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Professional Responsibility

James E. Moliterno



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PROFESSIONAL RESPONSIBILITY

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The Emanuel Law Outlines Series



Wolters Kluwer
Law & Business

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This book is intended as a general review of a legal subject. It is not intended as a source of advice for the solution of legal matters or problems. For advice on legal matters, the reader should consult an attorney.

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PROFESSIONAL RESPONSIBILITY

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To my Mother and Father, my first great teachers.
JEM

Preface

The Professional Responsibility course (by whatever name it is called at your school) is about the law and ethics that govern relationships lawyers have with clients, other lawyers, the profession, the justice system, and the public. It is the only law course in the typical law school curriculum that is about what lawyers do. In Torts, Contracts, and so on, you study law that affects clients' relationships with others and that lawyers interact with as an expert a step removed from the actual effect of the law. In Professional Responsibility, by contrast, the law you study is directly about the lawyer's relationships and your future role as a lawyer. In other words, Professional Responsibility is the course in which the lawyer is the "client," the one on whom the law studied actually operates. Arguably, Professional Responsibility is the most important course in the law school curriculum.

The law governing lawyers is a complicated mix of many different areas of substantive law from many different sources. Most obvious are the organized bar's self-regulations, enforced through the courts (as ethics codes adopted in the states), but other law fields have important applications to the various relationships of which lawyers are a part. Agency, contract, tort, procedure, and evidence law, among others, have specific applications to lawyers. All of these are interwoven in this outline.

In particular, the organized bar, through the American Bar Association (ABA), has promulgated model ethics codes. The ABA models have dominated the law of lawyering because these models, with some modification, have been adopted by the states as law. These models have also dominated law school courses in Professional Responsibility. They have dominated law school teaching of the subject because they are easily accessible and because they serve as simple proxies for what the law of lawyering is in the states. At some schools, you may study the ABA models and your particular state's modifications of them. At other schools, the modifications made in your state will be largely irrelevant to your course. In either event, when you study ethics codes in your course, the models will be the main focus.

Between the two models, the Model Code and the Model Rules, the Rules now dominate. The Code was originally adopted by the ABA in 1969 and was amended from time to time thereafter. When the Rules were adopted by the ABA in 1983, the ABA ceased its effort to amend and update the Model Code. The Code is now almost entirely out of date in some respects. (See Chapter 10.) States whose law reflects the Model Code as their basis have gone from a high point of nearly fifty to only one. Forty-nine states now have adopted ethics codes based on the Model Rules. In most courses the Model Rules dominate, with the Model Code being referred to occasionally and regarding particular topics (notably confidentiality; see Chapter 5) as contrast. This outline takes the approach with regard to the model that has come to be most prevalent in law school courses: The Model Rules are the basic document of study; the Model Code is used as contrast in particular areas. This trend in law school courses should continue. If your course makes more use of the Model Code than the usual, you will want to become familiar with the cross-reference charts that take you quickly back and forth between Model Code provisions and Model Rules provisions. Such charts are found in most statutory supplements that are required books for the Professional Responsibility course.

Important changes in the law governing lawyers have taken place since 2000. First, in 2000 the American Law Institute completed its work and published the Restatement of the Law Governing Lawyers, Third. The Restatement is now a critically important document of study. Second, in February 2002, the ABA adopted significant amendments to the Model Rules as a result of a report by the ABA-created Ethics 2000 Commission. In August 2003, further significant amendments were made to MR 1.6 and 1.13 in the wake

of Enron and other corporate scandals. Congress adopted the Sarbanes-Oxley Act as well, which included significant new requirements for lawyers doing work on securities matters. In 2007, the ABA completed work on a new model code of judicial conduct. All these changes in the law governing lawyers are reflected in this outline.

All this talk of ethics codes must not be read to mean that law other than the ethics codes is unimportant. On the contrary, the other significant trend in Professional Responsibility courses is toward the recognition that lawyers' conduct is governed largely by law outside the ethics codes. That law is a significant part of this outline. Many of the examples in this outline come not from disciplinary matters, but from the wide variety of other areas of law that control lawyer conduct.

This outline makes use of frequent examples, some of which are drawn from decided cases. In many instances, the cases chosen as examples are leading cases in the field that are also among those excerpted in the leading casebooks.

