Contents

Why It's Important: A Preface for Students Acknowledgments	
Chapter I Where Do "Ethics" Rules Com	ne From? 1
Part One	
THE ATTORNEY-CLIENT RELATIONSHIP	2 15
Chapter II Defining the Attorney-Client	Relationship 17
A. Is There a Client Here?	18
B. What Do Lawyers Owe Clients?	20
1. Competence	20
2. Confidentiality	21
The Case of the Innocent Life	er 21
"My Client Is HIV Positive"	22
"Dig They Must"	23
Self-Defense	24
Perez v. Kirk & Carrigan	25
Privileged Information and Ethic	,
Information: What's the Differ	ence? 29
Policies Behind the Privilege and	,
Rules	31
Entity Clients	32
Slip and Fall (Part I)	32
Upjohn Co. v. United States	34
What's the Right Policy?	38
Exceptions to the Privilege or the	,
Self-Defense and Legal Claims	39
Waiver	40
The Crime-Fraud Exception to P	
Future Crimes or Frauds	44
The "Fiduciary" Exception	44

xii Contents

	Noisy Withdrawal	45
	Lawyers and Social Media: Risks, Benefits, and Best	
	Practices	46
	3. Agency	48
	$Taylor\ v.\ Illinois$	49
	Bakery Machinery & Fabrication, Inc. v. Traditional	
	Baking, Inc.	51
	Vicarious Admissions	53
	Procedural Defaults	53
	Confidentiality Duties in Agency Law	54
	4. Fiduciary	54
	5. Loyalty and Diligence	55
	6. The Duty to Inform and Advise	55
	Nichols v. Keller	55
	The Client's Right to Know	57
	In a Box	58
C.	Autonomy of Attorneys and Clients	59
	1. The Lawyer's Autonomy	59
	Ms. Niceperson	60
	Lesser Included Offenses	61
	"I Don't Plea Bargain"	62
	Jones v. Barnes	62
	The Scope of the Lawyer's Autonomy	65
	2. The Client's Autonomy	66
	"I'd Rather Die"	66
	"Accept the Offer"	67
	Olfe v. Gordon	68
	The Scope of the Client's Autonomy	69
	Clients with Diminished Capacity	71
D.	Terminating the Relationship	72
	1. Termination by the Client	72
	2. Termination by the Lawyer	72
	3. Termination by Drift	73
	4. Episodic Clients	73
Chapte	r III Protecting the Attorney-Client Relationship	
	Against Outside Interference	75
A.	Communicating with Another Lawyer's Clients	75
	1. Civil Matters	78
	Slip and Fall (Part II)	78
	"We Want to Know What the Company Is Saying"	79
	Niesig v. Team I	79
	How Large Is the Circle of Secrecy?	83

xiii

	When Government Is the "Represented Person"	84
	Testers	85
	2. Criminal Matters	86
	The Case of the Cooperating Target	86
	United States v. Carona	89
В.	Improper or Accidental Acquisition of Confidential	
	Information	92
	"Something You Should Know"	93
	Inadvertent Disclosure and Metadata	94
apte	r IV Lawyers, Money, and the Ethics of Legal Fees	97
A.	The Role of the Marketplace	99
	Brobeck, Phleger & Harrison v. Telex Corp.	99
	Time or Value? Or Does Value = Time?	103
В.	Unethical Fees	104
	"What Are You Worth?"	105
	In re Laurence S. Fordham	106
	Are Fordham and Brobeck Compatible?	110
	Postretainer Fee Agreements	111
	Should a Lawyer Be Required to Put Fee Agreements	
	in Writing?	112
	Inflating Bills	112
C.	Contingent Fees	113
	Contingent Fees and Conflicts of Interest	115
	Prohibitions on Contingent Fees in Criminal and	
	Matrimonial Cases	116
	A Radical Proposal or Wise Consumer	
	Protection?	116
D.	Mandatory Pro Bono Plans	118
	"Should We Adopt Mandatory Pro Bono?"	118
	Deborah L. Rhode, Cultures of Commitment:	
	Pro Bono for Lawyers and Law Students	120
	Jonathan R. Macey, Mandatory Pro Bono:	
	Comfort for the Poor or Welfare for the Rich?	123
rt Tv	vo	
ONFI	LICTS OF INTEREST	127
	r V Concurrent Conflicts of Interest	129
napte		
iapte	Conflicts of Interest: Definition and Context	129
apte A.		129 134

