

ASPEN SELECT SERIES

KATERINA P. LEWINBUK

**CONNECTING ETHICS & PRACTICE:
A Lawyer's Guide to Professional Responsibility**



Wolters Kluwer

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***Connecting Ethics & Practice:
A Lawyer's Guide to Professional
Responsibility***

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—To the Privilege and Responsibility of Serving Others...

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Introduction to Professional Responsibility: A Course Overview

A. SEQUENCE OF RULES

Understanding how the Model Rules of Professional Conduct (Model Rules) are set out will help in the preparation for each class, the final exam, and the Multistate Professional Responsibility Exam (MPRE). However, understanding the sequence of the rules will also provide guidance to anyone in the legal profession, including prospective lawyers or senior lawyers, who is confronted with a new task and is unsure of ethical guidelines. The sequence should confirm the point made throughout this textbook: rules are everywhere, but the diligent attorney will know which rule to look to in any situation. As a result, the rules are set out in an order that creates a pathway of checkpoints that must be considered and sometimes checked off before opening a small private practice, becoming a partner in a large firm, joining in-house counsel at a corporation, or even entering the legal profession altogether.

Chapter 1 of this book, *History and Theory of Professional Responsibility—Where We Started and Who We Are Today*, offers an overview of the discipline and a brief history and current status of the legal profession. The majority of those reading this book are currently in law school with hopes of being admitted to their respective state bars. Chapter 2, *The Importance of Integrity—Before and After Entrance into the Profession*, studies the first step in this process. This chapter will give an overview of the rules regulating admission to the bar, the application process, and which behaviors are not permissible for admission. However, the rules and regulations for bar admission do not end once a lawyer is admitted to the bar. The other rules highlighted in this chapter focus on ways in which the legal profession maintains integrity amongst those who are both newly admitted to the bar and those who are considered senior lawyers. These additional rules shall follow any lawyer into all aspects of her legal career.

After admission to the bar, a new lawyer will be eager to put her hard-earned law degree to the test. To do this, she will need to find clients. Therefore, Chapter 3, *Obtaining Clients Through Advertising and Solicitation*, addresses obtaining clients through advertising and solicitation. Although advertising seems like a straightforward topic, the Model Rules provide certain restrictions on both the form of advertising and when direct solicitation is permissible. However, despite the popularity of advertising and solicitation, lawyers can also gain clients through pro bono work or by judicial appointments. Chapter 4, *Obtaining Clients Through Pro Bono Work, Judicial Appointment, and Other Ways of Creating the Attorney-Client Relationship*, focuses on the rules for client relationships for both voluntary pro bono work and judicial appointments. These methods for obtaining clients are growing in popularity and have become a heavily utilized process for obtaining clients.

Through advertising her services, the new lawyer is contacted by a person interested in hiring her as his attorney. It may be the lawyer's first client, and it may also be the start of her first attorney-client relationship. It is next important to address the duties that a lawyer owes her client. Some of these duties are very standard, including competence, diligence, and sufficient communication. However, the scope of representation is not always straightforward; it may depend upon the type of client or whether he can even be considered a "current client." A diligent and competent lawyer will also need to be aware of other critical aspects of the attorney-client relationship, including fees and confidential information. These topics are addressed next, in Chapter 5, *Confidentiality and Attorney's Fees*, and in Chapter 6, *Reality Check—Waiving Confidentiality and Applicable Exceptions*.

Before a lawyer can agree to enter into an attorney-client relationship, she must consider a number of matters in addition to fees and the scope of her representation. For instance, a lawyer must always consider whether representing a particular client will spark a conflict of interest. A number of standard conflicts are to be considered, such as conflicts for current clients or former clients, but there are also specialized conflicts to take into account, including whether a lawyer has worked for the government or as a judge. In some instances, the conflict cannot be overcome even with sufficient screening measures, which might lead to a lawyer declining or terminating representation. These topics are discussed in Chapter 7, *Conflict of Interest*, and Chapter 8, *The Prosecutor's Rule, Declining Representation and Sale of Law Practice*.

