

SYLLABUS
PROFESSIONAL RESPONSIBILITY–SPRING 2009
SECTION 298-002 ADJUNCT PROFESSOR – ARTHUR D. BURGER

MONDAY EVENINGS 8:00 P.M. TO 9:50 P.M. ROOM 121

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Office Conferences at School by Appointment

COURSE MATERIALS

American Bar Association, Compendium of Professional Responsibility Rules and Standards, 2008 Ed. In addition, students should obtain from TWEN the authorities identified below. PowerPoint slides for each class will be posted on TWEN and displayed in class.

CLASS TOPICS AND ASSIGNMENTS

<u>CLASS NO.</u>	<u>TOPICS</u>	<u>READING ASSIGNMENTS</u>
<u>Class 1</u>	<u>Introduction and Background</u> - Scope of Course - Morality and Legal Ethics - What is Being “Ethical?” - Ethical Duties to Whom? - Role of Advocate versus Role of Advisor <u>Sources of Law Governing Lawyers</u> - Contracts (Retainer Agreements) - Case Law on Agents and Principals - Case Law on Fiduciary Duties - Case Law on Malpractice - Case Law on Disqualification - Statutes - Rules of Procedure	<u>ABA Model Rules of Professional Conduct (“ABA Rules”):</u> Preamble, Scope and Rules 1.0 (Terminology), 1.1, 8.4 and 8.5. ¹

¹ Where ABA Rules are assigned to be read, this includes the Comments as well which provide important and authoritative explanations of the Rules.

- Court Orders
- Substantive Law Generally
- Court's Inherent Powers
- ABA Model Rules (See Scope and Preamble)
- Tribunal Rules of Conduct
- Choice of Law (Rule 8.4(b))

Duty of Competence – Rule 1.1

- How Does This Implicate Ethics?

Basic Duty of Honesty and Integrity

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

Rules of Construction

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

Class 2

Regulation of Legal Profession

ABA Rules: 1.18, 6.2, 5.5
8.1, 8.3, 8.4 and 8.5.

- Authority to Regulate (Federal Preemption see Sperry v. Florida)
- 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

Sperry v. Florida, 373
U.S. 379 (1963);
Birbrower v. Superior
Court of Santa Clara, 949
P.2d 1 (CA 1998).

Control Devices For Attorney Misconduct

ABA Formal Ethics
Opinion No. 07-448 (not
in book)

- Bar Discipline (Rule 8.4, and 8.5(a) on Disciplinary Authority)
- Reporting Misconduct (Rule 8.3)
- Court Sanctions (Fed.R. Civ. P. 11, 28 U.S.C. § 1927 and Court's Inherent Powers)
- Contempt of Court
- Disqualification From Case
- Civil Liability
- Criminal Liability

Creation of Attorney-Client Relationship

- Elements
- Prospective Clients (Rule 1.18)
- Court Appointments (Rule 6.2)

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 Ethics Opinion 93-379 (pp. 585-593 in book)
- In Re Addams, 579 A.2d 190 (DC 1990).

Care of Property of Others (Rule 1.15)

- Clients and Third Parties
- Commingling
- Misappropriation
- Sanctions (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 v. Arizona-Old Notions Begin To Crack
 - Hazards of In-Person Solicitation (Ohralik)
 - 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))
- Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978); Shapero v. Kentucky Bar Assoc., 486 U.S. 466 (1988); Peel v. Illinois, 496 U.S. 91 (1990).

