

<i>Contents (Practice Organization)</i>	<i>xix</i>
<i>Preface</i>	<i>xxiii</i>
<i>Acknowledgments</i>	<i>xxvii</i>

<b>1 INTRODUCTION TO PROFESSIONAL RESPONSIBILITY</b>	<b>1</b>
<b>A. The Foundations of Professional Responsibility</b>	<b>1</b>
1. The Lawyer as Fiduciary	1
2. The Lawyer as an Officer of the Court Functioning in an Adversarial System of Justice	3
3. The Lawyer as a Person with Personal and Financial Interests	4
<i>In re Pautler</i>	5
Notes and Questions	11
■ Rule Review: Model Rule 8.4	12
<b>B. Resolving Tensions in the Lawyer’s Role: Complying with Rules and Standards of Professional Conduct and the Law Governing Lawyers</b>	<b>13</b>
1. Professional Rules and Standards: ABA Model Rules, Ethics Advisory Opinions, Specialized Codes, and Organizational Standards	13
2. Law Governing Lawyers	17
3. Limitations of Professional Rules and of the Law Governing Lawyers and the Need for a Philosophy of Lawyering	20
<b>C. Going Beyond the Rules: Sources of Guidance for Lawyers</b>	<b>21</b>
Problem 1-1 Comparing Philosophies of Lawyering	26
David Boies, Interview with James B. Stewart of the <i>New York Times</i>	26
Statement of Michael Cohen, Long-Time Personal Counsel for President Donald Trump, at His Sentencing Hearing	28
Monroe Freedman, Must You Be the Devil’s Advocate?	30
Michael Tigar, Setting the Record Straight on the Defense of John Demjanjuk	32
Monroe Freedman, The Morality of Lawyering	34
Charles P. Curtis, The Ethics of Advocacy	36

<b>D. Issues Facing the Profession: Methods of Regulating Attorney Conduct</b>	<b>39</b>
1. Admission to Practice	39
2. The Disciplinary System	42
Problem 1-2 Determining the Appropriate Level of Discipline	46
3. An Attorney's Duty to Report Misconduct by Another Lawyer	47
Problem 1-3 Reporting to Disciplinary Authorities Misconduct by Another Lawyer	47
■ Rule Review: Model Rule 8.3	53
4. Civil Liability and Criminal Punishment	53
5. Legislation and Administrative Rules	55
<b>E. The Concept of a Philosophy of Lawyering</b>	<b>55</b>
Problem 1-4 Developing a Philosophy of Lawyering	58
<b>Assessments</b>	<b>59</b>
<b>Answers to Assessments</b>	<b>60</b>
<b>2 THE ATTORNEY-CLIENT RELATIONSHIP</b>	<b>61</b>
<b>A. The Duty of Competence</b>	<b>62</b>
Problem 2-1 Competence of Defense Counsel in Criminal Cases	62
Problem 2-2 The Duty of Competency in Civil Cases and Transactional Matters	68
<i>Togstad v. Vesely, Otto, Miller &amp; Keefe</i>	69
■ Rule Review: Model Rules 1.1 and 1.3	75
<b>B. Legal Fees, Expenses, and Client Property</b>	<b>76</b>
Problem 2-3 Contingent Fees, Expenses, and Fee Splitting	76
■ Rule Review: Model Rule 1.5	90
Problem 2-4 Trust Accounts, Advance Payments, and Security for Fees	90
■ Rule Review: Model Rule 1.15	99
Problem 2-5 Drafting Engagement, Limited Engagement, and Disengagement Documents	100
Contingent Fee Agreement	101
■ Rule Review: Model Rule 1.4	115
■ Rule Review: Model Rule 1.16	116
<b>C. Allocation of Authority Between Lawyer and Client</b>	<b>116</b>
Problem 2-6 Allocation of Authority in Civil Cases; Dealing with Clients with Diminished Capacity	116
■ Rule Review: Model Rule 1.14	128
<b>Assessments</b>	<b>128</b>
<b>Answers to Assessments</b>	<b>131</b>

<b>3</b>	<b>THE ETHICAL DUTY OF CONFIDENTIALITY, THE ATTORNEY-CLIENT PRIVILEGE, AND THE WORK PRODUCT DOCTRINE</b>	<b>133</b>
<b>A.</b>	<b>The Ethical Duty and Its Exceptions</b>	<b>134</b>
	Problem 3-1 Information About Unsolved or Contemplated Crimes	134
	Problem 3-2 Dealing with Instrumentalities, Fruits, and Evidence of Crimes	145
	Problem 3-3 False Testimony in Civil and Criminal Cases Sixth Amendment Issues	158
	Other Constitutional Issues	170
■	Rule Review: Model Rule 3.3	172
	Problem 3-4 Fraud by Clients in Business Transactions	175
■	Rule Review: Model Rule 1.13	176
	Problem 3-5 The Duty of Confidentiality and the Use of Technology Cyberattack	195
	Nathan M. Crystal, Ethics Watch: Technethics 2018 Year in Review: The Top Five	196
		203
<b>B.</b>	<b>The Relationship Between the Ethical Duty, the Attorney-Client Privilege, and the Work Product Doctrine</b>	<b>203</b>
	Problem 3-6 The Attorney-Client Privilege and the Work Product Doctrine	205
■	Rule Review: Model Rule 1.6	214
■	Rule Review: Model Rule 1.2	215
	<b>Assessments</b>	<b>216</b>
	<b>Answers to Assessments</b>	<b>218</b>
<b>4</b>	<b>CONFLICTS OF INTEREST</b>	<b>221</b>
<b>A.</b>	<b>Direct Adversity Against Current Clients</b>	<b>223</b>
	Problem 4-1 Who Is a Current Client?	225
	Comment: Positional Conflicts of Interest	230
	Problem 4-2 Obtaining Informed Consent Confirmed in Writing	231
<b>B.</b>	<b>Material Limitations on Representation</b>	<b>236</b>
	Problem 4-3 Lawyers as Representatives of Multiple Clients in Business Formations	236
	Comment: Ethical Issues of Lawyer Participation in Ownership of Their Client's Business and Service on the Board of Directors	242
	Problem 4-4 Representation of Multiple Plaintiffs in Tort Cases	244

■ Rule Review: Model Rule 1.7	249
Comment: Conflicts of Interest in Insurance Defense Practice	250
Problem 4-5 Multiple Representation of Codefendants in Criminal Cases	254
<b>C. Former Client and Prospective Client Conflicts</b>	<b>264</b>
Problem 4-6 Representation Against Former Clients and Prospective Clients	264
<b>D. Imputation of Disqualification</b>	<b>274</b>
Problem 4-7 Conflicts When Lawyers Change Firms	274
■ Rule Review: Model Rule 1.9	280
■ Rule Review: Model Rule 1.10	281
■ Rule Review: Model Rule 1.18	281
<b>E. Advocate-Witness Conflicts</b>	<b>282</b>
Problem 4-8 Conflicts When Trial Counsel May Be a Necessary Witness	282
■ Rule Review: Model Rule 3.7	287
<b>Assessments</b>	<b>288</b>
<b>Answers to Assessments</b>	<b>290</b>
<b>5 LIMITATIONS ON ZEALOUS REPRESENTATION</b>	<b>295</b>
<b>A. The Role of the Criminal Defense Lawyer in the Justice System</b>	<b>296</b>
Barry Winston, Stranger Than True: Why I Defend Guilty Clients	298
Comment: The Extent of Erroneous Convictions	300
<b>B. Beginning a Representation</b>	<b>302</b>
Problem 5-1 Frivolous Claims	302
■ Rule Review: Model Rules 3.1 and 3.2	304
Comment: Ethical Issues Arising from Lawsuits Filed Challenging the 2020 Presidential Election	312
<b>C. Pretrial Conduct</b>	<b>315</b>
Problem 5-2 Investigation: Contacts with Employees	315
■ Rule Review: Model Rules 4.2 and 4.3	323
Comment: Secret Recording of Conversations	324
<b>D. Discovery</b>	<b>327</b>
Problem 5-3 Discovery Abuse	327
Problem 5-4 Inadvertent Disclosures: Ethical and Legal Issues	341
<b>E. Alternative Dispute Resolution</b>	<b>346</b>
Problem 5-5 Negotiation	346