After the scope of representation is set, attorneys' fees are agreed upon and there are no conflicts of interest to be concerned with, the next step along the path is the actual client representation. Chapter 9, *Working on the Case—Responsibilities in Representing Clients*, addresses these

responsibilities. A lawyer is required to be both a counselor and an advocate for her client to ensure that the client is represented in the most effective manner possible. However, the lawyer should always be conscious of third parties and uphold the same level of integrity in her communications to those who are not under her representation. Chapter 10, *You Can't Work This Client's Case Alone—What Are Your Duties in a Law Firm?*, addresses these specific considerations.

Although a lawyer might feel invincible at times, the reality is the lawyer usually cannot possibly effectively represent her client by herself. This is where Chapter 10, which focuses on other lawyers and non-lawyers in a firm, becomes critical. In many instances, a new lawyer will need to confide in her superiors for legal advice and rely on her paralegals to take care of some of the behind the scenes work. The rules and duties under these types of scenarios are addressed next, including instances in which a lawyer has to go beyond her jurisdiction where she is licensed to represent a client.

However, there is another important member of the legal profession that lawyers will interact with frequently: a judge. Chapter 11, *The Role of Judges and the License to Practice Law*, discuss this topic. The canons of judicial ethics only apply to judges, but understanding them is an essential part of not only the MPRE, but also practicing law. For some, becoming a judge is the milestone of her legal career and thus these canons are critical. For those who do not wish to become judges, it is still beneficial to know the boundaries of judicial conduct, when a judge can and must recuse himself, and how to interact with a judge over a pending matter in the lawyer's case.

In addition to disciplinary proceedings, lawyers may also find their conduct regulated by judicial decisions over legal malpractice claims filed in civil courts. Chapter 12, *Malpractice Liability—Regulating from Outside the Disciplinary System*, focuses on the issues of attorney exposure and liability. Next, Chapter 13, *Lawyers and Their Role in the Protection of Human Rights*, addresses numerous issues relating to lawyers and human rights, including the level of responsibility a lawyer should take for the actual, real-life consequences of her legal decisions. Finally, Chapter 14, *Balance in the Legal Profession—Contemplative Law and Mindfulness*, discusses many challenges that lawyers face as they struggle to maintain balance between various aspects of their professional and personal lives. It then specifically focuses on using mindfulness practices as one possible solution.

B. HOW TO PREPARE FOR CLASS

Most students who enroll in professional responsibility will discover very quickly that while the Model Rules can initially appear

straightforward, the details and specifics turn out to be not the easiest to understand. The language used in the rules can be very ambiguous. There are a lot of “ands” and “ors” scattered throughout the rules, meaning some requirements are conjunctive while others are disjunctive. Some of the rules are also lengthy and contain a number of exceptions, meaning there are multiple steps to consider for a given situation. Due to the nature of the rules, this course offers additional resources to utilize each week to get a better grasp on what the rules actually mean and how they have been specifically applied in practice.

As the sequence indicates, each chapter focuses on a different rule or a part of a rule. Every week, students should begin preparation by reading the featured rule or rules very carefully. Sometimes the rule will be better understood after reading the official corresponding comments. The comments are all very important, but students should be sure to focus on the comments highlighted at the beginning of each chapter that accompany a certain rule. These comments will sometimes provide a more specific explanation of the rule or describe certain scenarios that are often encountered and fall within the rule’s scope. Because of the helpful nature of the comments, not to mention that they are often tested on the MPRE, reading and understanding them is a critical part of class preparation.

Sometimes the key to understanding one of the Model Rules involves actually applying it to a certain set of facts. The next step in class preparation is reading the articles and case examples in each chapter that apply the Model Rules to real life situations encountered in the legal profession. When reading the cases, pay close attention to how the court applies the rule. Consider what the case stands for and illustrates. The discussion questions after each case example and article are there to guide students to discover and comprehend what the case stands for. Some of the questions will also challenge the students to consider how the outcome of the case might have changed if the lawyer (or other individual) took a different course of action. The questions will also prompt students to consider how the rule might change as certain advancements, such as technology and social media, continue to thrive in the legal profession. The purpose of these questions is not just to challenge the students in the area of legal reasoning and analysis, but also to help them better understand what the rule stands for.

