Table of Contents

Preface xxv Acknowledgments xxvii



Chapter 1: The Role and Responsibility of Lawyers	3
A. The Role of the Lawyer in the System of Justice	4
1. Guardians of Due Process	4
2. Self-Regulation and the Protection of Our Public Good	6
B. Law and Moral Responsibility	8
Oliver Wendell Holmes, The Path of the Law	8
1. Impact and Critique of the Bad Man Perspective	10
Alexander Meiklejohn, What of the Good Man?	13
2. Communication, Moral Dialogue, and Role Morality	15
Spaulding v. Zimmerman	19
 Cultivating Moral and Professional Judgment in Forming One's Professional Identity 	25
Neil Hamilton, Professionalism Clearly Defined	26
C. Professional Responsibilities in Litigating, Advising, and	
Transactional Planning	32
1. Shaping Client Conduct	32
2. Providing Advice Outside of the Checks of the Adversary System	36
Chapter Summary	40
Applying the Rules	41
Professional Responsibility in Practice	42

Cł	napter 2: The Regulation of the Legal Profession	43
A.	Lawyer Regulation	44
	1. Regulatory Powers of State Courts	44
	2. Bar Associations and Lawyer Ethics (Conduct) Codes	45
B.	Admission to the Bar	47
	1. Educational and Testing Requirements	48
	2. Character and Fitness	50
	Other Character Examples — Immigration Status, Bigotry, Financial Neglect	52
	In re Glass	54
C.	Lawyer Discipline	62
	1. Misconduct Defined	62
	2. The Disciplinary Process	64
	3. Sanctions — Aggravating and Mitigating Factors	66
	4. Disciplinary Authority; Choice of Law	67
	5. Reciprocal Discipline	68
	6. Lawyers' Duty to Report Misconduct	69
	In re Himmel	71
D.	Legal Malpractice	78
	1. Background	78
	2. Legal Malpractice and Professional Negligence	79
	West Bend Mutual Insurance Co. v. Schumacher	82
	3. Legal Malpractice and Breach of Fiduciary Duty	86
	Bayview Loan Servicing, LLC v. Law Firm of Richard M. Squire & Associates, LLC	87
	4. Minimizing Liability for Legal Malpractice	90
Ch	apter Summary	92
	plying the Rules	93
	ofessional Responsibility in Practice	94
	THE ATTORNEY-CLIENT RELATIONSHIP	97
Cł	napter 3: The Attorney-Client Relationship	99
A.	Forming an Attorney-Client Relationship	99
	1. Implied Attorney-Client Relationships	100

	Togstad v. Vesely, Otto, Miller & Keefe	101
	2. Prospective Clients	106
	In re Marriage of Perry	107
В.	Allocation of Attorney and Client Authority	113
	1. Basic Allocation of Authority	113
	Red Dog v. Delaware	115
	2. Counseling or Assisting the Client in Crime or Fraud	118
	Iowa Supreme Court Attorney Disciplinary Board v. Engelmann	121
C.	Understanding the Identity of the Client	123
	1. Organizational Clients	123
	Yablonski v. United Mine Workers of America	125
	"Mirandizing" the Organization's Constituents	130
	Reporting Up and Out	133
	Pang v. International Document Services	135
	2. Government Clients	141
	3. Insureds	143
	Obligations of a Lawyer Representing an Insured Who Objects to a Proposed Settlement Within Policy Limits, ABA Formal Opinion 96-403 (1996)	144
	4. Clients with Diminished Capacity	145
D.	Attorney as Fiduciary	146
_,	1. Fees	146
	Communicating the Fee to the Client	147
	Contingent Fees	147
	A Reasonable Fee	148
	Sallee v. Tennessee Board of Professional Responsibility	150
	Fraudulent Fees	156
	2. Safeguarding Client Funds and Property	158
	Segregation	159
	In re Sather	161
	Record Keeping	167
	Notification, Delivery, and Accounting	167
	Disputes over Property Held by the Attorney	167
	3. Terminating the Representation	168
	In re Kiley	170
	Mandatory Withdrawal	173
	Permissive Withdrawal	174
	Duties Owed to the Client After Termination	176