Comment: Enforceability of Nondisclosure and Nondisparagement Agreements in Sexual Misconduct Cases, Other Situations, and the Stormy Daniels/Donald Trump Litigation	364
Mediation or Arbitration	365
■ Rule Review: Rules involved in negotiation and ADR including Model Rules 2.4, 4.1, 5.6, and 8.4	371
<b>F. Limitations on Trial Tactics</b>	<b>372</b>
Problem 5-6 Trial Publicity	372
■ Rule Review: Model Rule 3.6	381
Problem 5-7 Advocacy Before Tribunals	382
<b>Assessments</b>	<b>396</b>
<b>Answers to Assessments</b>	<b>399</b>
<b>6 ETHICAL ISSUES INVOLVING JUDGES AND GOVERNMENTAL ATTORNEYS</b>	<b>403</b>
<b>A. Judicial Ethics</b>	<b>403</b>
Problem 6-1 Judges in Their Official Capacities	403
■ Rule Review: Model Code of Judicial Conduct Rule 2.11	419
Problem 6-2 Extrajudicial Conduct and Judicial Selection	420
<b>B. Prosecutors and Agency Attorneys</b>	<b>432</b>
Problem 6-3 Prosecutorial Ethics	432
Problem 6-4 Agency Attorneys	448
■ Rule Review: Model Rule of Professional Conduct 1.11	461
<b>Assessments</b>	<b>462</b>
<b>Answers to Assessments</b>	<b>464</b>
<b>7 ISSUES IN THE DELIVERY OF LEGAL SERVICES</b>	<b>469</b>
<b>A. Marketing of Legal Services</b>	<b>469</b>
Problem 7-1 Law Firm Marketing Practices	469
■ Rule Review: Model Rule 7.3	480
■ Rule Review: Model Rules 7.1 and 7.2	488
Problem 7-2 Current Constitutional Issues in Lawyer Advertising and Solicitation	489
<b>B. Delivery of Legal Services to the Middle Class</b>	<b>497</b>
Problem 7-3 Removal of Restrictions on the Unauthorized Practice of Law	498

Problem 7-4 Unbundling of Legal Services	504
Comment: Legal Services Plans	507
<b>C. Delivery of Legal Services to Indigents</b>	<b>509</b>
Problem 7-5 Evaluation of Delivery of Defense Services in Criminal Cases	509
Comment: Delivery of Legal Services in Criminal Cases	509
American Bar Association, The Ten Principles of a Public Defense Delivery System	511
Problem 7-6 Mandatory Pro Bono and Delivery of Legal Services to Indigents in Civil Cases	513
<b>Assessments</b>	<b>522</b>
<b>Answers to Assessments</b>	<b>523</b>
<b>8 SPECIAL ETHICAL PROBLEMS OF LAW FIRMS</b>	<b>525</b>
<b>A. A Lawyer's Obligation to Supervise Lawyers and Nonlawyers in Firms and Other Entities</b>	<b>525</b>
Problem 8-1 The Duty to Supervise	525
■ Rule Review: Model Rules 5.1, 5.2, and 5.3	532
<b>B. Organizational Form, Departing Lawyers, and Sale of a Practice</b>	<b>533</b>
Problem 8-2 Law Firm Organization and Breakups	533
■ Rule Review: Model Rule 1.17	543
<b>C. Multidisciplinary Practice, Ancillary Business Services, and Multijurisdictional Practice</b>	<b>543</b>
Problem 8-3 Expanding Practice into Other Areas and Places	543
<b>D. Discrimination and Well-Being in the Profession</b>	<b>549</b>
Comment: Lawyer Well-Being	551
<b>Assessments</b>	<b>553</b>
<b>Answers to Assessments</b>	<b>554</b>
<i>Rule Review Answers</i>	557
<i>Table of Cases</i>	000
<i>Table of Model Rules, Restatements, and Other Standards</i>	000
<i>Table of Articles, Books, and Reports</i>	000
<i>Index</i>	000

