



Professional Responsibility

Law School Legends

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PART 1: How does the bar regulate attorneys?

Much of the law of professional responsibility is about regulating attorneys so as to assure their competence, so as to protect the integrity of the system and all of the other goals that I will be discussing.

A. Who Regulates?

1. States regulate all aspects of the practice of law.
2. Attorneys have an ethical obligation to aid in regulating lawyers.

B. Who May Practice Law in a State?

1. A state may restrict the practice of law to those who are members of the bar of that state.
2. What are the permissible standards for admission to a state's bar?

C. The Bar Has the Duty to Prevent the Unauthorized Practice of Law.

1. What is the unauthorized practice of law?
2. What are the responsibilities of an attorney in preventing the unauthorized practice of law?

D. How Can the Bar Ensure Compliance with its Rules?

1. Looks at attorney conduct that can give rise to discipline.
2. Attorneys have the duty to make reasonable efforts to supervise subordinates and make sure that subordinate lawyers comply with the codes of professional responsibility.
3. Attorneys have the duty to make independent judgments.
4. The responsibility for ethical violations of another lawyer.

PART 2: How is the Formation and Ending of the Attorney/Client Relationship Regulated?

There are quite specific rules regarding when and how lawyers can form the attorney/client relationship, but it's more important when and how attorneys can end that relationship.

A. What is the Attorney's Duty to Accept Representation?

1. General rule: Attorneys have no duty to accept representation.
2. Exception: There is a duty to accept representation if court-appointed.

B. What is the Attorney's Duty to Reject Representation?

1. Where representation will result in violation of the law or a disciplinary rule.
2. Representation that will require filing a frivolous claim.
3. If the attorney is not competent to handle the matter.

C. When Must or May an Attorney Withdraw from Representation?

Note: Once a matter is in litigation, withdrawal requires permission. Whether the justification of a withdrawal is mandatory under the rules or permissive, the lawyer must always seek court permission to withdraw once litigation has begun.

1. Are there circumstances where the attorney must withdraw?
Must, of course, means it's mandatory. If it's in litigation, it means the lawyer must seek to withdraw.

2. The circumstances where the attorney may withdraw.
As the word “may” says, it’s permissive here for the lawyer to seek to get out, but the lawyer is not required to do so.

3. Requirements when an attorney withdraws.

PART 3: What are the Attorney’s Duties to the Client?

Much of the law of professional responsibility is about defining an attorney’s duties to the client.

A. The Duty to Avoid Conflicts of Interest

1. The general rules concerning conflicts of interest
 - a. The most important: An attorney may not represent a client if the representation of the client may be materially limited by the lawyer’s responsibilities to another client, a third person, or the lawyer’s own interests, unless:
 - i. The lawyer reasonably believes that the representation will not be adversely affected; and
 - ii. The client consents.
 - b. If one attorney in an office is disqualified, then all attorneys in the office are disqualified. This is sometimes called the *Rule of Imputed Disqualification*.
2. Conflict among current clients.
3. Conflicts between the attorney’s interest and the client’s interest.
4. Organizations and representation.
5. Conflicts with past clients.

B. The Duty of Competence

1. An attorney has a duty to provide competent representation to a client.
2. An attorney is subject to discipline for attempting to contractually limit malpractice liability.
3. An attorney cannot settle malpractice claims without advising the client in writing to see another attorney.

C. The Attorney's Duty to Follow Client Instructions

When does the lawyer have to do what the client asks? When can the lawyer refuse the client's request and follow his own independent best judgment?

1. The general rule: The client controls the ends, the attorney controls the means.
2. These are situations in which the lawyer must follow the client's instructions:
 - a. Whether to sue in a civil case.
 - b. Whether to accept a settlement in civil cases or whether to plead guilty in criminal cases.
 - c. Whether to waive jury trial in criminal cases. Only the client gets to decide whether it will be a jury or a bench trial in criminal cases.
 - d. Whether to testify in criminal cases.
 - e. Whether to appeal.
3. Attorneys have the duty to keep clients reasonably informed.
4. An attorney may limit the objectives representation if the client consents.
5. Concerns representing a client with a disability.

D. The Duty to Protect Client Confidences

1. What information is protected as confidential?
2. What duties does an attorney have with regard to confidential information?
3. What are the exceptions to the duty of confidentiality?
 - a. The Model Rules provide only three exceptions:
 - i. Waiver
 - ii. Future crimes exception
 - iii. Self defense
4. How should an attorney handle the fruits in instrumentalities of a crime?

The lawyer is not allowed to keep, hide, or alter them.
5. How should an attorney handle knowledge that a client will or has committed perjury?

PART 4: How is the Integrity of the System Protected?**A. Many of the Rules Exist to Protect the Integrity of the Judiciary**

1. An attorney shall not bring or defend the proceeding, assert or controvert an issue unless the lawyer believes there is a basis for doing so that is not frivolous.
2. An attorney shall make reasonable efforts to expedite litigation consistent with the interests of the client.
3. An attorney shall not seek to influence a judge or jury in a manner prohibited by law.

4. An attorney shall not engage in conduct intended to disrupt the tribunal.

B. The Duty of Candor to Tribunal, the Duty of Honesty

1. An attorney shall not make a false statement of material fact or law to a tribunal.
2. An attorney shall not fail to disclose a material fact where disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.
3. An attorney shall not offer evidence that the lawyer knows to be false.
4. An attorney shall disclose adverse legal authority that is on point and from the controlling jurisdiction.
5. In ex parte proceedings, the attorney shall inform the tribunal of all material facts.

