Chapter 1

M&F3rd Chapter 2

Judicial and Professional Regulation of Lawyers

Notes, Slide Text, Optional Readings

Who Regulates Lawyers?

The state's highest court. Not Congress. Not the legisature. Not the ABA. The Supreme Court of each State.

By and large, lawyers must abide by most of the same laws that govern everybody else. But a statute purporting to explicitly regulate the legal profession would violate the Separation of Powers doctrine.

The courts govern lawyers, not legislatures.

Nebraska State Bar

Nebraska has an integrated or "unified" bar. In other words, you must join the bar and pay dues if you want to practice law in Nebraska. Even if you are "inactive," dues often must be paid.

Lawyers Are Super Fiduciaries!

Real estate agents, stock brokers, trustees, executors . . . those are fiduciaries. Lawyers are SUPER fiduciaries.

Fiduciary

When one person reposes confidence, faith, and reliance in another whose aid, advice, or protection is sought in some matter.

The relation existing when good conscience requires one to act at all times for the sole benefit and interests of another with loyalty to those interests.

Examples: executors or administrators and legatees or heirs; conservators and wards, trustees, or beneficiaries; partners, joint adventurers, corporate directors or officers and stockholders; majority and minority stockholders; factors, agents, or brokers and principals; attorneys and clients; promoters and stock subscribers; mutual savings banks or investment corporations and their depositors or investors; receivers, trustees in bankruptcy, or assignees in insolvency and creditors.

When clients have problems with "regular" fiduciaries, they come to us for advice and protection and trust and discretion.

We have to be scrupulously loyal. Your instincts, no matter how good, are not enough. The only way I know of to protect yourself and to protect your client is to OBEY the Model Rules.

But instincts are important, so we talk about things like having a SPIDER SENSE when YOU FEEL FUNNY about something your client is asking you to do, or even funnier when somebody is asking you to keep a secret from your client, or divulge your client's business and so on. That's when you consult the Model Rules.

The ABA Model Rules

Model Rules of Professional Conduct

Lawyers owe common law duties to clients, and clients can sue for breach of those duties, we lawyers also have Ethical Rules, the most recent iteration of those are the ABA's Model Rules of Professional Conduct.

History

Just a 60-second history lesson.

- 1908 - ABA Canons of Professional Ethics
- 1969 - ABA Model Code of Professional Responsibility
- 1983 – ABA Model Rules of Professional Conduct.
- 2003 – ABA Model Rules of Professional Conduct. Extensive revisions. Ethics 2000.
- 2012 - ABA Model Rules of Professional Conduct. Ethics 20/20 Commission

Lawyers who graduated graduated from law school before 1970 (literally a dying breed), probably learned about the ABA's Canons of Professional Ethics. The Canons were not rules, but general exhortations about what lawyers SHOULD and SHOULD NOT DO.

A lawyer "will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

True, but what to do if you find out your client is running a money laundering operation? Very little by way of specific rules.

Lawyers who attended law school in the 70s or early 80s probably learned about the MODEL CODE of Professional Responsibility. The Model Code was a whirligig contraption containing Nine "Canons," along with "Disciplinary Rules," and "Ethical Considerations." This was the ABA's first effort at setting national standards for lawyer conduct. But Code was not popular because of the confusion over all the moving parts.

After the mid-1980s, lawyers learned about the Model Rules of Professional Conduct.

These came in a popular "Restatement" format. Definite rules followed by "Comments", with the COMMENTS being the best part.

And indeed the ABA still uses the Model Rules, but those rules were extensively rewritten by the ABA's Ethics 2000 commission. Too many lawyers were involved in the Enron and Tyco and other corporate scandals, and the ABA decided to get serious about regulating lawyers, because they were afraid Congress might do it instead.

It's usually a CRISIS that prompts change, especially Watergate and the Enron debacles, lawyers intimately involved in both scandales.

Egil "Bud" Krogh Jr., a deputy assistant to the president.