Many Professional Responsibility courses end with exams that are at least partially multiple-choice. Bar applicants in nearly every state must pass a Multistate Professional Responsibility Exam, which is a multiple-choice exam. As a result, more teachers of Professional Responsibility than of some other subjects include multiple-choice questions on their exams. For this reason, a Multistate-Style Exam Question section is included in this book.

James E. Moliterno

September 2009

CASEBOOK CORRELATION CHART

(Note: general sections of the outline are omitted from this chart.

NC = not directly covered by this casebook.)

Emanuel's Contracts Outline (by chapter and section heading)	Crystal: <i>Professional Responsibility: Problems of Practice and the Profession</i> (4th edition)	Gillers: <i>Regulation of Lawyers</i> (8th edition)	Hazard, Koniak, Cramton, & Cohen: <i>The Law and Ethics of Lawyering</i> (4th edition)	Morgan & Rotunda: <i>Professional Responsibility</i> (10th edition)	Schwartz, Wydick, Perschbacher, & Bassett: <i>Problems in Legal Ethics</i> (8th edition)
CHAPTER 1 INTRODUCTION AND THE ROLE OF LAWYER					
I. Courses Called Professional Responsibility, Legal Ethics, and Legal Profession	xxxi	xxiii-xxvi	v-vi	v, 1-2	3
II. Moral Philosophy, Right and Wrong, and the Law Governing Lawyers	11-32	xxiv, 9-11	1-3, 13-25	14-23	3-27
III. The Role of Lawyer	1-11, 26-32, 51-55	15-20	3-20	2-11, 23-28	4-5
CHAPTER 2 REGULATION OF THE LEGAL PROFESSION					
I. Organization of the Bar	NC	1-2, 3-5	1136-1141	31	28-31, 36-40
II. Sources of Law Governing Lawyers	12-19	1-10	1142-1144	46-47	40-42
III. Admission to Practice	35-38	635-658	1030-1053	32-46	31-36
IV. Unauthorized Practice	477-486	690-691	909-927	614-622	157-159
CHAPTER 3 CONTROLS ON LAWYER CONDUCT					
I. Discipline	39-53	770-807	58-59	46-63	42-46
II. Malpractice	49-52	701-749	853-872	63-82	152-154
III. Liability for Client Conduct	523-549	NC	108-115, 632-636	280-282	146-154
IV. Contempt of Court	52-55	NC	998-999	NC	NC
V. Disqualification Motions and Other Litigation-Driven Controls	9-51, 360-369	NC	659-685	198-199	76-77
CHAPTER 4 FORMAL ASPECTS OF THE LAWYER-CLIENT RELATIONSHIP					
I. Undertaking Representation	236-247	23-28	754-759	84-95, 276-283	53-54
II. Fees	241-258	141-209	754-796	95-112, 120-127	54-76

Emanuel's Contracts Outline <i>(by chapter and section heading)</i>	Crystal: <i>Professional Responsibility: Problems of Practice and the Profession (4th edition)</i>	Gillers: <i>Regulation of Lawyers (8th edition)</i>	Hazard, Koniak, Cramton, & Cohen: <i>The Law and Ethics of Lawyering (4th edition)</i>	Morgan & Rotunda: <i>Professional Responsibility (10th edition)</i>	Schwartz, Wydick, Perschbacher, & Bassett: <i>Problems in Legal Ethics (8th edition)</i>
III. Fiduciary Duties	96-98, 258	76-78	813-816	112-127	110-114, 134-138
IV. Competence and Diligence	78-83	28-29, 78-79	848-852	276-283, 517-524	143-145, 154-157
V. Communication and Shared Decision-Making	250-255	86-102, 107-139	817-834	92-95	267-273
VI. Terminating Representation		103-106	835-846	117-120	52-53, 69-76, 146
CHAPTER 5 CONFIDENTIALITY					
I. The Duty of Confidentiality and the Attorney-Client Evidentiary Privilege	98-105, 258-261	29-68	255-261, 342-344	133-137	165-167
II. To Whom Is the Duty Owed?	265-267, 269-271	86-102	258-279	129-130, 141-142	171-179
III. To What Does the Duty Apply?	110-113, 265-269	79-84	279-302, 344-347	128, 130-134, 142-154	167-171
IV. Exceptions to the Duty of Confidentiality	105-110, 265-267	53-67	264, 302-342, 347-388	134-141, 155-157	179-181
V. Other Professional Duties That Are Subject to the Duty of Confidentiality	105-110	534-535	740-743	293-295, 155	NC
VI. Use of Confidential Information for the Lawyer's Benefit	519, 659	56-58	342-343	208-212	166
CHAPTER 6 CONFLICTS OF INTEREST					
I. Loyalty and Other General Principles	275	214-218	389	158-161, 171-172	267-269
II. Organization of the Model Rules Provisions on Conflicts	271-288, 290-298	347-350	391	NC	NC
III. Waiver of Conflicts	288-290, 310-313	278-279	410-411, 423, 429-433	161-169	NC
IV. Sources of Conflicts	273-275, 285-287, 324-334, 523, 526-534, 549-555	220-240, 241-304, 305-308, 309-327, 328-342, 343-350	392-471	173-203, 215-223	261-289, 290-304
V. Imputed Conflicts	299-305	276-277, 329-342	472-490	244-260	305-306
VI. Special Role-Related Conflicts Rules	626-629	307-308	491-514	260-274	NC

