

Professor(s): Arthur Burger

Mon. 4:00 – 6:00 pm EST | **Final Exam:** Tues. May 6, 12:00 pm EST

Reading(s): The sole text to purchase is the Model Rules of Professional Conduct, 2024 Ed, published by the American Bar Association, ISBN No. 9781639052998. 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

Do I have an “agenda” for this course? Yes, and it’s neither “political” nor doctrinal.

Rather, my goal is very straightforward: 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, and I can’t promise that there won’t be some bad jokes.

As to the subject area, regardless of the type of legal work you 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 very 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 needless “nagging” of them with platitudes. 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 similar careful 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. To me, the symmetry of this 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

Students will be able to demonstrate basic knowledge of the ABA Model Rules of Professional Conduct.

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.

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.

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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.

Students will be able to demonstrate basic knowledge of the ABA Model Rules of Judicial Conduct.

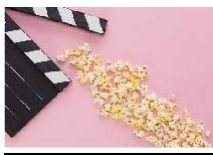
Students will be able to communicate orally and in writing their knowledge of the above-stated matters.

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 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.

See https://www.law.gmu.edu/news/2024/instructional_ethics_videos_now_available_for_professors_and_attorneys as posted on “Scalia Spotlights” on the school’s web page. These videos can also be accessed for free on YoTube by searching for “GMU 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.

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COURSE SCHEDULE & ASSIGNMENTS

	<u>TOPICS</u>	<u>READING ASSIGNMENTS</u>
<u>Class 1</u>	<u>Introduction and Background</u> Scope of Course Morality and Legal Ethics Ethical Duties to Whom? Role of Advocate versus Role of Advisor <u>How the Rules of Professional Conduct Interact with Other Law</u> <u>Sources of Law Governing Lawyers (In addition to ABA Model Rules)</u> Constitutional Law Contracts (Retainer Agreements; Engagement Letters) Case Law on Agent/Principal Relationship Case Law on Fiduciary Duties Case Law on Legal Malpractice Statutes Court Rules of Procedure Court Orders Court's Inherent Powers <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> <u>Defining "Professional Misconduct"</u> Rule 8.4(a) <u>Disciplinary Authority and Choice</u>	<i>ABA Model Rules of Professional Conduct:</i> Preamble, Scope and Rules 1.0 (Terminology), 8.3, 8.4 and 8.5. ¹ <i>Middlesex County Ethics Committee v. Garden State Bar Assoc.</i> 102 S.Ct. 2515 (1982).

¹ Where an ABA Rule is assigned among the readings for a class, this includes a careful study of the Comments to each Rule as well. These Comments provide authoritative explanations of the intent and meaning of each section of the Rules, which students shall be responsible for learning. Skipping over the Comments is not advised.

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

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of Law

-Regulation of the legal profession, “Reciprocal Discipline,” as
federal and state per Part 6, Section IV, ¶¶

-“Self Regulation”-Rule 8.3 re 13-21 of the Rules of the
duty to report Supreme Court of Virginia

-The disciplinary process for
lawyers

-Reciprocal discipline

-Rule 8.5

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 Principles of “Statutory”

Interpretation

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

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-Prospective Clients (Rule 1.18(a)) **ABA Rules: 1.1, 1.2, 1.3, 1.4, 1.5(b), 1.13(a), 1.14, 1.18(a) and 6.2**
-Retainer Agreements (Rule 1.5(b))
-Court Appointments (Rule 6.2)
Duty of Competence (Rule 1.1)
How Does Competence Implicate **Restatement (Third) of the Law Governing Lawyers**
Ethics? Who Makes the Decisions? **§14.**
(Rule 1.2)
-Scope and *Goals* of
Representation as Distinguished **ABA Ethics Opinion No. 07-448 - Court**
from **Appointments**
Means to Reach those Goals
Clients with Fraudulent or Criminal **ABA Opinion 96-404–**
Goals **Client Under a Disability**
Advising as distinguished from **ABA Opinion 491**
assisting Clients who have **Obligations under Rule**
Criminal or Fraudulent Intentions **1.2(d)**
Duty of Diligence (Rule 1.3) **ABA Opinion 481-**
Applies Equally to Advocates and **Lawyer’s Duty to Inform**
Advisors Duty to Keep Client **Client of Errors**
Informed (Rule 1.4)
This conforms to agent-principal
obligations, which constitute
fiduciary duties of attorneys to
their clients.

