

## Professional Responsibility chronology, Spring 2005. Dean Burnett.

### Introduction to legal ethics

Client trust accounts

Utilitarianism

John Stuart Mill: *Utilitarianism*

James Rachels: *The Debate Over Utilitarianism*

The golden rule

The categorical imperative

Immanuel Kant: *The Categorical Imperative*

Professionalism

ABA Report of Commission on Professionalism

ABA Lawyer's Creed of Professionalism

ABA Lawyer's Pledge of Professionalism

ABA Aspirational Goals on Lawyer Advertising

The Texas Lawyer's Creed—A Mandate for Professionalism

Burnett: *Professionalism: Restoring the Flame*

### Sources and application of legal ethics rules

*MRPC*

*Preamble*

*Scope*

*Rule 1.0: terminology*

*Rule 5.5: unauthorized practice of law; multijurisdictional practice of law*

*Rule 8.1: bar admission and disciplinary matters*

*Rule 8.2: judicial and legal officials*

*Rule 8.3: reporting professional misconduct*

*Rule 8.4: misconduct*

*Rule 8.5: disciplinary authority; choice of law*

*Restatement*

*Section 1: regulation of lawyers—in general*

*Section 2: admission to practice law*

The organization of the bar

Admission to practice in the courts of a state

Residency requirements

Character requirements

*In re DeBartolo* (Illinois)

Admission to practice in other states and the federal courts

Lawyer associations

Nationwide associations

The American Bar Association

State bar associations

Local bar associations

Sources of guidance on legal ethics

State rules, statutes, and rules of court  
ABA Model Code of Professional Responsibility  
ABA Model Rules of Professional Conduct  
ABA Code of Judicial Conduct  
Advisory opinions of ethics committees  
Ethics hot lines

#### Discipline

*In re Mountain* (Kansas)  
*In re Holmay* (Minnesota)

### **Beginning and ending the lawyer-client relationship**

#### *MRPC*

*Rule 1.16: declining or terminating representation*  
*Rule 1.18: duties to prospective client*  
*Rule 3.1: meritorious claims and contentions*  
*Rule 6.1: voluntary pro bono publico service*  
*Rule 6.2: accepting appointments*

#### *Restatement*

*Section 14: formation of a client-lawyer relationship*  
*Section 15: a lawyer's duties to a prospective client*

#### Beginning the lawyer-client relationship

##### Duty to take some kinds of cases

General rule: lawyers are not public utilities

Exceptions to the general rule

Who should pay when the client cannot?

*Bothwell v. Republic Tobacco Co.* (D. Neb.)

#### *Restatement*

*Section 31: termination of a lawyer's authority*  
*Section 32: discharge by a client and withdrawal by a lawyer*  
*Section 33: a lawyer's duties when representation terminates*  
*Section 110: frivolous advocacy*

#### Outlook for the future

Substitution of counsel: *Ruskin v. Rodgers* (Illinois)

Payment after discharge: *Rosenberg v. Levin* (Florida)

Withdrawal, nonpayment: *Holmes v. Y.J.A. Realty Corp.* (New York)

Withdrawal, inability to pay: *Kriegsman v. Kriegsman* (New Jersey)

#### Frivolous claims

Burnett: . . . *The Ethics of Dealing with Bad Clients*

### **Advertising and solicitation**

#### *MRPC*

*Rule 7.1: communications concerning a lawyer's services*  
*Rule 7.2: advertising*  
*Rule 7.3: direct contact with prospective clients*  
*Rule 7.4: communication of fields of practice and specialization*

*Rule 7.5: firm names and letterheads*

*Rule 7.6: political contributions to obtain government legal engagements . . .*

Historical summary

Advertising

Solicitation

The forces of change—antitrust and the First Amendment

The *Bates* case

*Bates v. State Bar of Arizona* (1977)