xiv Table of Contents

Chapter Summary	177
Applying the Rules	177
Professional Responsibility in Practice	179
Chapter 4: Competence—The Lawyer's	
Indispensable Duty	181
A. The Competent Attorney	182
1. Legal Knowledge and Skill	183
Dahl v. Dahl	184
2. Inexperienced Lawyers	189
Attorney Grievance Commission of Maryland v. Kendrick	190
3. Thoroughness and Preparation	192
4. Competence and Technology	194
Use of Cloud Computing Services, Ohio State Bar Association Informal Advisory Opinion 2013-03	197
5. Diligence	199
In re Disciplinary Action Against Howe	200
6. Communication	204
Disclosing Potential Malpractice to a Client, North Carolina State Bar Ethics Opinion (2015)	206
Martin Cole, The Hardiest Perennials	209
Utah Bar Journal, Discipline Corner	210
B. Ineffective Assistance of Criminal Defense Counsel	212
1. The Constitutional Test for Ineffective Assistance of Counsel	215
Strickland v. Washington	216
2. Strickland's First Prong: Deficient Performance	223
Failure to Investigate	224
Failure to Communicate	225
Helmedach v. Commissioner of Correction	226
Deportation Consequences of a Plea	230
3. Strickland's Second Prong: Prejudice	231
C. When Incompetence Is Not Your Fault	233
Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere	
with Competent and Diligent Representation	234
Ohio v. Jones	237

291

294

295

	Table of Contents
D. Competence and Attorney Well-Being	240
The Struggle Above the Law (Aug. 22, 2016)	244
Chapter Summary	245
Applying the Rules	246
Professional Responsibility in Practice	247
Chapter 5: Confidentiality, the Attorney-Clier Privilege, and Work-Product Immunity	nt 249
A. The Duty of Confidentiality	250
Purcell v. District Attorney for the Suffolk Distri	ct 257
3. The Attorney-Client Privilege	262
1. Introduction	262
Attorney-Client Privilege Elements Defined	263
2. Scope of the Privilege	263
The Confidential and Privileged Relationship	263
Communications for the Purpose of Legal Advice	264
Mixed Communications	265
No Privilege for Preexisting Client Documents and Underlying Facts	266
Entity Clients and the Privilege	267
Upjohn Co. v. United States	267
Government Lawyers and the Privilege	272
Common Interest Doctrine	273
3. Waivers	278
Protecting the Privilege in Adversarial Proceedings Representation	and During
Selective Waiver	279
In re Pacific Pictures Corp.	280
Partial Disclosures and Subject Matter Waivers	284
Inadvertent Disclosures: Limiting Attorney-Client and Work-Product Waivers	Privilege 286
Ardon v. City of Los Angeles	287
4. Exceptions	289
Crime-Fraud Exception	289

