HOW TO WRITE ESSAYS FOR

PROFESSIONAL RESPONSIBILITY

LAW SCHOOL AND BAR EXAMS

WHAT to Say and HOW to Say It!

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Attorney at Law
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Chapter 3: Issue Spotting

Since you lose points for every “required” issue you fail to discuss, it is CRITICAL TO SPOT all of the “required” issues. BUT DON'T waste time discussing issues that do not really exist. This is easier said than done and introduces a certain level of sadism peculiar to law school.

The Reader (the person who will grade your essay) always expects you to discuss certain required issues. But Readers (and question writers) fall into two basic schools. The first, rational school, simply states the issues to be discussed in certain terms. The second, less rational and often sadistic school of Readers uses only hints about the intended issues. Sometimes the "hints" are obvious. Other times they are so subtle the student has to be a psychic. At this extreme this approach is called HIDING THE BALL, and it is the stuff of law school horror stories.

The HIDE THE BALL question utilizes words and fact patterns that only vaguely suggest issues. This is like a code language known only to law school professors. The following is a list of "code" words and facts that are often used to indicate intended issues.

<table>
<thead>
<tr>
<th>Issue Spotting Hints</th>
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<tbody>
<tr>
<td><strong>PROFESSIONAL RESPONSIBILITY:</strong></td>
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<td><strong>Issue Area and Coded Hint:</strong></td>
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<tr>
<td><strong>UNLICENSED PRACTICE</strong></td>
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<tr>
<td>1. Paralegal, clerk, secretary:</td>
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<td><strong>SOLICITATION OF CLIENTS</strong></td>
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<td>2. Hospital, ambulance:</td>
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<td>3. Advertisements, claims:</td>
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<td>4. Guarantees of success:</td>
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<tr>
<td><strong>FULL DISCLOSURE</strong></td>
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<td>5. Contrary case law:</td>
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<td>6. Old friends with opposing counsel:</td>
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<td>7. Prior representation:</td>
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<tr>
<td><strong>IMPROPER ACCEPTANCE OF CASE</strong></td>
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<tr>
<td>8. Attorney observed event in dispute:</td>
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<td>9. No knowledge or experience:</td>
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<tr>
<td>10. Related to opposing party/counsel:</td>
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<tr>
<td>11. Financial interest, media rights:</td>
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<tr>
<td><strong>FAILURE TO ADEQUATELY REPRESENT</strong></td>
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<tr>
<td>12. Missed deadlines:</td>
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<tr>
<td><strong>FEES</strong></td>
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<td>13. Contingency fees:</td>
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<tr>
<td>14. Fee agreements:</td>
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Chapter 15: Answering Professional Responsibility Questions

Applicable Law. The issues and answers given below are based generally on the American Bar Association (ABA) Model Rules of Professional Conduct, the ABA Code of Professional Responsibility, the ABA Canons of Professional Ethics and the ABA Code of Judicial Conduct. In addition, the California Rules of Professional Conduct (CRPC) and California Business and Professions Code (BPC) may be referred to and relied on in places.

If you are going to take a Bar exam, and will be tested on the rules of professional conduct for YOUR STATE, take the time to quickly read through ALL of those rules before taking the exam! Often they are posted on the internet. ¹

Warning! The ethical rules from different sources generally duplicate each other. Where there are differences, base your answer on the stricter rule! For example, ABA Model Rule 1.5 says it is unethical for an attorney to charge a contingency fee in both domestic relations (family law) and criminal actions, but ABA Model Code DR 2-106 only says it is unethical to charge a contingency fee only in a criminal law action, California Rule of Professional Conduct just says it is unethical to charge an “unconscionable” or “illegal” fee, and California Business and Professions Code section 6147 clearly suggests a contingency fee may be charged in any and all actions. So if this issue arises on a Bar exam, say the attorney “should” follow the stricter rule that contingency fees should not be charged in EITHER family law or criminal law actions.

