

SYLLABUS
PROFESSIONAL RESPONSIBILITY– SPRING 2022
SECTION 298-002 ADJUNCT PROFESSOR – ARTHUR D. BURGER

MONDAY EVENINGS 8:10 P.M. TO 10:10 P.M.

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INTRODUCTION

This will likely be the most practical course you will take in law school. Regardless of the nature of the legal work you undertake, your day-to-day conduct as a lawyer must conform to the legal mandates covered by this course. More than any other single course, this one teaches how to go about your daily interactions as a lawyer and to understand what others—including clients, adversaries, courts, colleagues and others—have a right to expect and demand from you.

While I *will* talk about the critical need for lawyers to consistently and scrupulously conduct themselves with the highest level of honesty and integrity in order for the legal system to function properly and will urge you to accept this obligation as central to the legal profession, unlike some other professors of this course, my focus is not on moral preaching. I will assume that by this point in your life you already have your basic moral bearings, and if not, I doubt I could change that. Rather, this course is a rigorous study of the complex body of substantive law that governs lawyers in their representation of clients. These principles are mainly codified in the ABA Model Rules of Professional Conduct and explained in ABA Ethics Opinions and applicable case law. These Model Rules, where promulgated in a State, have the force and effect of law for lawyers and constitute the means by which the practice of law is regulated. This is the law that governs lawyers. Knowledge of this body of law, as well as the ABA Model Code of *Judicial* Conduct, which we also cover, is required for admission to the Bar via the Multistate Professional Responsibility Exam.

I will let you in on a common misconception as to the body of law that we will cover: It is complex and detailed. Contrary to what many assume, ascertaining proper ethical conduct under various scenarios cannot be correctly divined by mere intuition or the application of general notions of fair play, any more than the correct answers to difficult contract or property law questions can be intuited or guessed at. The Model Rules resemble the Uniform Commercial Code and the Federal Rules of Civil Procedure in its complexity and requires a similar degree of study in order to master. Some of the complexity stems from the delicate balance of duties that

lawyers owe—not just to their clients—but also to tribunals, adversaries, third parties, the legal system as a whole, and others.

The balance of these competing duties can change based on subtle and nuanced shifts in factual scenarios and the questions you will be expected to answer will often involve situations on the margins of the competing duties. Other complexities stem from such modern trends as: the pervasive use of electronic documents, the need to apply conflicts of interest principles to law firms with offices in various cities and to clients who use different law firms for different types of legal services, lawyers often moving from one job to another and growing concerns about economic harm to third parties resulting from corporate fraud such as took place at Enron and the resulting implications on the limits on client-lawyer confidentiality. Further, much of the complexity derives from the inherently adversarial and intense nature of the controversies for which clients often seek assistance from lawyers, the complexity of legal disputes generally and the enormously high stakes of the participants.

As a practicing lawyer at Jackson & Campbell, P.C., my practice consists of representing law firms and lawyers in carrying out their ethical duties and includes assisting them in defending allegations of professional misconduct. I also serve as our firm’s in-house ethics counsel and, from 2015 to 2017, was a member of the ABA Standing Committee on Ethics and Professional Responsibility which issues Ethics Opinions and assists the ABA in considering revisions to the ABA Model Rules of Professional Conduct. I served a three-year term on the Board of Editors of the ABA/BNA Manual of Professional Conduct. I have spent the last two decades steeped in these issues and have lectured to numerous lawyer groups. On occasion, I have served as an expert witness in litigation related to legal ethics.

Do I have an “agenda” for this course? Yes, and it is very simple: To convey to you in the time we have together as much of my basic knowledge and understanding of this body of law that I can, and to do so in as understandable, memorable and painless a way as I can. A sense of humor is allowed and hopefully we can have a bit of fun—but no big promises on that score, especially if you don’t care for “dad jokes.”

I also have a set of videos that present fact-scenarios between lawyers and clients that illustrate various ethical issues under the rules and assist in triggering discussion of those issues. The set of videos is presented by the Association of Professional Responsibility Lawyers.

COURSE MATERIALS

American Bar Association, Compendium of Professional Responsibility Rules and Standards, 2021 Ed. The assigned readings below that are not in the book will be posted on TWEN. PowerPoint slides for each class will also be posted on TWEN and displayed in class.

