

Contents

Acknowledgments xxxi

About the Authors xxxv

Introduction 1

1 How to Use This Book 5

A. Read the Rules 5

B. The Ball Is in Plain Sight; Just Keep It There 7

C. Work the Problems – No, Really: Work the Problems.

Then Use the Big-Picture Takeaways and the Multiple-Choice

Review Questions at the End of the Chapters and

Chapter Sections for Review as You Prepare for Class 8

D. Follow the “Signposts” 9

E. Remember Recurring Defined Terms 12

F. Enjoy the Advantages Offered by the Digital Edition 13

G. Meet Danielle, Frank, and Maya 14

Big-Picture Takeaways from Chapter 1 16

UNIT I Working in a Regulated Profession

17

2 What Lawyers Do, and Where They Do It 19

A. Types of Work (a Gross Oversimplification) 21

1. Dispute Resolution 21

2. Transactional (“Deal”) Work 22

3. Counseling in General 23

4. Compliance and Regulatory Work 23

5. Legislative and Lobbying Work 23

B. Types of Work Environments 24

1. Law Firms: Big Firms, Small Firms, and Solo Practitioners 24

2. In-House Counsel 25

3. Government Service 26

4. Nonprofits and Public-Interest Organizations 27

Big-Picture Takeaways from Chapter 2 28

- 3 Regulating Lawyer Conduct:
Where Guidance and Consequences Come From** 29
 - A. Government Regulation of Law Practice and Admission to the Bar** 29
 - 1. The Development of Lawyer Ethics Rules:
From Professional Aspiration to Disciplinary Regulation 30
 - 2. State Regulation of Admission to Practice 33
 - a. *An Introductory Observation:
The Powers and Perils of Regulating Law Practice* 34
 - b. *Substantive Competence* 35
 - c. *“Character” Evaluation* 37
 - 3. State Government’s Regulation
of Law Practice Through Professional Discipline 41
 - 4. Federal Regulation of Law Practice 42
 - 5. Disciplinary Procedures (a Quick and Dirty Overview) 43
 - B. Civil Consequences for Violating Duties Specific to Lawyers** 46
 - 1. Professional Liability Claims for Damages 46
 - a. *Common Civil Causes of Action for Damages Asserted Against Lawyers* 46
 - b. *A Note About the Relationship Between the Rules of
Professional Conduct and the Elements of Duty and Breach
in Civil Professional Liability Cases* 49
 - c. *A Note About Causation in Civil Professional Liability Cases* 50
 - 2. Disqualification 51
 - 3. Fee Disputes 52
 - C. Monetary Sanctions and Other Liability Imposed During Litigation** 53
 - D. Civil or Criminal Liability for Violation of Duties Applicable to Everyone** 54
 - E. Informal Consequences** 55
 - F. Summary: A Taxonomy of Professional Woes** 56
 - Big-Picture Takeaways from Chapter 3** 57
 - Multiple-Choice Review Questions for Chapter 3** 59
- 4 Why Smart People Do Stupid Things:
Cognitive Biases and the Stresses of Practice** 69
 - A. Cognitive Biases** 70
 - 1. Bad Apples or Bad Barrels? The Role of Situational Pressures
and Organizational Structures 70
 - a. *The Challenges of Being a New Lawyer in an Unfamiliar Environment* 71
 - b. *The Invisibly Powerful Effect of Situational Pressures* 75
 - 2. Cognitive Biases Affecting Individual Perception and Reasoning 80

- a. *Cognitive Dissonance* 80
 - b. *Ethical Fading and Framing* 84
- B. What Should You Do If You Wake Up on the Wrong Side of the Line?** 87
- C. Coping with the Stresses of Practice** 88
 - 1. Like Law School, Lawyering Is Stressful 88
 - 2. How Do You Know When Practice Stresses Are More Than You Should Handle Alone? 90
 - 3. Getting Support 93
- D. It's Not All About You: Like It or Not, You Are Your Brothers' and Sisters' Keeper** 95
- Big-Picture Takeaways from Chapter 4** 97
- Multiple-Choice Review Questions for Chapter 4** 97

UNIT II The Attorney-Client Relationship

101

5 The Lawyer as Fiduciary 105

- A. What Does It Mean to Be a Fiduciary?** 105
- B. How Do You Know When You're a Fiduciary?** 106
 - 1. Fiduciaries by Status 106
 - 2. Fiduciaries by Circumstance 107
- C. Why Lawyers Are Fiduciaries: The Example of Sex with Clients** 108
- D. The Lawyer's Fiduciary Duties: An Overview** 112
 - 1. The Duty of Loyalty 113
 - 2. The Duty of Care 115
 - 3. The Duty of Confidentiality 116
 - 4. The Duty of Candor 117
 - a. *What You Must Disclose to Your Clients* 117
 - b. *What You Should Disclose to Your Clients* 123
 - c. *What About Your Colleagues?* 124

Big-Picture Takeaways from Chapter 5 125

Multiple-Choice Review Questions for Chapter 5 127

6 The Lawyer as Agent 131

- A. The Lawyer as Agent** 133
 - 1. An Introduction to Agency 133
 - 2. Sources of the Lawyer-Agent's Authority to Bind the Client-Principal 135

- a. *Actual Authority* 136
 - b. *Implied Authority* 140
 - c. *Apparent Authority* 141
 - d. *Ratification* 143
3. What Happens If You Exceed the Scope of Your Authority? 145
- a. *Professional Discipline* 145
 - b. *Undoing the Unauthorized Act or Agreement* 145
 - c. *Lawyer Liability* 146
4. How Lawyers Negotiate Without Exceeding the Scope of Their Authority 148

B. The Lawyer-Agent's Duties to the Client-Principal 151

C. The Division of Authority Between the Client-Principal and the Lawyer-Agent 151

1. Client Control Over the Objectives of the Representation 151
- a. *What Are the "Objectives of Representation" as Defined by Model Rule 1.2(a)?* 151
 - b. *What Kinds of Conduct Amount to a Failure to "Abide by a Client's Decisions" About an "Objective of Representation"?* 154
2. Lawyer Control (of a Sort, and Subject to "Consultation" with the Client on Material Matters) Over the "Means" by Which the Client's Objectives Are Pursued 157
- a. *The Source of Lawyer Control Over Means Decisions* 157
 - b. *The Nature and Effects of "Consultation" with the Client on Means Decisions "As Required by Rule 1.4"* 158
 - c. *Unusual Cases in Which the Client's Right to Discharge Counsel Is Limited* 161
 - d. *What Happens If the Lawyer-Agent Makes Incompetent or Careless Means Decisions?* 162

Big-Picture Takeaways from Chapter 6 163

Multiple-Choice Review Questions for Chapter 6 166

7 The Duties of Competence, Diligence, and Care 171

A. The Duties of Competence and Diligence 172

- 1. Getting Up to Speed 172
- 2. Using Forms 175
- 3. Exercising Reasonable Diligence and Promptness 178
- 4. Keeping Up 179

B. The Duty of Care 180

C. The Constitutional Right to Effective Assistance of Counsel in Criminal Cases 184

1. The Source of the Right to Effective Assistance of Counsel 184
2. When Is Defense Counsel's Assistance "Ineffective"? 185
 - a. The Strickland "Presumption of Reasonableness" or "Deficiency and Prejudice" Test 185
 - b. The Cronin "Automatic Reversal" or "Per Se" Test 191
3. What Happens If a Criminal Defendant Receives Ineffective Assistance of Counsel? 194

Big-Picture Takeaways from Chapter 7 196

Multiple-Choice Review Questions for Chapter 7 197

8 The Duty of Confidentiality 203

A. The Scope and Nature of the Duty of Confidentiality 204

1. Introduction 204
2. The Scope of the Duty of Confidentiality 206
 - a. To Whom Is the Duty of Confidentiality Owed, and When Does It Start? 206
 - b. What Must Be Treated as Confidential Information Protected by the Duty of Confidentiality? 210
 - c. What Does the Duty of Confidentiality Prohibit or Require? 217
 - d. When Does the Duty of Confidentiality End? 224
3. The Differences Among the Duty of Confidentiality, the Attorney-Client Privilege, and the Attorney Work Product Doctrine 225

Big-Picture Takeaways from Chapter 8.A 228

Multiple-Choice Review Questions for Chapter 8.A 231

B. Exceptions to the Duty of Confidentiality Found in Model Rule 1.6 235

1. The Client's Informed Consent, Express or Implied 238
 - a. Express Informed Consent 238
 - b. "Implied[] Authori[ty]" to Disclose Confidential Information "in Order to Carry Out the Representation" 239
2. Preventing Imminent and Serious Physical Harm 240
3. Preventing or Addressing Serious Economic Wrongs in Which the Client Used the Lawyer's Services 242
4. Obtaining Legal Advice About Compliance with the Lawyer's Own Legal or Ethical Obligations 243
5. Lawyer Self-Defense 246
6. To Comply with Other Law 248
7. To Allow the Lawyer to Check for Conflicts of Interest 249

C. The Limits of the Duty of Confidentiality – How Hard Cases Can Test Your Ethical Tolerance 249

Big-Picture Takeaways from Chapter 8.B-C 250

Multiple-Choice Review Questions for Chapter 8.B-C 252

9 Creation, Assumption, Disclaimer, and Termination of a Lawyer's Duties 255

A. Creation of the Attorney-Client Relationship 257

1. Why Should You Care Whether You Have an Attorney-Client Relationship with Someone? 257
2. How Do You Know Whether You Have an Attorney-Client Relationship with Someone? 259
3. What Is the Scope of Your Attorney-Client Relationship in Any Given Engagement? 262