Emanuel's Contracts Outline (by chapter and section heading)	Crystal: <i>Professional Responsibility: Problems of Practice and the Profession</i> (4th edition)	Gillers: <i>Regulation of Lawyers</i> (8th edition)	Hazard, Koniak, Cramton, & Cohen: <i>The Law and Ethics of Lawyering</i> (4th edition)	Morgan & Rotunda: <i>Professional Responsibility</i> (10th edition)	Schwartz, Wydick, Perschbacher, & Bassett: <i>Problems in Legal Ethics</i> (8th edition)
CHAPTER 7 DUTIES TO THIRD PARTIES					
I. Truth-Telling Outside the Court Context	408-425	376-379	737-753	318-346	333-337
II. Harassment and Other Abusive Conduct	387-406	435-440	659-664, 706-708	377-379	NC
III. Threatening Criminal Prosecution	NC	431-433	NC	NC	NC
IV. Communicating with Represented Persons	369-385	108-126	719-733	302-310	NC
V. Communicating with Unrepresented Persons	371-372	108-126	734-735	302-303, 310-313	NC
VI. Civil Liability to Third Persons	367-369	NC	686-695	295-300, 346-350	NC
CHAPTER 8 DUTIES TO THE LEGAL SYSTEM AND SOCIETY					
I. Truth-Telling Inside the Court Context	3-4, 113-135	376-399	61-78, 632-658	432-453	185-206
II. Suppressing Evidence and Witness Payment	98-110, 183-186	450-453	696-701	401-432	211-219
III. Limitations on Presentations to a Court	130-131, 162-166, 168-172, 175-176	374-399	7037-7038	386-390	222-225, 227-229
IV. Obligation to Improve the Legal System	NC	763-767, 788-797	996-1014	398-401, 486-494, 643-646	54-56
V. Limitations on Litigation Publicity	162-173	475-476	NC	465-473	219-225
VI. Ex Parte Contact with Judges and Jurors	173-175, 602	NC	49, 162-163, 721-726	453-461	217-219
VII. Pro Bono Publico	481-486	194-199	968-992, 1106-1122	563-565	54-56
CHAPTER 9 SPECIAL ROLE-RELATED DUTIES					
I. Special Duties of Prosecutors	187-206	475-476	708-717	313-318, 464-465, 473-481	225-227
II. Special Duties of Supervising and Subordinate Lawyers	643-646	702	591-593, 1107-1108	531-534	312, 318-319
III. Lawyers as Intermediaries	504-510	NC	392-393, 455-456	NC	333-337
IV. Ancillary Businesses	659-662	755	1116-1122	NC	158-159
V. Multidisciplinary Practice	661-662	752-755	1116-1122	595	157-159

