Professional Responsibility

Spring 2018

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Ground Rules

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 will be important to each of you in your daily practice of the law.

Moreover, I 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. Fortunately, the rules supplement/treatise assigned for this course contains all of that material—and much more.

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.

Class Attendance and 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 26 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 moot court, clinic assignments, absences on travel for another class, interviews, illness, etc. The only exception to this — that is, the only excused absence not included in the four — is the one excused absence allowed for a mentor event.

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, again more than by 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.

**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.
Classroom Decorum

As Professor Neil Hamilton reminds his classes, “[t]he four original learned professions serve sacred transcendental purposes: justice, spiritual and physical health, and the growth of reason. Each profession has its sacred spaces; for a lawyer, the courtroom, for a professor the classroom. We each hold important offices in these places, and we honor the office and the place, even if we may not like the person holding the office. So each of us will honor the judge and the opposing counsel, who hold critical offices in the justice system, and we will honor the courtroom. Similarly, each of us will honor the offices of professor and student, and this classroom.”

For this reason, we expect faculty and students to respect one another in the classroom, welcoming ideas and subjecting them to critical examination, but with respect.

Assignments

The assignments in the attached syllabus are not designed to be covered in one class period. Some assignments will take more; some will take less. Depending upon the length of a particular assignment, you should be prepared at least one assignment beyond where we ended during the previous class period. The syllabus is subject to modification or omission during the course as warranted.

Class Materials

For this course, you will need the following materials:

- STEPHEN GILLERS, REGULATION OF LAWYERS (customized edition).

- The Model Rules of Professional Responsibility, either in book form or readily available online.

As part of the customized Gillers book package, you can also obtain “Professional Responsibility: Examples and Explanations” by W. Bradley Wendel, which uses the problem method — very similar to law
school exam essay questions — to provide further understanding of the concepts in this course.

While I honestly don’t think you’ll need anything more, if you want additional study materials, I suggest the following treatises, especially if you should have a need to conduct research into this subject once in practice, which should be available in the library and the bookstore:


GEOFFREY C. HAZARD & WILLIAM W. HODES, THE LAW OF LAWYERING (2 volumes, regularly updated; on reserve in the law library).

**Final Examination**

The grade in this course will be based upon a three-hour-and-forty-five-minute final examination. The exam will consist of (1) a multiple-choice segment and (2) an essay question segment.

This will be a limited open book examination. You may bring with you the following items and the following items only: (1) the casebook, (2) the rules supplement, (3) this supplement, (4) your notes from class, (5) class handouts (if any), (6) print-outs of class web materials, and (7) 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. Your compliance with these requirements will be assumed under the honor code.

For the exam, you will be responsible only for the materials addressed in class, especially those provisions of the Model Rules of Professional Conduct that we study in detail. The Model Rules do not and cannot address every ethical problem, so you will also need to be familiar with other aspects of law and ethics (e.g., laws governing discovery, disclosure of physical evidence, etc.) that we discuss in class as being pertinent to a particular problem. And, yes, having an
appreciation for the relevance and importance of questions of morality and character is necessary for the final exam as well.

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 these grounds rules 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.