

LAW 638 – PROFESSIONAL RESPONSIBILITY

Hon. Jennifer M. Perkins

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Fall 2021

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

Office hours: After class and by appointment

Our contact information:

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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's Model Rules of Professional Conduct, but will also treat significant variations of these rules as adopted in Arizona, and will also examine the common and statutory law governing lawyers. The ultimate objective of the course is to give students both 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 are two required books for this course:

1. Thomas D. Morgan, Ronald D. Rotunda, and John S. Dzienkowski, *Professional Responsibility: Problems and Materials* (Foundation Press Unabridged 13th ed. 2018) (“Casebook” or “CB”).
2. John S. Dzienkowski (ed.), *Professional Responsibility Standards, Rules, and Statutes* (Foundation Press 2021-22 ed.) (“Supplement”).

Where cases, rules, statutes, or other materials outside the Casebook or Supplement are assigned, you are responsible for procuring them. The Arizona Rules of Professional Conduct (“Ethics Rules” or “ERs”), are available at azbar.org/for-lawyers/ethics/rules-of-professional-conduct/. Opinions of the (defunct) State Bar of Arizona Committee on the Rules of Professional Conduct are available at azbar.org/for-lawyers/ethics/ethics-opinions/. Opinions of the Arizona Supreme Court Attorney Ethics Advisory Committee are available at azcourts.gov/cld/Attorney-Ethics-Advisory-Committee/Opinions-Issued-by-the-Committee.

Assignments

See weekly reading assignments appended to this Syllabus.

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. **Where the Casebook reading includes references to the Model Rules of Professional Conduct, read the cited Model Rules, and any related comments — available in the Supplement — as well.**

Please bring your Casebook and Supplement with you to every class; we will refer to them frequently.

We may sometimes distribute or post on Canvas 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, we 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 Code of Academic Integrity. 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 may petition a committee designated by the dean, which any in its discretion convert the grade to a W.

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>.

“Excessive absence” is defined as unexcused absence from more than 20% 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 mandated reporters, we are 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.

Face Coverings

University policy, as of August 11, 2021, is as follows:

As announced on July 30, 2021, consistent with CDC guidelines for colleges and universities, ASU strongly recommends that everyone wear a face cover when inside a university building.

In addition, face coverings will be required in certain indoor settings, i.e., where distancing may not be possible. These include the following:

- Classrooms and teaching or research labs where distancing is not possible.

- All ASU clinical programs and centers that serve the general public, such as the ASU Health Centers, Child Development Laboratory, and Counselor Training Center (the “Programs”), whether on- or off-campus.
- Meeting rooms, workshop, design or production studios, and other indoor settings where distancing is not possible.

Additionally, consistent with CDC guidance, face covers may be recommended in selected outdoor settings or activities where distancing cannot be attained.

As previously stated, the university continues to recommend strongly that people get vaccinated and ASU continues to provide COVID-19 vaccines free of charge to students, faculty and staff. Greater rates of vaccination are the best tool available to reduce the rate of transmission in the community, which could change the applicable face covering guidance.

This and related matters are, of course, fluid. We encourage everyone to stay abreast of applicable law as well as University policy.

Eating/Drinking

To the extent inconsistent with law and policy (see above), you may not eat or drink in the classroom.

Class Recordings

Students may use class recordings for an educational purpose only.