On June 26, 1973, the growing Watergate scandal was already a year old, and John W. Dean III, President Richard M. Nixon's former White House counsel, was in his second day of testimony before the Senate Watergate Committee when Herman Talmadge, a Democrat from Georgia, directed his attention to exhibit 34-47.

"It is a list of all the people that you thought had violated the law and what the laws may be that they violated—is that correct?" the Georgia senator inquired. "That is correct," Dean responded. "My first reaction was: There certainly are an awful lot of lawyers involved here. So I put a little asterisk beside each lawyer." "Any significance to the stars?" asked Talmadge, referring to the asterisks. "That was just a reaction of mine," answered Dean. "How in God's name could so many lawyers get involved in something like this?"

Each state adopts its own version of the Model Rules. The Nebraska Supreme Court adopted its version of the Model Rules on September 1st, 2005.

In the second half of the 20th Century, changes in the Model Rules happened primarily in response to Scandals like Watergate, the Savings & Loan Crisis, BCCI, crisis

What's prompting the MOST RECENT changes to the RULES, less than TEN YEARS AFTER the last crisis?

TECHNOLOGY

The Model Rules

Model Rules of Professional Conduct 1983.

Bob Kutak and the Kutak Commission gave us the first and best WORKING version of the Model Rules.

I say WORKING version, because lawyers who went to school in the 70s or early 80s learned about the MODEL CODE of Professional Responsibility, a whirligig contraption containing Nine "Canons," along with "Disciplinary Rules," and "Ethical Considerations."

This was the ABA's first effort at setting national standards for lawyer conduct. But Code was not popular because of the confusion over all the moving parts.

And when you finish reading it, you still don't know whether contingency fees have to be in writing and whether we can allow our client to take the stand when we know they are going to lie.

What The Kutak commission did was make a Restatement out of the Model Rules basically. Much simpler: Rules and Comments, with the comments being the best part.

And how are the Model Rules holding up in the face of globalization and technology? A set of rules that were drafted for the most part back in 1983, when personal computers were just becoming available and the Internet did not exist, are now being applied to a world where lawyers talk to smartphones and meet clients on Twitter.

Overall they've held up pretty well. A Rule that began by prohibiting IN-PERSON and LIVE TELEPHONE SOLICITATION now also covers REAL-TIME ELECTRONIC CONTACT in what used to be called a chatroom.

Friending a person on Facebook can be an IMPROPER COMMUNICATION WITH A PERSON REPRESENTED BY COUNSEL, every bit as much as a lawyer calling them on the phone.

Probably would have worked even better if the ABA had taken the Kutak Commission's original proposals for exceptions to the confidentiality rules.

Model Rule 8.1

Bar Admission & Disciplinary Matters

An applicant for admission to the bar (or a lawyer in connection with a bar admission application or in connection with a disciplinary matter) shall not:

- knowingly make a false statement of material fact;
- fail to disclose a fact necessary to correct a misapprehension …
- except that this rule **does NOT require disclosure of information otherwise protected by Rule 1.6.**

Model Rule 8.3

Reporting Professional Misconduct

- A lawyer who knows that another lawyer has committed a violation of the Rules … **that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer** … shall inform the appropriate professional authority.
- Same for judges …
- This Rule **does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.**

Does the term "substantial" as in raises a substantial question as to that lawyer's honesty … refer to the SERIOUSNESS of the possible offense or the AMOUNT of evidence you need?

Rule 8.3 Comment 3 "the term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware."

Duty to Report vs. Duty of Confidentiality

Model Rules 8.1: (Bar Admission & Disciplinary Matters) and 8.3: (Reporting Professional Misconduct) are good examples of Rules that REQUIRE a lawyer to INFORM, REPORT, or DISCLOSE information. Whenever a Rule requires disclosure of information it will also indicate whether the duty to report or disclose information TRUMPS the lawyer's duty of confidentiality to her client, or IS TRUMPED by that duty.