The fact that one body of ethical rules differs from another should NOT be used as the basis for an argument that attorneys can or should deviate from the highest ethical standards.

Be sure to recognize and address the potential conflicts of interest that exist whenever one attorney represents two or more clients. Always say attorneys should decline cases that pose conflicts of interest. Always lean in favor of full disclosure of every potential conflict of interest to clients and obtaining the clients' informed written consent. NEVER hint or suggest that an attorney might legally circumvent the spirit and intent of the codes of professional responsibility. Always say attorneys should withdraw from representation when their continued involvement would violate ethical rules (while being sure to protect the client’s interests).

Issue Spotting. More than any other subject, Professional Responsibility issues can be crossover issues interwoven into other subject areas of law, especially Business Organization and Will and Trust questions. If any essay question mentions that an ATTORNEY or LAWYER is involved in the fact pattern there is almost always a Professional Responsibility cross-over issue to discuss.

Also watch out for "Larry the Lawyer" and "Annie the Attorney" in evidence or civil procedure questions. If any lawyer or attorney "forgets" or "fails" there is a possible professional responsibility issue to discuss.

Focus on “Ethical Conduct” not “Malpractice”. In a Professional Responsibility answer the primary focus should be on the attorney’s duty to the client, the Courts and the profession more than on possible liability for “malpractice” for “negligence”. While an attorney may certainly be “negligent” that is more of a tort issue, not a “professional ethics” issue.

¹ For example, the California Rules of Professional Conduct are all available at www.calbar.ca.gov.
PROFESSIONAL RESPONSIBILITY ISSUES AND ANSWERS

FOLLOW THE CALL of the question. But if the call is general list the issues as follows:

1. **Did attorney HELP AN UNLICENSED PARTY PRACTICE LAW?**
   Under the rules of professional responsibility an attorney cannot assist an unlicensed person to practice law.

   [The common scenario is that the attorney is advising or directing an intermediary who in turn advises the client. If a question says an attorney is having a paralegal or clerk talk to the client, why? Is it intended to raise this issue? If a question says an attorney loses his license, his license is suspended, or he employs a disbarred attorney the clear intent is for you to discuss whether or not the attorney is practicing law or helping someone else practice law without a license.]

   Here...because...Therefore...

2. **Did attorney LIE ON A BAR APPLICATION?**
   Under the rules of professional responsibility an attorney cannot lie on his own or anyone else’s bar application.

   [This issue would be raised if the question says the attorney gave a favorable recommendation concerning an applicant knowing the applicant was unethical or incompetent.]

   Here...because...Therefore...

3. **Did attorney CONTACT A REPRESENTED OPPOSING PARTY?**
   Under the rules of professional responsibility an attorney cannot directly contact opposing parties known to be represented by counsel.

   Here...because...Therefore...

4. **Did attorney THREATEN ADMINISTRATIVE OR CRIMINAL ACTION TO ADVANCE POSITION?**
   Under the rules of professional responsibility an attorney cannot threaten to institute administrative or criminal action in order to advance his position in a civil matter.

   Here...because...Therefore...

5. **Did attorney DISOBEY A COURT ORDER?**
   Under the rules of professional responsibility an attorney cannot ignore or willfully disobey an order of the court.

   Here...because...Therefore...

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2 Your STATE may have particular rules of professional conduct on this issue. For California see California Rule of Professional Conduct 1-311.
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WHAT to Say and HOW to Say it on
PROFESSIONAL RESPONSIBILITY
Law School and Bar Exams —

* The MOST COMMONLY TESTED ISSUES and
RULES AND DEFINITIONS to Help Answer Them!
* How to SPOT ISSUES!
* How to BUDGET TIME on Exams!
* CONCLUSIONARY Answers and How to Avoid Them!
* 5 PRACTICE QUESTIONS with SAMPLE ANSWERS!

This is what LAW STUDENTS are saying about NAILING THE BAR —

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"Nailing the Bar" was the best guide I have found. Using it I passed the Bar in one try — Sabrina

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