ASSIGNMENTS

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
1	8/24	<p>I. The Legal Profession: Background & Fundamental Issues</p> <p>A. Introduction</p> <p>B. What Is a Lawyer</p> <p>C. How the Practice of Law Has Changed Over the Last Half-Century</p> <p>D. The Development of Standards of Professional Conduct</p> <p>E. Contributions from Moral Philosophy – Professionalism</p> <p>II. Regulation of the Legal Profession</p> <p style="padding-left: 20px;">__ Problem 1 Admission to the Bar __</p> <p>A. Character and Fitness for Admission to the Bar</p> <p>B. Candor in the Bar Application Process</p> <p style="padding-left: 20px;">__ Problem 2 Lawyer Discipline and the Disabled Lawyer</p> <p>A. Conduct That Can Subject a Lawyer to Discipline</p> <p>B. Aggravating and Mitigating Factors: Substance Abuse etc.</p> <p>C. Interstate Discipline</p> <p>D. Duty to Report</p>	<p><u>Casebook</u></p> <p>1 to top of 20</p> <p>29 to 33</p> <p>35 to “4” on 39</p> <p>“5” on 40 to “C” on 44</p> <p>Prob 2 on 49 to “2” on 56</p> <p>“C” on 57 to “4” on 59</p> <p>“D” on 60 to “2” on 61</p> <p>65 to Prob 3 on 67</p> <p><u>Additional Material</u></p> <p>July 2020 Letter Supp.: “Chapter 2” on 3 to “Problem 1” on 4</p>
2	8/31	<p style="padding-left: 20px;">__ Problem 3 Regulating Lawyers Outside the Disciplinary System __</p> <p>A. Standard of Care and Conduct in a Malpractice Case</p> <p>D. Other Significant Consequences of Negligence or Misconduct</p> <p style="padding-left: 40px;">3 Other Kinds of Remedies and Sanctions</p> <p style="padding-left: 40px;">4 Lawyers as Criminal Accomplices</p> <p>III. Fundamentals of the Lawyer-Client Relationship</p> <p style="padding-left: 20px;">__ Problem 4 Undertaking to Represent a Client __</p> <p>A. Duties to a Prospective Client</p> <p>B. Decision to Represent a Client</p> <p>C. Documenting That Decision</p> <p style="padding-left: 20px;">__ Problem 5 Billing for Legal Services __</p> <p>A. The Fee Agreement</p> <p>B. The "Reasonable Fee" Requirement</p> <p>C. Special Contingent Fee Rules</p>	<p><u>Casebook</u></p> <p>Prob 3 on 67 to “B” on 74</p> <p>“D” on 80 to “2” on 81</p> <p>“3” on 84 to “D” on 101</p> <p>Prob 5 on 106 to “3” on 113</p> <p>“4” on 114 to “C” on 116</p> <p>“2” on 116 to bottom of 119</p> <p><u>Additional Material</u></p> <p><i>Greenberg v. Haggerty</i>: Introduction, Parts A and C</p>

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
3	9/7	<p>__ Problem 6 Handling Client Property & Withdrawal from Rep. __</p> <p>A. Handling Client Property B. Withdrawal Without Client Consent C. Limitations on Efforts to Collect Fee D. Attorneys' Liens & Other Security Interests</p> <p>__ Problem 7 Duty of Confidentiality __</p> <p>A. Information Protected by Attorney-Client Privilege B. Information Protected by Work Product Immunity C. Lawyer's Professional Obligation of Confidentiality D. How Legal Protection Against Disclosure Can Be Lost</p> <p>__ Problem 8 Confidentiality and the Organization as Client __</p> <p>A. Privilege & Confidentiality Rules When the Client Is an Organization B. Control of Waiver of Privilege and Confidentiality C. Common Interest Privilege D. Limits of Confidentiality in Cases of Risk to Third Parties</p>	<p><u>Casebook</u> Prob 6 on 122 to "6" on 127 129 to "4" on 135 "D" on 136 to "b" on 140 "2" on 142 to "g" on 152 "2" on 154 to "c" on 162 "2" on 162 to "3" on 164 "B" on 168 to "4" on 171 "C" on 172 to "3" on 177</p>
4	9/14	<p>IV. Requirement of Loyalty to the Client</p> <p>__ Problem 9 Representing Multiple Parties Dealing with Each Other __</p> <p>A. Determining Whether Lawyer Has a Conflict of Interest B. Waiver of Conflict and Informed Consent C. Unconsentable Conflicts</p> <p>__ Problem 10 The Duty of Loyalty __</p> <p>A. Taking a Case Against a Current Client B. Ascertaining Who Is a Current Client C. Firing a Current Client; Hot Potato Rule D. Positional Conflicts</p> <p>__ Problem 11 Conflicts of Interest in Criminal Litigation __</p> <p>A. Limits on Representing Co-Defendants in a Criminal Case B. Public Interest in Objecting to Multiple Rep in Criminal Cases C. Conflicts of Interest Faced by Prosecutors</p>	<p><u>Casebook</u> 179 to "7" on 190 Prob 10 on 193 to "c" on 205 "C" on 207 to "3" on 213 "4" on 215 to bottom of 220 "B" on 221 to "D" on 226</p> <p><u>Additional Material</u> July 2020 Letter Supp.: "On p. 209" on 15 to "Problem 14" on 16</p>

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
5	9/21	<p>__ Problem 12 Personal Interest Conflicts __</p> <p>A. Business Transactions with Client; Payment in Stock</p> <p>B. Using Confidential Client Info to Make Private Investments</p> <p>C. Unsolicited Gifts from Happy Clients</p> <p>D. Intimate Lawyer/Client Relationships</p> <p>__ Problem 13 Representing the Insured and the Insurer __</p> <p>A. The Lawyer's Client</p> <p>B. Obligation of Confidentiality to the Insured</p> <p>C. Lawyer's Duty at Time of Settlement Offer in 3d Party Payment Case</p> <p>D. Level of Effort When Insurer Pays for Defense</p> <p>__ Problem 14 The Lawyer and the Former Client __</p> <p>A. Matters that Require Disqualification</p> <p>B. When Are Matters the Same or Substantially Related?</p> <p>C. Other Rule 1.9 Situations That May Require Disqualification</p>	<p><u>Casebook</u></p> <p>Prob 12 on 228 to “4” on 238</p> <p>“D” on 238 to “2” on 239</p> <p>242 to bot of 270</p>

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
6	9/28	<p><u>Problem 15 Imputed Disqualification</u></p> <p>A. Imputation of Conflicts Throughout a Law Firm B. Persons and Firms to Which Imputation Will Extend C. Imputation Within Lawyers' Families D. Using "Screening" to Avoid Imputation</p> <p><u>Problem 16 Conflict Issues for Government Lawyers & Judges</u></p> <p>A. Rules Applicable to Former Government Lawyers B. Former Private Lawyer Who Enters Government Service D. Conflicts of Former Judge or Neutral</p> <p>V. Advising Clients</p> <p><u>Problem 17 The Lawyer for an Individual Client</u></p> <p>A. The Difference Between Advice and Advocacy B. Limits of Advice a Lawyer May Give C. Client with Diminished Capacity</p>	<p><u>Casebook</u> Prob 15 on 272 to "3" on 274 "B" on 276 to "5" on 281 "6" on 282 to "2" on 284 "D" on 286 to "2" on 287 Prob 16 on 289 to "4" on 295 "B" on 297 to "4" on 300 "D" on 302 to "5" on 305 307 to "3" on 314 "C" on 315 to Prob 18 on 322</p> <p><u>Additional Material</u> <i>Arizona's Private Lateral Screening Rule: Dramatic Improvement</i> Ariz. Sup. Ct. Order, No. R-20-0034, at 1-2 & 21-22 (Aug. 27, 2020), re Ariz. ER 1.0(j) AEAC Op. 20-0004 (draft, as of 3/26/21) (to be distributed)</p>
7	10/5	<p><u>Problem 18 Advising the Business Corporation</u></p> <p>A. The Client to Whom a Corporate Lawyer Owes Primary Loyalty B. Reporting Corporate Misconduct Within and Without the Corporation D. Special Corporate Counsel Problems</p> <p><u>Problem 19 Contact with Represented and Unrepresented Persons</u></p> <p>A. Contacted with Represented Opponent in General B. Special Issues with Officers and Employees C. Interviewing Client Employees and Other Unrepresented Persons</p> <p><u>Problem 20 The Ethics of Negotiations</u></p> <p>A. Authority to Participate in and Consummate Negotiations B. Duty of Honesty in Negotiations C. Duty to Volunteer Information or Correct Misapprehension</p>	<p><u>Casebook</u> Prob 18 on 322 to "4" on 326 "B" on 327 to "C" on 329 "D" on 333 to "4" on 335 Prob 18 on 336 to "D" on 349 Prob 20 on 354 to "D" on 366</p> <p><u>Additional Material</u> <i>Lang v. Superior Court</i></p>

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
8	10/19	<p><u>Problem 21 Lawyer as Evaluator</u></p> <p>A. Duties to Client Who Asks for Legal Opinion B. Duties in Preparation of Legal Opinion for Third Party D. Lawyer Liability for Inaccurate Opinion</p> <p><u>Problem 22 Obligations When Client May Be Engaged in Fraud</u></p> <p>A. Disclosure of Client's Intended Crime or Fraud C. ABA and SEC Responses to a Series of Corporate Failures D. Special Issues of Disclosure by a Government Lawyer</p> <p>VI. Ethical Problems in Litigation</p> <p><u>Problem 23 The Decision to File a Civil Suit</u></p> <p>A. Ethical Standards Governing the Filing of a Civil Action B. Ethical Status of Delay as a Litigation Tactic</p>	<p><u>Casebook</u></p> <p>Prob 21 on 370 to bot of 375 “D” on 383 to “3” on 385 Prob 22 on 385 to “B” on 390 “C” on 396 to “3” on 417</p>
9	10/26	<p><u>Problem 24 Litigation Tactics</u></p> <p>A. The Line Between Creative Lawyering and Deception B. Using Deception in the Search for Truth C. Using an Opponent's Inadvertently Disclosed Confidential Information D. Judicial Efforts to Enforce Civility</p> <p><u>Problem 25 Disclosure of Facts or Law Favorable to the Other Side</u></p> <p>A. Candor About Adverse Legal Authority B. Candor About Adverse Facts C. Candor About Incomplete or Inaccurate Discovery Responses D. Candor About Factual Matters That Are Not Easily Verifiable</p>	<p><u>Casebook</u></p> <p>Prob 24 on 424 to “D” on 439 Prob 25 at 443 to bottom of 449 “5” on 451 to “2” on 455 “4” on 457 to Prob 26 on 462</p> <p><u>Additional Material</u></p> <p>ER 4.4(b); Ariz. Ethics Op. 07-03 Ariz. Sup. Ct. Rules 41 and 54(i)</p>

