

LAW 638 – PROFESSIONAL RESPONSIBILITY

Andy Halaby

Fall 2023

Class hours: Tuesdays, 5:30-8:25 p.m.

Office hours: After class and by appointment

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Course Objective

This is a practical course, drawn on real world lawyering experience, addressing key issues in professional responsibility. The course will focus substantially on the American Bar Association (“ABA”) Model Rules of Professional Conduct (“Model Rules” or “MRs”), but will also treat significant variations of these rules as adopted in Arizona, and as well as examine common and statutory law governing lawyers. The ultimate objective of the course is to give students a working knowledge of their professional (and related legal) obligations and an appreciation for the ethical difficulties and challenges that the working attorney confronts.

Materials

There is no assigned textbook for this course. The ABA Model Rules, which provide the primary materials for this course, are available here. The Arizona Rules of Professional Conduct (“Ethics Rules” or “ERs”), which also will be reviewed though less extensively, are available here. Additional assigned reading is provided through links in this syllabus, or through PDFs transmitted before or during the pertinent class period.

Assignments

See weekly reading assignments appended to this syllabus. **Boldface underscoring** indicates linked material. Assigned reading, sometimes linked and sometimes not, is indicated by **maroon font**. Some optional reading, not in maroon font, is included as well. You will not be examined on optional reading material.

You should complete each week’s assignment, **including Week 1’s assignment**, before that week’s class.

You should carefully study the assigned material so as to be prepared to participate in class regarding, and ultimately to be examined on, that material.

I may sometimes distribute or post additional materials of interest.

Attendance and Grading

See the Statement of Student Policies. Ninety percent of your grade will come from a final closed book, closed notes examination, likely three hours in length. The remainder will come from class participation, including timely arrival for class and consistent attendance.

Beyond the substantive and procedural subject matter, I want you to learn something about legal reasoning, jurisprudence, and practical application of the law. You should consider these topics, as discussed in class in the context of our subject matter, fair game for the exam.

Academic Integrity

All students are subject to ASU Law's Academic Integrity Code. The Code "is intended to preserve the integrity of the educational process at the Sandra Day O'Connor College of Law, to promote principles of ethics and professional responsibility, and to ensure an environment in which students can advance their education fairly and confidently. In addition, integrity and honesty are important elements of every state's bar admissions process."

"The Code is not self-enforcing, nor can it be enforced by the faculty or administration alone. Its value depends upon the commitment of students to its norms. Not only must students observe it individually, but they should actively discourage their peers from committing any ethical or academic violation. We expect any student who has personal knowledge of an AIC violation to report that violation to the dean's designee."

Students are obligated to abide by this Code, which can be found at <https://law.asu.edu/cs/student-resources>.

Students are also subject to ASU's Student Code of Conduct, which among other things prohibits engaging in conduct that constitutes discrimination or harassment on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status, or socioeconomic status and may be subject to discipline by the University according to ASU's Student Code of Conduct Procedures.¹ Anyone who becomes aware of such conduct by a student should contact the law school's Director of Student Services or report it directly to the Dean of Students Office.²

Attendance Policy

Per Section IV.B of the JD Statement of Student Policies,

Attendance at classes, seminars, and other offerings is an essential element in successful academic performance. An instructor in any law school course, seminar, or other offering may withdraw a student for excessive absence.

Withdrawal for excessive absence in any course, seminar, or other offering shall presumptively be recorded as a failing grade (E). Students who believe that they have good cause for failing to attend

¹ The University's Student Code of Conduct and procedures can be found at <https://eoss.asu.edu/dos/srr/codeofconduct>.

² Information about the Dean of Students Office may be found at <https://eoss.asu.edu/dos>.

may petition a committee designated by the dean, which may in its discretion convert the grade to a W.

“Excessive absence” is defined as unexcused absence from more than 15% of class or other instructional time. For courses the administration designates as a “special attendance course” and which are so noted in the course description and syllabus, faculty may define excessive absence differently.

Students should notify the instructor at the beginning of the semester about the need to be absent from class due to religious observances or due to university sanctioned events/activities pursuant to ASU’s Academic Affairs Manual §§ 304-04 and 304-02.

Classroom Behavior

Respect for the thoughts, ideas, and speech of classmates and faculty is the foundation of the educational process. Threatening behavior in the classroom will be dealt with in accordance with SSM § 104-02, which requires that “all incidents and allegations of violent or threatening conduct by an ASU student (whether on- or off-campus) must be reported to the ASU Police Department and the Office of the Dean of Students.”

The use of electronic devices during class is prohibited with the exception of laptops used for class purposes. Recording the class in any manner without the permission of the instructors is prohibited.