B. Assuming Duties to Non-Clients 267

1. Assuming Duties of Confidentiality to Non-Clients 268
 - a. *Assuming a Duty of Confidentiality by Consulting with a Prospective Client in Contemplation of Possible Representation* 268
 - b. *Assuming a Duty of Confidentiality by Promise* 268
 - c. *Assuming a Duty of Confidentiality by Representing a Client with Confidentiality Obligations to Third Parties* 270
2. Assuming Duties of Care to Non-Clients 270
 - a. *Assuming a Duty of Care by Offering Advice to a Non-Client* 270
 - b. *Assuming a Duty of Care by Agreeing to Provide Services to a Client for the Benefit of a Non-Client* 273
 - c. *Assuming a Duty of Care to Third Parties by Providing Work Product on Which You Know the Client Intends Third Parties to Rely* 275

Big-Picture Takeaways from Chapter 9.A-B 276

Multiple-Choice Review Questions for Chapter 9.A-B 279

C. Disclaiming Duties 283

1. Limiting the Scope of the Engagement 284
2. Client Waivers of Future Liability 285

D. Ending the Attorney-Client Relationship 286

1. How Do You Know When It's Over (and Why Should You Care)? 286
2. Terminating Pending Engagements 288
 - a. *Getting the Permission of Any Involved Tribunal* 288
 - b. *On What Grounds May the Client Terminate the Relationship?* 294
 - c. *On What Grounds Must or May the Lawyer Terminate the Relationship?* 294
3. What If Your Client Is Continuing to Violate the Law or Otherwise Exposing Third Parties to Torts or Crimes and You to Liability? The Challenges of the "Noisy Withdrawal" 298
4. What Are a Lawyer's Duties Upon Termination? 301
 - a. *"Giving Reasonable Notice to the Client [and] Allowing Time for Employment of Other Counsel"* 302

- b. “Refunding Any Advance Payment of Fees or Expenses That Have Not Been Earned or Incurred” 302
- c. “Surrendering Papers and Property to Which the Client Is Entitled” 303
- d. Other Steps to Ensure a Reasonably Smooth Transition to Successor Counsel 308

Big-Picture Takeaways from Chapter 9.C-D 309

Multiple-Choice Review Questions for Chapter 9.C-D 313

UNIT III Duties to Third Parties and the Public

319

10 Avoiding Misrepresentation 321

A. The Scope of Rule 4.1: Communications and Failures to Disclose

by “A Lawyer” “To a Third Person” Made “In the Course of Representing a Client” 323

B. What Qualifies as a “False Statement of Material Fact”

Under Model Rule 4.1(a)? 324

1. A “Statement” 324
2. “Material” 325
3. “Factually False” (in General) 325
4. “Factually False” in the Context of Negotiation – Statements of Position vs. Statements of Fact 327
5. “Knowingly” 329

C. Knowing “Fail[ure] to Disclose a Material Fact” When Necessary to Avoid Client Crime or Fraud Under Model Rule 4.1(b) 329

1. Knowing “Fail[ure] to Disclose a Material Fact” 329
2. When Disclosure Is “Necessary to Avoid Assisting a Criminal or Fraudulent Act by a Client” 330
3. When Disclosures Are “Prohibited by Rule 1.6” 331

Big-Picture Takeaways from Chapter 10 332

Multiple-Choice Review Questions for Chapter 10 333

11 Duties to People Who Have (or Must Be Treated as If They Had) Their Own Lawyers 339

A. Who Has to Follow the No-Contact Rule? 343

B. Who Is Protected by the No-Contact Rule – When Is Someone

“Represented by Another Lawyer” Within the Meaning of the Rule? 344

1. Direct Retention of Personal Counsel 344
2. Protection of an Organizational Constituent Through Organization Counsel Without Actual Personal Representation 345
 - a. *When Is an Organization “Represented” So That Some of Its Constituents Are Protected by the No-Contact Rule?* 347
 - b. *When the Organization Is “Represented,” Which Constituents Are Protected?* 348
- C. When Do You “Know” Someone Is Represented by Other Counsel?** 352
- D. When Are You “Communicat[ing]” with a Protected Person?** 354
- E. How Do You Know When the Other Lawyer Has “Consent[ed]” to Your Communicating with That Lawyer’s Client?** 356
- F. What Communications with a Protected Person Are Permitted *Without Counsel’s Consent*?** 358
 1. Communications Not Concerning “the Matter” with Respect to Which the Contacted Person Is Protected 358
 2. Communications as a Party 359
 3. Communications with Someone You Also Represent or Are Asked to Represent 359
 4. Communications Authorized by Law or Court Order 360
 - a. *Statutory Authorization of Governmental Lawyers for Certain Prefiling Investigative Purposes* 360
 - b. *Communication with Represented Governmental Agencies or Officers* 361
 - c. *Collective Proceedings Such as Class Actions* 362
- G. What Happens If You Violate the No-Contact Rule?** 362
 1. Professional Discipline 362
 2. Nondisciplinary Consequences When the Information-Protective Purpose of the Rule Is Violated 363
 - a. *Disqualification* 363
 - b. *Evidentiary or Other Informational Sanctions* 364
 - c. *Monetary Sanctions* 366
 3. Nondisciplinary Consequences When the Decision-Protective Purpose of the Rule Is Violated – Relief from Client Action Obtained in Violation of the Rule 366
- Big-Picture Takeaways from Chapter 11** 367
- Multiple-Choice Review Questions for Chapter 11** 368