# CONTENTS (PRACTICE ORGANIZATION)

<b>1</b>	<b>INTRODUCTION TO PROFESSIONAL RESPONSIBILITY</b>	<b>1</b>
<b>A.</b>	<b>The Foundations of Professional Responsibility</b>	<b>1</b>
<b>B.</b>	<b>Resolving Tensions in the Lawyer's Role: Complying with Rules and Standards of Professional Conduct and the Law Governing Lawyers</b>	<b>13</b>
<b>C.</b>	<b>Going Beyond the Rules: Sources of Guidance for Lawyers</b>	<b>21</b>
	Problem 1-1 Comparing Philosophies of Lawyering	26
<b>D.</b>	<b>Issues Facing the Profession: Methods of Regulating Attorney Conduct</b>	<b>39</b>
	Problem 1-2 Determining the Appropriate Level of Discipline	46
	Problem 1-3 Reporting to Disciplinary Authorities Misconduct by Another Lawyer	47
<b>E.</b>	<b>The Concept of a Philosophy of Lawyering</b>	<b>55</b>
	Problem 1-4 Developing a Philosophy of Lawyering	58
<b>2</b>	<b>DEFENSE AND PROSECUTION OF CRIMINAL CASES</b>	<b>61</b>
<b>A.</b>	<b>The Role of the Criminal Defense Lawyer in the Justice System</b>	<b>296-302</b>
	Comment: The Extent of Erroneous Convictions	300
<b>B.</b>	<b>Client-Lawyer Relationship</b>	<b>62</b>
	Problem 2-1 Competency of Defense Counsel in Criminal Cases	62
	Problem 2-4 Trust Accounts, Advance Payments and Security for Fees	90
<b>C.</b>	<b>Confidentiality</b>	<b>76</b>
	Problem 3-1 Information About Unsolved or Contemplated Crimes	134
	Problem 3-2 Dealing with Instrumentalities, Fruits, and Evidence of Crimes	145
	Problem 3-3 False Testimony in Civil and Criminal Cases	158

<b>D. Conflicts of Interests</b>	
Problem 2-6(b) Dealing with Clients with Diminished Capacity	116
Problem 4-5 Multiple Representation of Codefendants in Criminal Cases	254
<b>E. Limitations on Litigation Tactics by the Defense and the Prosecution</b>	<b>295</b>
Problem 5-6 Trial Publicity	372
Problem 5-7 Advocacy Before Tribunals	382
Problem 6-3 Prosecutorial Ethics	432
<b>3 ETHICAL ISSUES IN CIVIL LITIGATION: THE CLIENT-LAWYER RELATIONSHIP, CONFIDENTIALITY, AND CONFLICTS OF INTEREST</b>	
<b>A. The Client-Lawyer Relationship</b>	<b>61</b>
Problem 2-2 The Duty of Competency in Civil Cases and Transactional Matters	68
Problem 2-3 Contingent Fees, Expenses, and Fee Splitting	76
Problem 2-5 Drafting Engagement, Limited Engagement, and Disengagement Documents	100
<b>B. Confidentiality</b>	<b>133-134</b>
Problem 3-6 The Attorney-Client Privilege and the Work Product Doctrine in Civil Litigation	205
<b>C. Conflicts of Interest</b>	<b>221-225</b>
Problem 4-1 Who Is a Current Client?	225
Problem 4-2 Obtaining Informed Consent Confirmed in Writing	231
Problem 4-4 Representation of Multiple Plaintiffs in Tort Cases	244
Comment: Conflicts of Interest in Insurance Defense Practice	250
Problem 4-6 Representation Against Former Clients and Prospective Clients	264
Problem 4-7 Conflicts When Lawyers Change Firms	274
Problem 4-8 Conflicts When Trial Counsel May Be a Necessary Witness	282
<b>4 ETHICAL ISSUES IN CIVIL LITIGATION: LIMITATIONS ON ZEALOUS REPRESENTATION AND ALTERNATIVE DISPUTE RESOLUTION</b>	<b>295</b>
<b>A. Commencement of Actions, Investigation, and Discovery</b>	
Problem 5-1 Frivolous Claims	302