xiv Contents

		Lawyer. Realtor. Any Problem?	134
		In re Neville	135
		A Lawyer's Financial Interests	137
		Deals with Clients	138
		Interests Adverse to Clients	139
	2.	Media Rights	140
	3.	Financial Assistance and Proprietary Interests	142
	4.	Fee-Payer Interests	144
	5.	Related Lawyers, Significant Others, and Friends	145
	6.	Can a Lawyer's Gender, Religion, or Race Create a	
		Conflict?	145
		Karen Horowitz's Dilemma	145
		How Roger Baldwin Picked a Lawyer	148
B.		ient-Client Conflicts	150
	1.	Criminal Cases (Defense Lawyers)	150
		Murder One, Murder Two	150
		Did Officer Schwarz Get the Effective Assistance	
		of Counsel?	151
		Cuyler v. Sullivan	153
		Turning Conflicts into Sixth Amendment Claims	
		After Cuyler v. Sullivan	157
		Holloway Error	158
		Disqualification of Defense Counsel	159
		Murder at the Ballgame	160
		Wheat v. United States	161
		Wheat's Harvest	168
		Criminal Case Disqualification and the "Automatic	
		Reversal" Debate	168
		Can a Conflicted Lawyer Advise a Client on Whether	
	_	to Waive Her Conflict?	169
	2.	Criminal Cases (Prosecutors)	171
		Forfeiture Plus Prosecution	171
		Young v. United States ex rel. Vuitton et Fils S.A.	172
	0	Prosecutors Avec Deux Chapeaux	174
	3.	Civil Cases	175
		"Will You Represent Us Both?"	175
		"They're All on the Same Page"	175
		Restraint of Trade	176
		Fiandaca v. Cunningham	176
		Imputed Conflicts	181
		Standing to Object	182
		May a Lawyer Act Adversely to a Client on an	100
		Unrelated Matter?	183
		Confidentiality and Privilege in Multiple Client	105
		Representations	185

Contents xv

	The Common Interest Rule	186
	Some Other Issues	188
	Class Conflicts	189
	Appealability of Civil Disqualification Orders	190
	Malpractice and Fee Forfeiture Based on Conflicts	190
	Simpson v. James	190
	What Did Oliver and James Do Wrong?	194
	Consent and Waiver	195
	4. The Insurance Triangle	196
	Ed's Daughter Was Driving	196
	Public Service Mutual Insurance Co. v. Goldfarb	197
	Client Identity and the Obligation to Defend	200
C.	The Advocate-Witness Rule	201
	Policies Behind the Advocate-Witness Rule	202
Chapte	r VI Successive Conflicts of Interest	203
A.	Private Practice	203
	Divorce and Default	203
	"Do I Still Owe the Record Store?"	204
	"Stop the High Rise"	204
	Analytica, Inc. v. NPD Research, Inc.	206
	The "Substantial Relationship" Test	209
	Can "Playbook" Create a Substantial Relationship?	211
	The Loyalty Duty to Former Clients (or It's Not Only	
	About Confidences)	213
	Who Is a Former Client?	214
	"Like a Hot Potato"	214
	"Thrust Upon" Conflicts	216
	Standing and Waiver	216
	The Appearance of Impropriety	217
	Conflicts in Class Actions	217
В.	Imputed Disqualification and Migratory Lawyers	218
	"You Don't Know Anything"	218
	"Can We Hire Taylor Monk?"	219
	Cromley v. Board of Education	220
	Why Didn't <i>Cromley</i> Inquire ?	223
	Presumptions in Imputed Disqualification	224
	Removing Conflicts from a Former Firm	226
C.		226
	Investigating Landlords	226
	Armstrong v. McAlpin	227
	The Revolving Door in the Model Rules	229