12 Duties to Unrepresented Persons 373

- A. How Do You Violate the Protections for Unrepresented Persons (or Better Yet, How Do You *Avoid* Violating Them)?** 376
 1. Creating or Failing to Dispel Misimpressions Regarding your Role 376

2. Giving Advice to Unrepresented Persons 379
 - a. *When the Unrepresented Person's Interests "Are or Have a Reasonable Possibility of Being in Conflict" with Your Client's Interests* 379
 - b. *When You "Know or Reasonably Should Know" About the "Reasonable Possibility" of a Conflict Between Your Client's Interests and the Interests of the Unrepresented Person* 380
 - c. *When You Are Giving "Legal Advice" to an Unrepresented Person as Opposed to Making Statements of Fact or Negotiating Position* 381
3. Requesting That Someone Withhold Relevant Information 384

B. What Happens If You Violate the Rules Protecting Unrepresented Persons? 385

1. Professional Discipline 385
2. Nondisciplinary Consequences When the Information-Protective Purpose of the Rules Is Violated 385
3. Nondisciplinary Consequences When the Decision-Protective Purpose of the Rules Is Violated – Relief from Action Obtained in Violation of the Rules 386

Big-Picture Takeaways from Chapter 12 386

Multiple-Choice Review Questions for Chapter 12 387

13 Involvement in a Client's Wrongdoing: Advising, Assisting, Condoning, Aiding and Abetting, Conspiring 391

A. The Ethical Prohibition on Advising or Assisting a Client to Engage in Illegal Conduct 392

1. May We Ever Counsel or Assist a Client to Break the Law? 393
2. A Client Proposes Something Unlawful. How Must or Should We Respond? 394
3. A Client Insists on or Persists in Doing Something Unlawful Without Telling Us, or Despite Our Advice Not To. What Now? 396
4. We Develop Concerns That a Client May Be Doing or Planning Something Unlawful. How Must or Should We Respond? 398

B. Nondisciplinary Consequences of Involvement in a Client's Wrongdoing 401

1. Vicarious Criminal Liability 402
2. Vicarious Civil Liability 403

Big-Picture Takeaways from Chapter 13 405

Multiple-Choice Review Questions for Chapter 13 407

14 Unnecessarily Embarrassing, Delaying, or Burdening Others 413

A. Tactics with No Substantial Purpose Other Than to Embarrass, Delay, or Burden a Third Person 415

1. "In Representing a Client" 415
2. "Third Persons" 415
3. "No Substantial Purpose Other Than to Embarrass, Delay, or Burden" 416
4. "Embarrass, Delay, or Burden" 417

B. Court Sanctions and Civil Liability for Conduct of the Kind Prohibited by Model Rule 4.4(a) 420

C. The Constitution's Uncertain Role in Limiting Regulation of Abusive Lawyer Conduct 420

Big-Picture Takeaways from Chapter 14 423

Multiple-Choice Review Questions for Chapter 14 424

15 Avoiding Invidious Discrimination 427

A. Understanding Model Rule 8.4(g) 428

1. "Harassment or Discrimination on the Basis of" Protected Status 429
2. "Knows or Reasonably Should Know" 431
3. "In Conduct Related to the Practice of Law" 431
4. Other Scope Limitations 431

B. Understanding Why Model Rule 8.4(g) Is Controversial 433

Big-Picture Takeaways from Chapter 15 435

Multiple-Choice Review Questions for Chapter 15 436

16 Threatening to Report and Reporting Wrongdoing 439

A. Threats 440

B. Presenting Criminal Charges to Gain Advantage in a Civil Matter 444

C. Consequences for Improper Threats 445

D. Reporting Another Lawyer's Wrongful Conduct 446

1. "Knows" 447
2. "Another Lawyer" 447
3. "A Violation of the Rules of Professional Conduct That Raises a Substantial Question as to That Lawyer's Honesty, Trustworthiness or Fitness as a Lawyer in Other Respects" 447
4. "Shall Inform the Appropriate Professional Authority" 447
5. Exceptions to the Mandatory Reporting Requirement 448
 - a. "Information Otherwise Protected by Rule 1.6" 448
 - b. "Information Gained . . . While Participating in an Approved Lawyers Assistance Program" 448
6. Consequences for Violation of Model Rule 8.3 449