In re Grand Jury Investigation

Joint-Clients Exception

Self-Defense Exception

xvi Table of Contents

C.	Work-Product Immunity	295
	1. Two Types of Work Product: Ordinary and Opinion	296
	Schaeffler v. United States	298
	2. Waivers and Exceptions to Work-Product Immunity	302
Ch	apter Summary	302
Аp	plying the Rules	304
Pro	ofessional Responsibility in Practice	306
Cł	napter 6: Conflicts of Interest	307
A.	Current-Client Conflicts and Client Waivers	308
	1. Directly Adverse and Material Limitation Conflicts	308
	W. Bradley Wendel, Conflicts of Interest Under the Revised Model Rules	309
	Cinema 5, Ltd. v. Cinerama, Inc.	312
	Multiple/Joint Representation Conflicts	316
	Criminal Cases	318
	Civil Cases	320
	Positional Conflicts	322
B.	Lawyer Personal-Interest Conflicts with Clients	323
	1. Business Transactions and Using Client Information	324
	In re Disciplinary Proceedings Against Creedy	326
	2. No Gift Solicitations (or Writing Testimonial Bequests to Yourself)	329
	3. Literary Rights and Financial Assistance	330
	4. Aggregate Settlements	332
	5. No Prospective Malpractice Limitations	333
	6. No Proprietary Interest in Client Matter	334
	7. Sexual Relations with Clients	335
	8. Prospective-Client Conflicts and Advance Waivers	336
	9. Advocate-Witness Conflict	337
C.	Former-Client Conflicts of Interest	339
	Western Sugar Coop. v. Archer-Daniels-Midland Co.	342
D.	Imputation of Client Conflicts	351
	Goldberg v. Warner Chappell Music, Inc.	356
E.	Conflicts of Interests for Current and Former Lawyers in	
_	Government Service	361
F.	Specific Conflict Rules: Judges, Arbitrators, and Others	363

_	1. 1			•		
าว	n	Δ١	ΛT	Coi	ЭΤΩ	ntc

Chapter Summary	364
Applying the Rules	365
Professional Responsibility in Practice	366



LAWYER AS ADVOCATE 369

Chapter 7: Fairness in Adjudication	371
A. Meritorious Claims and Expediting Litigation	371
In re Olsen	373
B. Obligation to Be Truthful	376
1. Candor to the Court	377
In re Richards	378
2. Failure to Disclose Adverse Facts in <i>Ex Parte</i> Proceedings	380
3. Failure to Disclose Controlling Legal Authority	381
In re Thonert	382
4. Client or Other Witness Giving False Testimony in Civil Litigation	384
Comm. on Pro. Ethics v. Crary	386
Limitations on a Lawyer's Participation in the Preparation of a Witness's Testimony, D.C. Bar Legal Ethics Committee	
Formal Opinion 79 (1979)	389
C. Fairness to Opposing Party and Counsel	391
1. Obstruction, Alteration, or Destruction of Evidence	391
2. Discovery Obligations	393
D. Trial Tactics	394
1. Disruption	394
2. Civility	395
E. Maintaining the Impartiality of the Tribunal	396
F. Public Comment on Pending Civil Litigation	398
Maldonado v. Ford Motor Co.	400
G. Communicating with Represented Persons	402
Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College	405
H. Communicating with Unrepresented Persons	409
I. Truthfulness in Statements to Others	410
In re Crasson	112

xviii Table of Contents

Chapter Summary Applying the Rules	
Chapter 8: Special Ethical Issues in Criminal Practice	419
A. The Prosecutor	419
1. Who Do You Represent?	419
Fred Zacharias, Structuring the Ethics of Trial Advocacy	420
2. Quantum of Proof Necessary for Charging	425
Benjamin Weiser, Doubting Case, a Prosecutor Helped	426
the Defense3. Disclosure of Exculpatory Evidence	420
Brady v. Maryland	430
Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense, ABA Formal Opinion 09-454 (2009)	434
4. Contact with Represented Suspects	437
United States v. Lopez	439
5. Subpoenas to Attorneys	445
6. Statements to the Media	445
B. The Criminal Defense Lawyer	447
Taking Possession of Physical Evidence	447
Client's Confidences and Secrets; Past Crimes Disclosed to Lawyer; Plea Bargaining, New York State Bar Association Formal Opinion 479 (1978)	449
2. Putting Your Client on the Stand	454
Nix v. Whiteside	454
3. Cross-Examining a Truthful Witness	464
John Mitchell, Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"	464
	470
Chapter Summary	
Applying the Rules Professional Responsibility in Practice	