The *Ohralik* and *Primus* cases—solicitation

The adoption of the ABA Model Rules

The *Peel* case—claims of specialization

The *Zauderer*, *Shapero*, and *Went For It* cases—the shadowland between advertising and solicitation

*Florida Bar v. Went For It, Inc.* (1995)

## **Attorney fees and fiduciary duties**

*MRPC*

*Rule 1.5: fees*

*Rule 1.8(e): [specific conflict of interest rules: financial assistance to clients]*

*Rule 1.15: safekeeping property*

*Restatement*

*Section 38: client-lawyer fee contracts*

*Section 39: a lawyer's fee in the absence of a contract*

*Section 40: fees on termination*

*Section 41: fee-collection methods*

*Section 42: remedies and the burden of persuasion*

*Section 43: lawyer liens*

Reasonable fee determination: *Robert L. Wheeler, Inc. v. Scott* (Oklahoma)

Billing practices: *ABA Formal Opinion 93-379*

The billable hours treadmill

Contingent fees

*Restatement*

*Section 44: safeguarding and segregating property*

*Section 45: surrender in possession of property*

Loans to clients

Client trust accounts

## **Competence, diligence, and unauthorized practice**

*MRPC*

*Preamble ¶7 [personal conscience and reputation of a lawyer]*

*Rule 1.1: competence*

*Rule 1.2: scope of representation and allocation of authority . . .*

*Rule 1.3: diligence*

*Rule 1.4: communication*

*Rule 1.8(h): [specific conflict of interest rules: malpractice agreements]*

*Rule 5.3: responsibilities regarding nonlawyer assistants*

*Rule 5.4: professional independence of a lawyer*

*Rule 5.5: unauthorized practice of law; multijurisdictional practice of law*

## Legal malpractice

The relationship between legal malpractice and discipline by the bar

Theories of legal malpractice liability

To whom does an attorney owe a duty of care?

What is the standard of care?

Breach of the duty of care

Actual cause

Proximate cause

Damages

Defenses to legal malpractice claims

Vicarious liability

Malpractice insurance

The ethics of second-rate legal service

Multijurisdictional and multidisciplinary practice

Multijurisdictional practice

Multidisciplinary practice

## Restatement

*Section 48: professional negligence—elements and defenses generally*

*Section 49: breach of fiduciary duty—generally*

*Section 50: duty of care to a client*

*Section 51: duty of care to certain nonclients*

*Section 52: the standard of care*

*Section 53: causation and damages*

*Section 54: defenses; prospective liability waiver; settlement with a client*

## Confidential information

### MRPC

*Rule 1.2(d): [scope of representation: counseling client in crime or fraud]*

*Rule 1.6: confidentiality of information*

*Rule 1.8(b): [specific conflict of interest rules: use of info. to disadvantage]*

*Rule 1.9(b): [former client conflicts of interest: former firm client]*

*Rule 3.3: candor toward the tribunal*

*Rule 3.4(a): [fairness to opponents: destruction of evidence]*

*Rule 4.1: truthfulness in statements to others*

Evidence of a crime, movement: *Washington v. Orwell* (Washington)

Evidence of a crime, alteration: *People v. Meredith* (California)

Exceptions to the ethical duty of confidentiality

Client consent or implied authority

Self-defense

Court order or other law

Prevent future harm

An “almost exception”—noisy withdrawal

## **Candor in litigation**

### *MRPC*

*Rule 1.6: confidentiality of information*

*Rule 3.3: candor toward the tribunal*

*Rule 4.1: truthfulness in statements to others*

### *Restatement*

*Section 111: disclosure of legal authority*

*Section 116: interviewing and preparing a prospective witness*

*Section 117: compensating a witness*

*Section 118: falsifying or destroying evidence*

*Section 119: physical evidence of a client crime*

*Section 120: false testimony or evidence*

### The trilemma: trust, confidentiality, and candor

The old ABA Model Code position

The narrative testimony position

Monroe Freedman's position

The ABA Model Rules position

*People v. Johnson* (California)