<u>Class 5</u>	<u>Determining and Carrying Out the Goals of the Representation, Diligence, Communication, Shared Decision-Making and Termination of Attorney-Client Relationship</u>	<u>ABA Rules: 1.1, 1.2, 1.3, 1.4, 1.13, 1.14, 1.15 and 1.16.</u>
	<ul style="list-style-type: none"> - Duty to Communicate With Client (Rule 1.4) - Fiduciary Relationship - Who Makes the Decisions? (Rule 1.2) - Clients with Fraudulent or Criminal Intent - Advising versus Assisting Clients in Criminal or Fraudulent Acts - Duty of Diligence (Rule 1.3) - Organizations as Clients (Rule 1.13) - Impaired or Unwise Clients (Rule 1.14) - When/How to Terminate Relationship (Rule 1.16) - Mandatory Withdrawal - Permissible Withdrawal - Court Approval - Duties Upon Withdrawal - “Noisy Withdrawal” 	
<u>Classes 6 & 7</u>	<u>Duty of Confidentiality and Attorney-Client Privilege</u>	<u>ABA Rules: 1.6, 1.8(b), 1.9(c), 1.13 and 1.18.</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) - Facts versus Communications - Contrast with Attorney-Client Privilege (<u>UpJohn</u>) - “Using” versus “Revealing” Client Information (Rule 1.8(b)) - Confidentiality With Organization As Client (Rule 1.13) - Post-Enron Principles (<u>Sarbanes-Oxley</u> etc.) 	<u>UpJohn v. U.S.</u> , 449 U.S. 383 (1981); <u>U.S. v. Jacobs</u> , 117 F.3d 82 (2d Cir. 1997).
<u>Class 8</u>	<u>Duties to Adversaries and Third Parties</u>	<u>ABA Rules: 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 4.1, 4.2, 4.3, 4.4 and 6.1.</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) 	<u>Qualcomm Incorporated v. Broadcomm</u>

- Represented Persons (Rule 3.4 and 4.2)
- Witnesses and Others (Rules 3.4, 4.1, 4.2 and 4.3)

Corporation, 2008 US Dist.LEXIS 911 (Jan. 7, 2008), vacated 2008 US Dist.LEXIS 16897 (March 5, 2008).

Duties to the Legal System

- “Officer of Court”
- 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)
- 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)

Reconciliation of Above Duties With Duties of Confidentiality

- Various Hypotheticals

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
- Government Lawyers (Rule 1.11)
- Rule 1.8 Prohibitions
- Screening and Remedies
- Motions To Disqualify
- Lawyer as Witness (Rule 3.7)
- Attorney Migration (Rules 1.9 and 1.10)

ABA Rules: 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.13, 1.18, 3.7 and 5.6.

ABA Opinion No. 05-436, pp. 668-674 in book; ABA Opinion 95-390, pp. 594-609.

Class 11 **Special Roles**

ABA Rules: 1.12, 2.1, 2.3, 2.4, 3.8, 5.1, 5.2, 5.3, 5.4, 5.6 and 8.3

- Advisor (Rule 2.1)
- Evaluations For Third Parties (Rule 2.3)
- Third Party Neutral (Rule 2.4)
- Prosecutor (Rule 3.8)
- Criminal Defense Lawyer (Rules 3.1 and 3.3)
- Supervising Lawyer (Rule 5.1)
- Subordinate Lawyers (Rule 5.2)
- Lawyers as Employers (Rules 5.1 and 5.3)
- Prohibiting Restrictions on Right to Compete (Rule 5.6)
- Lawyers as Partners (Fiduciary Duties)
- Lawyers as Firm Managers
- Former Law Clerk to Judge (Rule 1.12)
- Reporting Misconduct (Rule 8.3)
- Multidisciplinary Practices (MDP) (Rule 5.4)
- Amicus Counsel

Class 12 **Judicial Conduct**

ABA Rules: 1.12, 7.6 and 8.2.

- Appearance of Impropriety
- Sources of Law
- Outside Activities
- Impartiality
- Political Activities
- Immunity

ABA Model Code of Judicial Conduct: (Entire)

Class 13 **Review, Questions and Discussions**

CLASS ATTENDANCE

While hopefully this should not be considered a chore, class attendance is required and will be checked periodically. Any student who is unable to attend a class is expected to advise me by email or telephone and, where possible, should arrange in advance for the class to be recorded. As stated below, many of the examination questions will be derived from the class lectures.

Class participation will not be used to lower the grade a student receives on the exam. I reserve the ability, however, to raise a grade in the unusual and unexpected circumstance that a student who has shown a consistent understanding of the material in class should obtain a grade of C+ or less, which in my opinion departs from the level of understanding shown by that student throughout the course.

FINAL EXAM - MAY 11, 2009 AT 6:00 P.M.

It will be a closed-book objective test, using a combination of multiple choice and “true and false” questions. The examination questions will be based in large measure, but not entirely, on the principles discussed during class lectures. Students will NOT be asked to recite or identify Rule numbers but rather will be tested on their understanding of the principles in those Rules and other authorities and the application of the Rules to hypothetical situations.