

NORTHEASTERN UNIVERSITY LAW SCHOOL

PROFESSIONAL RESPONSIBILITY

SPRING QUARTER 2010

Arnold R. Rosenfeld, Esq.

CLASS SCHEDULE AND READING ASSIGNMENTS

I. BOOKS REQUIRED

- A. Hazard, Koniak, Cramton, Cohen (Hazard), *The Law and Ethics of Lawyering*, 4th Ed. (2005) (Foundation Press)
- B. Gillers and Simon, *Regulation of Lawyers*, Statutes and Standards, Concise Edition 2009, (Aspen Publishing), or Morgan & Rotunda, *2010 Selected Standards on Professional Responsibility* (Foundation Press).

II. CLASS TOPICS AND READING ASSIGNMENTS ¹

**Class 1 & 2: Introduction to Professional Responsibility;
(MARCH 2 & 4) **Formation and Termination of the Attorney- Client Relationship, Fees; Advertising****

- A. Hazard: pp. 1-3; 13-20; p. 932 (Ohralik); p. 933 (Primus); p. 934 (Shapero); p. 842 (Togstad); p. 762 (Fordham); p. 767 (Brobeck); p. 783 (Gallaher); p. 784 (Gagnon); pp. 835-842.
- B. Preamble, Scope, & Terminology of the Model Rules (scan)
- C. Model Rules: 1.5; 1.16; 1.18; 7.1 thru 7.5.
- D. Problem 1- Married Couple/Friends

¹ The dates are heuristic. I sometimes am traveling, have to appear in court, or have depositions on days of scheduled classes. While I try to avoid these events class days, I do not have total control over my schedule.

I have limited the reading assignments in Hazard, et al., with the hope that all students, at a minimum, will read the cases and other assignments that are referenced. Students will be called upon to discuss the cases and/or rules in class and knowledge of them will be necessary for the course examination. If you want some additional context to the cases and issues, I would suggest you read the accompanying notes and/ or the chapters in which you find the cases.

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)
(CLASS TOPICS AND READING ASSIGNMENTS-CONT'D)

Class 3 & 4: Conflicts of Interest -Concurrent & Successive Representation;
(MARCH 9 & 11)

- A. Hazard: pp. 389-398; p. 398 (Westinghouse); p. 413 (Fiandaca); p. 433 (Cuyler v. Sullivan); pp. 439-442 (Mickens); p. 447 (Callahan); p. 461 (Brennans); p. 476 (Nemours); p. 497 (SIPC v. Vigman);
- B. Model Rules: 1.7 thru 1.13.
- C. Problem 2- Banks and Bunks;

Class 5 & 6. A/C Privilege, Work Product, and Client Confidentiality
(MARCH 16 & 18)

- A. Hazard: pp. 257-264; p. 264 (Upjohn); pp. 279-284 (Work Product); p. 284 (Fisher); p. 302 (Lewinsky); p. 312 (Purcell) p. 320 (Columbia Healthcare); pp. 344-349; p. 349 (Meyerhoffer); p. 357 (O.P.M.).
- B. Model Rule 1.6
- C. Problem 3- The Flooded Basement

Class 7 & 8. Candor to the Tribunal and Others; Conformity to the Law,
(MARCH 23 & 25)

- A. Hazard: p. 654 (Freedman Article); p. 634 (Crary); pp. 635-639; p. 639 (Nix v. Whiteside); p. 3 (Spaulding v. Zimmerman); p. 27 (Stenach); p. 61 (Gellene); p. 81 (Cintolo) p. 83 (Andersen)(also read, Andersen v. U.S., 125 S.Ct. 2129 (2005); p. 90 (Greycas);
- B. Model Rules: 1.2(d)(e); 3.3, 3.4, 4.1; 8.4.