C. Fairness to Opposing Parties

1. An attorney shall not obstruct another person's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value.
2. An attorney shall not falsify evidence or counsel a witness to testify falsely.
3. An attorney shall not make a frivolous discovery request or fail to comply with discovery in good faith.
4. An attorney shall not make a false statement of material fact or law to a third party.

D. Trial Tactics

1. An attorney shall not allude to any matter that is not supported by admissible evidence.
2. An attorney shall not assert personal knowledge about the justice of a cause or personal knowledge of facts, except when testifying as a witness.
3. Special duties of prosecutors.

E. Voluntary Pro Bono Work

1. An attorney shall aspire to perform at least 50 hours of pro bono service per year.
2. An attorney may serve as an officer, director, or member of a legal service organization, even if it has interests adverse to the lawyer's clients.

F. The Attorney as Advisor

1. An attorney shall not counsel a client to engage or assist the client in conduct that the lawyer knows to be criminal or fraudulent. It is a specific rule and its reasons are obvious.
2. An attorney may discuss the legal consequences of any proposed course of conduct of the client, and may assist the client to determine the means of the application of the law.
3. An attorney shall give candid advice, not only about the law, but also about moral, economic, social, and political considerations.

G. What is the Permissible Nature of Communications With People Other than that Clients?

1. Communication with adversaries.
2. Communication with witnesses.
3. Communication with jurors.
4. Communications with the Court.

5. Communications with the press.

Part 5: How Should the Market for Legal Services Be Regulated?

A. Advertising and Solicitation

1. Attorneys must not make false or misleading statements in their advertisements.
2. Solicitation
 - a. Attorney-in-person solicitation of clients for profit is prohibited.
 - b. An attorney shall not solicit if the prospective client makes it known that he or she does not want to be solicited.
3. Advertising

B. How May the Practice of Law Be Structured?

1. The topic about names of law firms.
2. Firms may incorporate, if a state law permits it, but all officers, directors, and shareholders must be attorneys.
3. Buying and selling of law firms.

C. Fees

1. Fees should be set as soon as possible in the course of representation, preferably in writing.
2. A lawyer's fees must be reasonable.
3. Contingency fees.

4. Fee splitting with other attorneys.

5. Attorneys shall not enter into agreements that restrict the ability of other lawyers to practice after termination of their employment.

D. What is the Attorney's Duty to Protect the Client's Money or Property?

What is key to remember here is that attorneys are in a fiduciary relationship with their clients.

1. An attorney must not commingle client funds and personal funds.
2. An attorney must keep a record of client funds for at least five years after representation.
3. An attorney must keep a client's property safe.
4. An attorney must pay all money owed to the client promptly.

Part 6: Ethical Standards for Judges

A. When are Judges Disqualified?

The key general rule to remember is that judges must avoid the appearance of impropriety.

1. If the judge has personal knowledge of disputed evidentiary facts.
2. If the judge served as a lawyer in the matter of controversy.
3. If the judge has a financial interest in the case.
4. If the judge or family member is involved in the case.
5. Exceptions:
 - a. Remittal

 - b. The rule of necessity

B. What Conduct is Appropriate While Serving as Judge?

1. A judge shall comply with all constitutional, statutory, and procedural law for the obvious reasons.
2. A judge shall require order ad decorum in all court proceedings. Again, that seems obvious.
3. A judge shall be patient, dignified, and courteous.
4. A judge shall perform judicial duties without bias or prejudice.
5. A judge shall not engage in ex parte communications.
6. A judge shall avoid and shall require attorneys to avoid expressing bias based on race, national origin, religion, gender, age, disability, sexual orientation, or socioeconomic status.
7. A judge shall dispose of all judicial matters promptly, efficiently, and fairly.
8. A judge shall not commend or criticize jurors for their verdict except in a court order or opinion.
9. A judge shall not disclose or use any non-public information that was gained in a judicial capacity.
10. A judge shall not make comments about any pending proceeding that could be reasonably expected to affect its outcome.

C. What Off-the-Bench Conduct by Judges is Appropriate?

1. A judge is not allowed to engage in the practice of law.
2. A judge is not allowed to serve as a fiduciary.
3. A judge may serve in a charitable or civic organization as long as it does not reflect adversely on the judge's impartiality. A few qualifications here:
4. A judge shall not hold membership in any organization that practices discrimination based on race, sex, religion, or national origin.

5. A judge shall not appear as a character witness unless subpoenaed.
6. A judge shall not engage in financial transactions that risk a conflict of interest.
A couple of specifics here:
 7. A judge shall not accept, and shall urge family members not to accept, gifts from those likely to appear before the judge.
 8. A judge may receive compensation for his or her non-judicial conduct where that is permitted.
 9. A judge shall comply with the law in all of his or her activities.

D. What Political Activities by Judges or Judicial Candidates are Permissible?

If somebody is running to be a judge or a judge is running for reelection or retention, what is allowed?

1. Judges and candidates for judicial office may not:
 - a. Hold office in political organizations.
 - b. Publicly endorse or oppose candidates for office.
 - c. Make speeches on behalf of political organizations.
 - d. Attend political gatherings.
 - e. Solicit funds, make contributions, or buy tickets to political events.
2. Judges must resign from the bench if running for non-judicial office.
3. In campaigning for election or retention of the bench, a judge shall not:
 - a. Personally solicit or receive funds.
 - b. Make pledges or promises of conduct in office.
 - c. Cannot knowingly misrepresent their own qualification of facts concerning an opponent.