

Law 298-001 | Professional Responsibility | Summer 2025 | 2 credits

Professor(s): Arthur Burger

MON/WED 6:00-7:50 pm | Final Exam(s): MON., JULY 14, 6:00 pm

Reading(s): The sole text to purchase is the Model Rules of Professional Conduct, 2025 Ed., published by the American Bar Association. All other assigned readings, consisting of ABA Ethics Opinions, court cases and other materials, will be posted on TWEN, along with the PowerPoint slides discussed below.

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INSTRUCTOR BACKGROUND

As a practicing lawyer at Jackson & Campbell, P.C., where I am now Of Counsel and semi-retired, my practice for the last twenty-five years has consisted solely of representing law firms and lawyers in connection with their legal obligations in representing clients. My representation has included defense of lawyers in legal malpractice suits and in disciplinary investigations and proceedings, as well as providing advice to lawyers and law firms on how to avoid such claims. From 2015 to 2017, I 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. Before that, I was a member of the D.C. Bar Legal Ethics Committee and then served as an elected D.C. Bar Delegate to the ABA House of Delegates. More recently, I served a three-year term on the Board of Editors of the ABA/BNA Manual of Professional Conduct, and I am a member of the Association of Professional Responsibility Lawyers (“APRL”). I have also testified occasionally as an expert witness in legal ethics in civil litigation.

COURSE DESCRIPTION

My goal in teaching this course is very simple: To convey to you in the time we have together as much of my 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. That’s my North Star. My focus is on how much I can teach you. A sense of humor is allowed.

As to the subject area, regardless of the type of legal work you will do as a lawyer, whether as a litigator or advisor and whether in private practice or as a government official, or as an employee of an entity, your conduct must conform to the legal mandates covered by this course.

Accordingly, this course will instruct you on the behavior that all those with whom you interact— including clients (whether they be organizations or persons), prospective clients, former clients, courts and other tribunals, co-counsel, opposing counsel, adversaries, colleagues, third parties and others—have a right to expect and demand from you. These legal mandates are codified in the ABA Model Rules of Professional Conduct, with such modifications as are promulgated in each State.

There’s a common (and hazardous) misconception by law students that these legal mandates are mostly obvious and can be divined by mere intuition or “common sense it. But the legally correct assessment of a lawyer’s ethical duties under varied fact patterns can be as difficult as are questions under contract law, civil procedure, tax law or any other substantive area of law. As with other legal subjects, a proper legal assessment often requires a full understanding of the applicable principles and how those principles interact when they conflict.

Some of the complexity of legal ethics stems from the need to reconcile the ethical duties that lawyers owe—not just to their clients—but also to tribunals, adversaries, third parties and others, and the tension between those competing duties under various circumstances. The appropriate resolution of these duties can shift based on subtle changes in the facts. Other complexities stem from such present-day realities as the pervasive use of numerous electronic documents as evidence, the use of AI, the need to apply conflicts of interest principles to large law firms with offices in multiple cities, the frequency of lawyers moving from one job to another throughout their careers and relatively recent concerns about economic harm to third parties from financial misconduct by corporate clients. Further, much of the troublesome nature of the circumstances lawyer’s face derives from the high-stakes controversies with which they are often embroiled and the accompanying passions of the parties, whether they be a lawyer’s own clients or their clients’ adversaries. Sometimes it’s not pretty.

A related common misconception among law students is that this course likely consists of “nagging” with platitudes about proper behavior. If that were all this course were about, I would have no interest in teaching it. Again, students should recognize the subject matter of this course as academically rich and challenging, and requiring as much study and attention as do other courses in law school.

We will also discuss how the law of legal ethics interacts with other areas of law. The dictates of legal ethics do not operate in a vacuum. Rather, as with all substantive and procedural law, the law of legal ethics is affected by other law and works as part of a coherent, integrated legal system. Thus, for example, the ethical duties of lawyers when acting as prosecutors or representing defendants in a criminal trial, are impacted by the constitutional rights that such defendants possess. This symmetry in the law is one of the reasons this subject area fascinates me.

In addition to studying the ethical duties of lawyers, this course includes a study of the ethical duties of state court judges, which are codified in the ABA Model Rules of Judicial Conduct.