For example, Model Rules 8.1 and 8.3 both **do not require disclosure of information protected by Rule 1.6 (Confidentiality)**. How does that work?

Suppose in looking over your client's case you discover that the lawyer who had the case before you stole money from your client, meaning, the lawyer

committed professional misconduct that raises a substantial question about the lawyer's fitness to practice law. Normally, you have a duty to report this violation under Model Rule 8.3. Of course you tell your client about your discovery and urge your client to report the former lawyer's unethical behavior. But the client does not wish to disclose this information, because it's too much trouble, or perhaps because it will make her look foolish. Your Model Rule 1.6 duty to protect client confidential information TRUMPS your Model Rule 8.3 duty to report misconduct, and you are not required to report the former lawyer's misconduct.

Compare instead what happens under Model Rule 3.3, which also requires the lawyer to disclose information in the following subsections presented here in truncated form:

Model Rule 3.3

Candor Toward The Tribunal A lawyer shall not knowingly:

1. . . . **fail to correct a false statement of material fact or law previously made** to the tribunal by the lawyer;
2. **fail to disclose to the tribunal legal authority in the controlling jurisdiction** . . . or
3. . . . If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, **disclosure to the tribunal.**

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, **disclosure to the tribunal.**

The duties stated … continue to the conclusion of the proceeding, and **apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.**

"Trumps" Rule 1.6 Confidentiality

Here the lawyer's Model Rule 3.3 duty of candor to the tribunal TRUMPS the lawyer's Model Rule 1.6 duty of confidentiality to the client. In other words, even if the client insists that the lawyer not disclose information covered by the terms of Rule 3.3, the lawyer must do so.

Others have looked at these competing duties and seen, not conflict, but a harmonious hierarchy of duties:

> The lawyer has a specific duty to preserve the confidence of the client, but that duty is subordinate to an equally specific duty not to participate in fraud upon the court. A hierarchy of duties–not a conflict–exists.

Rule 1.6 - Confidentiality

Note the imperative language here.

What kind of information is CONFIDENTIAL information under Model Rule 1.6?

Think BIG and BROAD.

If you think CONFIDENTIALITY is small and narrow and is vaguely synonymous with PRIVILEGED, as in protecting PRIVILEGED communications between you and your client, then you are confusing Rule 1.6 (an ETHICAL rule) with the attorney-client privilege (a rule of EVIDENCE), which by comparison IS small and narrow, because it applies only when a court or an adverse party is trying to compel you or your client to testify about "a privileged communication made in confidence to obtain or provide legal assistance for the client."

Or worse, perhaps you confuse Rule 1.6 (an ETHICAL rule) with the attorney work product doctrine (a DISCOVERY rule, Rule 26(b)(3) in the Federal Rule of Civil Procedure. Somebody wants documents or other tangible things. You say, "NO. That's work product."

The attorney-client privilege and the work product doctrine are both narrow, specific DEFENSIVE tactics you assert in proceedings connected with LITIGATION. CL

IT is a MISTAKE to think of them as similar to the comparatively huge ethical duty of confidentiality.

You must keep client information confidential whether either of you ever sets foot in a courtroom.

The ethical duty of confidentiality embraces: ALL information relating to the representation, WHATEVER ITS SOURCE.

Did I make that up?

No. Straight from Rule 1.6 Comment 3, found in BOTH the Nebraska and the ABA Model Rules.

"The confidentiality rule applies NOT ONLY TO MATTERS COMMUNICATED IN CONFIDENCE but also to ALL INFORMATION relating to the representation WHATEVER ITS SOURCE!

Your client's brother mentions to you that your client once did time in prison, your client was married twice before, your client is deeply in debt. CONFIDENTIAL!

Some other people know these things about your client, they may even be in public records, court filings etc, but if YOU learned about them in the course of representation, the information is confidential.

