

# Professional Responsibility

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## Ground Rules, Learning Objectives, and Assessment

### Introduction

Professional Responsibility is a course that should be of special interest to each of you because it is a course about *you*. This is a course about what *you* are becoming — *lawyers*. Professional Responsibility involves a study of the ethical and moral responsibilities and the disciplinary regulation of lawyers in their professional conduct relating to their clients, to the courts, and to others. Thus, this course will provide information, resources, and tools for analysis that should be important to each of you in your daily practice of the law.

I also hope that the course will also sensitize each of us to the responsibilities embraced by becoming part of our profession, not only so that we may avoid disciplinary sanctions, but also to live a more satisfying and uplifting life in the law and uphold the dignity of others involved in the legal system, including not only your clients but your adversaries. Navigating your way through the sometimes conflicting pulls of client demands, financial rewards, ethics regimes, and personal character and faith is a lifelong journey. Professional Responsibility should help you along your way.

Although professional ethics are connected to moral principles, the rules of our profession are not always intuitive. Nor can the right step as a matter of professional standards always be directly deduced from personal morality. Professional ethics may be seen as a study of the tension between the lawyer's responsibility to his or her client and the lawyer's responsibility to the public and the court system, as well as

the problems that arise when a lawyer acts in his or her own personal interests to the detriment of the client or the public. The official rules governing professional responsibility reflect an attempt to balance these competing interests and concerns. In order to address each of the substantive problems of professional ethics, we have to study the ethical rules in place (especially the Model Rules of Professional Conduct that apply in the vast majority of states including Minnesota), as well as alternative approaches on some issues, *and* understand the rationales underlying the individual rules. Thus, whenever you are assigned to read a particular rule from the Model Rules of Professional Conduct, you also need to read the accompanying official comments that further explain the rule; understand the rule's history; and, on occasion, consider how that rule has been received by the states, that is, whether states have adopted variations from that rule.

In addition, through the subjects we address and our class discussions, we regularly will return to the mission of our law school in integrating faith and reason in the search for truth. Not every question can be answered, at least not fully, by merely citing to a rule, nor is every answer found in the rules fully in accord with or completely expressing principles of faith or values. Indeed, on many of the most difficult questions of professional ethics, the rules may be open-ended, leaving resolution to the individual lawyer. As we discuss these problems in class, we should constantly be striving to consider how to integrate our faith and deepest moral principles into your growing professional character and identity.

As part of these questions, we'll discuss the moral foundation of the attorney-client relationship and encourage a moral deliberation between lawyers and clients. What lawyers do on behalf of clients may have consequences, sometimes profound, for others, which necessarily has moral resonance. Successfully integrating the lawyer's moral being and professional role is, perhaps, the greatest challenge in modern professional life. At the same time, the lawyer should not become a moralistic "Lone Ranger," isolated from the community and acting in atomistic solitude. Not only do we have many colleagues of moral standing in the legal profession upon whose experience and wisdom we may draw, but we must remember that the practice of law always involves a client. While no self-respecting and morally-sensitive lawyer may descend into the position of being a hired gun for the client, neither does conscious acceptance of moral responsibility for

professional behavior justify assuming a posture of moral dictator, overriding and suppressing the dignity of the client as a moral actor. Rather, we need to come to a greater appreciation for the attorney-client relationship as what Joseph Allegretti calls “a common moral community in which each has responsibilities for the other.”

For these reasons, Professional Responsibility promises to be a difficult but intriguing course. I expect that we (both you and I) will struggle together in our mutual attempts to understand the subject in all its multi-faceted dimensions. But I hope as well that the course will be an engaging and interesting one, perhaps precisely because of its complexity and controversy. Through our class discussions (and debates) about the application of the ethical rules to hypothetical problems and the cases, I hope that we can begin to develop a sense of practical wisdom and integrity of character that will stay with each of us in our legal careers.

### **Learning Objectives for Professional Responsibility**

By the end of this semester (and by the time of the final examination), you should be able to:

- Demonstrate an understanding of the Rules of Professional Conduct:
  - Know the general history and enforceability of the rules.
  - Understand the limits of the rules and generally know other sources of the law governing lawyers.
- Demonstrate an understanding of a lawyer’s professional and ethical responsibilities in serving clients, the profession, and society.
- Demonstrate an understanding of the rules governing the beginning and ending of the attorney-client relationship:
  - Demonstrate an understanding of the ethical rules governing creation and termination of the relationship.
  - Demonstrate an understanding of the ethical rules governing attorney advertising and solicitation.