Class 9: Corporate Fraud & the SEC;
(MARCH 30)

- A. p. 152 (ACC/Lincoln); p. 163 (FDIC v. O'Melveny & Myers); p. 171 (Nat'l Student Marketing); p. 186 (Carter & Johnson); p. 189 (Gutfreund); p. 191 (Klein v. Boyd); p. 207 (Enron); Hazard: p. 457
- B. Model Rules: 1.2(d), 1.13 (d), 2.3; 8.4

Class 10: Competence, Malpractice, & Ineffective Assistance
(APRIL 1)

- A. (Togstad); p. 90 (Greycas); p. 856 (Lucas v. Hamm); p. 859 (Smith v. Lewis); pp. 865-872; p. 874 (Strickland v. Washington)
- B. Model Rules: 1.1, 1.3, 1.4;

Class 11 & 12: Conflict of Interest- Representing the Organization
(APRIL 6 & 8)

- A. Hazard: p. 519 (Meehan v. Hopps); p. 525 (Yablonski); p. 543 (Fassihi); p. 553 (Fickett). p. 568 (Paridigm Ins.); pp. 582-592; p. 611 (Amchem).
- B. Model Rules: 1.7, 1.8, 1.13, 1.14.
- C. Problem 4- The Muses

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)
(CLASS TOPICS AND READING ASSIGNMENTS-CONT'D)

Class 13: **Duties to Clients and Non-Clients;**
(APRIL 13)

- A. Hazard: p. 821 (Int'l Telemeter Corp.); p. 828 (Jones v. Barnes); p.721 (Messing & Rudavsky v. Harvard));
- B. Model Rules: 1.4, 4.1, 4.2-4.4, 1.2(d);

CLASS 14: **Criminal Prosecutors and Defense Lawyers; Public Comment**
(APRIL 15) **About Cases;**

- A. Hazard: p. 1004 (Gentile v. State Bar of Nevada)
- B. Model Rules 3.6; 3.8

Class 15 & 16: **Duties to Courts, Frivolous Claims, Rule 11, Litigation**
(APRIL 20 & 22) **Conduct; Professionalism;**

- A. Hazard: pp. 659-670; pp. 670-676 (Golden Eagle Discussion); p. 686 (Freedman v. Dozor); pp. 696-708; pp. 407, 414; pp. 434-445; pp. 553-557.
- B. Model Rules, 1.15; 3.1, 3.2,3.3, 3.4, 4.4, 8.4
- C. Problem 5- The Ring and the Stock Market; Problem 6- Abusive Litigation Conduct-Curry, Crossen, Donahue

Class 17: **Client Property; Lawyer Client Transactions**
(APRIL 27)

- A. Hazard: pp. 800 (Mershon)
- B. Model Rules: 1.8; 1.15

Class 18 & 19: **Bar Discipline; Legal Education; Bar Admissions; Bar**
(APRIL 29&) **Associations; Multi-Disciplinary and Multi-Jurisdictional**
(MAY 4) **Practice; Judicial Ethics**

- A. Hazard: p. 1037 (Hale); p. 1149 (Masters); p. 1155 (Himmel); pp. 1142-1153; 1116-1122; pp 1122-1134. pp. 804-817; Gillers & Simon or Morgan & Rotunda: ABA Code of Judicial Conduct; Selected Federal Statutes on Disqualification and Discipline of Judges.
- B. Rule 8.4;

CLASS 18: COURSE REVIEW
(MAY 6)

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)

COURSE EXPECTATIONS

I. Your Word

There will be a number of occasions during this course where you will be asked to give your word that your representation of facts is true. I will accept your statements, both oral and written, as being true unless I learn otherwise. If I do learn otherwise, I will report you to the Associate Dean for misconduct. I do not say this as a threat, but to stress to you the critical importance of a lawyer making true and accurate statements.

II. Attendance:

I will expect students to attend class on a regular basis. This term I will take attendance for each class by handing around a piece of paper for individuals to sign and I will keep a record of attendance. If you are absent and have a good reason, please email me with the reason at arnie.rosenfeld@klgates.com.

III. Class Participation

I expect you to do the reading prior to the class. I will call upon students by going around the room and will expect you to be prepared to respond when called upon. If you are not ready to speak on the assigned cases, please say so. I am interested in your ideas, and if you disagree with me about some interpretation of the law, don't be afraid to speak up.

IV. The Exam

I normally give a take-home open book examination. In the instructions to the examination, I state that you must work alone, without help from anyone. I will take your word that you will not hand in an examination that violates these instructions. (See, paragraph # I, above)

V. Make-up Classes

This schedule assumes that we will have all the classes as scheduled and that I will not be away or on trial for some scheduled classes. This schedule therefore is subject to change and if necessary, I will schedule a make-up class or classes.