xvi Contents

TD 4		
Part	1 nree	2

Simon Rifkind and Marvin Frankel: Two Views on Truth in the Adversary System Simon H. Rifkind, The Lawyer's Role and Responsibility in Modern Society Marvin E. Frankel, Partisan Justice 239 The Advocate as Performance Artist Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 1. Literal Truth a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias	SPECIAL I	LAWYER ROLES	231
Simon Rifkind and Marvin Frankel: Two Views on Truth in the Adversary System Simon H. Rifkind, The Lawyer's Role and Responsibility in Modern Society Marvin E. Frankel, Partisan Justice 239 The Advocate as Performance Artist Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias	Chapter VI	I Ethics in Advocacy	233
Simon H. Rifkind, The Lawyer's Role and Responsibility in Modern Society Marvin E. Frankel, Partisan Justice 339 The Advocate as Performance Artist Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire —A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias	A. Fo		237
Responsibility in Modern Society Marvin E. Frankel, Partisan Justice The Advocate as Performance Artist Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 280 Daniel J. Kornstein, A Tragic Fire —A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 Appeals to Bias		, ,	237
Marvin E. Frankel, Partisan Justice The Advocate as Performance Artist Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 281 Ann Ruben & Emily Ruben, Letter to the Editor 282 Ann Ruben & Emily Ruben, Letter to the Editor 283 Appeals to Bias			237
The Advocate as Performance Artist Robert C. Post, On the Popular Image of the Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony B. Fostering Falsity or Advancing Truth? 1. Literal Truth 2. The Parable of Billy 3. The Romance of Annie and Bill C. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) E. The Law of Contempt "Did You Communicate with Cassie?" 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias		, ,	
Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness 246 B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Selma's False Testimony 252 Nix v. Whiteside 253 After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 C. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias			
Lawyer: Reflections in a Dark Glass The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness 246 B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Selma's False Testimony 252 Nix v. Whiteside 253 After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 C. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias		Robert C. Post, On the Popular Image of the	
The Advocate in Literature Anthony Trollope, Orley Farm Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias			242
Justice As Fairness B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias		•	245
B. Are Lawyers Ever Morally Accountable for Their Clients? C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias		Anthony Trollope, Orley Farm	245
C. Truth and Confidences "Out Carousing with Mikey" Selma's False Testimony Selma's False Testimony 252 Nix v. Whiteside 253 After Nix, What? 266 The Lecture 264 The Immigrant 266 Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias		Justice As Fairness	246
Selma's False Testimony 252 Nix v. Whiteside 253 After Nix, What? 260 The Lecture 264 The Immigrant 266 Robert Bennett's Letter to Judge Susan Webber Wright 267 Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy 271 b. The Romance of Annie and Bill 271 c. In the Matter of William Jefferson Clinton 272 d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt 278 "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness 280 Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias	B. Are		247
Selma's False Testimony Nix v. Whiteside After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill 711 c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias	C. Tr	uth and Confidences	250
After Nix, What? 260 The Lecture 264 The Immigrant 266 Robert Bennett's Letter to Judge Susan Webber Wright 267 Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy 271 b. The Romance of Annie and Bill 271 c. In the Matter of William Jefferson Clinton 272 d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt 278 "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness 280 Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias			250
After Nix, What? The Lecture The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill 711 c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire —A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias		Selma's False Testimony	252
The Lecture The Immigrant 266 Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 2. The Parable of Billy 5. The Romance of Annie and Bill C. In the Matter of William Jefferson Clinton C. In the Matter of William Jefferson Clinton The Law of Perjury (and Rules Governing "False" Statements) C. The Law of Contempt		Nix v. Whiteside	
The Immigrant Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill 271 c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias			
Robert Bennett's Letter to Judge Susan Webber Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony 268 D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill 271 c. In the Matter of William Jefferson Clinton 4. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias			
Wright Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 269 1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 3. Appeals to Bias		-	266
Summary: Variables in Analyzing Issues Concerning Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 281 291 291 291 291 291 291 291 291 291 29			
Witness Perjury and False Testimony D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 281 291 291 291 291 291 291 291 291 291 29			267
D. Fostering Falsity or Advancing Truth? 1. Literal Truth 270 28. The Parable of Billy 29. The Romance of Annie and Bill 29. C. In the Matter of William Jefferson Clinton 29. Statements 29. Statements 20. The Law of Perjury (and Rules Governing "False" Statements) 29. Cross-Examining the Truthful Witness 29. Cross-Examining the Truthful Witness 29. Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 29. Ann Ruben & Emily Ruben, Letter to the Editor 28. Appeals to Bias 28.		, , ,	
1. Literal Truth 270 a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias			
a. The Parable of Billy b. The Romance of Annie and Bill c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 3. Appeals to Bias			
b. The Romance of Annie and Bill 271 c. In the Matter of William Jefferson Clinton 272 d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt 278 "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness 280 Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284	1.		
c. In the Matter of William Jefferson Clinton d. The Law of Perjury (and Rules Governing "False" Statements) e. The Law of Contempt "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 3. Appeals to Bias			
d. The Law of Perjury (and Rules Governing "False" Statements) 274 e. The Law of Contempt 278 "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness 280 Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284			
Statements) 274 e. The Law of Contempt 278 "Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness 280 Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284			272
e. The Law of Contempt "Did You Communicate with Cassie?" 2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 3. Appeals to Bias			074
"Did You Communicate with Cassie?" 279 2. Cross-Examining the Truthful Witness 280 Daniel J. Kornstein, A Tragic Fire—A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284		•	
2. Cross-Examining the Truthful Witness Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination Ann Ruben & Emily Ruben, Letter to the Editor 3. Appeals to Bias			
Daniel J. Kornstein, A Tragic Fire — A Great Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284	9		
Cross-Examination 281 Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284	2.		400
Ann Ruben & Emily Ruben, Letter to the Editor 283 3. Appeals to Bias 284			901
3. Appeals to Bias 284			
1 1	2	•	
Feorite D. Maintall 285	Э.	People v. Marshall	285