YOU SHOULD NOT BE THE SOURCE OF INFORMATION ABOUT YOUR CLIENT THAT YOUR CLIENT MIGHT CONSIDER CONFIDENTIAL.

Is it so tough to realize how important this is? Think of your doctor. Think of your doctor at a dinner party and your name comes up. "Oh, yeah, I know Dooling. He's a patient of mine."

"Oh, he is? What kind of doctor are you?"

"I'm an infectious disease specialist."

It's the same with you and your client's information. In many settings, just knowing that your client needs the services of a DIVORCE LAWYER, A CRIMINAL LAWYER, OR A WATER RIGHTS LAWYER is enough to violate this duty.

Model Rule 1.6's prohibits revealing "information relating to the representation of a client," and it makes no exception for information that has been previously disclosed or is publicly available.

You ethical duty of confidentiality applies even to PROSPECTIVE CLIENTS even when no client relationship ensues.

Confidentiality and Prospective Clients

Rule 1.18 Duties To Prospective Client

- A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
- Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation

Dead Clients & Confidentiality

And if the United States Supreme Court's opinion in *Swidler v. Berlin* is any indication, Rule 1.6 protects confidential information even after the death of the client.

Bar Admission & Discipline

Now, in your text you see the question asked several times:

When it comes to MISCONDUCT, is the standard for ADMISSION to the bar the same as DISCIPLINE of the bar?

In other words, if Lawyer Dooling would not be disbarred for possession of marijuana, does that mean that Law Student Dooling should be admitted to the bar for doing the same thing?

The cases suggest that test is the same, namely, "whether the individual is a fit and proper person to be permitted to practice law."

Model Rule 8.4

It is professional misconduct for a lawyer to:

- commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Bar Admission Problems

Can be caused by:

- Academic Dishonesty.
- Dishonesty in handling of money.

Lawyers often handle client money? But also money troubles make you a malpractice risk, because you are more likely to cut corners or be tempted to pad bills or pilfer cash from client trust accounts.

Are bar authorities too harsh?

The bankruptcy issue is a bit murkier. It is an excellent example of: doing what is LEGAL and doing what is RIGHT?

Should the latter concern the bar admission authorities?

Mental Illness? ☒Alcohol or chemical dependency?

A recent survey by the New York City bar association found that 50 percent of lawyers seeking counseling from its lawyer-outreach program list mental health as their primary concern, up from 40 percent in 2005.

We are often a prescription drug society? Pain killers? Xanax?

NLAP: Nebraska Lawyers Assistance Program

Nebraska Lawyers Assistance Program.

This is a great program. Comprehensive. For lawyers, judges, law students. Families.

Health, substance abuse, alcoholism, injuries.
CONFIDENTIAL under Nebraska Rule 1.6(c).

Trick Question

Larry Lawyer knows that Adam Attorney has committed a misdemeanor. Larry must report Adam's behavior if:

1. Larry has substantial evidence of Adam's crime . . .
2. Larry has substantial knowledge of Adam's crime . . .
3. Adam's crime raises a substantial question as to Adam's fitness as a lawyer . . .
4. Larry also violated the Model Rules.
5. Larry must report Adam's misdemeanor no matter what.

Answer = 3.

How Soon & How Sure?

Under the old Model Code, a lawyer had to report ANY violation of ANY Disciplinary Rule. Under the Model Rules.

Under the Model Rules, the reporting obligation is limited to conduct that raises "a substantial question as to that [other] lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Wait until after the case is finished?

Three possible places and conditions.

You are in front of a tribunal, candor to the court, discovery abuses and such.

You are opposite a lawyer in negotiations (report to firm, or report to disciplinary commission).

The Lawyer "Knows" . . .

Model Rule 1.0 Terminology: "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Most cases and ethics opinions conclude that 'knowledge' is determined by an objective standard."

Evidence must be such that a REASONABLE LAWYER UNDER THE CIRCUMSTANCES would have formed a FIRM OPINION that it was more likely than not that the conduct occurred.