Big-Picture Takeaways from Chapter 16 451

Multiple-Choice Review Questions for Chapter 16 452

17 Offering or Agreeing to Restrict Your Future Practice 455

A. The Prohibition on Lawyers' Offering or Agreeing to Restrict Their Future Practice as Part of the Settlement of a Client Controversy 457

1. "Shall Not" 457
2. "Participate in Offering or Making" 457
3. "An Agreement . . . That Is Part of the Settlement of a Client Controversy" 457
4. "An Agreement in Which a Restriction on the Lawyer's Right to Practice Is Part of the Settlement" 458
5. Why Does Model Rule 5.6(b) Forbid the Agreements That It Does? 458
6. Consequences of Violating Model Rule 5.6(b) 460

B. Organizational or Employment Agreements That Restrict a Lawyer's Practice Upon Changing Jobs 462

Big-Picture Takeaways from Chapter 17 466

Multiple-Choice Review Questions for Chapter 17 467

18 Advertising and Solicitation 473

A. A Brutally Short History of the Regulation of Lawyer Advertising, and an Equally Short Summary of the Constitutional and Other Safeguards Limiting State Bars' Regulatory Powers 474

B. The Prohibition on False or Misleading Communications 477

1. "Communications" 477
2. "False or Misleading" Communications 477
 - a. *In General* 477
 - b. *The Organized Bar's Continuing Aversion to Lawyer Advertising* 478
 - c. *Categories of Communications That State Bars Condemn as "False or Misleading," Whether All of Them Are or Not* 481

C. Prohibited Economics and Mechanics 485

1. *Quid Pro Quos*; "Capping" and "Running" 485
2. Advertising Mechanics 488

D. Solicitation 488

1. Solicitation Defined 488
2. Types of Solicitation That Are Prohibited 489
 - a. *Live Person-to-Person Contact for Profit* 490

- b. *Contacting Someone Who Has Discouraged Solicitation* 491
- c. *Any Solicitation Involving Coercion, Duress, or Harassment* 492
- d. *Any Solicitation That Is Materially False or Misleading* 492
- 3. *Consequences of Engaging in Prohibited Solicitation* 492
- E. Lawyer Advertising in the Wild** 493
- Big-Picture Takeaways from Chapter 18** 496
- Multiple-Choice Review Questions for Chapter 18** 498

UNIT IV Some Realities of Practice

503

19 The Organizational Environment 505

- A. Defining a Practice Organization** 506
- B. The Duty of Each Individual Lawyer Within a Practice Organization to Comply with Applicable Rules of Professional Conduct and Other Law** 507
 - 1. *The Broad Rule of Individual Responsibility* 507
 - 2. *The Narrow Exception for Complying with a Supervisor's Reasonable Resolutions of Genuinely Arguable Questions of Professional Duty* 509
- C. The Duties to Manage and Supervise** 513
 - 1. *The Duty to Manage Other Lawyers* 514
 - 2. *The Duty to Manage Nonlawyers* 515
 - 3. *The Duty to Supervise Other Lawyers* 515
 - 4. *The Duty to Supervise Nonlawyers* 516
 - 5. *The Vicarious Disciplinary Liability of Managerial and Supervisory Lawyers for the Misconduct of Those Whom They Manage or Supervise* 516
 - 6. *Consequences for Failing to Manage or Supervise (or Causing a Subordinate to Act Unlawfully)* 517
- D. The Duty to Be Supervised Appropriately (in Other Words, the Duty to Get Help When You Need It)** 520
- E. Lawyers' Obligations to Their Practice Organizations** 523
 - 1. *The General Duty of Loyalty That Lawyers Owe Their Practice Organizations* 523
 - 2. *Conflicting Duties and Interests That May Arise When a Lawyer Changes Jobs* 525
- Big-Picture Takeaways from Chapter 19** 527
- Multiple-Choice Review Questions for Chapter 19** 531

20 Fees and Fee-Sharing 535

- A. Fees and Expenses 536
- B. Common Fee and Expense Arrangements, and the Formalities Necessary to Make Them Enforceable 537
 - 1. Regular Salary or Wages 537
 - 2. Flat-Rate Fees 538
 - 3. Hourly Fees 540
 - 4. Contingent Fees 541
 - 5. “Alternative” Fee Arrangements 544
- C. Substantive Limits on Fees and Expenses 546
 - 1. The General Prohibition on Unreasonable Fees or Expenses 546
 - 2. Prohibited Contingent Fees and Other Substantive Limits 550
- D. Consequences for Violating Formal or Substantive Requirements Regarding Fees or Expenses 554
- E. Retainers and Deposits, and Their Role in Fee and Expense Arrangements 556
 - 1. “True” Retainers 556
 - 2. Retainers as Security 557
- F. Sharing Fees 558
 - 1. Sharing Fees with Other Lawyers 559
 - 2. Sharing Fees with Nonlawyers 560
- Big-Picture Takeaways from Chapter 20 563
- Multiple-Choice Review Questions for Chapter 20 566

