

Professional Responsibility
Fall 2023
Prof. Lerner
Syllabus
(August 7, 2023)

Class Schedule:

Class meets Thursdays from 6:05 to 8:05.

Office hours:

I will be available in my office (433H) on Tuesday's and Thursdays from 11:30 to 12:00 p.m. Please also feel free to email me at clerner@gmu.edu to arrange an appointment, either in-person or on Zoom. I will often be free and available to meet on Tuesday and Thursday afternoons. I am happy to discuss subjects raised in class or more generally questions about the legal profession.

Required course material:

(1) Lerman, Schrag & Rubinson, Ethical Problems in the Practice of Law (6th edition 2022).

(2) ABA Model Rules of Professional Conduct. The Rules can be accessed for free on the ABA website, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/.

You should probably consider buying a copy on the Internet—a used copy or a slightly outdated version is fine.

Classroom attendance and participation:

I will take attendance. Students are expected to be present and prepared. I reserve the option of raising or lowering grades based on class participation. To discourage distractions and encourage participation, **the use of laptop computers is prohibited**. If you have a disability that would preclude you from taking notes by hand, please contact the Director of Student Academic Affairs.

Classroom discussion:

Many of the cases and articles we will study involve sensitive and controversial topics. You should expect to hear opinions that are contrary to your own beliefs. You are encouraged to formulate reasoned responses and refutations. Students are free to speak their minds on relevant subject matter, and they are expected to do so in a professional manner.

Recording policy:

Recording of the class in any way is prohibited.

Final exam:

The exam is on December 8 at 6 pm.

Learning Outcomes:

By the end of the course students should be able to do the following:

- Think critically about navigating some of the ethical issues that confront lawyers.
- Think critically about managing one's duties to clients, other lawyers, the judicial system, and the general public.
- Identify the relevance of the ABA Model Rules of Professional Conduct to particular situations.

Introduction:

Professional Responsibility is a required course. In the background, and often in the forefront, of all the readings and class discussions are fundamental questions: What is a good lawyer? Can a good lawyer be a good person? Must a good lawyer be willing to help bad people in concealing and even advancing their nefarious schemes? How, in so doing, can a good lawyer remain a good person?

Here are some reflections on these questions:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.

Henry Lord Brougham, 2 Trial of Queen Caroline 3 (1821)

An attorney must decline in a civil cause to conduct a prosecution, when satisfied that the purpose is merely to harass or injure the opposite party, or to work oppression and wrong.

Judge Thomas Goode Jones, Alabama Code (1887)

The one saving attribute for the lawyer, and through him of society, is fidelity to the client. Fidelity is the saving salt of human nature, and ennobles whatever it touches. . . .

It is not the exception, but the rule, for the lawyer to surrender his whole mental, intellectual, and physical power to his client's cause. There are no sacrifices which he will not make, and no dangers that he will not incur, to advance the success of his employment.

John R. Dos Passos, *The America Lawyer As He Was—As He Is—As He Can Be* 142-143 (1907)

[T]he duty of the lawyer, subject to his role as an “officer of the court,” is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be.

Justice Lewis Powell, *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973)

A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Rules of Professional Responsibility, Rule 1.3 (adopted in 1983) (An older formulation had provided: “A lawyer shall represent his client zealously within the bounds of the law.”)

None of us who have practiced for any length of time can fail to note the dramatic decline in the level of civility between lawyers. Today we live in a ‘me’ society not a ‘we’ society and that regrettable change has been made manifest by certain of our colleagues. ‘Zealous advocacy’ is the buzz-word which serves to legitimize the most outrageous conduct, conduct which regrettably debases the profession as well as the perpetrator.

Illinois Circuit Judge Richard Curry *Lawyers of Conscience Enforce the Unenforceable*, Illinois Bar Journal, November 1985

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These quotations frame the issues in a general way, so to focus the discussion for our first class, consider the question of whether, in defense of a morally dubious cause, a lawyer can justly raise “technical” defenses. Here is an old-fashioned statement of a now generally repudiated position:

I will never plead the Statute of Limitation, when based on the mere efflux of time; for if my client is conscious he owes a debt, and has no other defense than the legal bar, he shall never make me a partner in his knavery.

David Hoffman, A Course in Legal Ethics (1836)

Reading assignments for the class:

The assignments below are from the Lerman, Schrag & Rubison book (LSR). They will be supplemented with additional readings. The assignments may be adjusted over the course of the semester. Every Friday morning, I will email the assignment for the following week.

You will also be responsible for the Model Rules of Professional Conduct that correspond to the assigned reading.

Week 1 (August 24): Introduction and the Legal Profession: Bar Admission and History

Reading Assignment: The Syllabus, LSR 1-46, and Thomas L. Shaffer and Robert Cochran, “Technical” Defenses: Ethics, Morals, and the Lawyer as Friend, 14 Clinical Law Review 337 (2007), available at http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1082&context=law_faculty_scholarship.

Focus on Model Rules Preamble and Scope and Rules 1.0 and 8.1

Week 2 (August 31): The Legal Profession: Regulation, Discipline, and Liability

Reading Assignment: LSR 63-136

Focus on Model Rules 1.2, 5.1, 5.2, 5.3, 8.3, 8.4, and 8.5

Week 3 (September 7): Relationship Between Lawyers and Clients

Reading Assignment: LSR 137-158, 166-204, and 207-213

Focus on Model Rules 1.1., 1.3, 1.4, 1.14, 1.16, 2.1, and 6.5

Week 4 (September 14): The Duty to Protect Client Confidences

Reading Assignment: LSR 215-248

Focus on Model Rule 1.6

Week 5 (September 21): The Duty to Protect Client Confidences

Reading Assignment: LSR 248-277

Focus on Model Rules 1.2, 1.6, 1.8, 1.13, 1.16, 4.1, and 8.4

Week 6 (September 28): The Attorney-Client Privilege and the Work Product Doctrine

Reading Assignment: LSR 279-321

Focus on Model Rule 1.6

Week 7 (October 5): Conflicts of Interest: Current Clients

Reading Assignment: LSR 323-363

Focus on Model Rule 1.7 and 1.10

Week 8 (October 12): Conflicts Involving Former and Prospective Clients

Reading Assignment: LSR 365-417

Focus on Model Rules 1.9, 1.10, and 1.18

Week 9 (October 19): Conflicts Issues in Particular Practice Settings

Reading Assignment: LSR 419-461

Focus on Model Rules 1.8, 1.9, 1.10, 1.13, and 1.18

Week 10 (October 26): Conflicts of Interest Between Lawyers and Clients

Reading Assignment: LSR 463-538

Focus on Model Rules 1.5, 1.7, 1.8, 1.9, 1.10, and 1.15

Week 11 (November 2): Lawyers' Duties to Courts

Reading Assignment: LSR 587-634

Focus on Model Rules 1.8, 1.10, 1.15, 3.1, 3.3, 3.4, 3.5, and 8.4

Week 12 (November 9): Lawyers' Duties to Courts

Reading Assignment: LSR 634-671

Focus on Model Rules 3.3, 3.4, 3.5, 3.6, 3.9, and 5.6

Week 13 (November 16): Lawyers' Duties to Adversaries and Third Parties

Reading Assignment: LSR 673-723

Focus on Model Rules 3.4, 3.7, 3.8, 4.1, 4.2, and 4.3