

SYLLABUS
PROFESSIONAL RESPONSIBILITY– SPRING, 2024
SECTION 298-001 ADJUNCT PROFESSOR – ARTHUR D. BURGER

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INTRODUCTION

Regardless of the nature of the legal work you undertake as a lawyer your conduct must conform to the legal mandates covered by this course. This course will provide an understanding of what those with whom you will interact as a lawyer—including clients, adversaries, courts, colleagues, and others—have a right to expect and demand from you.

While I will discuss the need for lawyers to conduct themselves with the highest level of honesty and integrity, I don't use this course as a platform for moral preaching. I assume that you have your moral bearings, and I don't claim to possess moral superiority over you merely because I teach this course. 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 how 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.

There's a very common misconception that this body of law can be divined by mere intuition, "common sense," or the application of general notions of fair play. Don't believe it. Many of a lawyer's precise ethical duties under a particular set of circumstances are as difficult to divine by mere intuition or guessing as are the answers to difficult questions of contract law, civil procedure or any other substantive area of law.

Some of the complexity in legal ethics 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, and third parties. 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 as evidence, the need to apply conflicts of interest principles to large 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. Further, much of the complexity of legal ethics derives from the inherently adversarial nature of the controversies for which clients often seek assistance from lawyers and the substantive complexity of the legal matters that lawyers are asked to undertake.

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 over two decades steeped in these issues and have lectured to numerous lawyer groups. I have also 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 and memorable a manner as I can. A sense of humor is allowed and hopefully we can have a bit of fun as well.

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

The sole text to purchase is the Model Rules of Professional Conduct, 2023 Ed, published by the American Bar Association, ISBN No. 9781639052998. All other assigned readings, consisting of ABA Ethics Opinions, court cases and other materials, will be posted on TWEN, along with the PowerPoint Slides for each class.

(Class topics and reading assignments begin on next page.)

CLASS TOPICS AND ASSIGNMENTS

TOPICS

READING ASSIGNMENTS

Class 1

Introduction and Background

- Scope of Course
- Morality and Legal Ethics
- Ethical Duties to Whom?
- Role of Advocate versus Role of Advisor

ABA Model Rules of Professional Conduct: Preamble, Scope and Rules 1.0 (Terminology), 8.3, 8.4 and 8.5.¹

How the Rules of Professional Conduct Interact with Other Law

Middlesex County Ethics Committee v. Garden State Bar Assoc. 102 S.Ct. 2515 (1982).

Sources of Law Governing Lawyers (In addition to ABA Model Rules)

- Constitutional Law
- Contracts (Retainer Agreements; Engagement Letters)
- Case Law on Agent/Principal Relationship
- Case Law on Fiduciary Duties
- Case Law on Legal Malpractice
- Statutes
- Court Rules of Procedure
- Court Orders
- Court's Inherent Powers

History of Lawyer Regulation and ABA's Ethics Rules

The old *ABA Canons of Professional Ethics*, followed by the *ABA Code of Professional Responsibility* and now the *ABA Model Rules of Professional Conduct*

Defining "Professional Misconduct"

Rule 8.4(a)

Disciplinary Authority and Choice of Law

- Regulation of the legal profession, federal and state
- "Self Regulation"-Rule 8.3 re duty to report
- The disciplinary process for lawyers
- Reciprocal discipline

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

-Rule 8.5

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

Duty of Competence (Rule 1.1)

How Does Competence Implicate Ethics?

ABA Opinion 96-404– Client Under a Disability

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)

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

Duty of Diligence (Rule 1.3)

Applies Equally to Advocates and Advisors

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)

Class 3

Retainer Agreements, Fees and Billing (Rule 1.5)

ABA Rules: 1.5 and 1.15

- 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

Care of Property of Others (Rule 1.15)

In re Addams, 579 A.2d 190
(D.C. 1990).

- Clients and Third Parties
- Commingling
- **Misappropriation, the “THIRD RAIL”**
Presumption of disbarment for misappropriation (In re Addams)

Class 4

Advertising and Solicitation

ABA Rules: 7.1, 7.2, 7.3,
7.4, 7.5, 7.6 and 8.4(e).