Policy on Threatening Behavior

Students, faculty, staff, and other individuals do not have an unqualified right of access to university grounds, property, or services. Interfering with the peaceful conduct of university-related business or activities or remaining on campus grounds after a request to leave may be considered a crime.

Disability Accommodations

Per ASU Law and university policies, “the College of Law will provide reasonable accommodations for students with documented disabilities. College of Law accommodations can be made after the student requesting accommodations has met with the Student Accessibility and Inclusive Learning Services (SAILS) staff and eligibility has been established. Accommodations that fundamentally alter the prescribed course of studies must be approved by the College of Law. Students with disabilities that require accommodation(s) and/or adjustments should contact the law school registrar to make arrangements for the SAILS-approved accommodations.”

Title IX

Title IX is a federal law that provides that no person be excluded on the basis of sex from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity. Both Title IX and university policy make clear that sexual violence and harassment based on sex is prohibited. An individual who believes they have been subjected to sexual violence or harassed on the basis of sex can seek support, including counseling and academic support, from the university. If you or someone you know has been harassed on the basis

of sex or sexually assaulted, you can find information and resources at <https://sexualviolenceprevention.asu.edu/faqs>.

As a mandated reporter, I am obligated to report any information we become aware of regarding alleged acts of sexual discrimination, including sexual violence and dating violence. ASU Counseling Services, <https://eoss.asu.edu/counseling>, is available if you wish to discuss any concerns confidentially and privately. ASU online students may access 360 Life Services, <https://goto.asuonline.asu.edu/success/online-resources.html>.

Syllabus Revisions

Information in this syllabus, other than grading and attendance policies, is subject to change with reasonable notice.

Copyright Material

Pursuant to § 304-06 of the Academic Affairs Manual, “all contents of the lectures, including written materials distributed to the class, are under copyright protection.”

In accordance with ACD 304-10, students must refrain from uploading to any course shell, discussion board, or website used by the course instructor or other course forum, material that is not the student’s original work, unless the students first comply with all applicable copyright laws; faculty members reserve the right to delete materials on the grounds of suspected copyright infringement. Students may not share class materials outside the class, including uploading, selling or distributing course content or notes taken during the conduct of the course. Any recording of class sessions is authorized only for the use of students enrolled in this course during their enrollment in this course. Recordings and excerpts of recordings may not be distributed to others.

Class Recordings

Students may use class recordings for an educational purpose only.

ASSIGNMENTS

Week	Date	Subject Matter
1	8/22	<p>I. Essentials of Lawyering</p> <p>A. What is “practicing law”? <i>Ariz. R. Sup. Ct. 31, 31.1(a)(1), 31.2</i></p> <p>B. What does it mean to be a lawyer? <i>Matter of Pappas</i>, <i>Ariz. Sup. Ct. (1988)</i> – through Section III</p> <p>C. Lawyer regulation</p> <p>1. Sources</p> <p>a) State constitutions <i>Ariz. Const. art. 6 § 1</i></p> <p>b) State supreme courts</p> <p>(1) Decisions</p> <p>(2) Rules <i>Ariz. R. Sup. Ct. 32(a)(1), 32(c)(2)</i></p> <p>c) State statutes</p> <p>d) ABA</p> <p>(1) Model Rules</p> <p>(2) Formal Ethics Opinions</p> <p>2. Forms and format</p> <p>a) Rules of professional conduct – e.g., <i>Ariz. ERs (Ariz. R. Sup. Ct. 42)</i></p> <p>b) Ethics opinions</p> <ul style="list-style-type: none"> • Formal • Informal <p>c) Motions to disqualify <i>Gomez v. Superior Court</i>, <i>Ariz. Sup. Ct. (1986)</i></p> <p>d) Civil liability</p> <p>e) Criminal liability</p> <p>3. Choice-of-law <i>MR Preamble & Scope; MR 8.5 & cmts. [1]-[7]</i></p> <p>D. Who may practice law? <i>Ariz. R. Sup. Ct. 32(h), 33(a), 33(c), 34(a)-(c); MR 5.5 & cmts. [1]-[6]; ER 5.5(f)</i></p> <p>E. What qualifications are required to practice? <i>Ariz. R. Sup. Ct. 36(b); In re Hamm</i>, <i>Ariz. Sup. Ct. (2005)</i></p>