- Identify each of the key elements of the attorney-client relationship, with particular emphases on confidentiality, counseling, and loyalty:
  - Demonstrate an understanding of the broad duty of confidentiality and the special rule of attorney-client privilege, along with exceptions.
  - Demonstrate an understanding of counseling and allocation of decision-making authority between lawyers and clients, appreciating the sometimes difficult questions of lawyer and client autonomy.
  - Demonstrate an understanding of the rule prohibiting conflicts of interest, including attorney-client conflicts, client-client conflicts, and past client-conflicts.
- Demonstrate an understanding of the rules governing attorney fees.
- Identify the ethical problems arising in advocacy:
  - Demonstrate an understanding of the longstanding debate about the perjurious client, including the persistent conflict between protection of the truth-finding function and confidentiality.
  - Demonstrate an understanding of the problems of appropriate arguments and presentations in the truth-finding processes of advocacy.
  - Demonstrate an understanding of the tension between zealous advocacy and the officer of the court in discovering, preserving, and presenting before a tribunal.
- Apply the relevant ethical rules and moral reasoning to reach the correct (or best) answers to hypothetical problems of ethical dilemmas involving the areas set out above, including working in small groups with peers.

These course specific learning outcomes most directly address the following law school learning outcomes (as set out in Part III.1.A of the Academic Policy Manual): Learning Outcome 1 (by addressing professional and ethical responsibilities); Learning Outcome 2 (by

teaching basic concepts, underlying theories, policy implications, and rules of law in professional ethics and the law governing lawyers); Learning Outcome 3 (by guiding students in analyzing and assessing strategies for resolving ethical problems); and Learning Outcome 6 (through several in-class problem-solving discussions in assigned small groups). These course specific learning outcomes also address, but less directly, Learning Outcome 4 (by encouraging students to speak in class), Learning Outcome 5 (by evaluating the legal authorities on professional ethics), and Learning Outcome 6 (by addressing the differing impacts of procedural choices on those who are disadvantaged or from different cultures).

### **Formative Assessment**

Formative assessment provides opportunities for students to evaluate their knowledge, check their understanding, and practice applying what they are learning and then receive feedback from your professor — before the entire semester’s grade is on the line. During the course of the semester, you will receive my feedback on your work in four primary ways:

Daily Classroom Exchange: First, a limited form of formative assessment will occur on a daily basis in class as I ask questions of students who are called on and the class as a whole, thereby giving one of you at a time a chance to participate directly. Through our exchange, those who are participating will get the immediate feedback of seeing whether their contributions are moving the discussion forward or not. Thus, one more reason to volunteer in class is the opportunity to gain that immediate feedback.

Multiple Choice Questions With Clickers: Second, on a nearly daily basis, both to present materials in a hypothetical problem setting and to review materials, I will present multiple choice questions and each of you will be able to record (anonymously) your selection of an answer through the electronic clickers we’ll use in class. The multiple choice questions are designed to be instructive but are also examples of the kinds of questions that will be included in the multiple choice Multistate Professional Responsibility Examination (MPRE). After students have selected answers, we’ll then identify the right and wrong answers in class discussion with my guidance — including of course why those are the right and wrong answers.

“Clicker Question of the Week”: Third, on at least two occasions during the semester, your small group will be among the groups responsible for taking the lead on proposing the answer and reasoning to a “Clicker Question of the Week.” The quality of participation by your small group will be the other half of the measurement for eligibility for the grade boost, as discussed below. Thus, this is part of both formative and graded assessment.

Small Group Discussions: Finally, on regular occasions through the semester — including but not limited to the “Clicker Question of the Week” — you will be asked to evaluate a problem in a small group to which you will be assigned. The primary benefit of this approach comes from hearing the perspectives of your fellow students. In addition, we will discuss the problem as a class.

### **Graded Assessment: Final Exam, Class Participation, and Small Group Discussions**

The grade in this course will be primarily based on a Final Exam, with a grade boost option for class participation.

Final Exam: The Final Exam will be three-hours-and-forty-five-minutes at the end of the semester. The Final will consist of (1) a multiple-choice segment (worth 40 percent) and (2) an essay question segment (worth 60 percent). While they will not be separately timed, I expect you will need approximately 45 minutes to complete the multiple choice segment and three hours for the essay segment.

The Final Exam is a limited open book examination. You may bring with you the following items: (1) the casebook, (2) the rules, (3) your notes from class, (4) class handouts (if any), (5) print-outs of material from the class web page, and (6) any outline that you played a substantial role in creating. You may not bring any other materials, such as purchased outlines, treatises, or examinations and model answers from previous years. Everyone then will be on the same even playing field for these exams in terms of materials. Your compliance with these requirements will be assumed under the honor code.

Grade Boost: Based on (1) your class participation under the policy outlined below, and (2) your small group's work on the "Clicker Question of the Week" and other hypothetical problems discussed in the small groups, you may obtain a grade boost. If you qualify, your grade will be raised one notch from your examination grade (e.g., from B to B+; from B- to B; etc.). (The grade "boost" applies to any grade, except of course "A".)

Present and Prepared/Small Group Participation: For this course, I have a special class preparation and attendance policy. It may take a little getting used to, but I think you will end up being comfortable with it. It is designed to provide a "reward" for being present and prepared, without exacting a "penalty" (other than the indirect penalty of not receiving the reward) for not being present or prepared. Those who are prepared regularly will benefit in terms of their grade. On the days when you are unprepared, you may come to class without fear of being called upon. For those who wish never to be called upon, you can effectively "opt-out" and simply accept that you will not receive the reward.

