

Law and Ethics of Lawyering for Litigators

Spring 2013
Professor Stephen Bundy

Class Meetings: M, W 8:35-9:50 in Room 12

Course Materials: David McGowan, *Developing Judgment About the Practice of Law* (West 2011); John Dzienkowski, *Professional Responsibility: Standards Rules and Statutes*, current edition. I'll have a few words to say about each of these at the first class.

There will also be handouts.

Course Requirements: Class participation. We fortunately a small group, but that means that I'll sometimes be expecting a lot from each of you. Starting next week, and for the middle 12 weeks of the semester, I'm going to put half the class on call each week.

There will be a required self-study unit and ungraded short exercise on some of the ethics rules governing the financial aspects of law practice.

There will be an eight hour take home examination with a word limit.

Instructor: Room 436 (North Addition). Office hours Tuesday 3:30-4:30 and Wednesday 3-4 or by appointment. Email: sbundy@law.berkeley.edu.

Interesting Resources: For keeping up with developments, I highly recommend: Legal Ethics Forum <http://www.legalethicsforum.com/> and Legal Profession Blog http://lawprofessors.typepad.com/legal_profession/#tp

Topics: I'll say more about each of these in class.

1. Introduction
2. Authority
3. Confidentiality
4. Privilege
5. Work product
6. Conflict of Interest
7. Joint Clients and Common Interest Arrangements
8. Entity Clients
9. Regulation of the Duty of Care: Malpractice and Ineffective Assistance

10. Investigation, Evidence and Witnesses
11. Ethics of Advocacy: Substantiality of Claims and Defenses
12. Ethics of Advocacy: Discovery and Disclosure.
13. Negotiation and Settlement
14. Witness Preparation and Counseling
15. Other Duties to the Court and Withdrawal

First Block of Assignments (Casebook is referred to as McG)

Class 1

Preamble and Scope section of the ABA Model Rules of Professional Conduct. Available online at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html. If you can get to the bookstore, they are also in the assigned rules supplement by Professor Dzienkowski.

If you can get to the bookstore, you should also read pages 12-16 in the McGowan case book. But if you can't, don't worry—I'll give a clear idea about what I view as the highlights of this material in class, and then you can read it later at your convenience.

Class 2 (McG pp. 17-38)

I. DUTIES LAWYERS OWE CLIENTS

- A. The Duty of Loyalty**
Restatement of the Law Governing Lawyers ("Restatement") §16(3)
- B. The Duty of Care**
Restatement §§16(2), 52(1)
- C. The Duty of Confidentiality**
Restatement §§59-60
- D. An Overview of the Implications of Care, Loyalty, and Confidentiality**

United States v. 7108 West Grand Avenue, 15 F.3d 632 (7th Cir. 1994),
cert. denied sub nom. Flores v. United States, 512 U.S. 1212 (1994)\

Thinking Dynamically and Interactively I (background)

Tante v. Herring, 453 S.E.2d 694 (Ga. 1994) Mapping Risk

Overlapping Causes of Action I

Boundary Issues I: When Are You A Lawyer, and When Are You Just An Ordinary Person?

Exercise: Framing Legal Ethics (background)

Main Points To Recall From Chapter I

Class 3 (McG 39-68; 78)

II. DIVISION OF AUTHORITY BETWEEN LAWYER AND CLIENT

A. Authority, Apparent Authority, and Inherent Authority

Restatement §§14, 26-30

B. Client Calls

Model Rule of Professional Conduct 1.2(a); 1.4

Restatement §§20-23

California Rules of Professional Conduct 3-500, 3-510

1. Authority to Settle Civil Matters

In re: Grievance Proceeding, 171 F.Supp.2d 181 (D. Conn. 2001)
Purposivism, Discipline, and Discretion

Thinking Dynamically and Interactively II
(background)

Diversification, Risk Tolerances, and Client Conflicts
(background)

Prospect Theory and Valuation (background)

2. Apparent Authority and Inherent Authority to Settle Civil Matters

Restatement §27

Fennell v. TLB Kent Co., 865 F.2d 498 (2d Cir. 1989)

Agency Cost I: The Importance of Reputational Capital and Conflicts Between Your Client and Your Reputation

Inherent Agency Power

Performative Utterances and the Practice of Law

Client Ratification (page 78)

Class 4 (McG 79-92; 94; and article on website: Finnegan, Defending the Unabomber, New Yorker 3/16/98)

C. Lawyer Calls

1. Criminal Matters

Model Rules 1.2(c); 1.14 (pay special attention to the comments on both rules, which are enlightening)

Model Rule 2.1

Arko v. People, 183 P.3d 555 (Co. 2008)

Appointed Counsel and Client Control

“Is this 1984, or what?": Defending the Unabomber
plus Finnegan article on bSpace website

2. Civil Litigation (through page 91)

Main Points to Recall from Chapter II (at page 94)