2	8/29	<p>F. Forming an attorney-client relationship <u><i>Foulke v. Knuck</i></u>, Ariz. Ct. App. (1989) – through “Conflict of Interest” section</p> <p>G. Fundamental duties of the attorney-client relationship</p> <ol style="list-style-type: none"> 1. Competence MR 1.1 & cmts.; <u><i>Matter of Alexander</i></u>, Ariz. Sup. Ct. (2013) – ¶¶ 1-47 <ol style="list-style-type: none"> a) Duty of care distinguished b) Limiting liability for malpractice MR 1.8(h)(1) & cmts. [17]-[18] c) Malpractice insurance and risk prevention 2. Diligence MR 1.3 & cmts. [1]-[4] 3. Communication MR 1.4 & cmts. [1]-[5], [7]; <u><i>Matter of Hiser</i></u>, Ariz. Sup. Ct. (1991) 4. Loyalty – MR 1.7 <ol style="list-style-type: none"> a) Independent professional judgment MR 2.1 5. Confidentiality 6. Financial integrity <ol style="list-style-type: none"> a) Payment for your services b) Handling funds and property 7. Honesty MR 8.4(c) 8. Obedience (?) MR 1.2(a)-(c) & cmts. [1]-[2] & [5]-[7]
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3	9/5	<p>II. Confidentiality and privilege (and work product doctrine)</p> <p>A. Confidentiality and its exceptions MR 1.6 & cmts. [2]-[3], ER 1.6; <u>California Business & Professions Code 6068(e)</u>; <u>California RPC 1.6</u>; Ariz. Sup. Ct. Att’y Ethics Advisory Comm. <u>EO-19-0010</u></p> <p>1. Reporting misconduct MR 8.3(a), (c)</p> <p>B. The privilege explained and distinguished A.R.S. § 12-2234; Halaby & Levy, <u>Arizona ABS Compliance Lawyers & the Attorney-Client Privilege</u> – through II.C</p> <p>C. Special situations</p> <p>1. Candor toward the tribunal MR 3.3 & cmts.; <u>Matter of Alcorn</u>, Ariz. Sup. Ct. (2002) – ¶¶ 1-40</p> <p>2. Use of client-related information MR 1.8(b)</p> <p>3. Waiver and informed consent MR 1.0(e) & cmts. [6]-[7]</p> <p>D. Work product</p>
4	9/12	<p>III. Conflicts of interest</p> <p>A. Overview MR 1.7 & cmts. [1]-[2], [4], [6]; ER 1.7</p> <p>1. Third party interests</p> <p>B. Personal interests MR 1.7 cmt. [10]</p> <p>C. Civil litigation <u>Matter of Shannon</u>, Ariz. Sup. Ct. (1994) – through Facts and Procedural History § A.2 only; MR 1.7 cmts. [23]-[24]</p> <p>1. Material limitation MR 1.7 cmt. [8]</p> <p>2. Insurer MR 1.8(f)</p> <p>3. Joint representation MR 1.8(g) & cmts. [29]-[33]</p> <p>4. Acquiring an interest MR 1.8(i)</p> <p>5. Financial assistance MR 1.8(e)</p> <p>D. Transactional representation MR 1.7 cmt. [7]</p> <p>E. Estate planning representation MR 1.7 cmt. [27]</p>

5	9/19	<p>F. Other conflict generators</p> <ol style="list-style-type: none"> 1. Deals with clients MR 1.8(a), ER 1.8(m) 2. Third party compensation MR 1.7 cmt. [13] 3. Gifts from clients MR 1.8(c) 4. Media deals MR 1.8(d) 5. Sex with clients MR 1.8(j) 6. Conflicting roles MR 1.7 cmt. [9] 7. Family involvement ER 1.8(l); MR 1.7 cmt. [11] <p>G. Advance and other conflict waivers MR 1.7 cmts. [14]-[19], [22], [28]</p>
6	9/26	<p>IV. Prospective clients and former clients</p> <p>A. Former clients MR 1.9; <i>Foulke v. Knuck</i> (remainder of opinion)</p> <p>B. Prospective clients MR 1.18, ER 1.18</p> <p>V. Ending the representation MR 1.16; Ariz. Sup. Ct. Att’y Ethics Advisory Comm. <u>EO-19-0009</u> and <u>EO-20-0001</u></p>
7	10/3	<p>VI. Organization as client MR 1.13 & MR 1.7 cmts. [34]-[35]</p> <p>VII. The business of practicing law</p> <p>A. Money (and property)</p> <ol style="list-style-type: none"> 1. Fees MR 1.5 & cmts. [4]-[5] <ol style="list-style-type: none"> a) Fee agreements <u><i>Matter of Swartz</i></u>, Ariz. Sup. Ct. (1984) – through “Was the Fee Excessive” section only b) Division of fees <u>Tex. Disc. R. Prof’l Conduct 1.04(f)</u>; <u>Cal. R. Prof’l Conduct 1.5.1</u> 2. Handling funds and property MR 1.15 & cmts. [3]-[4]; Ariz. R. Sup. Ct. 43; <u><i>Matter of Retter</i></u>, Ariz. Sup. Ct. (1994); <i>Matter of Shannon</i> – § A.3 only