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
10	11/02	<p>__ Problem 26 Handling Physical Evidence __</p> <p>A. Confidentiality of a Client's Identity</p> <p>B. Taking Possession of Physical Evidence for Testing or Safekeeping</p> <p>C. Nondisclosure of Physical Evidence</p> <p>D. Destroying, or Failing to Retain, Physical or Documentary Evidence</p> <p>__ Problem 27 The Client Who Intends to Commit Perjury __</p> <p>A. Knowing When a Lawyer Knows Something</p> <p>B. Deciding to Call a Witness Who May Testify Falsely</p> <p>C. Deciding to Call the Defendant Who May Commit Perjury</p> <p>D. What to Do When the Client Gives False Testimony</p> <p>Secret Tape Recording</p> <p>The Lawyer as Witness at Client's Trial</p>	<p><u>Casebook</u></p> <p>Prob 26 on 462 to bottom of 500</p> <p>“C” on 506 to bottom of 508</p> <p>“D” on 510 to Prob 29 on 513</p>
11	11/09	<p>__ Problem 30 Duty to See Justice Done __</p> <p>A. Lawyer Duties When Injustice May Have Been Done</p> <p>B. System Reliability Concerns</p> <p>C. Obligation, If Any, to Respond to Concerns About an Injustice</p> <p>D. Other Conflicts Between Professional Obligations and Doing Justice</p> <p>VII. The Delivery of Legal Services</p> <p>__ Problem 31 Marketing Professional Services __</p> <p>A. Constitutional Context of Regulating Lawyer Marketing</p> <p>B. When Lawyer Advertising Becomes Solicitation</p> <p>__ Problem 32 Specialization __</p> <p>A. Duty When Matter Requires New Skills or Raises Unfamiliar Issues</p> <p>B. Calling a Lawyer a "Specialist"</p> <p>C. Payment of a "Referral Fee"</p>	<p><u>Casebook</u></p> <p>Prob 30 on 537 to “2” on 555</p> <p>“B” on 560 to “C” on 566</p> <p>577 to “3” on 581</p> <p>“C” on 583 to bottom of 586</p> <p><u>Additional Material</u></p> <p>Ariz. Supreme Court Order R-20-0030 (Aug. 27, 2020)</p>

<u>Week</u>	<u>Date</u>	<u>Topic</u>	<u>Reading</u>
12	11/16	<p>__ Problem 33 Roles and Responsibilities in a Modern Law Firm __</p> <p>A. Obligation of Supervisory Lawyers and Those They Supervise</p> <p>B. Rights of Lawyer Who Refuses to Violate the Law</p> <p>__ Problem 34 Leaving One Law Firm and Forming Another __</p> <p>A. Law and Ethics of Departing a Law Firm</p> <p>B. Efforts by Firms to Inhibit Lawyers' Ability to Leave</p> <p>__ Problem 35 The Duty to Work for Free __</p> <p>A. The Moral Obligation to Provide Pro Bono Legal Services</p> <p>B. Efforts to Translate the Moral Obligation into a Legal Requirement</p> <p>C. Tradition of Accepting Court Appointment in a Criminal Case</p> <p>D. Other Sources of Funding for Legal Services to the Poor</p>	<p><u>Casebook</u> 591 to "C" on 601 609 to bottom of 617 630 to "4" on 645</p> <p><u>Additional Material</u> ABA Formal Ethics Op. 19-489 (to be distributed)</p>
13	11/23	<p>__ Problem 37 The Future of the Practice of Law __</p> <p>A. UPL</p> <p>B. MJP</p> <p>C. Prohibition on the Corporate Practice of Law</p> <p>D. Ancillary Services</p> <p>VIII. Ethical Conduct of Judges</p> <p>__ Problem 38 Judges' Disqualifying Conflicts of Interest __</p> <p>A. Financial Interests That May Create Disqualifying Bias</p> <p>B. Financial Interests of the Judge's Family</p> <p>C. Bias from Personal Views Rather than Financial Interest</p> <p>D. Waiving Judicial Disqualification</p>	<p><u>Casebook</u> Prob 37 on 669 to 691 693 to 712</p> <p><u>Additional Material</u> Ariz. Sup. Ct. Order, No. R-20-0034, at 9-10 (Aug. 27, 2020), re Ariz. Sup. Ct. Rules 31-31.3</p> <p>Ariz. Task Force on the Delivery of Legal Servs., <i>Report & Recommendations</i>, at 6-16 (Oct. 4, 2019)</p> <p><i>Arizona's New Alternative Business Structures Law Is Alive & Kicking</i></p>