An additional resource available to students in preparing for class each week is studying a visual map, also known as a “mind map,” which establishes how certain aspects of the rules fit together. A mind map is like a flow chart in that it depicts how different rules or parts of the same rule fit together and relate to each other. The center of the mind map is the main subject, such as the rule that is being dissected. The lines that flow from the center are the main topics or focus points of the main subject. In this class, these lines may consist of the rules within one particular rule.

For instance, if Rule 8 is the main subject, Rule 8.4 might be one of the lines that flows from the center subject. In some mind maps, there will be secondary lines that stem from the main lines. In this course, it might be the requirements within one of the rules. For instance, the secondary lines could be the requirements or guidelines within Rule 8.4.

The mind map is beneficial not only to visual learners, but to anyone who wants to understand how the rules all fit together. Along with reading the rule, the comments, and the case examples and articles, the mind maps should be utilized for additional understanding of the parts of the rules and staying organized with the structure of the course. For those who miss utilizing their creative side in law school, drawing out one's own mind map by hand for the rules or the course structure can also be very beneficial. Drawing a mind map challenges the creator to understand how the rules fit together and it also is meant to maintain organization throughout the course. Creative learners might prefer making a mind map as a form of preparing for the exam in addition to writing out an outline, because a mind map accomplishes the similar goal of organizing and connecting the concepts, except it does so on a visual level.¹

C. PURPOSE OF THE COURSE

This course is the first step in achieving mastery on the MPRE because it covers all of the rules tested on the MPRE. For most law school classes, once the final exam is over students are not tested over the subject again until they take the state bar exam. However, professional responsibility is unique because students do not have to wait until the bar exam to confront legal ethics again.

The MPRE is a section of the state bar exam that students can take before they take the actual state bar exam. The MPRE is designed to test one's understanding of legal ethics by applying the concepts learned in professional responsibility course to multiple-choice questions. Students will have a total of 2 hours to answer 60 multiple-choice questions dealing with not only the Model Rules, but also the official comments and the ABA's Model Code of Judicial Conduct. Each state has a specific score that students must get in order to pass the MPRE. If a student passes, the score will be reported to the state the student plans to practice law in and will count towards getting licensed by the state bar.

Although answering 60 multiple-choice questions in 2 hours does not seem any more difficult than the average law school exam, the MPRE is

¹ See generally Tony Buzan & Barry Buzan, *The Mind Map Book: Unlock Your Creativity, Boost Your Memory, Change Your Life* (BBC Active 2002) (providing instructions and ideas on how to create a mind map).

known as a very challenging test. The multiple-choice questions can be very lengthy and like most exams, there might be 2 or 3 answer choices that seem correct. That is why adequate preparation is critical in order to pass.

Taking this professional responsibility course and preparing the material each week is a great starting point. Also, many professional responsibility professors will practice MPRE-type questions with their students. However, students should also consider practicing multiple-choice questions within a certain time limit leading up to the MPRE. Additionally, many bar-prep companies offer a special preparation course for the MPRE. Students should consider taking the course and answering the practice exams offered afterward. It is also very important to read over the rules and comments multiple times, highlighting the disjunctive and conjunctive requirements or any other part of the rule that is important to remember when answering a question. Because of the extensive preparation, students should give themselves a few weeks at the very least to focus primarily on the MPRE preparation.

After the MPRE, however, legal ethics does not go away. The purpose of this course is also to provide students with a better understanding of what to do if they are confronted by an ethics-related issue while in practice. In this course, we will explore various ethical scenarios and learn how to properly handle them, a skill that will come handy when one has to face numerous real life ethical situations head on. It is important to realize that, unlike many other law school courses, professional responsibility applies to each and every lawyer and the rules learned in this course (or their state equivalent) will follow every member of the bar no matter which road she decides to take in her legal career.

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