SYLLABUS
PROFESSIONAL RESPONSIBILITY—SPRING 2014
SECTION 298-002 ADJUNCT PROFESSOR – ARTHUR D. BURGER

MONDAY EVENINGS 8:00 P.M. TO 9:50 P.M.
HAZEL HALL ROOM 225

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Office Conferences at School by Appointment

COURSE MATERIALS

American Bar Association, Compendium of Professional Responsibility Rules and Standards, 2013 Ed. Some of the assigned readings below are not in the book. PowerPoint slides for each class will posted on TWEN and displayed in class.

CLASS TOPICS AND ASSIGNMENTS

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<tr>
<th>CLASS NO.</th>
<th>TOPICS</th>
<th>READING ASSIGNMENTS</th>
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<tr>
<td>Class 1</td>
<td>Introduction and Background</td>
<td>ABA Model Rules of Professional Conduct (“ABA Rules”): Preamble, Scope and Rules 1.0 (Terminology), 8.4 and 8.5.¹</td>
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<tr>
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<td>- Scope of Course</td>
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<td>- Morality and Legal Ethics</td>
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<td>- What is Being “Ethical?”</td>
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<td>- Ethical Duties to Whom?</td>
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<td>- Notion of “Minimum Standards”</td>
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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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<td>- Case Law on Agents and Principals</td>
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<td>- Case Law on Fiduciary Duties</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 Legal Malpractice
- Statutes
- Court Rules of Procedure
- Court Orders
- Court’s Inherent Powers

History of ABA’s Ethics Rules

Disciplinary Authority For ABA Model Rules; 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

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

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 relationship

Organizations as Clients (Rule 1.13(a))  
Brief introduction to topic

Impaired Clients (Rule 1.14)  
How to Determine the Client’s Intentions

**Class 3**  Retainer Agreements, Fees and Billing (Rule 1.5)  
ABA Rules: 1.5 and 1.15, and 5.4

- Retainer Agreements, Required Elements  
ABA Ethics Opinion 93-379 Billing (p. 621 in book)

- Retainer Agreements, Elective Features  
In Re Addams, 579 A.2d 190 (DC 1990).

- Types of Fee Arrangements  

- Reasonableness  

- Contingency Fees  

- Illegal Fees  

- Statutory Fees  

- Fee Shifting Statutes  

- Fee Sharing  

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

- Historical Aversion of Advertising and Soliciting  
Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978); In re Primus, 436 U.S. 412 (1978); In the Matter of Joshua S.

- 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”  


Classes 5 & 6
Duty of Confidentiality and Attorney-Client Privilege
- 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.)

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

Classes 7 & 8
Duties to the Legal System
- 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)

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.

ABA Legal Ethics Opinion 06-442 – Metadata (not in book).
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”

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<tr>
<th>Classes</th>
<th>Duty of Loyalty and Conflicts of Interest</th>
<th>ABA Rules: 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 1.18 and 3.7.</th>
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<td>9 &amp; 10</td>
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<td>ABA Opinion No. 05-436-Advance Waivers- (not in book).</td>
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- 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)
- Lawyer as Witness (Rule 3.7)
- Rule 1.8 Prohibitions
- Screening and Remedies
- Motions To Disqualify
- Attorney Migration (Rules 1.9 and 1.10)
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

ABA Rules: 2.3, 2.4, 3.8, 5.1, 5.2, 5.3, 5.4 and 5.6.

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


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

ABA Rule: 5.5.

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 Model Code of Judicial Conduct: (Entire)

ABA Ethics Opinion 462 Feb. 21, 2013-Judges’ Use of Social Media

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. There will be some videos shown depicting various ethical dilemmas faced by lawyers.

FINAL EXAM

It will be a closed-book objective test, using a combination of multiple choice and “true/false” questions. 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.