Organizations as Clients (Rule **VIDEOS**
1.13(a)) Brief introduction to
topic of entity clients Impaired GMU VIDEO No. 6 APRIL
Clients (Rule 1.14) VIDEO No. 1

Class 3

Retainer Agreements, Fees, ABA Rules: 1.5 and 1.15
Costs and Billing (Rule 1.5)
Retainer Agreements, Required ABA Opinion 02-425
Elements Arbitration Clause in Retainer
Retainer Agreements, Elective Agreement
Features
Types of Fee Arrangements
Reasonableness ABA Opinion 93-379
Contingency Fees
Illegal Fees Billing
Statutory Fees
Fee Shifting Statutes
- Fee Sharing

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Care of Property of Others
(Rule 1.15)

In re Addams, 579 A.2d 190
(D.C. 1990).

- Holding Property Clients and
Third Parties

- Funds (Trust Accounts,
IOLTAs and other Escrow
Accounts)

Virginia Rule on “IOLTAs,”
from Part 6

Holding Other Types of
Personal Property

Section IV of the Rules of the
Supreme Court of
Virginia

Keeping Property Separate and
Secure (Avoid “Commingling”)

**- Misappropriation, the
“THIRD RAIL”**

VIDEOS

**Presumption of disbarment for
misappropriation (In re
Addams)**

GMU VIDEO Nos. 2, 5 and
7.

APRL VIDEO No. 8.

Class 4

Advertising and Solicitation

Historical Aversion of
Advertising and Soliciting
Bates (Old Notions Begin to
Crack)

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

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))

Classes

Duty of Confidentiality and
Attorney-Client Privilege

ABA Rules: 1.6, 1.8(b),

5 & 6

- Policy Bases

1.9(c), 1.13, 1.18 and
4.5(b).

When Duty Attaches

Upjohn v. U.S., 449 U.S. 383
(1981)

To Whom Is Duty Owed?

Present Clients (Rule 1.6)

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Prospective Clients (Rule 1.18) ABA Opinion 480
Past Clients (Rule 1.9)
Exceptions (Rule 1.6 (b)(1) to Confidentiality Obligations for
(b)(7)) Lawyer Blogging
Facts versus Communications
Contrast with Attorney-Client
Privilege (*Upjohn*)
- Inadvertent Production of ABA Opinion 477R- Securing
Privileged Material (Rules Communication of
1.6(c) and 4.4(b))
“Using” versus “Revealing” Protected Client Information
Client Information (Rule
1.8(b))
Confidentiality with
Organization as Client (Rule
1.13)
Post-Enron Principles
(*Sarbanes-Oxley* etc.)

VIDEOS

APRL VIDEO No. 13.

Class 7

Duties to Tribunal When an ABA Rules 3.1, 3.2, 3.3,
Advocate
- Lawyer as “Officer of Court” 3.4, 3.5, 3.6, 3.8, 3.9 and
4.4.
Fed. R. Civ. P. 11 ABA Ethics Opinion 508- The
Candor to Tribunal Regarding Ethics of Witness
Facts, Evidence and Legal
Arguments (Rule 3.1 and 3.3)
Differences in Civil and Preparation
Criminal Cases
Frivolous Claims (Rule 3.1)
Delay (Rule 3.2) **VIDEOS**
Fairness to Others (Rule 3.4) GMU VIDEO No. 9.
Assertions of Personal
Knowledge or Opinion (Rule
3.4)
“Data Mining” APRL VIDEO Nos. 3, 5
Court Orders and 6.
Decorum (Rule 3.5)
Ex Parte Contact (Rule 3.5
Publicity (Rule 3.6)
Lawyer as Witness (Rule 3.7)
Non-adjudicative Proceedings
(Rule 3.9)
- Pro Bono Publico (Rule 6.1)

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Class 8

<u>Duties to Adversaries and Others When Acting as an Advocate</u>	ABA Rules 3.3, 3.4, 4.1, 4.2, 4.3 and 4.4
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>	ABA Rule 1.16
When/How to Terminate Relationship	ABA Opinion 471-Ethical Obligations of Lawyers to Surrender Papers and Property
Mandatory Withdrawal	<u>VIDEOS</u>
Permissible Withdrawal	APRL VIDEO No. 3.
Court Approval	
Duties Upon Withdrawal	
“Noisy Withdrawal”	