COURSE OBJECTIVES

1. Students will be able to demonstrate basic knowledge of the ABA Model Rules of Professional Conduct.
2. 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.
3. 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.
4. 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.
5. Students will be able to demonstrate basic knowledge of the ABA Model Rules of Judicial Conduct.
6. Students will be able to communicate orally and in writing their knowledge of the above- stated matters.

GRADING & PARTICIPATION

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, videos 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.

POWERPOINT SLIDES AND LEGAL ETHICS VIDEOS



To assist students in absorbing the material, I will use PowerPoint slides during each class to help organize the material. These PowerPoint slides will also be available on TWEN and students may find it helpful to consult the slides before class or use them to assist in note taking.

I will also use two sets of legal ethics video vignettes, presenting hypothetical scenarios that illustrate ethical dilemmas that lawyers face. One set of videos consist of ten vignettes that were produced last year at Scalia Law School by GMU -TV, with Scalia students & faculty. These were posted on “Scalia Spotlights” on the school’s web page last spring. These videos can also be accessed for free on YouTube by searching for “GMU-TV Legal Ethics Videos.” The other set of 12 video vignettes were produced in 2021 by APRL. These are under a pay wall and will be shown only in class.

I find that such videos help provide a relatable frame of reference that facilitates a deeper understanding of the application of various ABA Model Rules, which is more memorable than a written hypothetical. Below, I include a reference to the videos which will be used in each class and are cited as “GMU VIDEO” or “APRL VIDEO.”

Questions on the Final Exam are NOT limited to scenarios depicted on the videos.

COURSE SCHEDULE & ASSIGNMENTS

Class	Topic	Assignments
1	<p><u>Introduction and Background</u></p> <ul style="list-style-type: none"> • Scope of Course • Morality and Legal Ethics Ethical Duties to Whom? • Role of Advocate versus Role of Advisor <p><u>How the Rules of Professional Conduct Interact with Other Law Sources of Law Governing Lawyers (In addition to ABA Model Rules)</u></p> <ul style="list-style-type: none"> • Constitutional Law • Contracts (Retainer Agreements; Engagement Letters) • Agency Law • Fiduciary Duties • Legal Malpractice Statutes • Rules of Procedure Court Orders • Court's Inherent Powers <p><u>History of Lawyer Regulation and ABA's Ethics Rules</u> 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> <p><u>Defining "Professional Misconduct"</u></p> <ul style="list-style-type: none"> • Rule 8.4(a) <p><u>Disciplinary Authority and Choice of Law</u></p> <ul style="list-style-type: none"> • Regulation of the legal profession, federal and state • "Self Regulation"-Rule 8.3 re duty to report • The disciplinary process for lawyers • Reciprocal discipline • Rule 8.5 <p><u>Duty of Honesty and Integrity</u></p> <ul style="list-style-type: none"> • Central to ABA Rules and Applies Even Outside of Professional Work (Rule 8.4(c)) • Specific Applications Later in Course <p><u>Principles of "Statutory" Interpretation</u></p> <ul style="list-style-type: none"> • Terminology Section of ABA Rules – (Rule 1.0) 	<p><i>ABA Model Rules of Professional Conduct: Preamble, Scope and Rules 1.0 (Terminology), 8.3, 8.4 and 8.5 (always including Comments thereto).</i></p> <p><i>Middlesex County Ethics Committee v. Garden State Bar Assoc. 102 S.Ct. 2515 (1982).</i></p> <p>"Reciprocal Discipline," as per Part 6, Section IV, ¶¶ 13-21 of the Rules of the Supreme Court of Virginia</p>