CLASS TOPICS AND ASSIGNMENTS

<u>CLASS</u>	<u>TOPICS</u>	<u>READING ASSIGNMENTS</u>
<u>Class 1</u>	<u>Introduction and Background</u> <ul style="list-style-type: none">- Scope of Course- Morality and Legal Ethics- Ethical Duties to Whom?- Role of Advocate versus Role of Advisor <u>Sources of Law Governing Lawyers (In addition to ABA Model Rules)</u> <ul style="list-style-type: none">- Contracts (Retainer Agreements; Engagement Letters)- Case Law on Agents and Principals- Case Law on Fiduciary Duties- Case Law on Legal Malpractice- Statutes- Court Rules of Procedure- Court Orders- Court's Inherent Powers <u>History of Lawyer Regulation and ABA's Ethics Rules</u> <p>The old <i>ABA Canons of Professional Ethics</i>, followed by the <i>ABA Code of Professional Responsibility</i> and now the <i>ABA Model Rules of Professional Conduct</i></p> <u>Defining "Professional Misconduct"</u> <p>Rule 8.4(a)</p> <u>Disciplinary Authority and Choice of Law</u> <ul style="list-style-type: none">-Regulation of the legal profession, federal and state-"Self Regulation"-Rule 8.3 re duty to report-Disciplinary process-Reciprocal discipline-Rule 8.5	<p><i>ABA Model Rules of Professional Conduct</i>: Preamble, Scope and Rules 1.0 (Terminology), 8.3, 8.4 and 8.5.¹</p> <p>Section III of the <i>ABA Standards for Imposing Lawyer Sanctions</i>, pp. 454 to 466 in book.</p> <p><i>Middlesex County Ethics Committee v. Garden State Bar Assoc.</i> 102 S.Ct. 2515 (1982) in TWEN</p>

¹ Where ABA Rules are assigned to be read, this always includes the Comments to the Rule as a critical part of the assignment.

Basic Duty of Honesty and Integrity

- Honesty is Central to ABA Rules and Concept of Professional Responsibility
- Applies Even Outside of Professional Work (Rule 8.4(c))
- Specific Applications Later in Course

Principles of “Statutory” Interpretation

- Terminology Section of ABA Rules – (Rule 1.0)
- Various Principles That Apply in Interpreting the ABA Rules and Other Authorities

Class 2

Creation of Attorney-Client Relationship

- Prospective Clients (Rule 1.18(a))
- Retainer Agreements (Rule 1.5(b))
- Court Appointments (Rule 6.2)

ABA Rules: 1.1, 1.2, 1.3, 1.4, 1.5(b), 1.13(a), 1.18(a) and 6.2

ABA Ethics Opinion No. 07-448 - Court Appointments (not in book-TWEN)

Duty of Competence (Rule 1.1)

How Does Competence Implicate Ethics?

ABA Opinion 96-404– Client Under a Disability (not in book-TWEN)

Who Makes the Decisions? (Rule 1.2)

- Scope and *Goals* of Representation as Distinguished from *Means* to Reach those Goals
- Clients with Fraudulent or Criminal Goals
- *Advising* as distinguished from *assisting* Clients who have Criminal or Fraudulent Intentions

ABA Opinion 491 Obligations under Rule 1.2(d) (not-TWEN in book).

Duty of Diligence (Rule 1.3)

Applies Equally to Advocates and Advisors

ABA Opinion 481- Lawyer’s Duty to Inform Client of Errors, (not in in book-TWEN).

Duty to Keep Client Informed (Rule 1.4)

Conforms to agency and fiduciary principles

Organizations as Clients (Rule 1.13(a))

Brief introduction to topic of entity clients

Impaired Clients (Rule 1.14)