Problem 5-2 Investigation: Contacts with Employees	315
Comment: Secret Recording of Conversations	324
Problem 5-3 Discovery Abuse	327
<b>B. Alternative Dispute Resolution</b>	
Problem 5-5 Negotiation	346
Comment: Mediation and Arbitration	365
<b>5 ETHICAL ISSUES IN BUSINESS PRACTICE</b>	<b>295</b>
Problem 3-4 Fraud by Clients in Business Transactions	176
Problem 4-3 Lawyers as Representatives of Multiple Clients in Business Formations	236
<b>6 ETHICAL ISSUES INVOLVING JUDGES AND GOVERNMENTAL ATTORNEYS</b>	<b>403</b>
<b>A. Judicial Ethics</b>	<b>403</b>
Problem 6-1 Judges in Their Official Capacities	403
Problem 6-2 Extrajudicial Conduct and Judicial Selection	420
<b>B. Prosecutors and Agency Attorneys</b>	<b>432</b>
Problem 6-4 Agency Attorneys	448
Problem 6-3 Prosecutorial Ethics	432
<b>7 ISSUES IN THE DELIVERY OF LEGAL SERVICES</b>	<b>469</b>
<b>A. Marketing of Legal Services</b>	<b>469</b>
Problem 7-1 Law Firm Marketing Practices	469
Problem 7-2 Current Constitutional Issues in Lawyer Advertising and Solicitation	489
<b>B. Delivery of Legal Services to the Middle Class</b>	<b>497</b>
Problem 7-3 Removal of Restrictions on the Unauthorized Practice of Law	498
Problem 7-4 Unbundling of Legal Services	504
Comment: Legal Services Plans	507
<b>C. Delivery of Legal Services to Indigents</b>	<b>509</b>
Problem 7-5 Evaluation of Delivery of Defense Services in Criminal Cases	509
Problem 7-6 Mandatory Pro Bono and Delivery of Legal Services to Indigents in Civil Cases	513

---

<b>8</b>	<b>SPECIAL ETHICAL PROBLEMS OF LAW FIRMS</b>	<b>525</b>
<b>A.</b>	<b>A Lawyer's Obligation to Supervise Lawyers and Nonlawyers in Firms and Other Entities</b>	<b>525</b>
	Problem 8-1 The Duty to Supervise	525
	Problem 3-5 The Duty of Confidentiality and the Use of Technology	196
<b>B.</b>	<b>Organizational Form, Departing Lawyers, and Sale of a Practice</b>	<b>533</b>
	Problem 8-2 Law Firm Organization and Breakups	533
<b>C.</b>	<b>Multidisciplinary Practice, Ancillary Business Services, and Multijurisdictional Practice</b>	<b>543</b>
	Problem 8-3 Expanding Practice into Other Areas and Places	543
<b>D.</b>	<b>Discrimination and Well-Being in the Profession</b>	<b>549</b>