	<ul style="list-style-type: none"> • Various Principles That Apply in Interpreting the ABA Rules and Other Authorities 	
2	<p><u>Creation of Attorney-Client Relationship</u></p> <ul style="list-style-type: none"> • Prospective Clients (Rule 1.18(a)) • Retainer Agreements (Rule 1.5(b)) • Court Appointments (Rule 6.2) <p><u>Duty of Competence</u> (Rule 1.1)</p> <ul style="list-style-type: none"> • How Does Competence Implicate Ethics? Who Makes the Decisions? (Rule 1.2) • Scope and <i>Goals</i> of Representation as Distinguished from <i>Means</i> to Reach those Goals • Clients with Fraudulent or Criminal Goals • <i>Advising</i> as distinguished from <i>assisting</i> Clients who have Criminal or Fraudulent Intentions <p><u>Duty of Diligence</u> (Rule 1.3)</p> <ul style="list-style-type: none"> • Applies Equally to Advocates and Advisors <p><u>Duty to Keep Client Informed</u> (Rule 1.4)</p> <ul style="list-style-type: none"> • This conforms to agent-principal obligations, which constitute fiduciary duties of attorneys to their clients. <p><u>Organizations as Clients</u> (Rule 1.13(a))</p> <ul style="list-style-type: none"> • Brief introduction to topic of entity clients <p><u>Impaired Clients</u> (Rule 1.14)</p>	<p>ABA Rules: 1.1, 1.2, 1.3, 1.4, 1.5(b), 1.13(a), 1.14, 1.18(a) and 6.2</p> <p><i>Restatement (Third) of the Law Governing Lawyers</i> §14.</p> <p>ABA Ethics Opinion No. 07-448 - Court Appointments</p> <p>ABA Opinion 96-404– Client Under a Disability ABA Opinion 491</p> <p>Obligations under Rule 1.2(d)</p> <p>ABA Opinion 481- Lawyer’s Duty to Inform Client of Errors</p> <p>VIDEOS GMU VIDEO No. 6 APRL VIDEO No. 1</p>
3	<p><u>Retainer Agreements, Fees, Costs and Billing</u> (Rule 1.5)</p> <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 <p><u>Care of Property of Others</u> (Rule 1.15)</p> <ul style="list-style-type: none"> • Holding Property Clients and Third Parties • Funds (Trust Accts, IOLTAs and other Escrow Accts) 	<p>ABA Rules: 1.5 and 1.15</p> <p>ABA Opinion 02-425 Arbitration Clause in Retainer Agreement</p> <p>ABA Opinion 93-379</p> <p>Billing</p> <p><i>In re Addams</i>, 579 A.2d 190 (D.C. 1990).</p> <p>Virginia Rule on “IOLTAs,” from Part 6</p> <p>Section IV of the Rules of the Supreme Court of Virginia</p> <p>VIDEOS GMU VIDEO Nos. 2, 5 and 7</p>

	<ul style="list-style-type: none"> • Holding Other Types of Personal Property • Keeping Property Separate and Secure (Avoid 'commingling') • Misappropriation, the "THIRD RAIL" • Presumption of disbarment for misappropriation (<u>In re Addams</u>) 	
4	<u>Advertising and Solicitation</u> <ul style="list-style-type: none"> • Historical Aversion of Advertising and Soliciting • Bates (Old Notions Begin to Crack) • Hazards of In-Person Solicitation (Ohrlick) • 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)) 	APRL VIDEO No. 8. ABA Rules: 7.1, 7.2, 7.3, 7.4, 7.5, 7.6 and 8.4(e). ABA Opinion No. 10-457 Law Firm Web Sites ABA Opinion No. 501- Solicitation
5 & 6	<u>Duty of Confidentiality and Attorney-Client Privilege</u> <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) Past Clients (Rule 1.9) • Exceptions (Rule 1.6 (b)(1) to (b)(7)) • Facts versus Communications Contrast with Attorney-Client Privilege (<i>Upjohn</i>) • Inadvertent Production of Privileged Material (Rules 1.6(c) and 4.4(b)) • "Using" versus "Revealing" Client Information (Rule 1.8(b)) • Confidentiality with Organization as Client (Rule 1.13) • Post-Enron Principles (<i>Sarbanes-Oxley</i> etc.) 	ABA Rules: 1.6, 1.8(b), 1.9(c), 1.13, 1.18 and 4.5(b). <i>Upjohn v. U.S.</i> , 449 U.S. 383 (1981) ABA Opinion 480 Confidentiality Obligations for Lawyer Blogging ABA Opinion 477R- Securing Communication of Protected Client Information
7	<u>Duties to Tribunal When an Advocate</u> <ul style="list-style-type: none"> • Lawyer as "Officer of Court" • Fed. R. Civ. P. 11 • Candor to Tribunal Regarding Facts, Evidence and Legal Arguments (Rule 3.1 and 3.3) 	VIDEOS APRL VIDEO No. 13 ABA Rules 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.8, 3.9 and 4.4. ABA Ethics Opinion 508- The Ethics of Witness Preparation