- Historical Aversion of Advertising and Soliciting
- Bates (Old Notions Begin to Crack)
- Hazards of In-Person Solicitation (Ohralick)
- Political Expression and Non-Commercial Considerations (In re Primus) (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))

ABA Legal Ethics Opinion
No. 10-457 Law Firm Web
Sites

ABA Legal Ethics Opinion
No. 501-Solicitation

**Classes
5 & 6**

Duty of Confidentiality and Attorney-Client Privilege

ABA Rules: 1.6, 1.8(b),
1.9(c), 1.13 and 1.18

- Policy Bases
- When Duty Attaches
- To Whom Is Duty Owed?
- Present Clients (Rule 1.6)

Upjohn v. U.S., 449 U.S.
383 (1981)

- Prospective Clients (Rule 1.18)
- 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

ABA Opinion 477R-
Securing Communication of
Protected Client
Information

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)
- Delay (Rule 3.2)
- Fairness to Others (Rule 3.4)
- Assertions of Personal Knowledge or Opinion (Rule 3.4)
- Inadvertent Production of Privileged Material (Rule 4.4)
- “Data Mining”
- Court Orders
- Decorum (Rule 3.5)
- Ex Parte Contact (Rule 3.5_)
- Publicity (Rule 3.6)
- Lawyer as Witness (Rule 3.7)
- Non-adjudicative Proceedings (Rule 3.9)
- Pro Bono Publico (Rule 6.1)

ABA Rules 3.1, 3.2, 3.3,
3.4, 3.5, 3.6, 3.8, 3.9 and
4.4.

Class 8

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)

Termination of Attorney-Client Relationship

ABA Rule 1.16

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

ABA Opinion 471-Ethical
Obligations of Lawyers to
Surrender Papers and
Property

Classes
9 & 10

Duty of Loyalty and Conflicts of Interest

- Basic Concepts
- Duties to current clients (Rule 1.7)
- Direct adversity (Rule 1.7(a)(1))
- Potential conflicts in joint representation of multiple clients in a single matter. Sanford v. Virginia
- “Punch-pulling conflicts (Rule 1.7(a)(2))
- Issue or “Positional” Conflicts
- Joint representation of multiple clients in a matter
- Duties to former clients (Rule 1.9)
- The substantial-relationship test
- Duties to prospective clients (Rule 1.18)
- Government lawyers who move to private practice (Rule 1.11)
- Former judges and law clerks (Rule 1.12)
- Imputation of Conflicts (Rule 1.10)
- Consent to Conflicts (Rule 1.7(b))
- Advance Waivers
- Corporate Affiliates
- Lawyer as Witness (Rule 3.7)
- Rule 1.8 Prohibitions and restrictions re interactions with clients
- Screening and Remedies
- Attorney Migration (Rules 1.9 and 1.10)
- Motions to Disqualify

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

Sanford v. Commonwealth of Virginia, 687 F.Supp.2d 591 (E.D. Va. 2009)

ABA Opinion No. 05-436-Advance Waivers

Article by A. Burger on Advance Waivers (published by the ABA/Bloomberg Manual of Professional Conduct)

ABA Opinion 95-390-Conflicts in Corporate Family

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
- New Prohibition of Discrimination (Has a broad scope) (Rule 8.4(g))

ABA Rules: 1.17, 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

Law Firms

- Forms of Organization
- Roles of Non-Lawyer Employees
- 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 Firm Managers (Rules 5.1 and 5.3)

Attorney Grievance Comm’n of Md. v. McDowell, 93 A.3d 711 (MD 2022)

ABA Opinion 498-Virtual Practice

- Restrictions on Right to Practice (Rule 5.6)
- Fee Sharing with Lawyers Not in same Firm
- Multidisciplinary Practice
- Virtual Law Firms
- Fiduciary Duties Among Partners
- Sale of law firms (Rule 1.17)

Class 12 Unauthorized Practice of Law

ABA Rule: 5.5

- 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 Opinion 495-Lawyers Working Remotely

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

LegalZoom v. South Carolina State Bar, 2015

Ethics Rules for Practice Before Some Federal Agencies

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

Class 13 Judicial Conduct

ABA Rule: 8.2

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

ABA Model Code of Judicial Conduct (Entire)

ABA Opinion 488-Judges’ Social or Personal Relationships as Grounds for Disqualification or Disclosure

STUDENT LEARNING OBJECTIVES

- 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.