The seating chart will go around on the first day of class. Starting on the second day of class, I will arrive in class a few minutes early with two copies of the seating chart (one for each side of the room), dated for that day, at the front of the room. If you are present and prepared to be called upon, you must check your name off on the seating chart before class begins. You will then be counted as "present and prepared" for that day, *whether I call on you or not.*

I will keep track throughout the semester of which students are present and prepared. If I have counted correctly, we are scheduled to have a total of 24 class sessions during the semester. If you sign up as present and prepared for all but four class sessions during the semester, your grade will be raised one notch from your examination grade (e.g., from B to B+; from B- to B; etc.). (The grade "boost" applies to any grade, except of course "A".) Everyone will receive credit for the first day of class. In the event that a class is canceled and not made up, everyone will receive credit for that day as well. (You should keep track yourself of how many days you've signed up as "present and prepared;" if necessary, you can check with me at the end of a particular week. The responsibility to be aware of that number is your own — failure to receive a warning is not an excuse that will avoid loss of the bonus.)

Please appreciate that this policy allows you the equivalent of two weeks of missed classes, while still earning the bonus. Four class periods should be sufficient to cover absences due to mentor events, moot court, clinic assignments, absences on travel for another class, interviews, illness, etc.

As a consequence of this generosity, a student who misses more than four classes for *any* reason will not receive the grade boost. Even if you have an unfortunate extended absence by reason of outside activities, family responsibilities, or extended illness, etc., the fact would remain that you would have missed too many class sessions to earn the grade boost. While there would be no grade penalty for that reason (although ABA policies expect a student to attend at least 75 percent of the class sessions to be eligible to take the exam), the student's inability to participate in class discussions would preclude any reward. In sum, if a student misses more than four class sessions, the grade boost is not available and no excuse, however sympathetic I may be (and, if anything, I tend to be too soft-hearted), can be accepted. Think of it as an extra credit assignment; if you don't do it, you simply don't get the credit, whatever the reason for failure or inability to do it.

**You may not sign up as present and prepared once class period is underway.** In other words, you may not claim to have been prepared after the fact, because then you were not at risk of being called upon. If you are late to class (at least by more than a couple of minutes), then you have not been present and prepared on that day. I generally will collect the lists shortly after starting class and thus close off the sign-up for that day. For the same reason, if you are obliged to leave class early, other than by just a few minutes, you should not check yourself off as present and prepared for that day — you will not have truly been present for the entire class period.

There is a penalty for being caught “bluffing” under this system. If you sign up as present and prepared, and I call upon you and you are not, in my opinion, prepared, I reserve the right to preclude you from receiving the grade boost or to *lower* your final grade one notch from your exam grade. I do not wish to use this penalty, and hope it will not be necessary. Please understand that I do not expect perfect answers from a present and prepared student, but will look for strong evidence that the student has read the material and made a good faith effort to think

about the issues. The fact that a student does not fully understand the material will not result in any penalty as long as the answers show that he or she has read and thought about the material.

It is your decision about whether to take advantage of this policy. It is also your decision about whether you risk being called upon for a given class period. If you check your name off as “present and prepared,” you are subject to being called upon. If you do not, you are not. Each student who signs up as present and prepared is subject to be called upon at any time, and several students are likely to be called upon each day. The fact that you may have been called upon the previous week or even the previous day does not necessarily immunize you from being called upon again.

As part of this same policy, you will work in small groups on several occasions during the semester, both on the “Clicker Question of the Week” and on other discussion hypotheticals. To receive credit for that day’s participation for the grade boost, your small group if called upon must achieve a basic passing evaluation — not perfection but a good faith effort to resolve the problem.

### **Appropriate Use of Materials**

You may not possess, read, or otherwise use any notes, outlines, print-outs of web pages or slides, or any other form of printed or electronic materials that I distributed to prior Professional Responsibility classes, or that were prepared in whole or in part by any former student of my Professional Responsibility class. While you are encouraged to work and study together with other classmates in this year’s section, you need to develop your own understanding and not piggy-back on the work-product of prior year’s sections. I reserve the right to lower your grade if, in my judgment, you violate the letter or spirit of this rule.

### **Office Hours**

My office is on the fourth floor of the law school building, Room 460. My office telephone number is 651-962-4923. I keep no regular office hours and instead attempt to maintain an open-door policy. (My

door is usually open but sometimes may be closed to keep out noise, in which case don't hesitate to knock, as I often will be in and available.) However, I generally will be unable to meet with you during the two hours before each class, which means that on Monday through Wednesday, I will be preparing for and then teaching from about 9:00 to noon each day, but generally available in the afternoons and into the early evenings. I'll also generally set aside the time right after class is you have a question.

### **Web Site**

For this course, I have created a web page that you may wish to consult regularly. On the web page, I have included this document and the syllabus, as well as links to important sites concerning legal ethics. In addition, I will regularly post the assignment and other announcements and the PowerPoint slides used in class.

Although subject to change, the current URL for the web site is:

<http://courseweb.stthomas.edu/gcsisk/profresp.html>

Note: If you type in "www" at the beginning of the URL, it will not work.