	<ul style="list-style-type: none"> • 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) • “Data Mining” Court Orders • Decorum (Rule 3.5) • <u>Ex Parte</u> Contact (Rule 3.5 Publicity (Rule 3.6) • Lawyer as Witness (Rule 3.7) • Non-adjudicative Proceedings (Rule 3.9) • <u>Pro Bono Publico</u> (Rule 6.1) 	VIDEOS GMU VIDEO No. 9. APRL VIDEO Nos. 3, 5 and 6.
8	<u>Duties to Adversaries and Others When Acting as an Advocate</u> <ul style="list-style-type: none"> • 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) <u>Termination of Attorney- Client Relationship</u> <ul style="list-style-type: none"> • When/How to Terminate Relationship • Mandatory Withdrawal Permissible Withdrawal Court Approval • Duties Upon Withdrawal “Noisy Withdrawal” 	ABA Rules 3.3, 3.4, 4.1, 4.2, 4.3 and 4.4 ABA Rule 1.16 ABA Opinion 471-Ethical Obligations of Lawyers to Surrender Papers and Property VIDEOS APRL VIDEO No. 3
9 & 10	<u>Duty of Loyalty and Conflicts of Interest</u> <ul style="list-style-type: none"> • 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. <u>Sanford v. Virginia</u> • “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) 	ABA Rules: 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.18 and 3.7 <u>Sanford v. Commonwealth of Virginia</u> , 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 <u>ABA/Bloomberg Manual of Professional Conduct</u>) ABA Opinion 95-390- Conflicts in Corporate Family VIDEOS GMU VIDEO Nos. 1, 3 and 8. APRL VIDEO Nos. 2, 4 and 7.

	<ul style="list-style-type: none"> • 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 Opposing Counsel 	
11	<p><u>Special Roles</u></p> <ul style="list-style-type: none"> -Lawyer as prosecutor (Rule 3.8) -Evaluations for Third Parties (Rule 2.3) as third-party neutral (Rule 2.4) -Amicus Counsel Use of AI -New Prohibition of Discrimination (Has a broad scope) (Rule 8.4(g)) <p><u>Law Firms</u></p> <ul style="list-style-type: none"> • -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) • -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) 	<p>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).</p> <p>ABA Opinion 486- Obligations of Prosecutors in Negotiating Pleas for Misdemeanors</p> <p>ABA Opinion 512-Use of Generative AI</p> <p><u>Attorney Grievance Comm'n of Md. v. McDowell</u>, 93 A.3d 711 (MD 2022)</p> <p>ABA Opinion 498-Virtual Practice</p> <p>VIDEOS</p> <p>GMU VIDEO Nos. 4 and 10</p> <p>APRL VIDEO Nos. 9 and 11</p>
12	<p><u>Unauthorized Practice of Law</u></p> <ul style="list-style-type: none"> • Admission to State Bars • Admission the Bars of Specific Courts • Ethical Duty to Avoid – Rule 5.5 • Defining “Practice of Law” • Unauthorized Practice by Lawyers (Multi-jurisdictional Issues) (<u>Birbrower</u> and Rule 5.5) • Admission to Practice (Rule 8.1) 	<p>ABA Rules: 8.1 and 5.5</p>

<p>13</p>	<p><u>Pro Hac Vice</u> Admissions</p> <ul style="list-style-type: none"> • Non-lawyer online services for consumers (LegalZoom etc.) • <u>Ethics Rules for Practice</u> • <u>Before Some</u> Federal Agencies • -Federal Preemption (<i>Sperry v. Florida</i>) • -Use of State Ethics Rules • <u>Judicial Conduct</u> Sources of Law • Judicial Immunity • Appearance of Impropriety Abuse of Office • Outside Activities • Competence and Diligence Impartiality-Recusal • Political Activities 	<p>Unauthorized Practice Rules of the Supreme Court of Virginia ABA Opinion 495-Lawyers Working Remotely</p> <p>LegalZoom v. South <u>Carolina</u> <u>State Bar</u></p> <p><u>Sperry v. Florida</u>, 373 U.S. 379 (1963)</p> <p>ABA Rule: 8.2</p> <p><u>ABA Model Code of Judicial Conduct</u> (Entire)</p> <p>ABA Opinion 488-Judges' Social or Personal Relationships as Grounds for Recusal or Disqualification</p>
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