INTRODUCTION

While I will do my best to get you to buy in fully to 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 to accept this obligation as central to the legal profession, this course is mainly a hard-core 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 binding 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.

Contrary to what some assume, the Model Rules cannot be divined or guessed at by the simple application of general notions of good conduct. Rather, the Model Rules resemble the Uniform Commercial Code or the Internal Revenue Act in their degree of complexity and require 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. Those duties can change based on subtle and nuanced shifts in factual scenarios. 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 during their careers and growing concerns about economic harm to third parties resulting from financial fraud such as took place at Enron and the resulting implications on the scope of client-lawyer confidentiality. Further, much of the complexity derives from the inherently adversarial nature of the controversies for which clients often seek assistance from lawyers and the complexity of legal disputes generally.
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 am a member of the ABA Standing Committee on Ethics and Professional
Responsibility, which issues Ethics Opinions. I have spent the last 18 years steeped in these
issues and have lectured to numerous lawyer groups.

This course is very likely the single most practical course you will take in law school
because, regardless of the nature of your legal work or the field of law that you take up, your
day-to-day conduct must conform to these legal mandates. Thus, more than any other single
course, this course teaches you how to go about your business as a lawyer and to understand
what others have a right to expect from you.

What’s my “agenda”? Yes, I have one 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 there.

COURSE MATERIALS

American Bar Association, Compendium of Professional Responsibility Rules and
Standards, 2015 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.
There will also be some videos shown depicting various ethical dilemmas faced by lawyers.

CLASS TOPICS AND ASSIGNMENTS

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<td>- Role of Advocate versus Role of Advisor</td>
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<td>Sources of Law Governing Lawyers (In addition to ABA Model Rules)</td>
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<td>- Contracts (Retainer Agreements; Engagement Letters)</td>
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1 Where ABA Rules are assigned to be read, this includes the Comments as well which provide
important and authoritative explanations of the Rules.
- 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

Disciplinary Authority; Choice of Law

Rules 8.4 and 8.5

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

Some Principles on Interpretation Generally

- 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)

Duty of Competence (Rule 1.1)

How Does Competence Implicate Ethics?

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

ABA Formal Ethics Opinion No. 07-448 – Oct. 20, 2007 Court Appointments (not in book)

ABA Formal Ethics Opinion 96-404 – Client Under a Disability (not in book)
Duty of Diligence (Rule 1.3)
Applies Equally to Advocates and Advisors

Duty to Keep Client Informed Client (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)
How to Determine the Client’s Intentions

Class 3
Retainer Agreements, Fees and Billing (Rule 1.5)  
- 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 Rules: 1.5 and 1.15. and 5.4
ABA Ethics Opinion 93-379 Billing (not 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, the “THIRD RAIL”**

Presumption of disbarment for misappropriation  
(In re Addams)

Class 4
Advertising and Solicitation  
- 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)  

ABA Rules: 7.1, 7.2, 7.3, 7.4, 7.5, 7.6 and 8.4(e).
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978);
- 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))

**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)  
- 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.)

**Classes 7 & 8**  
Duties to the Legal System  
ABA Rules: 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 4.1, 4.2, 4.3, 4.4, 6.1 and 8.3.

- Lawyer as “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)  
- “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)

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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)

Reconciliation of Above Duties With Duties of Confidentiality

Various Hypotheticals

Termination of Attorney-Client Relationship (Rule 1.16)

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

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).

ABA Opinion 95-390- Conflicts in Corporate Family (pps. 615 to 638 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

Law Firms

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

- Fiduciary Duties Among Partners

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.)

Ethics Rules For Practice Before Some Federal Agencies
- Federal Preemption (Sperry v. Florida)
- Use of State Ethics Rules

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. 351-396 in book)

ABA Ethics Opinion 462
Feb. 21, 2013-Judges’ Use of Social Media (Not in book)

Class 14 Review, Questions and Discussion

CLASS ATTENDANCE

Class attendance is required and will be checked. Where possible, any student who is unable to attend a class should advise me by email or telephone in advance.

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.