21 Safeguarding, Segregating, and Accounting for Others’ Funds and Property 573

- A. Background: The Lawyer’s Three Basic Duties with Other People’s Money and Property, and the Tools That We Use to Comply with Them 574
 - 1. The Lawyer’s Three Basic Duties with Other People’s Money and Property 574
 - 2. Tools for Compliance: The Two Kinds of Bank Accounts That Lawyers Maintain 575
- B. The Duty to Safeguard 577
- C. The Duty to Segregate 578
 - 1. Generally 578
 - 2. Avoiding Commingling 579
 - a. Combining Different Clients’ and Third Parties’ Funds in a Single Trust Account Is Permitted 580

- b. *Keeping a Small Amount of Your Own Money in Your Trust Account to Cover Anticipated Routine Banking Charges Is Permitted* 580
- c. *Interest on Trust Accounts* 581
- d. *When Ownership of Money in a Trust Account Changes, the Money Must Be Promptly Handled in Accordance with the Change in Ownership* 581
- e. *Funds That Arrive in Your Hands Pre-Commingled in a Single Instrument May Be Deposited in Your Trust Account and Then Segregated When the Funds Are Available* 583
- f. *Disputed Funds: You Must Not Pay Out Funds Subject to Any Colorable Claim or Dispute to Yourself or Any Third Party; You May Hold Disputed Funds in Your Trust Account Until the Dispute Is Resolved* 585

D. The Duty to Account 586

- 1. *Delivering Others' Property* 586
- 2. *Notifying Others When You Are in Possession of Their Property* 586
- 3. *Maintaining Detailed Records in Proper Form, and Providing Them to Those Legitimately Interested on Request* 587

Big-Picture Takeaways from Chapter 21 589

Multiple-Choice Review Questions for Chapter 21 590

UNIT V Challenges and Complications When Duties and Interests Collide

597

22 Conflicts of interest 599

A. Conflicts of Interest Created by Conflicts Between

the Lawyer's Personal Interests and a Client's Interests 603

- 1. *Forbidden Financial Assistance to Litigation Clients* 604
 - a. *The General Rule: Financial Assistance to a Litigation Client Is Forbidden* 606
 - b. *Implicit Exceptions to the General Prohibition on Lawyers' Providing Financial Assistance to Clients* 609
 - c. *Express Exceptions to the General Prohibition on Lawyers' Providing Financial Assistance to Clients* 609
- 2. *Forbidden Conduct in Connection with Gifts and Bequests from Clients* 612
- 3. *Forbidden Negotiation for or Acquisition of Literary or Media Rights Related to the Engagement While the Engagement Is Pending* 615
- 4. *Forbidden Acquisition of Proprietary Interests in the Client's Cause of Action or in the Subject Matter of the Litigation* 616
- 5. *Substantive and Formal Requirements for Those Transactions with Clients That Are Not Forbidden* 617
 - a. *The Scope of Model Rule 1.8(a): Any "Business Transaction with a Client," or Any Acquisition of Any Kind of Proprietary "Interest Adverse to a Client"* 618
 - b. *Implicit Exceptions to the Scope of Model Rule 1.8(a)* 619
 - c. *What Model Rule 1.8(a) Requires in the Transactions That It Covers* 622

6. Restrictions on Situations in Which There Is a “Significant Risk” That the Representation of a Client Will Be “Materially Limited” by a “Personal Interest of the Lawyer” 626
 - a. *Close Personal Relationships* 627
 - b. *Other Personal Interests Creating Significant Risks of Material Effects on the Lawyer’s Conduct* 629
7. Summary: Situations Creating Conflicts of Interest Between a Lawyer’s Personal Interests and a Client’s Interests That Are Regulated by the Model Rules of Professional Conduct 632