*ABA Formal Opinion 93-376*

## **Technology and legal ethics**

Lee Dillion gues presentation: technology and legal ethics

## **Fairness in litigation**

### *MRPC*

*Rule 3.1: meritorious claims and contentions*

*Rule 3.2: expediting litigation*

*Rule 3.3: candor toward the tribunal*

*Rule 3.4: fairness to opposing party and counsel*

*Rule 3.5: impartiality and decorum of the tribunal*

*Rule 3.6: trial publicity*

*Rule 3.7: lawyer as witness*

*Rule 3.8: special responsibilities of a prosecutor*

*Rule 3.9: advocate in nonadjudicative proceedings*

*Rule 4.4: respect for rights of third persons*

### *CJC*

*Section 3(B)(7): [ex parte communications]*

*Section 3(B)(9): [public comment]*

*Section 4(D)(5): [gifts]*

### *Restatement*

*Section 107: prohibited forensic tactics*

*Section 108: an advocate as a witness*

*Section 109: an advocate's public comment on pending litigation*

### Witness coaching

Jury interaction: *Colorado Bar Association Opinion 70* (Colorado)  
Public comments about pending litigation

Background

The ABA enters the fray

The *Gentile* case

Current rules

Aggressive trial advocacy: *Matter of Vincenti* (New Jersey)

Idaho Courts: *Standards for Civility in Professional Conduct*

*ABA Standards Relating to the Administration of Criminal Justice*

*The Prosecution Function*

*Standard 3-1.1: the function of the standards*

*Standard 3-1.2: the function of the prosecutor*

*Standard 3-1.3: conflicts of interest*

*Standard 3-1.4: public statements*

*Standard 3-1.5: duty to respond to misconduct*

*The Defense Function*

*Standard 4-1.2: the function of defense counsel*

*Standard 4-1.3: delays; punctuality; workload*

*Standard 4-1.4: public statements*

The prosecutor's special duties

The duties of the criminal defense lawyer

Barry T. Winston: *Why I Defend Guilty Clients*

## **Bias in (and out of) the courtroom**

*MRPC*

*Rule 3.4: fairness to opposing party and counsel*

*Rule 3.5: impartiality and decorum of the tribunal*

*Rule 4.4: respect for rights of third persons*

*Rule 8.4: misconduct*

*CJC*

*Section 3(B)(5): [bias and prejudice]*

*Section 3(B)(6): [manifestation of bias or prejudice]*

Lilia M. Cortina: *The Study of Gender in the Courts: Keeping Bias at Bay*

Lilia M. Cortina, et al.: *What's Gender Got to Do with It?*

*In re Charges of Unprofessional Conduct Contained in Panel File 98-26* (Minnesota)

*In re Plaza Hotel Corporation* (E.D. Cal.)

*In re Vincenti* (New Jersey)

*In re Kirby* (Minnesota)

Andrew E. Taslitz & Sharon Styles-Anderson: *Still Officers of the Court*

## **Conflicts of interest—lawyers, clients, and third parties**

*MRPC*

*Rule 1.2: scope of representation and allocation of authority . . .*

*Rule 1.7: conflict of interest: current clients*

*Rule 1.8: conflict of interest: current clients: specific rules*

*Rule 1.10: imputation of conflicts of interest: general rule*  
*Rule 1.13: organization as client*  
*Rule 1.14: client with diminished capacity*  
*Rule 1.18: duties to prospective client*  
*Rule 2.1: advisor*  
*Rule 3.7: lawyer as witness*  
*Rule 5.4(c): [professional independence: third-party payers]*

*Restatement*

*Section 125: a lawyer's personal interest affecting the representation of a client*  
*Section 126: business transactions between a lawyer and a client*  
*Section 127: a client gift to a lawyer*  
*Section 134: compensation or direction of a lawyer by a third person*

Allocating decision-making between lawyer and client

Insurer and insured: *Beckwith Machinery Co. v. Travelers Indemnity Co.* (W.D. Penn.)

