Professional Responsibility

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GILBERT

PROFESSIONAL RESPONSIBILITY

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I. How does the bar regulate attorneys?

A. Who regulates?

1. States regulate all aspects of the practice of law.

2. Attorneys have an ethical obligation to aid in regulating lawyers.

B. Who may practice law in a state?

1. A state may restrict the practice of law to those who are members of the bar of that state.

2. What are the permissible standards for admission to a state's bar?

C. The bar has the duty to prevent the unauthorized practice of law

1. What is the unauthorized practice of law?

2. What are the responsibilities of an attorney in preventing the unauthorized practice of law?

D. How can the bar ensure compliance with its rules?

1. Attorney conduct which can give rise to discipline:

2. Duty to make reasonable efforts to supervise subordinates (lawyers and non-lawyers) and make sure subordinate lawyers and non-lawyers comply with codes of professional responsibility.

3. Duty to make independent judgments.

4. Responsibility for ethical violations of another attorney or non-lawyer subordinate

II. How is the formation and ending of the attorney-client relationship regulated?

A. What is the attorney's duty to accept representation?

1. General rule: no duty to accept representation

2. Exception: duty to accept if court appointed

B. What is the attorney's duty to reject representation?

1. Representation which will result in violation of the law or a disciplinary rule

2. Representation which will require filing a frivolous claim or defense

3. If the attorney is not competent to handle the matter

C. When must or may an attorney withdraw from representation?

. NOTE: once a matter is in litigation, withdrawal requires court permission.

1. Circumstances where the attorney must withdraw

2. Circumstances where the attorney may withdraw

3. Requirements when an attorney withdraws

III. What are the attorney's duties to the client?

A. Duty to avoid conflicts of interest

1. General rules

a. An attorney may not represent a client if the representation of the client may be materially limited by the lawyer's responsibilities to another client, or to a third person, or by the lawyer's own interests, unless:

i) the lawyer reasonably believes that the representation will not be adversely affected; and

ii) the client consents.

b. If one attorney in an office is disqualified, all attorneys in the office are disqualified. Exceptions

i) Disqualification because of the attorney's own personal interests and representation would not interfere with representation by other lawyers in the firm; or

ii) Screening.
---disqualified lawyer is screened and apportioned no part of the fee; and
---former client is notified; and
----certification of compliance is provided.

2. Conflicts among current clients

3. Conflicts between an attorney's interests and a client's interests

4. Organizations and representation

5. Conflicts with past clients

a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client

---whose interests are materially adverse to that person; and
---about whom the lawyer acquired confidential information that is material to the matter;
---unless the client gives informed consent, confirmed in writing.

c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter use information to the disadvantage of the former client or reveal information relating to the representation except as allowed by the Rules.

B. Duty of competence

1. An attorney has a duty to provide competent representation to a client

2. An attorney is subject to discipline for attempting to contractually limit malpractice liability

3. An attorney cannot settle malpractice claims without advising the client in writing to see another attorney

C. Duty to follow client's instructions

1. General rule: the client controls the ENDS, attorney controls the MEANS

2. The client controls the following:

a. whether to sue in civil cases

b. whether to accept a settlement in civil cases or whether to plead guilty in criminal cases

c. whether to waive a jury trial in criminal cases

d. whether to testify in criminal cases

e. whether to appeal

3. Duty to keep the client reasonably informed

4. An attorney may limit the objectives of representation if it is reasonable under the circumstances and the client gives informed consent.

5. Representing a client with disabilities

D. Duty to protect client confidences

1. What information is protected as confidential?

2. What duties does an attorney have with regard confidential information?

Attorneys may not disclose it or use it to the client's detriment, except as authorized by law. Attorneys have an affirmative duty to prevent the inadvertent or unauthorized disclosure of a client's information.

3. What are the exceptions to the duty of confidentiality? A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

a) To prevent reasonably certain death or substantial bodily harm;

b) To prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

c) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

d) To secure legal advice about the lawyer's compliance with these rules.

e) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

f) To comply with other law or court order.

g) If the client gives informed consent.

h) To detect and resolve conflicts of interest.

4. How should an attorney handle the fruits and instrumentalities of a crime?

5. How should an attorney deal with knowledge that a client will or has committed perjury?

IV. How is the integrity of the system protected?

A. Duty to prevent abuse of the system

1. An attorney shall not bring or defend a proceeding or assert or controvert an issue unless the attorney believes that there is a basis for doing so that is not frivolous

2. An attorney shall make reasonable efforts to expedite litigation consistent with the interests of the client

3. An attorney shall not seek to influence a judge or a jury in a manner prohibited by law

4. An attorney shall not engage in conduct intended to disrupt a tribunal

B. Duty of candor to a tribunal

1. An attorney shall not make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal.

2. An attorney shall not fail to disclose a material fact when fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client

3. An attorney shall not offer evidence that the lawyer knows to be false.

4. An attorney shall disclose adverse legal authority that is on point and is from the controlling jurisdiction

5. In ex parte proceedings, the attorney shall inform the tribunal of all material facts

C. Fairness to opposing party

1. An attorney shall not obstruct another person's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value

2. An attorney shall not falsify evidence or counsel a witness to testify falsely

3. Make a frivolous discovery request or fail to comply with discovery in good faith

4. Make a false statement of material fact or law to a third party

5. A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know the document was inadvertently sent shall promptly notify the sender.

D. Trial tactics

1. An attorney shall not allude to any matter that is not supported by admissible evidence

2. Assert personal knowledge about the justness of a cause or personal knowledge of facts, except when testifying as a witness

3. Special duties of prosecutors:

E. Voluntary pro bono work

1. An attorney shall aspire to perform at least 50 hours of pro bono service per year

2. An attorney may serve as an office, director, or member of a legal services organization, even if it has interests adverse to the lawyer's clients

F. Attorney as advisor

1. An attorney shall not counsel a client to engage, or assist client, in conduct that the lawyer knows to be criminal or fraudulent

2. An attorney may discuss the legal consequences of any proposed course of conduct with a client and may assist a client to determine the meaning and application of the law

3. An attorney shall give candid advice and may refer not only to the law, but also to moral, economic, social, and political considerations

G. What is the permissible nature of other than clients?

1. Communication with adversaries

2. Communication with witnesses

3. Communication with jurors

4. Communications with the court

5. Communications about judges and adjudicatory officers

6. Communications with the press

V. How should the market for legal services be regulated?

A. Advertising and solicitation

1. Attorneys must not make false or misleading statements

2. Solicitation

a. Attorney in-person solicitation of clients profit is prohibited

b. Attorney shall not solicit if prospective client makes it known that he or she does not want to be solicited

3. Advertising

B. How may the practice of law be structured?

1. Names of law firms

2. Firms may incorporate if state law permits it, all officers, directors, and shareholders must be attorneys

3. Buying and selling law firms

C. Fees

1. Fees should be set as soon as possible in the course of representation, preferably in writing (contingency fee agreements must be in writing)

2. A lawyer's fee must be reasonable

3. Contingency fees

4. Fee splitting with other attorneys. A division of fees between lawyers who are not in the same firm may be made only if:

a) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

b) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

c) the total fee is reasonable.

5. Attorneys shall not enter into agreements that restrict the ability of lawyers to practice after the termination of their employment

D. What is the attorney's duty to protect the client's money or property?

1. An attorney must not comingle client funds and personal funds

2. An attorney must keep a record of client funds for at least five years after representation

3. An attorney must keep a client's property safely

4. An attorney must pay all money owed to the client promptly

VI. What are the ethical standards for judges?

A. When are judges disqualified?

1. If the judge has personal knowledge of disputed evidentiary facts

2. If the judge served as a lawyer in the matter in controversy or a judge in another court

3. If the judge has a financial interest in the case, including if a party or lawyer made a campaign contribution larger than an amount designated by law.

4. If the judge or a family member is involved in the case

5. Exceptions

a. remittal

b. rule of necessity

B. What conduct while serving as a judge is appropriate?

1. A judge shall comply with all constitutional, statutory, and procedural law

2. A judge shall require order and decorum in court proceedings

3. A judge shall be patient, dignified, and courteous

4. A judge shall perform judicial duties without bias or prejudice

5. A judge shall not engage in ex parte communications

6. A judge shall avoid and shall require attorneys to avoid expressing bias based on race, national origin, religion, gender, age, disability, sexual orientation, or socio-economic status

7. A judge shall dispose of all judicial matters promptly, efficiently, and fairly

8. A judge shall not commend or criticize jurors for their verdict, except in a court order or opinion

9. A judge shall not disclose or use any nonpublic information gained in a judicial capacity

10. A judge shall not make comments about any pending proceeding that can be reasonably expected to affect its outcome

11. A judge shall not conduct an independent investigation of the facts.

C. What off-the-bench conduct by judges is appropriate?

1. Judges are not allowed to engage in the practice of law

2. Judges are not allowed to serve as fiduciaries

3. Judges may serve in a charitable or civic organization so long as it does not reflect adversely on the judge's impartiality

4. A judge shall not hold membership in any organization that practices invidious discrimination based on race, sex, religion, national origin, ethnicity or sexual orientation

5. A judge shall not appear as a character witness unless subpoenaed or testify at a public hearing unless it concerns the law or the legal system.

6. Judges shall not engage in financial transactions that risk a conflict of interest

7. A judge shall not accept and urge family members not to accept gifts from those likely to appear before the judge

8. Judges may receive compensation for their non- judicial conduct, where permitted

9. A judge shall comply with the law in all of his or her activities

D. What political activities by judges or judicial candidates are permissible?

1. Judges and candidates for judicial office may not:

2. Judges must resign from the bench if running for non-judicial office

3. In campaigning for election or retention to the bench, a judge shall not:

a. personally solicit or receive funds

b. make pledges or promises of conduct in office

c. knowingly misrepresent own qualifications or facts concerning an opponent