8	10/17	<p>B. Imputed disqualification MR 1.10, 1.8(k) & cmt. [23]; ER 1.10(d); MR 1.11-1.12</p> <p>C. Supervision MR 5.1 & cmts. [1]-[3] & [8]; MR 5.2; <u>Ariz. R. Sup. Ct. 48(d)</u>; MR 5.3 & cmts. [1]-[2] & 4; ER 5.3; <u>Matter of Phillips</u>, Ariz. Sup. Ct. (2010) – ¶¶ 1-27</p> <p>D. Restrictions on right to practice MR 5.6; <u>Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C.</u>, Ariz. Sup. Ct. (2006) – ¶¶ 1- 24</p> <p>E. ABSs MR 5.4; Arizona Supreme Court Task Force on the Delivery of Legal Services, <u>Report & Recommendations</u> (Oct. 4, 2019) – through 28, plus “Opposition Statement” beginning at 57; <u>Order on RCP R-20-0034</u> (Aug. 27, 2020); <u>ACJA § 7-209</u></p> <p>F. Law related services MR 5.7 & cmts. [9], [11]</p>
9	10/24	<p>G. Advertising and solicitation MR 7.1 & cmts. [1]-[3], [5]; MR 7.2 & cmts. [5], [8]; MR 7.3 & cmts. [2]-[4]; <u>Bates v. State Bar of Arizona</u>, U.S. Sup. Ct. (1977) – majority opinion only; <u>Order on RCP R-20-0030</u> (Aug. 27, 2020)</p> <p>H. Litigation finance MR 1.8(e); Ariz. Sup. Ct. Att’y Ethics Advisory Comm. Op. <u>20-0003</u></p> <p>I. Selling a law practice MR 1.17; ER 1.17</p> <p>VIII. Special issues and problems</p> <p>A. Litigation</p> <ol style="list-style-type: none"> 1. Meritorious claims and contentions MR 3.1; <i>In re Alexander</i> – ¶¶ 12-21 2. Expediting litigation MR 3.2 3. Fairness to opposing party and counsel MR 3.4, 3.9 4. Impartiality and decorum of tribunal MR 3.5 5. Trial publicity MR 3.6 & cmts. [1], [7] 6. Lawyer as witness MR 3.7 & cmts. <p>B. Criminal prosecution MR 3.8; ER 3.8, 3.10</p>

10	10/31	Catch up class
11	11/7	<p>C. General</p> <ol style="list-style-type: none"> 1. Limiting client's right to report misconduct MR 1.8(h)(2) 2. Misconduct MR 8.4(a)-(e) & cmt. [2] 3. Counseling re unlawful conduct MR 1.2(d) & cmts. [9]-[10]; <u>SBA Ethics Op. 11-01</u> 4. The client with diminished capacity MR 1.14 & cmts. 5. Truthfulness in statements to others MR 4.1 6. Communications with represented persons MR 4.2; <u>Lang v. Superior Court</u>, Ariz. Sup. Ct. (1992)
12	11/14	<ol style="list-style-type: none"> 7. Communications with unrepresented persons MR 4.3 & cmts. 8. Respect for the rights of third persons MR 4.4 & cmt. 1; ER 4.4(b); Ariz. Sup. Ct. Att'y Ethics Advisory Comm. <u>AZ EO-20-0008</u> 9. Civility and professionalism Arizona Supreme Court Rules 41 and 54; <u>Matter of Martinez</u>, Ariz. Sup. Ct. (2020) – ¶¶ 1 – 38 10. Harassment and discrimination MR 8.4(g); Halaby & Long, <u>New Model Rule of Prof'l Conduct 8.4(g)</u>, 41 J. Legal Prof'n 201 (2017) – 201-04, 233-45, 256-end; <u>State Bar of Ariz. v. O'Neil</u>, Ariz. Sup. Ct. (2020); <u>Greenberg v. Goodrich</u>, E.D. Pa. (Mar. 24, 2022)
13	11/21	<p>IX. Miscellaneous</p> <ol style="list-style-type: none"> A. Pro bono MR 6.1 B. Limited legal service programs MR 6.5 C. Legal reform MR 6.4 D. Legal service organizations MR 6.3 E. Accepting appointments MR 6.2 F. Advocate in nonadjudicative proceedings MR 3.9 G. Judges MR 8.2, 8.4(f)