Emanuel's Contracts Outline <i>(by chapter and section heading)</i>	Crystal: <i>Professional Responsibility: Problems of Practice and the Profession (4th edition)</i>	Gillers: <i>Regulation of Lawyers (8th edition)</i>	Hazard, Koniak, Cramton, & Cohen: <i>The Law and Ethics of Lawyering (4th edition)</i>	Morgan & Rotunda: <i>Professional Responsibility (10th edition)</i>	Schwartz, Wydick, Perschbacher, & Bassett: <i>Problems in Legal Ethics (8th edition)</i>
CHAPTER 10 ADVERTISING AND SOLICITATION					
I. Traditional Distinctions between Advertising and Solicitation	444	911-913	928-931	519-522	82-87
II. Constitutional Limitations on Disciplinary Authority	442-448	937-939	931-932, 942-945	498-500, 508-510, 515-517	87-105
III. General Constraints on All Communication Regarding Services	442-451	921-935	946	498-506	94-95, 98
IV. Constraints Particular to Advertising	441	NC	NC	511	88
V. Constraints on In-Person and Live Telephone Solicitation	443	911-912	932-942	506-607, 512-613	NC
VI. Other Restrictions on Specific Solicitation	448-451	NC	NC	NC	NC
VII. Client-Getting on the Internet	448-451	913	945-946	507-508	NC
VIII. Client-Getting Relationship to Barratry, Maintenance, and Champerty	442-445	937-940	931	513-615	88
IX. Lawyer Agents	NC	937	946	NC	NC
CHAPTER 11 JUDICIAL CONDUCT					
I. Sources of Judicial Conduct Law	591-592	585-589	NC	639	342-343
II. Who Is a Judge?	609-612	NC	NC	639	NC
III. General Judicial Attributes	592-593	585-589	NC	662-664	359
IV. Personal Conduct and Activity Outside the Judicial Role	594-597, 604-608	618-627	NC	618-628, 659-662	348-355
V. Judicial Duties	592-593	589-617	NC	677-684	344
VI. Political Activities	612-616	NC	NC	684-686	355-359
VII. Liability for Civil Wrongs Committed	NC	NC	NC	656-657	NC

Summary of Contents

Table of Contents	<i>xi</i>
Preface	<i>xxix</i>
Casebook Correlation Chart	<i>xxxi</i>
Capsule Summary	<i>C-1</i>
1. Introduction and the Role of Lawyer	<i>1</i>
2. Regulation of the Legal Profession	<i>9</i>
3. Controls on Lawyer Conduct	<i>31</i>
4. Formal Aspects of the Lawyer-Client Relationship	<i>47</i>
5. Confidentiality	<i>75</i>
6. Conflicts of Interest	<i>99</i>
7. Duties to Third Parties	<i>135</i>
8. Duties to the Legal System and Society	<i>155</i>
9. Special Role-Related Duties	<i>183</i>
10. Advertising and Solicitation	<i>199</i>
11. Judicial Conduct	<i>217</i>
Essay Exam Questions	<i>241</i>
Essay Exam Answers	<i>243</i>
Multistate-Style Exam Questions	<i>247</i>
Multistate-Style Exam Answers	<i>261</i>
Table of Cases	<i>263</i>
Table of Statutes, Rules, and Opinions	<i>267</i>
Index	<i>271</i>

Table of Contents

Preface	xxix
Casebook Correlation Chart	xxxi
Capsule Summary	C-1

CHAPTER 1

INTRODUCTION AND THE ROLE OF LAWYER

CHAPTERSCOPE	1
I. Courses Called Professional Responsibility, Legal Ethics, and Legal Profession	1
II. Moral Philosophy, Right and Wrong, and the Law Governing Lawyers	1
A. Moral philosophy	1
B. Right and wrong	2
C. The law governing lawyers	2
D. Role morality	2
1. Lawyer's role in dispute resolution system	2
2. Role morality v. general moral standards	2
3. Balance of many duties	2
III. The Role of Lawyer	3
A. Differing conceptions of the lawyer's role	3
1. The standard conception of the lawyer's role	3
2. The lawyer as businessperson	4
3. The moral activist lawyer	4
B. Differences between lawyers' litigation and planning roles	4
1. Litigation context	4
2. Planning context	4
3. Responsibility for client's acts	4
C. Practice setting	5
1. Prosecutors	5
2. Other government lawyers	5
3. Criminal defense	5
4. Corporate or other organization counsel	6
5. Legal aid	6
D. Other roles for lawyers	6
<i>Quiz Yourself on</i> INTRODUCTION AND THE ROLE OF LAWYER	6
<i>Exam Tips on</i> INTRODUCTION AND THE ROLE OF LAWYER	7

