

Professional Responsibility Spring 2020

Richard A. Schwartz
Adjunct Professor of Law
University of Houston Law Center
dschwartz@uh.edu

Please take the time to read this syllabus carefully. It contains important information about the organization of the course, the requirements, and your grade. This is a syllabus, not a contract, and it is subject to change. Refer to TWEN for the most up-to-date information.

ORGANIZATION OF THE COURSE

- 1. Course Description.** Welcome to one of the most important classes in the law school curriculum. More than any other class you will take during your time in law school, this course is about you and your future irrespective of what you decide to do as a lawyer. The course is designed to acquaint you with the lawyer's obligations—both individual and as a member of the legal profession—to the world in which he/she lives. In addition to a discussion of ethical concerns inherent in the practice of law, we will cover lawyer regulation including the Model Rules of Professional Conduct. We also will consider what it means for you to become a member of the legal profession at a time of economic pressure, technological advancement and international competition. A lawyer's work largely turns upon relationships, namely between the lawyer and client, but also in the connections made with fellow lawyers, other professionals and society in general. This course is your opportunity to reflect upon the lawyer you will become as you build these relationships over the coming years. I consider it my professional responsibility to do all that I can in this course to ensure that you will be well-equipped for a rewarding and meaningful career in the law. I will demand excellence from you in every class; you should expect the same from me. I look forward to learning with you and value your participation.
- 2. Learning Outcomes.** During your time in this course, you will develop competence in the following:
 - Knowledge and understanding of substantive and procedural law regulating lawyers' conduct;
 - Legal analysis and reasoning, legal research, problem-solving, and written and oral communication related to legal ethics and professional responsibility;
 - Exercise of proper professional and ethical responsibilities to clients and the legal system;
 - Reflection upon how to integrate conceptions of professionalism and the lawyer's role into your career;
 - Recognition of the trends that will influence the future of lawyers' work; ¹and ²SEP
 - Other professional skills needed for competent and ethical participation as a member of the legal profession.

More details about the specific learning outcomes for this course are included below with the reading assignments.

3. Required Materials.

- A. PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH, Knake et al. (2017) [http://store.westacademic.com/Pearce Professional Responsibility A Contemporary A pproach 3d 9781634600163.html](http://store.westacademic.com/Pearce_Professional_Responsibility_A_Contemporary_Approach_3d_9781634600163.html) *You MUST have this edition because there have been significant content revisions from the first and second editions.* You may wish to register for the e-version of your textbook (see the inside front cover) or to purchase only the e-version, which you may do here: <http://store.westacademic.com/Professional-Responsibility-A-Contemporary-Approach-3d-eBook-and-Learning-Library.html>
- B. AMERICAN BAR ASS'N MODEL RULES OF PROFESSIONAL CONDUCT 2017, available online https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/. You must access these rules online. You are not required to purchase a print copy, but you might find it helpful to do so. The most affordable option is to purchase the ABA's version. *Please note that when the ABA Model Rules of Professional Conduct are referenced in the casebook, you are responsible for looking up and reading the entire Rule as well as the corresponding Comments, which require clicking through to a new webpage.*
- C. I will communicate with you through email when necessary out of class. Please be sure I have a good email address.

- 4. **The MPRE.** For admission to the bar of most states (including Texas), you must pass the Multistate Professional Responsibility Exam (MPRE). The MPRE is a multiple-choice exam covering the ABA Model Rules of Professional Conduct and Code of Judicial Conduct as well as generally accepted principles established in federal and state cases regarding the conduct of lawyers. This class will cover a number of subjects included on the exam and will provide a useful background; however, this is not an MPRE review course. Before you take the MPRE, I STRONGLY encourage you to take a review course in addition to this class. More information can be found at <http://www.ncbex.org/about-ncbe-exams/mpre/test-dates-deadlines-and-fees/>. The test date for this spring have not been announced. The date to register to pay the lowest registration fee has not been announced yet. See <http://www.ncbex.org/exams/mpre/registration/>
- 5. **ADA Accommodations.** The Law Center is committed to meeting the needs of students with physical, learning and other disabilities and provides appropriate accommodations and services tailored to each person's specific requirements. Please contact the Center For Students With Disabilities at (713) 743-5400 for more information.
- 6. **Counseling and Psychological Services.** Counseling and Psychological Services (CAPS) can help students who are having difficulties managing stress, adjusting to the demands of a professional program, or feeling sad and hopeless. You can reach CAPS (www.uh.edu/caps) by calling 713-743-5454 during and after business hours for routine appointments or if you or someone you know is in crisis. No appointment is necessary for the "Let's Talk" program, a drop-in consultation service at convenient locations and hours around campus. http://www.uh.edu/caps/outreach/lets_talk.html.