Big-Picture Takeaways from Chapter 22.A 634

Multiple-Choice Review Questions for Chapter 22.A 639

B. Conflicts of Interest Created by Current Clients and Grounded in the Duty of

Loyalty: The “Concurrent Client Rule” 645

1. The “Concurrent Client Rule” 646
2. When Is a Client a Current Client? 648
 - a. *Generally* 648
 - b. *The “Hot-Potato Rule”* 650
3. Concurrent Conflicts of Interest Created by “Direct Adversity” Between Concurrent Clients: When Are Concurrent Clients’ Interests “Directly Adverse”? 651
4. Indirect Concurrent Conflicts of Interest Created by a “Significant Risk” That the Interests of Concurrent Clients May Conflict and “Materially” Limit the Lawyer’s Ability to Represent All Concurrent Clients with Undivided Loyalty 654
 - a. *Concurrent Conflicts of Interest Created by Current Duties or Connections to Clients or Others Not Directly Adverse to Your Client* 655
 - b. *Concurrent Conflicts of Interest Created by Possibilities of Future Direct or Serious Indirect Concurrent Conflicts That Do Not Currently Exist, and May Never Develop, Including Joint Representations* 656
5. What Happens If You Have or Develop a Concurrent Conflict of Interest? 663

Big-Picture Takeaways from Chapter 22.B 667

Multiple-Choice Review Questions for Chapter 22.B 670

C. Conflicts of Interest Grounded in the Duty of Confidentiality: The “Successive Client” or “Former Client Rule” (Which, Ironically, Also Applies to Current Clients and Prospective Clients) 678

1. The “Successive Client” or “Former Client Rule” 679
 - a. *The Basic Protection Afforded Former Clients* 679
 - b. *Extension of the Successive Client Rule to Prospective Clients and Current Clients* 681
 - c. *A Practical Paraphrase of the Successive Client Rule* 682

2. How We Know When the Lawyer's New Engagement Is in "the Same or a Substantially Related Matter": The "Substantial Relationship" Test 683
 - a. *Why Setting and Applying a Standard Is Difficult* 683
 - b. *The "Substantial Relationship" Test* 684
 - c. *The "Playbook Information" Problem* 688
3. What Happens If You Violate the Successive Client Rule? 690

Big-Picture Takeaways from Chapter 22.C 692

Multiple-Choice Review Questions for Chapter 22.C 695

D. Imputation and Screening 701

1. What Imputation Is 702
2. When Imputation Is *Conclusively* Presumed 704
3. When Imputation Is Only *Rebuttably* Presumed, How It May Be Rebutted, and Why You Should Care 705
 - a. *Why Imputation of a Conflict of Interest Should Not Always Be Conclusively Presumed, and Why You Should Care* 705
 - b. *Situations in Which the Presumption of Imputation May Be Rebutted by Specific Situational Facts* 707
 - c. *Situations in Which the Presumption of Imputation May Be Rebutted by a Timely Implemented and Properly Maintained Ethical Screen* 716

Big-Picture Takeaways from Chapter 22.D 729

Multiple-Choice Review Questions for Chapter 22.D 732

E. Addressing Conflicts of Interest Through Abstention or Client Consent 733

1. Abstaining or Withdrawing from a Conflicted Engagement 736
2. Addressing a Conflict of Interest Through All Affected Clients' Informed Consent 738
3. When Is a Conflict of Interest Consentable? 739
4. What's Required to Make Client Consent to a Conflict of Interest Effective? 741
 - a. *Substantive Requirements for an Effective Conflicts Waiver: Informed Consent, Including Full Disclosure and Explanation of All Information Necessary to Make an Informed Decision, Such as the Risks of Consent and the Client's Right to Withhold Consent* 743
 - b. *Formal Requirements for an Effective Conflicts Waiver: The Disclosure and Consent Must Be Confirmed in Writing and Should Be Made in a Writing Signed by the Client* 751

F. How to See Conflicts of Interest Coming 753

Big-Picture Takeaways from Chapter 22.E-F 757

Multiple-Choice Review Questions for Chapter 22.E-F 760

23 Representing Organizations and Their Constituents 769

A. Knowing Who (or What) Your Client Is 770

1. Can You Represent an Organization and One or More of Its Constituents at the Same Time? 772
2. A Common Problem in Choosing and Identifying Your Client(s): Organizational Formation 777
3. How We Must Interact with Organizational Constituents Whom We Don't Represent: The "Corporate *Miranda*" or "Upjohn Warning" 781
 - a. What Triggers the Requirement for an Upjohn Warning? 782
 - b. What Information Must an Upjohn Warning Contain? 785
 - c. At What Point in Organization Counsel's Interaction with an Unrepresented Constituent Must an Upjohn Warning Be Given? 786
 - d. In What Form Must or Should an Upjohn Warning Be Given? 786
 - e. What Consequences Can Result from the Failure to Give a Timely or Complete Upjohn Warning? 786
4. Acting as Organization Counsel When Constituents Are in Conflict 789