Classes

9 & 10

<u>Duty of Loyalty and Conflicts of Interest</u>	ABA Rules: 1.7, 1.8, 1.9,
Basic Concepts	1.10, 1.11, 1.12, 1.18 and
Duties to current clients (Rule 1.7)	3.7.
Direct adversity (Rule 1.7(a)(1))	<u>Sanford v. Commonwealth of Virginia</u> , 687 F.Supp.2d
Potential conflicts in joint representation of multiple clients	
in a single matter. <u>Sanford v. Virginia</u>	591 (E.D. Va. 2009)
“Punch-pulling conflicts (Rule 1.7(a)(2))	ABA Opinion No. 05-436-
Issue or “Positional” Conflicts	
Joint representation of multiple clients in a matter	Advance Waivers
Duties to former clients (Rule 1.9)	
The substantial-relationship test	Article by A. Burger on Advance Waivers
Duties to prospective clients (Rule 1.18)	(published by the
Government lawyers who move to private practice	

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(Rule 1.11)	<u>ABA/Bloomberg Manual of</u>
- Former judges and law clerks	<u>Professional Conduct</u>
(Rule 1.12)	
Imputation of Conflicts (Rule 1.10)	ABA Opinion 95-390- Conflicts in Corporate
Consent to Conflicts (Rule 1.7(b))	
Advance Waivers	
Corporate Affiliates	Family
Lawyer as Witness (Rule 3.7)	
- Rule 1.8 Prohibitions and restrictions re interactions with clients	
Screening and Remedies	<u>VIDEOS</u>
Attorney Migration (Rules 1.9 and 1.10)	GMU VIDEO Nos. 1, 3 and 8.
Motions to Disqualify	APRL VIDEO Nos. 2, 4 and 7.
Opposing Counsel	

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Class 11

Special Roles

-Lawyer as prosecutor (Rule 3.8) 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).
-Evaluations for Third Parties (Rule 2.3) ABA Opinion 486- Obligations of Prosecutors in Negotiating
as third-party neutral (Rule 2.4)Pleas for Misdemeanors
-Amicus Counsel
Use of AI ABA Opinion 512-Use of
-New Prohibition of Generative AI
Discrimination (Has a broad scope) (Rule 8.4(g))

Attorney Grievance Comm'n of Md. v.

McDowell, 93 A.3d 711 (MD 2022)

Law Firms

-Forms of Organization ABA Opinion 498-Virtual Practice

-Roles of Non-Lawyer Employees

VIDEOS

-Lawyer as Supervisor of Lawyers (Rule 5.1) GMU VIDEO Nos. 4 and 10
-Supervisor of Non-Lawyer Employees (Rule 5.3) APRL VIDEO Nos. 9 and 11
-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

ABA Rules: 8.1 and 5.5

-Multidisciplinary Practice

Virtual Law Firms

-Fiduciary Duties Among Partners

Class 12

Unauthorized Practice of Law

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) (Birbrower and Rule 5.5)

Admission to Practice (Rule 8.1)

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<u>Pro Hac Vice</u> Admissions	Unauthorized Practice Rules of
Non-lawyer online services for the Supreme Court of Virginia	
consumers (LegalZoom etc.)	ABA Opinion 495-Lawyers
<u>Ethics Rules for Practice</u>	Working Remotely
<u>Before Some Federal Agencies</u>	
-Federal Preemption	<u>LegalZoom v. South Carolina</u>
(<i>Sperry v. Florida</i>)	<u>State Bar</u> ,
-Use of State Ethics Rules	<u>Sperry v. Florida</u> , 373 U.S. 379
	(1963)

Class 13

<u>Judicial Conduct</u>	
Sources of Law	
Judicial Immunity	
Appearance of Impropriety	ABA Rule: 8.2
Abuse of Office	
Outside Activities	<u>ABA Model Code of Judicial</u>
Competence and Diligence	<u>Conduct</u> (Entire)
Impartiality-Recusal	ABA Opinion 488-Judges'
Political Activities	Social or Personal
	Relationships as Grounds for
	Recusal or
	Disqualification