7. Class Policies

Class Attendance. This is a class in your responsibilities as a professional. I expect you to fulfill those responsibilities by attending class.

Class Participation. Preparation for each class is one of your responsibilities. You should participate in class discussions. To provide incentives for participation, I will award grade increases described below.

Grading. Your grade is principally based upon the final examination. I may raise or lower grades one level on the basis of class participation (e.g. from a B to a B+ or to a B-). Grade increases may be given to students who consistently demonstrate mastery of the material and thoughtful insights, and regularly participate. Grade decreases may be given to students who are consistently unprepared and do not regularly participate. I prefer that students volunteer participation and I will call upon you in class.

8. Chosen Names and Preferred Pronouns

I want to address each of you in a manner that corresponds to your identity. I will most often address students by their first names. Recognizing that mistakes may unfortunately happen, chosen names and preferred pronouns—including non-binary ones such as they/them/their—will be respected in our classroom. Please feel free to reach out to me at any time if you want to make me aware of your chosen name or preferred pronoun or if you have concerns about how I or your classmates address you.

READING ASSIGNMENTS, QUIZZES, AND WEEKLY ACTIVITIES

- All references to the “Rule/s” or “Model Rule/s” are to the American Bar Association Model Rules of Professional Conduct.
- Note that your reading assignments may look long, but are instead, for the most part, very detailed, spelling out precisely which materials you should review. Read closely, and you’ll save yourself time reading only what is assigned and relevant to our class.
- Remember, if you are using the e-version of casebook, much of the material includes hyperlinks to definitions, the Rules, additional source materials, etc. You are not required to read the hyperlinked material, but you undoubtedly will find the material useful and reviewing it likely will help your performance in this class.

Chapter 1: Introducing Professionalism and Legal Ethics

Learning Outcomes

At the end of this unit, you will be able to:

- Understand the framework for the rules and laws that regulate lawyers’ conduct
- Evaluate what constitutes the unauthorized practice of law
- Understand how the lawyer disciplinary system works
- Determine how to gain admission to the bar
- Articulate how you would respond to an ethical dilemma
- Differentiate professionalism and the dominant conception of the lawyer’s role ^[L]_{SEP}
- Reflect on the connection between personal and professional values ^[L]_{SEP}

January 13

- ☐ Read pages 1-21

January 15

- ☐ Review of pages 1-21 (previously read August 21), and note that the reading for Monday 1/28 is lengthy so you might want to read ahead in advance.

Chapter Two: The Basic Elements of Law Practice

Learning Outcomes

At the end of Units I and II, you will be able to:

- Explain the rationale that underlies the regulation of the unauthorized practice of law (UPL) and the critiques against this regulation [L][SEP]
- Apply the existing UPL principles to traditional fact patterns and new technologies
- Apply the rules that specify how lawyers may share fees or ownership with non-lawyers including the basic prohibition and the exceptions [L][SEP]
- Determine whether a lawyer's conduct in a law-related business is subject to the rules of professional conduct [L][SEP]

At the end of Unit III, you will be able to: [L][SEP]

- Recognize the importance of asking the question "Who is my client" and determining the answer at the outset of every relationship [L][SEP]
- Evaluate whether a lawyer-client relationship exists, including circumstances in which a lawyer might have a duty to accept representation or a duty to reject representation [L][SEP]

Unit IV, you will be able to: [L][SEP]

- Distinguish among situations that require, permit, or prohibit a lawyer to withdraw from representation of a client
- Determine what actions a lawyer must take before withdrawing from representation

At the end of Unit V, you will be able to:

- Articulate the distinctions between lawyer discipline rules, malpractice liability, and ineffective assistance of counsel
- Comply with the rules that govern a lawyer's ability to limit malpractice liability [L][SEP]

At the end of Unit VI, you will be able to: [L][SEP]

- Recognize the decisions that clearly are allocated to clients rather than lawyers [L][SEP]
- Identify the circumstances in which the traditional rules about allocation of decision-making authority do not apply [L][SEP]

January 20 – MLK Holiday

January 22

- ☐ Units I & II Defining the Practice of Law: read pages 23-40, 50-71 plus Model Rules 5.3, 5.4, 5.5 5.7 and 8.5