Geoffrey C. Hazard, Jr.: *Ethics in the Practice of Law*

Business transactions with a client: *Phillips v. Carson* (Kansas)

**Conflict of interest—conflicts between two clients**

*MRPC*

*Rule 1.7: conflict of interest: current clients*  
*Rule 1.8(b): [specific conflict of interest rules: use of info. to disadvantage]*  
*Rule 1.8(g): [specific conflict of interest rules: aggregate settlements]*  
*Rule 1.8(i): [specific conflict of interest rules: proprietary interests in causes]*  
*Rule 1.9: duties to former clients*  
*Rule 1.10: imputation of conflicts of interest: general rule*  
*Rule 1.11: special conflicts of interest for former and current government ofcfs.*  
*Rule 1.12: former judge, arbitrator, mediator, or other third-party neutral*  
*Rule 6.3: membership in legal services organizations*

*Restatement*

*Section 128: representing clients with conflicting interest in civil litigation*  
*Section 129: conflicts of interest in criminal litigation*  
*Section 130: multiple representation in a nonlitigated matter*  
*Section 131: conflicts of interest in representing an organization*  
*Section 132: a representation adverse to the interests of a former client*

Pseudo-adversarial situations: *State Farm Mutual Automobile Ins. Co. v. K.A.W.* (Florida)

Former in-house counsel: *Haagen-Dazs Co., Inc. v. Perhe No! Gelato, Inc.*

Joint representation

Imputed disqualification and screening

**Lawyers in law firms and specialized practice areas**

*MRPC*

*Rule 1.0(c): [terminology: definition of “firm”]*  
*Rule 1.10: imputation of conflicts of interest: general rule*  
*Rule 1.17: sale of law practice*  
*Rule 2.3: evaluation for use by third persons*

*Rule 2.4: lawyer serving as third-party neutral*  
*Rule 5.1: responsibilities of supervisory lawyers and law firms*  
*Rule 5.2: responsibilities of subordinate lawyer*  
*Rule 5.3: responsibilities regarding nonlawyer assistants*  
*Rule 5.4: professional independence of a lawyer*  
*Rule 5.5: unauthorized practice of law; multijurisdictional practice of law*  
*Rule 5.6: restrictions on right to practice*  
*Rule 5.7: responsibilities regarding law-related services*  
Gerald J. Clark: *American Lawyers in the Year 2000: An Introduction*  
New forms of legal practice  
Law firm breakups  
Law firm discipline  
Wrongful termination of lawyers: *General Dynamics Corp. v. Superior Court* (California)  
Lawyer as problem solver  
Carrie Menkel-Meadow: *The Lawyer as Problem Solver and Third-Party Neutral*  
Burnett: *Multijurisdictional Practice: An Emerging Issue for a Changing Profession*

## **Judicial conduct**

*CJC*

*MRPC*

*Rule 1.12: former judge, arbitrator, mediator, or other third-party neutral*

*Rule 3.5: impartiality and decorum of the tribunal*

*Rule 8.3(b): [reporting professional misconduct: judicial misconduct]*

*Rule 8.4(f): [misconduct: assisting judicial officer in misconduct]*

*Restatement*

*Section 113: improperly influencing a judicial officer*

*Section 114: a lawyer's statement concerning a judicial officer*

*Section 115: lawyer contact with a juror*

Judicial standards and discipline

*McCullough v. Commission on Judicial Performance* (California)

Disqualification: *Perpich v. Cleveland Cliffs Iron Co.* (E.D. Mich.)

Judges, politics, and free speech

Memorandum of Justice Scalia, re: motion for recusal, in *Cheney v. U.S. District Court*

Robert Hamlin guest presentation: the processes of judicial discipline