M&F 3rd, Chapter 2

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Abstract

Notes, Slide Text, Links, Optional Readings.

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Judicial and Professional Regulation of Lawyers

Who Regulates Lawyers?

The state's highest court. Not Congress. Not the legislature. Not the American Bar Association. The Supreme Court of each State regulates lawyers.

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.

Courts govern lawyers, not legislatures.

The ABA promulgates The Model Rules of Professional Conduct, and then each state supreme court adopts its own version of the Model Rules, tweaking rules here and there to suit each state's needs.

The Nebraska Supreme Court adopted its most recent version of the Model Rules on September 1st, 2005.

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.

What Is A Fiduciary?

Fiduciary comes from the Latin *fiducia*, meaning "trust." And true to its Latin roots fiduciary means a person in whom another person (the principal) places the utmost trust and confidence. Emphasis on the utmost. Emphasis on trust. As Wikipedia puts it:

> A fiduciary duty is the highest standard of care at either equity or law. A fiduciary is expected to be extremely loyal to the person to whom he owes the duty (the "principal"): such that there must be no conflict of duty between fiduciary and principal, and the fiduciary must not profit from his position as a fiduciary (unless the principal consents).

In the attorney-client relationship, the client seeks the lawyer's aid, advice, or protection and reposes confidence, faith, and trust in the lawyer.

Some Examples of Fiduciaries

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

Lawyers Are Super Fiduciaries!

Real estate agents, stock brokers, trustees, executors, and many others are fiduciaries. Lawyers are SUPER fiduciaries.

When clients have problems with "regular" fiduciaries, they come to lawyers for advice, protection, trust and discretion. Lawyer's must be scrupulously loyal, but also must not counsel or assist a client "in conduct that the lawyer knows is criminal or fraudulent."

These profound obligations are sometimes in tension and difficult to navigate. Veteran lawyers often speak of having a "gut feeling" or "spider sense," a queasy feeling about something the client wants to accomplish. Or a red alert when somebody says, "Don't tell your client, but guess what?" The lawyer's instincts, no matter how good, are not enough. To protect herself and her client, the lawyer must know and obey 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, but 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

ABA Canons, 1908

Lawyers who 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 were instead general exhortations about what lawyers SHOULD and SHOULD NOT DO.

For example, Canon 1 provides: "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 when the lawyer finds out his client is running a money laundering operation? Very little by way of specific rules or advice.

ABA Model Code, 1969

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. The Code was not popular because of the confusion over all the moving parts. Like the earlier Canons, the Code also did not provide the lawyers with clear rules about whether contingency fees have to be in writing, or whether a lawyer may allow her client to take the stand when she knows the client intends to lie to the court.

Watergate

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 Dean's 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?"

The lawyers involved included Egil "Bud" Krogh Jr., a deputy assistant to President Nixon during the Watergate Scandal.

In the second half of the 20th Century, the ABA has amended the Model Rules in response to scandals like Watergate, or later in the 1990s in response to financial fraud scandals like Enron, Worldcom, and Tyco.

Kutak Commission

In response to Watergate and other scandals, the ABA appointed Omaha lawyer, Bob Kutak, and the Kutak Commission to fix the Model Code and provide a body of rules lawyers could use to guide them, especially when they learn that their clients are up to no good.

It is no exaggeration to say that the Kutak Commission gave us the first and best working version of the Model Rules, a true handbook for the working lawyer. Kutak's Model Rules of Professional Conduct were much simpler and came in a popular "Restatement-like" 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 scandals.

The Model Rules and Technology

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 in a world where lawyers talk to smartphones and meet clients on Twitter.

Overall the Model Rules have 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.

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 under Model Rule 1.6?

Think big and broad.

Some lawyers think the duty of confidentiality means a duty to keep client confidences secret. Period. It means don't disclose privileged information and don't blab about anything the client asked the lawyer to keep secret. These lawyers confuse Model 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, other lawyers 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. The lawyer objects: "NO. That's work product."

The attorney-client privilege and the work product doctrine are both narrow specific defensive tactics the lawyer asserts in proceedings connected with litigation. It is a mistake to think of them as similar to the comparatively huge ethical duty of confidentiality. Lawyers must keep client information confidential whether either of lawyer or client 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!"

The client's brother mentions to the lawyer that the client once did time in prison, the client was married twice before, or the client is deeply in debt. CONFIDENTIAL!

Other people may know these things about the lawyer's client. There may be public records, court filings, or old news items about the client's personal or business affairs, but if the lawyer learned about these matters during representation, the information is confidential.

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

Confidentiality

Clients hate it when lawyers blab. If that is hard for any lawyer to understand, then the lawyer should imagine his infectious disease doctor at a crowded party, where the doctor overhears someone mention the lawyer's name. The doctor joins the conversation and tells everyone that she knows the lawyer quite well, because the lawyer is one of her patients.

"And what kind of doctor are you again?" someone asks.

"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. The lawyer's 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

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, 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."

Should a lawyer Wait until after the case is finished before reporting opposing counsel's ethical violations? Consider three possible places and conditions. The lawyer is appearing before a tribunal and must abide by her duty of candor to the court, may also discovery abuses and such.

The lawyer is opposite an unethical 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 technical competence in using computer 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 reference (implicitly or by explicitly) throughout. It reverberates throughout. The other Rules call for competently protecting client confidentiality, competently acting with diligence, and competently avoiding conflicts of interest. 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. But lawyers must be competent in technological know-how.

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. Often a lawyer can simply get a great result for a client by outworking opposing counsel, by knowing more about the case and the law then anybody else in the room.

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: