

OUTLINE

PREFACE	V
TABLE OF CASES	XXV

Introduction. The Preamble, Scope, and

Rule 1.0	1
1. A Historical Perspective.....	1
A. The Hoffman Resolutions.....	1
B. Sharswood's Lectures	1
C. The ABA Canons of Professional Ethics ...	2
D. The ABA Model Code of Professional Responsibility	3
2. The ABA Model Rules of Professional Conduct	5
A. The Kutak Commission and the 1983 Model Rules.....	5
B. The Role of the Comments	7
C. "Ethics 2000"	7
D. Restatement of the Law Governing Lawyers, Third.....	8
3. A Brief Note on the Terminology of Legal Ethics	9
4. The Relationship of Legal Ethics with Other Law.....	11
5. The Public Image of Lawyers	12
6. The Introductory Sections of the Model Rules of Professional Conduct	12
A. The Preamble.....	12
B. Scope.....	13
C. Terminology: Rule 1.0	17

Rule 1.1. Competence	19
1. Experience Versus Competence	19
2. Malpractice and Competence.....	21
Rule 1.2. Scope of Representation and Allocation of Authority	23
1. The Creation of the Attorney-Client Relationship.....	23
2. The Allocation of Authority Between Client and Lawyer	27
3. Counseling or Assisting the Client in Criminal or Fraudulent Conduct.....	31
Rule 1.3. Diligence	37
Rule 1.4. Communication	41
Rule 1.5. Fees	43
1. Factors That Determine Whether a Fee Is Reasonable.....	44
2. Fee Disputes	52
3. Contingent Fees.....	55
A. Common Objections Raised Against Contingent Fees.....	56
B. When the Rules Prohibit Contingent Fees.....	58
C. When the Rules Allow Contingent Fees.....	61
4. Referral Fees and Sharing Fees	65
A. Basic Rules.....	65
B. Comparing Referral Fees to the Sale of a Law Practice	70
C. Referral Fees and Hiring of Law- Temps	71

5.	Hourly Fees.....	72
6.	Charging for Disbursements	74
	Rule 1.6. Confidentiality of Information.....	77
1.	Introduction	77
2.	Inadvertent Disclosure.....	81
	A. The Case of the Inadvertent Fax or Email	82
	B. Using Insecure Modern Communications Methods.....	90
	C. Emails When the Adversary Controls the Server.....	92
	D. Metadata	95
	E. Selective Waiver	98
3.	Lawyers Consulting with Other Lawyers (in Different Law Firms) When They Are Not Associated in a Matter	99
4.	The Prospective Client	100
5.	The Former Client.....	103
	A. Confidential Obligations to Former Clients as Creating Conflicts of Interest.....	103
	B. The Death of the Client.....	104
6.	Co-Plaintiffs or Co-Defendants of a Client: Confidential Duties Owed to Persons Other than Clients or Former Clients	108
7.	The Law Firm's Supervisory Responsibilities over Its Agents Regarding Attorney-Client Confidences.....	111
8.	Government Lawyers and the Attorney- Client Privilege.....	112
9.	Law Firm's In-House Ethics Counsel	114
10.	Client Waiver—Express and Implied	115

11. Revealing Confidential Information Without a Waiver: Some Special Cases	116
A. When Required or Permitted by Other Ethics Rules, Other Law, or a Court Order	116
B. When Necessary for the Lawyer to Establish a Claim or Defense in a Controversy with the Client, to Defend Against Any Civil or Criminal Charge, and to Secure the Lawyer's Fee	118
C. When the Client Intends to Commit a Future Crime, or When Death or Bodily Harm Is Reasonably Certain but Not "Imminent"	124
(i) The Basic Provisions.....	124
(ii) When an Innocent Person May Be Convicted.....	126
(iii) The Crime-Fraud Exception in the Law of Evidence	128
D. Tort Liability and the Lawyer's Discretion to Reveal	129
E. Proposed Client Wrongdoing and a "Noisy Withdrawal"	131
F. Offering False Evidence and the Rule of Candor Toward a Tribunal	135
G. To Resolve Conflicts of Interest	136
 Rule 1.7. Conflicts of Interest—Current Clients.....	 137
1. Introduction	137
A. The Basic Rationales.....	137
B. Consent: The General Principle	140

2.	Simultaneous Representation of Multiple Clients in Related Matters.....	144
3.	Simultaneously Representing Adverse Clients in Unrelated Matters	146
4.	Securing Consent.....	149
	A. Full Disclosure.....	149
	B. Prospective Waivers	150
5.	The Hot Potato Doctrine	154
6.	Special Problem Areas	158
	A. Estate Planning.....	158
	B. Examining a Present Client as an Adverse Witness	160
	C. Multiple Representations in Criminal Cases: The Problem of Constitutionally Adequate Representation.....	162
	D. Representing Government Entities and Private Clients Simultaneously.....	164
	E. Job Negotiations Between Lawyer for One Party and Lawyer for an Adverse Party.....	166
	F. Idiosyncratic Personal Interests of a Lawyer.....	167
	G. Lawyers as Members of Unions.....	170
	H. The Lawyer as Director of the Corporate Client	172
	I. The Insurer and the Insured	174
	J. Positional Conflicts.....	176
	K. Motions of One Lawyer to Disqualify the Opposing Lawyer	180

Rule 1.8. Conflict of Interest—Current

Clients: Specific Rules	183
1. Rule 1.8(a)—Business Dealings with the Client.....	183
2. Rule 1.8(b)—Using Client Information.....	185
3. Rule 1.8(c)—Accepting Gifts from Clients	189
4. Rule 1.8(d)—Publication Rights	190
5. Rule 1.8(e)—The Lawyer's Financial Advances to the Client	192
6. Rule 1.8(f)—Accepting Money from a Non-Client to Represent a Client	195
A. The General Issue.....	195
B. The Insurer and the Insured	196
7. Rule 1.8(g)—Aggregate Settlements	201
8. Rule 1.8(h)—Limiting the Lawyer's Liability for Malpractice	204
A. Prospective Limitations of Liability	204
B. Subsequent Limitations of Liability.....	207
9. Lawyers Related by Blood or Marriage.....	208
10. Rule 1.8(i)—Acquiring a Propriety Interest in the Client's Cause of Action	210
A. Liens	210
B. Contingency Fees as Proprietary Interests	212
11. Rule 1.8(j)—Sexual Relations with Clients	213

Rule 1.9. Duties to Former Clients 217

1. An Introductory Note on the Distinction Between Rule 1.9 and Rule 1.10.....	217
2. Rule 1.9(a).....	218
3. Rule 1.9(b).....	221

4.	Using Client Information to the Client's Disadvantage	223
5.	Waiver	224
A.	Bringing Home to the Client the Significance of the Information Communicated Regarding the Waiver	224
B.	Prospective Waivers of Rule 1.9 Conflicts	226

Rule 1.10. Imputation of Conflicts of

	Interest	229
1.	Introduction	229
2.	Waiver and "Screening"	230
3.	Rule 1.10(a): Lawyers Currently Associated in a Firm	234
A.	Defining the "Firm"	234
B.	The Ethics Rules Implicated by Rule 1.10(a)	236
C.	Lawyer Temps or Temporaries	237
D.	Paralegals, Legal Secretaries, and Law Students	239
E.	The "Of Counsel" Relationship	240
4.	Rule 1.10(b): Imputed Disqualification When a Lawyer Leaves the Firm	242
5.	Sanctions	246

**Rule 1.11. Special Conflicts of Interest for
Former and Current Government
Officers and Employees..... 251**

1. Introduction to the Ethics Rules Governing
“the Revolving Door” Between the Lawyer
Moving Between Government Service and
Private Practice 251
2. The Government Lawyer Moving into
Private Practice 253
 - A. General..... 253
 - B. Imputation, Waiver, and Screening of
Conflicts 257
 - C. Confidential Governmental
Information 259
 - D. Negotiating for Private Employment ... 260
 - E. Judicial Law Clerks..... 261
3. The Private Lawyer Moving into
Government Practice..... 261

**Rule 1.12. Former Judge, Arbitrator,
Mediator or Other Third Party Neutral.... 267**

1. Former Judges and Other Third-Party
Neutrals 267
2. Law Clerks..... 269

Rule 1.13. The Organization as a Client..... 271

1. Introduction 271
2. Actual or Apparent Representation of the
Organization and One or More of Its
Constituents..... 277
3. Representing Trade Associations 279
4. Derivative Suits..... 281

5. Corporate Family Issues.....	283
A. The Entity Theory	283
B. Situations Where the Courts May "Pierce the Corporate Veil" for Conflicts Purposes	287
C. Representing Government Entities While Simultaneously Representing Private Parties.....	290

**Rule 1.14. Client with Diminished
Capacity 295**

Rule 1.15. Safekeeping Property.....	297
1. The General Rule	297
2. Disputes Regarding Trust Fund Property	299
3. Audits of Trust Fund Accounts.....	300
4. Interest Earned on Client Trust Funds	302

Rule 1.16. Declining or Terminating Representation.....	305
1. Accepting a Case.....	305
2. Terminating Representation	306
A. General Principles.....	306
B. Wrongful Discharge.....	309
C. Mandatory and Permissive Withdrawal	311

Rule 1.17. Sale of Law Practice	315
1. The General Rule on Selling a Practice	315
2. The Death of a Lawyer.....	318

Rule 1.18. Duties to Prospective Clients 321

Rule 2.1. The Lawyer as Advisor..... 325

Rule 2.2. Intermediary	329
Rule 2.3. