

# **PROFESSIONAL RESPONSIBILITY**

Fall 2019; Professor Olnek

Class will meet on Mondays, from 5:00 p.m. to 7:45 p.m. in Oakes Hall, room 107, except as otherwise noted on the schedule.

My office hours will be on Tuesdays and Thursdays between 1 p.m. and 5 p.m. You may also reach me by email me at molnek@vermontlaw.edu.

## **Required Books**

Lisa G. Lerman and Philip G. Schrag, *Ethical Problems in the Practice of Law* (4th Ed., Wolters Kluwer 2016) [referred to as “Text”].

Lisa G. Lerman, Philip G. Schrag and Anjum Gupta, *Ethical Problems in the Practice of Law: Model Rules, State Variations, and Practice Questions*, (2019 and 2020 edition, Wolters Kluwer). [Referred to as “Supplement”].

## **Introduction**

This class is structured as a problem-based course. The textbook includes many problems that we will discuss in class. Most of the problems put you in the shoes of a lawyer who has to deal with a situation involving both legal strategy and legal ethics, which are sometimes in conflict. Most of the problems are more complex than on-the-spot classroom hypotheticals; they require analysis before the class in which the problem will be discussed. For each assigned problem, study the facts carefully, decide what you would do if you were in the shoes of the lawyer, and come to class prepared to discuss and defend the action (if any) that you would take. In a problem method course such as this one, you may find it helpful to work in a study group outside of class, because members of the group are likely to take different approaches to a problem, thereby exposing the possible options and considerations.

This schedule may be revised during the course of the semester. If I make changes in daily assignments, I will announce them in class and send an email to each of you. If there are any major changes, I will publish an amended syllabus.

## **Preparation**

You have signed up for a 3-credit course, 1 day a week. We will be covering the same amount of material as if we met 2 days a week. Therefore, be prepared for heavy reading assignments for each class. I expect you will have carefully read all of the day’s assigned text material and that you will come to class prepared to discuss both that material and any questions contained in that material. In addition to reading the text, you should separately read all citations to the

Model Rules of Professional Conduct. When you read a Model Rule, please read both the Rule and the comments. If the comments to a particular rule are voluminous, don't try to read all of them at once. (Your eyes will glaze over.) Instead, find the comments that are relevant to the topic under discussion. Often there are references in the text to the relevant material, or headings within the comments themselves, that identify the subtopic covered. Please bring both the text and the supplement to class.

## **Rules**

You may not share class notes with other students who are not in this semester's class, or post any notes, course outlines, or analysis of problems online. If you think that you may wish to sell your book at the end of the semester you should not write the analysis of the problems into the text and course materials. You may not use a textbook or supplement into which a prior student has written "answers" to the problems.

Laptops and cell phones are not permitted in class.

## **Attendance**

I consider class attendance and participation to be extremely important and I believe that not only your success, but the success or failure of our class will depend, in part, upon the preparation and participation of each student in the class.

Pursuant to Vermont Law School's attendance policy, you are required to attend all classes except where religious observance, serious illness, personal emergency or a reason that is adequate in the judgment of the professor prevent attendance. If a student is absent from twenty (20%) of the regularly scheduled classes without adequate excuse, the student shall be automatically withdrawn from the course with a grade of F-Wd. Because this class meets only once per week, this requires you to be especially diligent about attendance. If you have 2 un-excused absences, you will receive a warning from me.

## **Course Objectives**

The objectives for students in this semester's course are the following:

1. To gain a working knowledge of the ABA's Model Rules of Professional Conduct;
2. To understand the competing policy objectives behind the Model Rules;
3. To gain knowledge that will assist the student to pass the Multistate Professional Responsibility Examination;
4. To gain an understanding of how the relevant state disciplinary codes impact the daily practice of law; and

5. To become better able to spot ethical issues in legal practice, to begin to develop a framework with which to analyze such issues, and to learn where to turn for help in resolving such issues.

### **MPRE**

I strongly suggest that you take the MPRE in November. It is not a requirement for this course, however, in order to become admitted to virtually all United States jurisdictions, a bar applicant must pass the Multistate Professional Responsibility Examination (MPRE). It's in your interest to take this examination during this semester. I have re-arranged the syllabus so that we will cover the topics that are commonly tested on the MPRE prior to the test date.

The regular registration deadline for the MPRE is September 19, 2019, the late registration deadline is September 26, 2019 and the Exam Test Date is November 9, 2019. You can get more information about the MPRE at [ncbex.org/exams/MPRE/registration](http://ncbex.org/exams/MPRE/registration).

### **Grading**

Your grade in this course will be based upon class participation (15%); short essays or quizzes (35%); and the balance (50%) will be based upon the final examination.

As in the case of the Multistate Professional Responsibility Examination, your final examination in this course will be totally closed-book. You will not be able to bring into your final examination any written or electronic material or refer to any material (written or electronic) other than the examination questions.

### **TWEN**

I use the TWEN course website, so you should view it as an important resource for course related announcements, supplemental readings, as well as additional course information. Please add yourself to TWEN prior to our first class.

# Schedule of Assignments

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Date	Topics, problems and cases to be discussed in class	Pages of textbook assigned and relevant rules
8/26	<b>Introduction; Chapter 1: Regulation of Lawyers; and Chapter 5: Relationships Between Lawyers and Clients</b>	
	<p><b>Introduction to the course</b></p> <p><b>Chapter 5:</b>  Formation of the lawyer-client relationship  <b>Togstad v. Vesely, Otto, Miller &amp; Keefe</b> “<i>You have no case.</i>”  Lawyers’ responsibilities as agents  Lawyers’ duties of competence, honesty, communication and diligence  <b>5-1 The Washing Machine</b>  Competence in criminal cases  <b>Strickland v. Washington</b> “<i>Capital case, not enough mitigating evidence</i>”  <b>5-2 A Desire to Investigate</b></p> <p><b>Chapter 1:</b>  Institutions that regulate lawyers  State ethics codes  Admission to practice  The bar examination  <b>1-1 The New Country</b></p>	<p>Text: pp. xxxiii –xxxvii  And 1-17;  Model Rules: Preamble and note on Scope;</p> <p>Text: 239-274  Model Rules 1.1, 1.3, 1.4, 6.2</p> <p>Text: 19-46  Model Rule 8.1</p>
9/9	<b>Chapter 1: Regulation of Lawyers, Continued and Chapter 2: Lawyer Liability</b>	
	<p>The character and fitness inquiry  <b>1-2 Weed</b>  Law school discipline: A preliminary screening inquiry  <b>1-3 The Doctored Resume</b>  Professional discipline  Grounds for discipline  <b>2-1 The Dying Mother</b></p>	<p>46-79  Model Rule 1.2(d)</p>

	Professional discipline, continued Grounds for discipline, continued <b>2-2 “I’m Not Driving”</b> Reporting misconduct by other lawyers <b>2-3 Exculpatory Evidence</b>	79-96 Model Rules 1.2(d), 8.3
<b>9/16</b>	<b>Chapter 2: Lawyer Liability, concluded; and Chapter 3: The Duty to Protect Client Confidences</b>	
	Professional discipline, cont. <b>2-4 The Little Hearing</b> Legal protections for subordinate lawyers <b>Case study: Kelly v. Hunton &amp; Williams “The whistleblowing associate”</b> Civil liability of lawyers Criminal liability of lawyers Client protection funds	97-149 Model Rules 5.1, 5.3, 1.6(a)
	The basic principle of confidentiality <b>3-1 Your Dinner with Anna</b> Exceptions to the duty to protect confidences Revelation of past criminal conduct <b>3-2 The Missing Persons, Scene 1</b>	149-163 Model Rule 1.6(b)(1)
<b>9/23</b>	<b>Chapter 3: The Duty to Protect Client Confidences, continued</b>	
	Confidentiality, continued <b>3-3 &amp; 3-4 The Missing Persons, Scenes 2 &amp; 3 People v. Belge</b>	163-174
	Confidentiality, continued The risk of future injury or death <b>3-5 Rat Poison</b> Client frauds and crimes that cause financial harm <b>3-6 Reese’s Leases</b> Use or disclosure of confidential information for personal gain or to benefit another client Talking to clients about confidentiality	175-196 Model Rules 1.0(f), 1.6(b)(2)-(7), 1.6(c), 1.16 (a) & (b), 3.3, 4.1, 8.4(c),
<b>9/30</b>	<b>Chapter 4: The Attorney-Client Privilege and the Work Product Doctrine Chapter 5: Relationships Between Lawyers and Clients (continued from first day of class)</b>	

	<p>Confidentiality and attorney-client privilege, compared  The elements of attorney-client privilege  Client identity  Waiver  <b>4-1 Murder for Hire</b>  The crime-fraud exception  Revelations permitted or required by the ethics codes  The death of the client  <b>4-2 A Secret Confession</b>  <b>Swidler &amp; Berlin v. United States “Why did this man die?”</b>  The work product doctrine  The attorney-client privilege for corporations  <b>4-3 Worldwide Bribery</b>  The attorney-client privilege for government officials</p>	197-238
	<p>Diligence  Candor and communication  <b>5-2 Lying to Clients</b>  Candor in counseling  <b>5-3 Torture</b>  Who calls the shots?  The competent adult client  <b>Jones v. Barnes “Who decides what to argue on appeal?”</b></p>	274-301 Model Rules 1.0(d), 1.2, 1.4, 1.16(b), 2.1, 8.4(c)
10/7	<p><b>Chapter 5: Relationships Between Lawyers and Clients  (continued from first day of class)</b>  <b>Chapter 6: Concurrent Conflicts of Interest: General  Principles</b></p>	
	<p>Who calls the shots? continued  Clients with diminished capacity  <b>5-4 The Package Bomber</b>  <b>5-7 The Foster Child</b>  Terminating a lawyer-client relationship</p>	301-328 Model Rules 1.2, 1.4, 1.14, 1.16
	<p>An introduction to conflicts of interest  General principles in evaluating concurrent conflicts  <b>6-1 The Injured Passengers, Scene 1</b>  <b>6-2 Food Poisoning</b></p>	329-356 Model Rule 1.7, 1.10
10/21	<p><b>Concurrent Conflicts of Interest: General Principles,  continued;</b>  <b>Chapter 7: Concurrent Conflicts in Particular Practice  Settings</b></p>	
	<p>Conflicts between current clients in litigation  Suing a current client  <b>6-3 I Thought You Were My Lawyer!</b>  Cross-examining a current client  Representation of co-plaintiffs or co-defendants in civil litigation  <b>6-4 The Injured Passengers, Scene 2</b>  Positional conflicts: Taking inconsistent positions in litigation  <b>6-6 Top Gun</b></p>	356-370 Model Rule 1.7, 1.10

	<p>Conflicts involving prospective clients</p> <p><b>6-7 <i>The Secret Affair</i></b></p> <p>Representing both parties to a transaction</p> <p>Representing organizations</p> <p><b>7-1 <i>A Motion to Disqualify</i></b></p> <p>Representing co-defendants in criminal cases</p> <p><b>7-3 <i>Police Brutality, Scene 1</i></b></p>	<p>370-402</p> <p>Model Rules 1.18, 1.7, 1.13</p>
<b>10/28</b>	<p><b>Chapter 7: Concurrent Conflicts in Particular Practice Settings, continued, and</b></p> <p><b>Chapter 8: Conflicts Involving Former Clients</b></p>	
	<p>Representing co-defendants in criminal cases, continued</p> <p><b>7-4, and 7-5 <i>Police Brutality, Scenes 2 and 3</i></b></p> <p>Representing co-defendants in civil cases</p> <p><b>7-6 <i>Termination of Parental Rights</i></b></p>	<p>403-408</p> <p>Model Rules 1.7, 1.8(f) and (g)</p>
	<p>Representing family members</p> <p><b>Florida Bar Opinion 95-4</b></p> <p><b>7-7 <i>Representing the McCarthys</i></b></p> <p>Representing insurance companies and insured persons</p> <p>Representing employers and immigrant employees</p> <p>Representing plaintiffs in class actions</p> <p>Representing parties to aggregate settlements of individual cases</p> <p>The nature of conflicts between present and former clients</p> <p>Duties to former clients</p> <p>Distinguishing present and former clients</p> <p>Evaluating successive conflicts</p> <p><b>8-1 <i>Keeping in Touch</i></b></p>	<p>409-449</p> <p>Model Rules 1.7, 1.9, 1.10</p>
<b>11/4</b>	<p><b>Chapter 9: Conflicts Between Lawyers and Clients</b></p>	
	<p>Addressing former client conflicts in practice</p> <p><b>8-2 <i>Toxic Waste</i></b></p> <p>Representing the competitor of a former client</p> <p>Conflicts between the interests of a present client and a client who was represented by a lawyer's former firm</p> <p>Imputation of former client conflicts to affiliated lawyers</p> <p><b>8-3 <i>A Brief Consultation</i></b></p>	<p>449-475</p> <p>Model Rules 1.7, 1.9, 1.10</p>

	<p>Legal fees          Lawyer-client fee contracts  <b>Matter of Fordham “Too many hours?”</b>  <b>9-1 An Unreasonable Fee?</b>  <b>9-2 Rising Prices</b>          Regulation of hourly billing and billing for expenses          Contingent fees</p>	<p>477-522          Model Rules 1.4, 1.5, 7.1, 8.4</p>
<b>11/6</b>	<b>Chapter 9: Conflicts Between Lawyers and Clients; and Chapter 10: Conflicts Issues Government Lawyers and Judges</b>	
	<p>Forbidden and restricted fee and expense arrangements  <b>9-3 An Impoverished Client</b>          Fee disputes          Dividing fees with other firms or with nonlawyers          Payment of fees by a third party          Legal fees, continued          Lawyer as custodian of client property and documents          Client trust accounts          Responsibility for client property          Administering estates and trusts          Conflicts with lawyers’ personal or business interests          Business transactions between lawyer and client          Gifts from clients          Sexual relationships with clients          Intimate or family relationships with adverse lawyers          Imputation of lawyer-client conflicts to other lawyers in a firm</p>	<p>522-554          Model Rules 1.4, 1.5, 1.7, 1.8(a), (c), (d), (e), (f) (h), &amp; (i), 1.10, 1.15, 1.16(d), 5.2, 5.4, 7.1, 8.3, 8.4</p>
	<p>Regulation of government lawyers and those who lobby them          Successive conflicts of present and former government lawyers  <b>10-1 The District Attorney</b>          Conflicts involving judges, arbitrators, and mediators  <b>10-2 A Trip to Monte Carlo</b>  <b>10-3 The Judge’s Former Professor</b></p>	<p>555-596          Model Rules 1.9-1.12          ABA Model Code of Judicial Conduct (especially canons 2 and 3)</p>
<b>11/11</b>	<b>Chapter 11: Lawyers’ Duties to Courts</b>	
	<p>Being a good person in an adversary system          Investigation before filing a complaint  <b>11-1 Your Visit From Paula Jones</b>          Truth and falsity in litigation          The rules on candor to tribunals          A lawyer’s duties if a client or witness intends to give false testimony  <b>Nix v. Whiteside “He said he saw something metallic”</b>          A lawyer’s “knowledge” of a client’s intent to give false testimony  <b>11-2 Flight from Sudan, Scene 1</b>          A lawyer’s duties if a client intends to mislead the court without lying  <b>11-3 Flight from Sudan, Scene 2</b></p>	<p>597-627          Model Rules 1.2, 1.16, 3.1, 3.3, 8.4(c)</p>

	<p>Truth and falsity in litigation, continued</p> <p>False impressions created by lawyers during litigation</p> <p><b>11-4 <i>The Drug Test</i></b></p> <p><b>11-5 <i>The Body Double</i></b></p> <p>Lawyers' duties of truthfulness in preparing witnesses to testify</p> <p>Concealment of physical evidence and documents</p> <p>Duties of criminal defense lawyers with respect to evidence of crimes</p> <p><b>11-7 <i>Child Pornography</i></b></p>	<p>628-650</p> <p>Model Rules 3.3, 3.4, 4.1, 7.1, 8.4</p>
<b>11/18</b>	<b>Chapter 12: Lawyers' Duties to Adversaries and Third Persons</b>	
	<p>Concealment of documents and evidence in civil cases</p> <p><b>11-8 <i>The Damaging Documents</i></b></p> <p>The duty to disclose adverse legal authority</p> <p>Disclosures in ex parte proceedings</p> <p>Improper influences on judges and juries</p> <p>Lawyers' duties in non-adjudicative proceeding</p>	<p>650-686</p> <p>Model Rules 3.3-3.9, 4.1, 4.4, 8.4(c)</p>
	<p>Communications with lawyers and third parties</p> <p>Deception of third persons</p> <p><b>12-1 <i>Emergency Food Stamps</i></b></p> <p>Restrictions on contact with represented persons</p> <p>Restrictions on contact with unrepresented persons</p> <p><b>12-2 <i>The Complaining Witness</i></b></p> <p>Respect for the rights of third persons</p> <p><b>12-3 <i>The Break-in</i></b></p>	<p>687-719</p> <p>Model Rules 4.1-4.4</p>
<b>11/25</b>	<b>Chapter 12: Lawyers' Duties to Adversaries and Third Persons, continued; Chapter 13: The Provision of Legal Services</b>	

	<p>Duties of prosecutors</p> <p><b>12-4 <i>The Prosecutor's Masquerade</i></b></p> <p><b>12-5 <i>The Corrupt Governor</i></b></p> <p>Conduct prejudicial to the administration of justice</p> <p><b>12-6 <i>A Letter of Commendation</i></b></p> <p>Are lawyers really too zealous?</p>	<p>719-743</p> <p>Model Rules 3.8, 8.4</p>
	<p>The unmet need for legal services</p> <p>Sources of free legal services for those who cannot afford legal fees</p> <p>Right to counsel for indigent litigants</p> <p>Civil legal aid</p> <p><b>13-1 <i>Restrictions on Legal Services</i></b></p> <p>Fee-shifting statutes</p> <p>Pro bono representation</p> <p><b>13-2 <i>Mandatory Pro Bono Service</i></b></p> <p>Loan forgiveness and scholarships for public service lawyers</p>	<p>745-795</p> <p>Model Rules 6.1, 6.2</p>
<b>11/2</b>	<p><b>Chapter 13: The Provision of Legal Services, continued;</b></p> <p><b>and</b></p> <p><b>Chapter 14: The American Legal Professions: Past, Present, and Future</b></p>	
	<p>Conflicts of interest in public interest litigation</p> <p><b>6-5 <i>The Prisoners' Dilemma</i></b></p> <p>Restrictions on participation by nonlawyers in providing legal services</p> <p>Unauthorized practice of law statutes</p> <p><b>13-3 <i>Special Education</i></b></p> <p>The prohibition of multidisciplinary practice</p> <p>The prohibition of nonlawyer investment in law firms</p>	<p>365-367, 795-813</p> <p>Model Rule 1.7, 5.4</p>

<p>History and development of the U.S. legal profession</p> <ul style="list-style-type: none"> <li>Pre-revolutionary America</li> <li>The nineteenth century</li> <li>A short history of American legal education</li> </ul> <p>Advertising and solicitation</p> <ul style="list-style-type: none"> <li>Advertising of legal services</li> <li>Solicitation of clients</li> </ul> <p><b>Problem 14-1 <i>Do You Need a Lawyer?</i></b></p> <p>Diversity and discrimination in U.S. law firms</p> <ul style="list-style-type: none"> <li>Women</li> </ul> <p><b>Problem 14-2 <i>The Job Interview</i></b></p> <ul style="list-style-type: none"> <li>People of Color</li> <li>Lesbian, gay, bisexual and transgender lawyers</li> <li>Lawyers with disabilities</li> <li>Other bases of discrimination</li> </ul> <p>Legal culture in certain practice settings</p> <ul style="list-style-type: none"> <li>Large firms</li> <li>Small firms</li> <li>Government and nonprofit organizations</li> </ul> <p>Work settings for lawyers: culture and satisfaction</p> <p>The business of law practice in the twenty-first century</p> <ul style="list-style-type: none"> <li>The 2008 recession: Impact on the legal profession</li> <li>Structural changes in private law practice</li> <li>Temporary and contract lawyers</li> <li>Lawyers in retail stores</li> <li>The Internet as a substitute for legal services</li> <li>Outsourcing legal work to cut labor costs: Offshoring and onshoring</li> <li>Multistate practice: A challenge to state-based licensing</li> <li>Globalization of law practice</li> <li>New methods of financing law firms and legal work</li> </ul>	<p>815-900; Model Rules 5.4, 5.5, 7.1, 7.5</p>
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