Cł	napter 9: Practicing Law: Issues in Group Lawyering	
ar	nd the Unauthorized Practice of Law	475
A.	Law Firms and Associations	476
	1. Responsibility of Supervisors	476
	2. Responsibility of Junior Lawyers	477
	Davis v. Alabama State Bar	479
В.	The Lawyer's Independence	48 4
	1. Independence from Non-Lawyers in Practicing Law	487
	Multidisciplinary Practice	488
	Sharing Fees with Non-Lawyers	488
	Ethical Considerations Relating to Participation in Fixed Fee Limited Scope Legal Services Referral Programs, Pennsylvania Bar Association Legal Ethics and Professional Responsibility Formal Opinion 2016-200 (2016)	489
	Non-Lawyer Ownership or Direction of Law Firms	494
	2. Restrictions on Lawyer's Practice	496
	In re Truman	496
	3. Sale of a Law Practice	499
C.	Unauthorized Practice of Law (UPL)	500
	1. Justifications for the Professional Monopoly	500
	2. Defining the Practice of Law	501
D.	Multijurisdictional Practice (MJP)	505
	Birbrower, Montalbano, Condon & Frank v. Superior Court	506
Ch	apter Summary	515
Аp	plying the Rules	516
Pro	ofessional Responsibility in Practice	517
Cł	napter 10: Marketing Legal Services	519
A.	Communications vs. Solicitation	520
В.	Regulation of Lawyer Advertising	520
	1. Constitutional Limits on the Bar's Power to Restrict Advertising	520
	Florida Ray w Wont For It Inc	522

2. Rules Governing Communications Concerning a Lawyer's Services	530
False or Misleading Communications	531
Required Disclosures	534
3. Social Media and Other Forms of Electronic Advertising	535
Do the Advertising Rules Apply to Websites and Social Media?	535
The State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 2012-186	535
Unique Dangers of Social Media and Other Forms of Electronic Advertising	537
C. Regulation of Solicitation	538
1. Constitutional Limits on the Bar's Power to Regulate Solicitation	539
Ohralik v. Ohio State Bar Association	539
2. Rules Governing Solicitation	545
Chapter Summary	546
	547
Applying the Rules	
Applying the Rules Professional Responsibility in Practice	548
	548
	548 54 9
Professional Responsibility in Practice	
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services	549
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon"	549
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers	549 550 551
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap	549 550 551 558
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions	549 550 551 558 561
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures	549 550 551 558 561 561
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures 2. Mandatory Pro Bono	549 550 551 558 561 562
Professional Responsibility in Practice Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures 2. Mandatory Pro Bono 3. Technology	549 550 551 558 561 562 563
Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures 2. Mandatory Pro Bono 3. Technology 4. Unbundled Legal Services	549 550 551 558 561 562 563 566
Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures 2. Mandatory Pro Bono 3. Technology 4. Unbundled Legal Services 5. Regulatory Changes	549 550 551 558 561 562 563 566 566
Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures 2. Mandatory Pro Bono 3. Technology 4. Unbundled Legal Services 5. Regulatory Changes Non-Lawyers Delivering Legal Services	549 550 551 558 561 562 563 566 566 566
Chapter 11: Access to Justice and Pro Bono Services A. "Civil Gideon" Turner v. Rogers B. The Justice Gap C. Possible Solutions 1. Simplifying Court Procedures 2. Mandatory Pro Bono 3. Technology 4. Unbundled Legal Services 5. Regulatory Changes Non-Lawyers Delivering Legal Services Alternative Business Structures (ABS)	549 550 551 558 561 562 563 566 566 570



Chapter 12: Judicial Ethics	
A. Performance of Judicial Duties	577
B. Extrajudicial Activities	579
C. Judicial Disqualification	582
1. Disqualification Under the Code	583
Cheney v. United States District Court for the	
District of Columbia	586
Lawrence J. Fox, I Did Not Sleep with That Vice President	594
2. Judges' Use of Social Media	602
3. Constitutional Dimensions of Disqualification	603
D. Judicial Campaigns and Other Political Activity	605
1. Fundraising	606
2. Other Political Activity	608
Republican Party of Minnesota v. White	609
Chapter Summary	
Applying the Rules	617
Professional Responsibility in Practice	

Table of Cases621Table of Rules627Index633