Contents	xvii	

	4. The Boundaries of Proper Argument	287
	"I Hang a Key on a Nail"	288
	The Eyewitness (Part I)	288
	The Eyewitness (Part II)	289
	Playing Games with the Jury?	290
	The Subin-Mitchell Debate	291
	Questions	296
	"Maxwell's Silver Handle .38"	298
	5. Fraud and Spoliation	298
	"Together We Can Be Unstoppable"	298
E.	Hardball and Incivility	300
	Mullaney v. Aude	302
F.	Misstating Facts, Precedent, or the Record	304
G.	The Obligation to Reveal Adverse Legal Authority	306
	Thul v. OneWest Bank, FSB	306
Chapte	r VIII Special Issues in Criminal Prosecutions	309
Δ	Real Evidence	309
11.	The Client's Loaded .45	309
	1. Real Evidence and Legal Ethics	311
	In re Ryder	311
	2. Real Evidence and Criminal Law	315
	3. Real Evidence and the Attorney-Client Privilege	318
	People v. Meredith	319
	The Turnover Duty	322
	Does the Source Matter?	323
	"The White Women on the Walls Have to Go"	323
В	Some Issues Concerning Prosecutors	325
Б.	1. Constitutional and Ethical Disclosure Obligations	325
	"We Can Make No Promises"	325
	2. Ethical Issues in Making the Charging Decision	329
	The People of the State of Montana v. Anita	343
	Winslow	330
	3. The Victim's Interest in How a Prosecutor Decides	334
	Contributions to Justice	334
	Whose Reasonable Doubt?	335
Chapte	r IX Negotiation and Transactional Matters	339
Λ	Laurers as Negatiators: An Introduction	340
	Lawyers as Negotiators: An Introduction Negotiation: The Risks to Lawyers	340
В.	Ÿ ,	341 341
	The Case of the Complex Formula	341 344
	The Case of the Dond Witness	
	The Case of the Dead Witness	345

xviii Contents

	1. The "Bad Client"	Problem	345
	The Noisy Wit	thdrawal	346
	2. The Lawyer's Own		348
		to Rely on a Lawyer's	
	Representations		349
		Exchange v. Bell	349
		to Rely on an Opposing Lawyer's	
	Legal Opinions	?	351
	_	Inc. v. Production Resource Group,	
	$\tilde{L}.L.C.$		351
	3. Exploiting an Op	ponent's Mistake	354
	Virzi v. Grand	Trunk Warehouse and Cold Storage Co.	354
	What Does Virzi S	tand For?	356
	Drafting Errors		357
	Some Special Situ	actions	358
Chapte	X Lawyers for C	ompanies and Other Organizations	361
	Introduction: "W	ho's Your Client?"	361
A.	Companies Behaving		362
		.2 to Prevent Some Secret	
	Settlements		364
В.	Conflicts and Confid	entiality in Entity Representation	365
	1. Internal Investiga	tions	365
	"Please, Just Find	Out What Happened"	365
	In re Grand Ju	ry Subpoena	366
	"Who's Your	Člient?" (Reprise)	370
	2. Change of Corpo	rate Control	371
	"I Never Worl	ked for the Buyer"	371
	Tekni-Plex, Inc.	v. Meyner & Landis	373
	3. Conflict and Privi	lege Issues in Representing a	
	Member of a C	orporate Family	378
		Done Work for the Parent"	378
	4. Closely Held Enti	ties	380
	Murphy & Den	nory, Ltd., et al. v. Admiral Daniel J.	
	1 2	.N. (Ret.), et al.	380
C.	,	d-Frank, and the Rule 1.13	
	Amendments		382
		y for the Secrets of My Client's	
	Client"		387

