so,

Is it "false or misleading" under **7.1**? There are a number of possibilities, *e.g.,* what does "to the best of his ability" mean, does the price differential imply a "comparison," is "feedback from clients" a forbidden testimonial. Does it create "unjustified expectations"? For example, what will consumers believe they are getting for their $20?

Does it comply with the technical requirements of **7.2**? Although AR has not spoken on the use of the internet for advertising, several states have and the ABA recently released a Formal Opinion on the use of e-mail to communicate with clients. It is considered "public media" and the same rules apply. Review specifics of subsections (b) through (e).

Is it "solicitation" under **7.3**? Is the site "direct contact"? Depends on how he uses it. If it isn't, do subsections (b), (c), or (d) have relevance? Only if the ad is directed to "prospective client[s] known to be in need of legal services." Is that the case here? Again, depends on whether he somehow "forces" his website on individuals. If it is simply there for anyone who is interested, these subsections would not be relevant. What about subsection (e)? Answer depends on whether we've decided that the site is a "direct contact." What about subsection (f)? According to the description given in the ad/article, Cole "owns" the site. Therefore, it would not qualify as a "prepaid group legal services plan."

Do Cole's activities create an attorney-client relationship with those who ask questions? We know the standard is a liberal one: asking for legal advice from someone known to be an attorney. Seems to fit here, which brings in consideration of Rules 1.1 (competence), 1.2 (scope of representation), 1.4 (communication of information), 1.6 (confidentiality), 1.7-1.9 (conflicts of interest), and, perhaps, 1.11, 1.13, 1.14, 1.16, 2.1, 5.1, 5.3.

Otherwise, Cole must be concerned about violating rules 5.5, 7.4 (although I do not think he has done that here), 7.5 (contingent on 7.1-7.3 analyses) and, ultimately, the "catch-all" 8.4.

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