B. Reporting Trouble "Up" or "Out" 791

1. "Reporting Up" 792
2. "Reporting Out" 798

Big-Picture Takeaways from Chapter 23 802

Multiple-Choice Review Questions for Chapter 23 808

24 Ethics in Advocacy 813

A. Working in an Adversary System as an "Officer of the Court" 814

B. Gathering and Handling Evidence 816

1. Investigation Must Be Conducted Lawfully 816
2. Discovery Conduct and Misconduct 821
3. Retaining and Handling Evidence 821
 - a. Refraining from Unlawfully Obstructing Access to, Hiding, Altering, or Destroying Evidence 821
 - b. Counsel's Role in Avoiding Spoliation 822
 - c. Counsel's Obligations as a Custodian of Material with Potential Evidentiary Value 827
 - d. Counsel's Obligations Upon Receipt of Material That Appears to Have Been Inadvertently Disclosed 828

Big-Picture Takeaways from Chapter 24.A-B 834

Multiple-Choice Review Questions for Chapter 24.A-B 836

C. Limits on Advocacy 841

1. Preserving the Impartiality and Decorum of the Tribunal 841

2. Limits on Asserting or Contesting Claims, Defenses, or Legal or Factual Issues 845
3. Limits on Miscitation of Legal Authority 850
4. Publicity Before and During Trial 853
5. Lawyer as Witness 857
6. Limits on Examination and Argument 860
7. The Duty of Candor to the Tribunal and the Duty to Correct 862
 - a. *You Must Not Make Misrepresentations to a Tribunal Yourself* 862
 - b. *You Must Not Present False Evidence, or Encourage or Assist Others to Do So* 864
 - c. *The Duty to Correct* 878
 - d. *The Special Rule of Extra Candor in Ex Parte Proceedings* 882

Big-Picture Takeaways from Chapter 24.C 883

Multiple-Choice Review Questions for Chapter 24.C 890

25 The Government Lawyer 907

A. What Do Government Lawyers Do? 908

B. What Ethical Rules Apply to Government Lawyers? 909

C. Situations Common to Government Practice That Complicate

the Application of Generally Applicable Professional Conduct Rules 911

1. Identifying Your Client 911

- a. *Witnesses, Helpers, and Victims (Oh My!)* 912
- b. *The Identity of a Government Client, and of the Government Official Ultimately Empowered to Direct and Speak for the Client* 913
- c. *The Identity of Your Client When You're Defending Government Actors* 915

2. Recognizing and Responding to Conflicts of Interest 921

- a. *Avoiding Direct Adversity to a Current Government Client* 921
- b. *Avoiding a Significant Risk of a Material Limitation on the Representation of a Government Client* 922

D. Special Rules of Professional Conduct

Uniquely Applicable to Government Lawyers 925

1. Special Obligations for Government Lawyers Found Outside the Rules of Professional Conduct 925

2. Special Rules of Professional Conduct Governing Conflicts of Interest for Lawyers Moving from Government Work into Private Practice or Vice Versa (Sometimes Referred to as "Revolving Door" Rules) 927

- a. *Concurrent Conflicts for Government Lawyers* 928
- b. *Successive Conflicts for Government Lawyers* 930
- c. *Conflicts Created as Government Lawyers Leave Government Service* 938

3. Rules of Professional Conduct Delineating the Special Role and Duties of Prosecutors 940
 - a. *Charging Only Those Defendants and Crimes for Which the Prosecutor Has a Proper Legal and Factual Basis* 941
 - b. *Assuring That the Defendant Has a Fair Opportunity to Exercise Pretrial Constitutional and Other Procedural Rights* 944
 - c. *Limiting Intrusion into Others' Attorney-Client Relationships* 948
 - d. *Trial Publicity* 949
 - e. *Remedying Unjust Convictions* 950

Big-Picture Takeaways from Chapter 25 956

Multiple-Choice Review Questions for Chapter 25 964

UNIT VI Judicial Ethics

971

26 Judicial Ethics 973

A. Regulation of Judicial Conduct 974

B. The ABA Model Code of Judicial Conduct 976

1. Canon 1: Independence, Integrity, and Impartiality 977
2. Canon 2: Competence, Diligence, and Impartiality (Again) 980
 - a. *Competence and Diligence* 980
 - b. *Decorum* 981
 - c. *Management and Supervision of Court Staff, and Oversight of Other Judges and Counsel* 982
 - d. *Impartiality* 984
3. Canon 3: Personal and Extrajudicial Activities 1003
 - a. *Extrajudicial Interactions with Government* 1003
 - b. *Financial, Business, or Remunerative Activities* 1004
 - c. *Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities* 1007
 - d. *Receipt of Gifts, Bequests, Loans, Benefits, and Other Things of Value* 1010
 - e. *Reporting (Public Disclosure) of the Fruits of Extrajudicial Activities* 1014
4. Canon 4: Limits on the Conduct of Candidates for Judicial Office 1015

Big-Picture Takeaways from Chapter 26 1021

Multiple-Choice Review Questions for Chapter 26 1025

Glossary of Recurring Defined Terms 1031

Table of Cases 1043

Index 1047