<u>Class 3</u>	<u>Retainer Agreements, Fees and Billing (Rule 1.5)</u>	ABA Rules: 1.5, 1.15 and 5.4
	<ul style="list-style-type: none"> - Retainer Agreements, Required Elements - Retainer Agreements, Elective Features - Types of Fee Arrangements - Reasonableness - Contingency Fees - Illegal Fees - Statutory Fees - Fee Shifting Statutes - Fee Sharing 	ABA Opinion 93-379 Billing (not in book-TWEN)
	<u>Care of Property of Others (Rule 1.15)</u>	
	<ul style="list-style-type: none"> - Clients and Third Parties - Commingling - Misappropriation, the “THIRD RAIL” Presumption of disbarment for misappropriation (<u>In re Addams</u>) 	<i>In re Addams</i> , 579 A.2d 190 (D.C. 1990). TWEN
<u>Class 4</u>	<u>Advertising and Solicitation</u>	ABA Rules: 7.1, 7.2, 7.3, 7.4, 7.5, 7.6 and 8.4(e).
	<ul style="list-style-type: none"> - Historical Aversion of Advertising and Soliciting - <u>Bates</u> (Old Notions Begin to Crack) - Hazards of In-Person Solicitation (<u>Ohrlick</u>) - Political Expression and Non-Commercial Considerations (<u>In re Primus</u>) (Rule 7.3) - Use of “Runners” - Targeted Solicitation (Rule 7.3) - What is “Misleading?” (Rule 7.1) - Holding Out as an Expert or Specialist (7.4) - Firm Names (7.5) - Letterhead - Firm Websites - Claims of Special Influence (8.4(e)) 	For historical perspective: Canons 27 and 28 of the ABA Canons of Professional Ethics, pp. 433-34 in book. ABA Legal Ethics Opinion No. 10-457 Law Firm Web Sites (not in book-TWEN)
<u>Classes 5 & 6</u>	<u>Duty of Confidentiality and Attorney-Client Privilege</u>	ABA Rules: 1.6, 1.8(b), 1.9(c), 1.13 and 1.18
	<ul style="list-style-type: none"> - Policy Bases - When Duty Attaches - To Whom Is Duty Owed? - Present Clients (Rule 1.6) - Prospective Clients (Rule 1.18) 	<i>Upjohn v. U.S.</i> , 449 U.S. 383 (1981)-TWEN

- Past Clients (Rule 1.9)
- Exceptions (Rule 1.6)
- Facts versus Communications
- Contrast with Attorney-Client Privilege (*Upjohn*)
- “Using” versus “Revealing” Client Information (Rule 1.8(b))
- Confidentiality with Organization as Client (Rule 1.13)
- Post-Enron Principles (*Sarbanes-Oxley* etc.)

ABA Opinion 480
Confidentiality Obligations
for Lawyer Blogging (pp.
600-606 in book).

ABA Opinion 477R-
Securing Communication of
Protected Client
Information (pp. 582-93 in
book).

Class 7

Duties as Advocate

- Lawyer as “Officer of Court”
- Fed. R. Civ. P. 11
- Candor to Court Regarding Facts and Law (Rule 3.1 and 3.3)
- Differences in Civil and Criminal Cases
- Frivolous Claims (Rule 3.1)
- Fairness to Others (Rule 3.4)
- Inadvertent Production of Privileged Material (Rule 4.4)
- “Data Mining”
- Delay (Rule 3.2)
- Court Orders
- Decorum (Rule 3.5)
- Assertions of Personal Knowledge or Opinion (Rule 3.4)
- Publicity (Rule 3.6)
- Ex Parte Contact
- Pro Bono Publico (Rule 6.1)

ABA Rules 3.1, 3.2, 3.3,
3.4, 3.5, 3.6, 4.4 and 8.3.

Excerpts from *King v.
Whitmer*, (S.D. Mich. 2021)
on TWEN.

Duties to Adversaries and Third Parties

- Adversaries (and their employees) (Rules 3.4, 4.1 and 4.2)
- Physical Evidence and Spoliation (Rule 3.4)
- Unrepresented Persons (Rules 3.4, 4.1 and 4.3)
- Represented Persons (Rule 3.4 and 4.2)
- Witnesses and Others (Rules 3.4, 4.1, 4.2 and 4.3)
- Mandatory reporting of other lawyers (Rule 8.3)

Class 8

Termination of Attorney-Client Relationship

- When/How to Terminate Relationship
- Mandatory Withdrawal
- Permissible Withdrawal
- Court Approval
- Duties Upon Withdrawal
- “Noisy Withdrawal”

ABA Rule 1.16

ABA Opinion 471-Ethical
Obligations of Lawyers to
Surrender Papers and
Property (pp. 567-74 in
book).

Classes
9 & 10

Duty of Loyalty and Conflicts of Interest

- Basic Concepts
- Sources of Conflicts
- Non-waiveable conflicts (Rule 1.7)
- Duties to Prospective Clients, Current Clients and Former Clients (Rules 1.7, 1.9 and 1.18)
- Issue or “Positional” Conflicts
- Imputation of Conflicts (Rule 1.10)
- Consent to Conflicts (Rule 1.7)
- Advance Waivers
- Corporate Affiliates
- Government Lawyers (Rule 1.11)
- Lawyer as Witness (Rule 3.7)
- Rule 1.8 Prohibitions
- Screening and Remedies
- Motions to Disqualify
- Attorney Migration (Rules 1.9 and 1.10)

ABA Rules: 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.18 and 3.7.