CHAPTER 2

REGULATION OF THE LEGAL PROFESSION

CHAPTERSCOPE	9
I. Organization of the Bar	10
A. The American Bar Association	10
1. Beginnings	10
2. A voluntary association	10
B. Alternative national bar associations	10
1. The National Lawyers Guild	10
2. The National Bar Association	10
3. Organizations of women lawyers	10
4. Others	10
C. State bar associations	11
1. Voluntary state bar associations	11
2. The integrated bar	11
II. Sources of Law Governing Lawyers	11
A. Ethics codes	11
1. ABA models and their organization	11
2. State-adopted codes	13
B. Case authority	13
1. Interpretation of codes	13
2. Inherent power to regulate lawyers	13
C. Ethics opinions	13
D. Restatement	13
E. Constitutional restraints	13
1. Commercial speech	13
2. Speech rights of lawyers	13
3. Entry to the bar	14
F. "Other law"	14
1. Contracts	14
2. Torts	14
3. Fiduciary law	14
4. Agency	14
5. Criminal law	14
6. Procedural law	14
7. Antitrust	14
8. Administrative regulations	15
9. Employment law	15
III. Admission to Practice	15
A. Policy	15
B. General requirements	15
1. Education	15
2. Knowledge	15
3. Good character	16
4. Misconduct in the application process	17

5. No assistance with admission of unqualified applicant	17
C. Federal courts	18
D. Admission <i>pro hac vice</i>	18
1. Reciprocity	18
2. Local counsel	18
3. Broad discretion	18
4. No due process right to be granted <i>pro hac vice</i> admission	18
IV. Unauthorized Practice	19
A. Attributes of the practice of law	19
1. Court appearance	19
2. Legal advice and counsel	19
3. Sale of do-it-yourself forms	19
B. Forms of unauthorized practice	19
1. Extraterritorial practice of licensed lawyers	19
2. Multijurisdictional practice	19
3. Practice by the unlicensed	22
V. Self-Governance and the Duty to Report Misconduct	23
A. Knowledge of misconduct	23
B. Level or type of misconduct	23
C. Confidentiality limitation on duty to report	23
1. A lawyer-client	23
2. Learning from a nonlawyer client	24
D. Defamation privilege	24
<i>Quiz Yourself on REGULATION OF THE LEGAL PROFESSION</i>	<i>25</i>
<i>Exam Tips on REGULATION OF THE LEGAL PROFESSION</i>	<i>28</i>

CHAPTER 3

CONTROLS ON LAWYER CONDUCT

CHAPTERSCOPE	31
I. Discipline	32
A. Discipline v. malpractice	32
B. Grounds for discipline	32
1. Violation of adopted ethics code	32
2. Acts indicating moral turpitude	33
3. Criminal conduct	33
4. Dishonesty, fraud, and deceit	33
5. Conduct prejudicial to the administration of justice	34
C. Forms of discipline	34
1. Disbarment	34
2. Suspension	34
3. Reprimand	34
D. Disciplinary procedure	34
1. Complaint	35
2. Investigation by committee	35

3. Hearing committee	35
4. Review by appeal board	35
5. State court of last resort	35
6. Due process	35
7. Mitigation	35
II. Malpractice	36
A. Contract theories	36
B. Tort theories	36
1. Duty	36
2. Breach	37
3. Causation	37
4. Damages	37
C. Fiduciary duty	37
D. Necessity of expert testimony	37
E. Prospective limitation on malpractice liability	38
F. Liability to third parties for malpractice	38
III. Liability for Client Conduct	38
IV. Contempt of Court	38
A. A last resort	39
B. Disruption of the proceedings	39
C. Direct or summary contempt	39
D. Indirect contempt	39
E. Sanctions	39
V. Disqualification Motions and Other Litigation-Driven Controls	39
A. Disqualification for conflicts of interest	39
1. Substantive standards	39
2. Other interests	39
B. Federal Rule of Civil Procedure 11 and its state law counterparts	40
1. Analogous to frivolous claims ethics code provisions	40
2. Claims that lack a basis in law or fact	40
3. Safe harbor	40
4. Sanctions against signer and firm	41
C. Other sanctions	41
<i>Quiz Yourself on CONTROLS ON LAWYER CONDUCT</i>	41
<i>Exam Tips on CONTROLS ON LAWYER CONDUCT</i>	44

CHAPTER 4

FORMAL ASPECTS OF THE LAWYER-CLIENT RELATIONSHIP

CHAPTERSCOPE	47
I. Undertaking Representation	48
A. Duty to undertake representation	48
1. General	48