Contents xix

P	art	Four

AVOIDING AND REDRESSING PROFESSIONAL FAILURE			
Chapte	Chapter XI Control of Quality: Reducing the Likelihood of Professional Failure		
		200	
Α.	Admission to the Bar	392	
	1. Geographical Exclusion	393	
	2. Geographical Restriction	394	
	3. Education and Examination	394	
	4. Character Inquiries	395	
	Borrowing From the Moot Court Account	395	
	The Racist Bar Applicant In re Glass	396	
		397	
	Frequently Cited Grounds for Delaying or Denying Admission to the Bar	409	
	5. Admission in a Federal System	402 404	
В.	Transient Lawyers and Multijurisdictional Firms: Local	404	
В.	Interests Confront a National Bar	404	
	1. Admissions Pro Hac Vice	405	
	Leis v. Flynt	405	
	What About the Client's Interests?	409	
	2. Services Other Than Litigation	410	
	Local Office, National Practice	410	
	Birbrower, Montalbano, Condon & Frank, P.C. v.	110	
	Superior Court	411	
	Why Is <i>Birbrower</i> a Problem and What Is the Solution?	415	
	The View from Canada and the European Union	417	
C.	Unauthorized Practice of Law	418	
	Advising Tenants	418	
	Professional Adjusters, Inc. v. Tandon	419	
	Two Constitutional Limitations on UPL Rules: The		
	Supremacy Clause and the First Amendment	423	
Chapte	er XII Control of Quality: Remedies for Professional		
	Failure	427	
A.	Malpractice and Breach of Fiduciary Duty	427	
	1. Liability to Clients	428	
	When Sally Left Ari	428	
	Togstad v. Vesely, Otto, Miller & Keefe	430	
	What Is the Required Standard of Care?	435	
	Breach of Fiduciary Duties	436	
	Tante v. Herring	437	

XX Contents

	2.	Liability to Third Parties for Professional Negligence	439
		Vicarious Liability	439
B.	Pro	ving Lawyer Liability	440
	1.	Use of Ethics Rules and Expert Testimony	440
		Smith v. Haynsworth, Marion, McKay & Geurard	440
		Rodriguez v. Disner	442
]	Fee Forfeiture (and Disgorgement)	444
	2.	Causation and Defenses	445
		Viner v. Sweet	445
	,	The "But For" Test in Malpractice and Fiduciary	
		Duty Claims	449
	(Causation in Criminal Cases	452
		Adkins v. Dixon	452
		Peeler v. Hughes & Luce	453
		Acquittal, Innocence, or Exoneration?	456
C.	Law	yer Liability Beyond Malpractice	458
		Death and Taxes (and Liability?)	458
		Petrillo v. Bachenberg	460
		Theories of Lawyer Liability Beyond Malpractice	464
		Negligent Misrepresentation	465
		Consumer Protection Laws	466
		Criminal Law	466
		Violation of Escrow Agreements	467
D.		cipline	467
		Purposes of Discipline	467
		Sanctions	468
		Disciplinary Systems	469
		Acts Justifying Discipline	469
	-	a. Dishonest Conduct	469
		The Defense Sting	469
		A Research Shortcut	470
		In re Warhaftig	471
		In re Disciplinary Proceedings Against Siderits	473
		Deceit, Dishonesty, Etcetera	474
)	b. Neglect and Lack of Candor	475
	(c. Sex With a Client	475
		Disciplinary Counsel v. Siewert	476
		Should Lawyers Be Forbidden to Have Sex With	
		Clients?	476
	(d. The Lawyer's "Private" Life and Conduct	4
		Unrelated to Practice	477
	(e. Discrimination in Choice of Clients	478
		Stropnicky v. Nathanson	478
		Joan Mahoney, Using Gender as a Basis of Client	403
		Selection: A Feminist Perspective	481

xxi

f. Racist and Sexist Conduct	483
In re Jordan Schiff	483
g. Failure to Report Another Lawyer's Misconduct	486
5. Defenses	487
E. Constitutional Protection in Criminal Cases	488
Strickland v. Washington	489
Padilla v. Kentucky	492
Some Reasons for Ineffectiveness Claims	493
The Ineffectiveness Test in a System of Procedural	
Defaults	494
Systemic Challenges	494
Table of Cases	497
Table of Codes, Rules, and Restatement Provisions	503
Index	505