ABA Opinion No. 05-436-Advance Waivers- (not in book-TWEN).

ABA Opinion 497 Conflicts involving Materially Adverse Interests (pp. 655-644).

ABA Opinion 95-390-Conflicts in Corporate Family (pp. 543-66 in book).

Class 11

Special Roles

- Lawyer as prosecutor (Rule 3.8)
- Evaluations for Third Parties (Rule 2.3)
- as third-party neutral (Rule 2.4)
- Amicus Counsel
- Lawyer as Supervisor of Lawyers (Rule 5.1)
- Supervisor of Non-Lawyer Employees (Rule 5.3)
- Lawyer as Subordinate to Supervisor (Rule 5.2)
- Lawyers as Managers (Rules 5.1 and 5.3)
- Lawyers as Witnesses (A role to be avoided when possible) (Rule 3.7)
- New Prohibition of Discrimination (Has a broad scope) (Rule 8.4(g))

ABA Rules: 2.1, 2.3, 2.4, 3.8, 5.1, 5.2, 5.3, 5.4, 5.6 and 8.4(g).

ABA Opinion 486-Obligations of Prosecutors in Negotiating Plea Bargains for Misdemeanor offenses (not in book-TWEN).

Law Firms

- Forms of Organization
- Restrictions on Right to Practice (Rule 5.6)
- Fee Sharing
- Multidisciplinary Practice
- Virtual Law Firms

ABA Opinion 489-Obligations Related to Notice When Lawyers Change Firms (pp. 642-50 in book).

-Fiduciary Duties Among Partners

ABA Opinion 498-Virtual Practice (pp. 665-674 in book)

Class 12 Unauthorized Practice of Law

- Ethical Duty to Avoid – Rule 5.5
- Defining “Practice of Law”
- Unauthorized Practice by Lawyers (Multi-jurisdictional Issues) (*Birbrower* and Rule 5.5)
- Admission to Practice (Rule 8.1)
- Pro Hac Vice Admissions
- Non-lawyer online services for consumers (LegalZoom etc.)

ABA Rule: 5.5

Model Rules Related to Multijurisdictional Practice-Model Rule for Registration of In-House Counsel (pp. 507-511 in book)

Ethics Rules for Practice Before Some Federal Agencies

- Federal Preemption (*Sperry v. Florida*)
- Use of State Ethics Rules

Sperry v. Florida, 373 U.S. 379 (1963)-TWEN

LegalZoom v. South Carolina State Bar, 2015 TWEN

Class 13 Judicial Conduct

- Sources of Law
- Judicial Immunity
- Appearance of Impropriety
- Abuse of Office
- Outside Activities
- Competence and Diligence
- Impartiality-Recusal
- Political Activities

ABA Rule: 8.2

ABA Model Code of Judicial Conduct: (Entire) (pp. 341-398 in book)

ABA Opinion 478 Internet Research by Judges (not in book-TWEN)

ABA Opinion 488-Judges’ Social or Personal Relationships as Grounds for Disqualification or Disclosure (not in book-TWEN).

STUDENT LEARNING OBJECTIVES

Upon successful completion of this course:

- Students will be able to demonstrate basic knowledge of the ABA Model Rules of Professional Conduct.

- Students will be able to explain how the agent-principal relationship between lawyers and their clients, and the associated fiduciary duties that lawyers have to their clients, are reflected in the ABA Model Rules of Professional Conduct.
- Students will be able to identify the ethical duties that a lawyer, acting as an advocate, owes to her client, her clients' adversaries, affected tribunals, and to other affected parties, and determine how those duties should be reconciled under a hypothetical series of facts.
- Students will be able to identify the ethical duties that apply to a lawyer when acting as an advisor and be aware of how the various duties owed to affected parties should affect the choices they make under various hypothetical scenarios.
- Students will be able to demonstrate basic knowledge of the ABA Model Rules of Judicial Conduct.
- Students will be able to communicate orally and in writing their knowledge of the above-stated matters.

FINAL EXAM

It will be a closed-book objective test, using a combination of multiple choice and "true/false" questions. Topics will encompass all assigned readings and all matters discussed in class. Students will NOT be asked to recite or identify Rule numbers or subsections, but rather will be tested on their understanding of the principles in those Rules and other authorities and the application of those principles to hypothetical situations.