VI. Extra Help or Questions

If you have questions or want extra help, you may approach me before or after class, or call and schedule an appointment to see me in my office (K & L Gates LLP at One Lincoln St. in Boston). My email address is arnie.rosenfeld@klgates.com and it is my preferred method of communication. My office number is (617) 951-9125. You may also call me at home in the evening at 617-312-4576.

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)

PROBLEM 1: MARRIED COUPLE/FRIENDS

You are a close friend of both John and Mary, a married couple. You have known each of them independently since high school and you attended their wedding, which took place two years ago.

John called you last night. He asked you to "cover" for him if Mary called you or if she ever asked you to confirm that he had been with you that night. He asked you to say that you had been with him talking from 8-11 P.M. John also asked you not to require him to explain anything more now. He did say it involved another woman and that he would tell you more at some other time, if you wished.

1. What would you tell John?
2. What, if anything, would you say to Mary:
 - a. if she called and asked you if you were with John?
 - b. if she didn't call and ask you if you were with John?
 - c. if she called and told you she and John were having problems and she needed advice since you knew John so well?
3. What impact do you think this request would have on your relationship with John and Mary?
4. Would it make any difference if you were friendlier with either John or Mary?
5. Would it make any difference if either John or Mary were related to you?

Please be prepared to explain what alternatives you would consider in responding to each question and the values you would apply in deciding how to respond.

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)

PROBLEM 2- BANKS and BUNKS

You have been hired to represent Bank One in its commercial lending work. A loan they made to International Bunk Co. is in default and they ask you to foreclose. You have occasionally done work for International Bunk, representing them in union negotiations, but you have nothing currently pending and you are not on a retainer with them. However, just to be diplomatic, you call the president of International Bunk to inform him of the situation. He isn't too happy at all that you will be suing him. He tells you he thought of you as International Bunk's lawyer insofar as labor issues were concerned and he also thought of you as a friend.

Meanwhile, your next-door neighbor tells you he has been hit with a late payment penalty on his home mortgage with Bank Two. He wants to obtain a declaratory judgment that such agreements are illegal. You accept a retainer from him and file suit against Bank Two. Soon thereafter, you receive a call from Bank One, asking you to drop the case. They tell you they want late payment clauses left the way they are because they are a large source of revenue.

What are the professional responsibility issues?

PROFESSIONAL RESPONSIBILITY- (PROF. ROSENFELD)

PROBLEM 3- THE FLOODED BASEMENT

Your longtime client, Carter, recently came to your office to tell you he expects to be sued by the person who bought his house. He told you that he had told the buyer that the house had a dry basement. He also told you that although the basement had never flooded in the five years he had lived there, the prior owner had told him that the basement regularly flooded after a heavy rain. He further told you that since he had sold the house to the new owner, there had been such a heavy rain, and the new owner's furniture has been seriously damaged.

Shortly before his death, you interviewed the prior owner of the house who told you that he had told Carter about the tendency of the house to flood when there was a heavy rain. You made notes of that interview. In your notes are your comments on the prior owner's likely credibility at trial. In addition, while at a party at a friend's home, Carter's banker lets you know that Carter is in bad financial condition. You mentally file away that information as important to your settlement posture in case Carter is sued.

The buyer has now filed suit against Carter. The buyer has subpoenaed you to give a discovery deposition in the case. You expect to be asked what Carter told you about whether his house tended to flood. You also have been asked to produce your notes of the statement you took from the prior owner. In addition, one of your friends, who is going into an investment with Carter, has asked you informally if the rumors that Carter has suffered financial reverses are true.

Which, if any, of the above pieces of information are protected by attorney-client privilege and/or work product?

What information is confidential pursuant to MR 1.6?

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)

PROBLEM 4 THE MUSES

Attorney Phoenix takes on a client, Clio Muse, who runs an unincorporated computer software company that makes software for the Internet. At the first meeting with Clio, Phoenix learns that Clio got the idea for the software from her sister, Erato, who lives in Florida. Phoenix also learns that Clio financed the initial development of the software with money borrowed from the estate of her father, Jupiter. Clio is the executor of the estate and the beneficiaries are Clio, Erato, and a third sister, Calliope, who is in a mental institution. Clio also is Calliope's guardian.

Shortly after their meeting, at Clio's direction, Phoenix copyrights the software design in Clio's name and incorporates the company (called IBMM), with the directors being Clio, Erato, and Calliope. Phoenix tells Clio she needs the approval of the directors to take the company public and the next day Clio asks her to draw up a power of attorney and accompany her to a mental hospital where Calliope is a patient. When Phoenix starts to explain what she is about to sign, Calliope waives her off and says: "Whatever Clio says is OK, I'll sign." The following day, Clio hands her signed papers of the meeting of the directors. Phoenix files these papers with the SEC.

Two days later, Phoenix receives a call from Erato saying she's glad to learn that Phoenix has been hired to handle her father's estate. Erato also mentions that she has a software idea for the Internet that she is trying to market and asks Phoenix's to represent her. Phoenix agrees to do so.

Two months later, Clio calls Phoenix and tells her she wants to dissolve the corporation. "I can make more money without my sisters being involved," she says. "I'll have the directors' approval by tomorrow."

What are the professional responsibility issues?

PROFESSIONAL RESPONSIBILITY (PROF. ROSENFELD)

PROBLEM 5- -THE RING & THE STOCK MARKET

In a suit to recover a ring, which was wrongfully withheld, a jury has just awarded Robert Baker the ring and \$100,000 punitive damages. The fee contract between Baker and attorney Samuel Sharp provided that Sharp would get 40% of all punitive damages. “That was because we thought the punitive damages would be low,” Baker complained after the verdict was announced. He told Sharp: “With a big recovery such as this, 40% is unfair. I’ll pay you 25% and not a penny more.”

The defendant in the case satisfied the judgment by giving Sharp the ring and a check for \$100,000, payable to “Sharp or Baker”. Sharp promptly deposited the full amount of the check in his client trust account and put the ring on his finger. He told Baker: “Until we get this fee dispute worked out, no one is getting a nickel of that fee.”

Sharp fancied himself a stock market wizard, able to spot rising stars in a falling market. He realized that a substantially greater rate of return could be achieved by successful margin investing. He usually selected stocks wisely and in the past had made considerable money, the only limitation being the shortage of funds to pledge as security for his margin account. Thus he saw little harm in using his trust account as collateral for margin purchases. He never had to dip into any security he had posted before, so he reasoned that his client funds were really as safe as they would be in an ordinary bank account. The broker, not realizing the source of the funds that Sharp was posting, accepted the cash and securities and allowed Sharp to begin trading on a much larger scale.

Baker soon asked for at least the portion of the judgment that even Sharp did not deny was due him. Sharp said that Baker would get it soon. Then, some of Sharp’s investments turned sour and the broker was required to dip into the security to cover the sums owed to him. Several weeks later, after some hasty borrowing of his own, Sharp was able to come up with \$60,000, which he paid to Baker in full, along with the ring. Sharp then showed a deposit of a \$40,000 fee into his personal bank account.

What are the professional responsibility issues?

PROFESSIONAL RESPONSIBILITY- (PROF. ROSENFELD)

PROBLEM 6-ABUSIVE LITIGATION CONDUCT

(Reprinted from the NOBC Website)

Topic

A ruse investigation created by private practitioners in order to induce a former judicial law clerk into disclosing confidential communications with a judge was improper and warrants a disbarment recommendation.

Summary

Bar Counsel v. Kevin P. Curry, Gary C. Crossen, and Richard K. Donahue, Commonwealth of Massachusetts, Board of Bar Overseers, BBO File Nos. CI-97-0602, CI-97-0589, and CI-97(9)589 (Hearing Officer's Report, May 11, 2005). This may be the longest report by a finder of fact in any recorded public disciplinary case. The 229-page report recommends the disbarment of several prominent lawyers for engaging in a scheme to discredit former state court judge Maria Lopez. The report issued in the wake of a twenty-five day hearing spanning a year and a half. One hundred and twenty-seven exhibits were admitted into evidence and twenty-one witnesses testified. Each Respondent had an interesting career history. Curry was employed for many years as an Assistant Attorney General and, after leaving government service, entered private practice where he developed an expertise in conducting undercover investigations using pretext and subterfuge because that is "[t]he only way you can get the truth." Crossen is a former federal and state prosecutor, former chairman of the state Judicial Nominating Commission, and former ethics counsel to Massachusetts Governors Weld and Cellucci. From 1960 through 1963, Dartmouth-college graduate Donahue served as an assistant to President John F. Kennedy. He also was the former chairman of the Board of Bar Overseers. Donahue served on the ABA House of Delegates and Board of Governors. From 1990 through 1995, he was president of NIKE Inc., and presently sits on the Board of Directors of that company. The disciplinary case has its genesis in rancorous litigation over the \$1 billion Demoulas supermarket empire that included the Market Basket and Lee Drug chains. Judge Lopez presided over several civil trials that featured internecine warfare between the families of Telemachus Demoulas and his late brother, George, who cofounded the grocery chain. Lopez had ruled in 1997 that George's heirs had been cheated out of hundreds of millions of dollars and she ordered Telemachus' family to transfer substantial assets. Curry, Crossen, and Donahue all worked at various times for the Telemachus Demoulas clan and they believed that Lopez had demonstrated considerable bias against their clients. In addition, certain defense counsel voiced the opinion to their clients that the judge was "too dumb" to have written the adverse decision. In order to establish this judicial enmity and overturn the judgment, they created an elaborate hoax that targeted the judge's former law clerk, Paul Walsh, who had worked for the judge during the course of the Demoulas litigation. During the course of the litigation, when his clerkship was ending, Walsh sent out letters soliciting employment from the various law firms that had filed appearances in the cases, but he had received nothing but rejection letters. At the time of the events in question, he was working as a part-time lawyer for a law firm. A private detective, posing as a 'headhunter' reached out to Walsh with the promise of a lucrative job opportunity. When the 'recruiter' sought a writing sample from Walsh, Walsh provided him with a copy of the opinion entered in the Demoulas case. Walsh allegedly claimed that he had written the opinion. Thereafter, Walsh traveled to Halifax in Nova Scotia to meet with representatives of an alleged multinational insurance company for a 'job interview.' Walsh was given airline tickets and \$300 in cash. At the 'job interview', he met with Curry, who was using the fake name 'Kevin Concave'. During the course of the session, Concave asked Walsh about the "process for writing a decision," and eventually Walsh confirmed that he had written the entire Demoulas decision and revealed that the judge merely signed her name to the document. He also allegedly noted that the judge was biased and predisposed to rule a certain way in the case. Later, it was decided that the ruse should be continued and that Walsh should be surreptitiously tape recorded in the hope that he would corroborate the statements that he made in Halifax or that he otherwise be 'persuaded' to provide an affidavit or other sworn testimony that could be used to establish the bias of the judge. Another phony interview was set up, this time in New York City. A Mercedes limousine picked up Walsh at the airport and delivered him to the Four Seasons Hotel where the phony job interview was tape recorded without

Walsh's knowledge. Most of the job interview was spent discussing the Demoulas decision. Sometime thereafter, Walsh was invited to the Four Seasons Hotel in Boston in order to get his 'job offer of a lifetime'. Walsh went out and bought a new suit and tie for the event. Once he got to the session, however, Walsh was informed that the job situation was an elaborate charade that had been created to gather information about the improper conduct of Judge Lopez. He was informed that he, Walsh, was not the "target" of the investigation, but that they wanted him to "tell [them] things about Judge Lopez." One of the Respondent's allegedly claimed that Walsh's statements about the judge's predisposition to rule against his clients would be eventually revealed in a pleading and told the former clerk:

Mr. Walsh, once it's fired it's a missile that's out of my control and it's off and I don't know where it goes and what it ends up doing, what the media ends up doing with it, what the court ends up doing with it or what facts get developed out of it."

Walsh eventually went to the FBI and agents persuaded him to wear a wire and secretly tape-record conversations with the lawyers. At the same time, Crossen arranged to have Walsh and Walsh's wife placed under surveillance by private investigators. The Justice Department investigated the case, but no criminal charges were ever filed. To defend themselves against the disciplinary charges, the Respondents asserted that the phony job ruse was akin to the use of 'testers' in discrimination cases. The Hearing Officer rejected the argument noting that the lawyers' conduct involved deception far exceeding that permitted in tester and infringement cases. In recommending disbarment, the Hearing Officer noted:

Like Bar Counsel, I have found no case anywhere that deals with facts remotely like those at issue in this sordid affair. In that, I suppose, we should take some small comfort. ...What I find particularly repellant about the Respondents' actions, however, is the manner in which they targeted and exploited Paul Walsh...I find their total lack of concern and compassion for how this would affect Walsh, the only human 'victim' in this affair, to be the most powerful factor in aggravation.