January 27

- ☐ Units III & IV Creating and Ending the Lawyer-Client Relationship: read pages 72-104 plus Model Rule 1.16

January 29

- ☐ Unit V The Duty of Competence: read pages 104 to 129 plus Model Rule 1.1

February 3

- ☐ Unit V Ineffective Assistance of Counsel: read pages 129 to 138
 - ☐ Unit VI Principles that Govern the Relationship Between Lawyers and Clients: read pages 150 to 158, 160 to 178 plus Model Rules 1.2 and 1.14
-

Chapter 3: The Business, Technology, and Marketing of Legal Services

Learning Outcomes

At the end of Units I and II, you will be able to:

- Distinguish solicitation from advertising [SEP]
- Identify the states' interest in regulating lawyer advertising as commercial speech [SEP]
- Recognize the ways in which lawyers are advertising with new media and technologies that may not be governed directly by the Model Rules [SEP]
- Determine whether a lawyer solicitation or advertisement complies with the Model Rules [SEP]

At the end of Unit III, you will be able to: [SEP]

- Distinguish the types of fees a lawyer may charge [SEP]
- Analyze whether a lawyer's fee is reasonable under the Model Rules [SEP]
- Analyze what funds or property a lawyer must maintain separately from the lawyer's property, including in a trust account [SEP]

February 5

- ☐ Units I and II Finding Clients: read pages 179-191 plus Model Rules 7.1, 7.2, and 7.3

February 10

- ☐ Units I and II Finding Clients: read pages 192-224

February 12

- ☐ Unit III Fees and Billing: read pages 241-72 plus Model Rule 1.5
-

Chapter 4: Attorney-Client Privilege and the Duty of Confidentiality

Learning Outcomes

At the end of Units I and II, you will be able to:

- Understand the relationship and distinguish between attorney-client privilege and the duty of confidentiality [SEP]

At the end of Unit III, you will be able to: [SEP]

- Explain the rationale for attorney-client privilege and the necessary elements [SEP]
- Identify who has the authority to waive attorney-client privilege [SEP]
- Analyze selective waiver of attorney-client privilege [SEP]
- Evaluate the impact of mistaken disclosures on attorney-client privilege [SEP]

- Summarize the Federal Rule of Evidence addressing attorney-client privilege [L] [SEP]
- Recognize the crime-fraud exception to attorney-client privilege [L] [SEP]

At the end of Unit IV, you will be able to: [L] [SEP]

- Identify the basics of the duty of confidentiality including the scope of information within the duty of confidentiality and exceptions
- Assess whether the duty of confidentiality and exceptions serve clients' interests, lawyers' interests, or society's interests
- Develop your own view on whether the duty of confidentiality should be modified

February 17

- ☐ Units I-III Attorney Client Privilege: read pages 289-302, 307-324, 330-346, 350-353

February 19

- ☐ Unit IV The Basics of the Duty of Confidentiality Under 1.6: read pages 353-362 plus Model Rule 1.6

February 24

- ☐ Unit IV The Basics of the Duty of Confidentiality Under 1.6: read pages 362-384

February 26

- ☐ Review

Chapter 5: Conflicts of Interest

Learning Outcomes

At the end of Units I and II, you will be able to:

- Analyze whether a concurrent conflict of interest exists and if representation is permitted
- Evaluate the enforceability of a prospective conflict of interest waiver [L] [SEP]
- Articulate what constitutes proper informed consent to a conflict of interest [L] [SEP]
- Recognize when a positional conflict of interest exists [L] [SEP]

At the end of Units III and IV, you will be able to: [L] [SEP]

- Analyze whether a conflict of interest exists between a client's interests and the lawyer's personal or financial interest and, if so, whether representation is permitted [L] [SEP]
- Determine whether a lawyer is prohibited from serving as an advocate in a trial in which the lawyer may serve as a witness

At the end of Unit V, you will be able to:

- Analyze whether a former client conflict of interest exists and if representation is permitted
- Analyze whether a former government lawyer is prohibited from representing a client and whether that lawyer's conflict is imputed to the lawyer's firm
- Analyze whether a current government lawyer is prohibited from representing a client because of a conflict of interest arising out of previous private practice work

At the end of Unit VI and VII, you will be able to:

- Articulate the duties of lawyers serving as third-party neutrals [L] [SEP]
- Analyze when conflicts of interest are imputed to lawyers associated in a firm [L] [SEP]

- Determine when representation is permitted even though there are conflicts of interest imputed to a tainted lawyer's firm [L]
[SEP]

At the end of Unit VIII, you will be able to: [L]
[SEP]

- Identify criminal defense attorney conflicts of interest [L]
[SEP]
- Evaluate when defense attorney conflicts of interest result in ineffective assistance of counsel [L]
[SEP]

March 2

- ☐ Units I and II Simultaneous Representations of Multiple Clients: read pages 384-402 and 408-412 plus Model Rule 1.7

March 4

- ☐ Units I and II Simultaneous Representations of Multiple Clients: read pages 412-428

Spring Break March 9 – March 13

March 16

- ☐ Unit III Conflicts Between Client's Interests and Personal or Financial Interests of the Lawyer and Unit IV Representation Adverse to a Former Client: read pages 429-441, 445-48 plus Model Rules 1.8, 1.9, and 1.11

March 18

- ☐ Unit VI Lawyers as Third Party Neutrals, Unit VII Vicarious Disqualification, Unit VII Conflicts of Interest in Criminal Cases: read pages 453-475, plus Model Rules 1.10 and 1.12

Chapter 6: The Lawyer's Duties to the Legal System, the Profession, and Nonclients

Learning Outcomes

At the end of Unit I, you will be able to:

- Explain the tension between the lawyer's role as a "zealous advocate" and the lawyer's role as an "officer of the court" [L]
[SEP]
- Distinguish between a frivolous claim and a good faith argument of law [L]
[SEP]
- Recognize the duty to disclose adverse legal authority [L]
[SEP]
- Analyze the duty to take reasonable remedial measures for "criminal or fraudulent conduct related to the proceeding" and how this duty trumps the duty of confidentiality [L]
[SEP]
- Analyze the attorney's obligations when the attorney reasonably believes, but is not certain, that a client intends to commit perjury in a civil case [L]
[SEP] and a criminal case
- Address the prohibition against stating a personal opinion as to the justness of a cause [L]
[SEP] and the prohibition against encouraging third parties to withhold relevant information [L]
[SEP]
- Analyze the rules relating to the compensation of occurrence witnesses as well as ex parte communications with judges and jurors
- Identify other obligations to the court and third parties

At the end of Unit II, you will be able to: [L]
[SEP]

- Analyze the prohibition against implying disinterest and offering legal advice to unrepresented persons [SEP]
- Analyze the prohibition against making false statements of material fact or failing to disclose material facts when disclosure is necessary to avoid assisting the client in a criminal or fraudulent act [SEP]
- Distinguish between proper and improper conduct when litigating against a party suspected of criminal wrongdoing [SEP]
- Analyze the prohibition on assisting a client with a crime or fraud [SEP]
- Analyze the duty to refer matters to higher authority in the organization under the Model Rules
- Analyze the prohibition against failing to disclose material facts when disclosure is necessary to avoid assisting the client in a criminal or fraudulent act [SEP]
- Analyze the elements of the Hazard test for civil and criminal liability [SEP]
- Analyze state of mind requirements for discipline for subordinate and supervising attorneys [SEP]
- Analyze the duty of competence as applied to legal opinions [SEP]
- Analyze the Sarbanes-Oxley regulations to determine what factual circumstances trigger the duty to report up-the-ladder [SEP]

At the end of Unit III, you will be able to:

- Analyze the prohibition against communications with a represented party [SEP]
- Analyze the prohibition against communications with a represented party where a non-lawyer agent is used [SEP]
- Analyze the duty to notify the other party in connection with inadvertent disclosures [SEP]
- Analyze the prohibition against making an agreement that restricts the right of lawyers to practice law as part of a settlement of a client controversy [SEP]
- Analyze the duty to report lawyer misconduct and the exception when information about misconduct is gained while participating in a lawyer assistance program [SEP]

March 23

- ☐ Units I Duties to the Court and Other Tribunals: read pages 477-503 plus Model Rules 3.1, 3.2, 3.3, 3.4

March 25

- ☐ Unit I Duties to the Court and Other Tribunals: read pages 503-536 plus Model Rules 3.5, 3.6, 8.4

March 30

- ☐ Unit II Duties to Third Parties and to the Law: read pages 544-568, 579-587, plus Model Rules 4.1, 4.2, 4.3, 4.4, 8.3

April 1

- ☐ Ethics Jeopardy game. No reading assignment

Chapter 7—Special Ethical Rules: Prosecutors and Judges

Learning Outcomes

At the end of Unit I, you will be able to:

- Articulate the unique role of the prosecutor as minister of justice [L][SEP]
- Recognize the boundaries of the prosecutor's discretion to charge [L][SEP]
- Differentiate the constitutional obligation to disclose evidence (the Brady Rule) from the requirements under Rule 3.8 [L][SEP]
- Identify proper prosecutorial conduct at different stages of an action, including plea bargaining, trial, sentencing, and post-conviction [L][SEP]
- Analyze, and articulate the policy behind, the rules requiring prosecutors to rectify, as well as avoid, wrongful convictions [L][SEP]

At the end of Unit II, you will be able to: [L][SEP]

- Recognize the sources of law governing the ethical standards for judges [L][SEP]
- Analyze prohibitions on external influences for sitting judges [L][SEP]
- Analyze when judicial disqualification is required [L][SEP]
- Recognize limitations on extrajudicial activity [L][SEP]
- Recognize limitations imposed on candidates for judicial elections [L][SEP]
- At the end of Unit I, you will be able to:
- Articulate the unique role of the prosecutor as minister of justice [L][SEP]
- Recognize the boundaries of the prosecutor's discretion to charge [L][SEP]
- Analyze when a prosecutor must refrain from prosecuting a charge for lack of probable cause [L][SEP]
- Recognize the role and requirements of prosecutors in ensuring a defendant's right to counsel
- Recognize the prohibition on a prosecutor seeking waiver of pretrial rights from an unrepresented accused [L][SEP]
- Differentiate the constitutional obligation to disclose evidence (the Brady Rule) from the requirements under Rule 3.8 [L][SEP]
- Identify proper prosecutorial conduct at different stages of an action, including plea bargaining, trial, sentencing, and post-conviction [L][SEP]
- Analyze, and articulate the policy behind, the rules requiring prosecutors to rectify, as well as avoid, wrongful convictions [L][SEP]
- At the end of Unit II, you will be able to: [L][SEP]
- Recognize the sources of law governing the ethical standards for judges [L][SEP]
- Analyze prohibitions on external influences for sitting judges [L][SEP]
- Analyze when judicial disqualification is required [L][SEP]
- Recognize limitations on extrajudicial activity [L][SEP]
- Recognize limitations imposed on candidates for judicial elections [L][SEP]

April 6

- ☐ Unit I Ethical Standards for Prosecutors: read pages 589-597, 615, 622-632, 639-648, 660-661 plus Model Rule 3.8. Guest Speaker.

April 8

- ☐ Unit II Ethical Standards for Judges: read pages 661-701. Guest Speaker.

Chapter 8—What is the Proper Role of a Lawyer?

Learning Outcomes

At the end of this Chapter, you will understand how to:

- Identify the elements of, and rationale for, the dominant conception of the lawyer's role as a neutral partisan [L][SEP]
- Differentiate the neutral partisan role from the historical understanding of lawyers as servants of the public good [L][SEP]
- Describe the arguments for and against alternative lawyering models grounded in moral responsibility, feminism, religion, racial justice, LGBTQ rights, and civic responsibility [L][SEP]
- Apply each model to lawyering decisions [L][SEP]
- Differentiate each model from the neutral partisan role [L][SEP]
- Articulate the lawyer's role that you choose for yourself [L][SEP]

April 13 – Top Reasons Lawyers get Disciplined. No reading.

April 15 – Trust Accounts, Pro Bono and Gender Equality.

- ☐ Reading will be handed out

Chapter 9—Why Do Lawyers Have Special Privileges and Responsibilities?

Learning Outcomes

At the end of Unit I, you will be able to:

- Assess whether standards for bar admission and discipline guarantee that lawyers provide competent representation [L][SEP]
- Assess whether restrictions on the unlicensed practice of law protect the public [L][SEP]
- Reflect upon competing visions of professionalism and morality [L][SEP]

At the end of Unit II, you will be able to: [L][SEP]

- Discuss special obligations of lawyers to the public, including pro bono service [L][SEP]
- Identify implicit bias and propose solutions through behavioral legal ethics and other tools [L][SEP]

In general: [L][SEP]

- Articulate considerations for developing a personally satisfying career in the law [L][SEP]
- Describe emerging issues in the regulation of legal services [L][SEP]

April 20

- ☐ Unit I The Professional Privilege: read pages 807-845 and 860-865, plus Model Rule 6.5

April 22

- ☐ Exam Review. **Submit questions about the exam by midnight April 17.**

EXAM PERIOD APRIL 28 – MAY 7