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

After the Ethics 20/20 commission changes in August of 2012, the duty of competence now requires competence in using technology

To maintain the requisite knowledge and skill, a lawyer should:

- keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,
- engage in continuing study and education and
- comply with all continuing legal education requirements to which the lawyer is subject.

Changes to Model Rule 1.1 Comment 8 because of technology and outsourcing of technology. Again the language added by the Ethics 20/20 Commission the comments simply makes the reference to technology explicit.

Nothing controversial.

But this definition of COMPETENCE is incorporated by implicitly or by explicit reference throughout,

IT REVERBERATES throughout the other RULES call for, say, COMPETENTLY protecting client confidentiality.

ABA is sending up a flare, really. NO new rule or modification of a rule can deal with that pervasive and relentless and exponential technological change

In fact, in their materials the Ethics 20/20 Commission intends to establish a site resource where lawyers can go to learn about cloud computing, secure WIFI communications, laptop encryption, biometric fingerprint readers instead of passwords and so on.

Clients too are demanding that their lawyers are technologically competent, because the alternatives are too risky.

> Being a Luddite can be expensive, embarrassing, and potentially disastrous for lawyers and clients. Technological incompetence can result in wasted time (and therefore increased cost to the client), loss of money and identity, ethical sanctions, and embarrassment or worse in the courtroom. Those are high prices to pay for being too proud (or lazy) to learn how the Internet, social media, and that box on your desk work.

The Consequences of Technological Incompetence, by Sam Glover on October 14th, 2015.

Model Rule 1.3

Diligence A lawyer shall act with reasonable diligence and promptness in representing a client.

And guess what, you CAN always outwork your opponent.

No matter how smart they are who how many resources they have you can always OUTWORK them.

Somebody has to be the person in the room who knows the MOST about the case. That person is you.

Model Rule 5.1

Partners, Managers, and Supervisory Lawyers A partner (or manager) . . . in a law firm . . . shall make reasonable efforts to . . . ensure that . . . all lawyers in the firm conform to the Rules of Professional Conduct.

A partner OR MANAGER or a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm

Lawyers who run the firm must make reasonable efforts to ensure that all lawyers in the firm conform to the Rules

Reasonable Efforts

Comment 2: Policies and practices designed to . . .

1. detect and resolve conflicts
2. identify dates by which actions must be taken in pending matters
3. account for client funds and property
4. ensure that inexperienced lawyers are properly supervised

The first three are ripe for your technical expertise. Conflict of Interest Checking software and systems. Case or Docket management software Accounting software (Quickbooks and the like)

Violations Of Others

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct IF:

> The lawyer orders or … ratifies the conduct involved; or the lawyer is a partner or … has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rule 8.4

Misconduct It is professional misconduct for a lawyer to: violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

Mickey Rourke is a lawyer and he assigns Danny DeVito (a investigator) and Matt Damon (a law student) to solicit accident victims in a hospital. *See, e.g., The Rainmaker*.

That is a violation of 8.4

If you induce, order, or ratify another LAWYER'S violation of the model rules you violate Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers).

If you induce, order, or ratify a NONLAWER's violations of the model rules then you violate Rule 5.3 (below)

Model Rule 5.2

Responsibilities Of A Subordinate Lawyer A lawyer is bound by the Rules . . . notwithstanding that the lawyer acted at the direction of another person.

No Nuremberg defense

Rule 5.2 Responsibilities Of A Subordinate Lawyer

- A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

However:

A subordinate lawyer does not violate the Rules . . . if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Model Rule 5.3

Nonlawyer Assistants With respect to a nonlawyer employed or retained by or associated with a lawyer: a partner (or manager) . . . in a law firm . . . shall make reasonable efforts to ensure that . . . the person's conduct is compatible with the professional obligations of the lawyer

Governs partners and lawyers who individually or together with other lawyers possesses comparable managerial authority and supervise nonlawyers employed or retained by or associated with a lawyer: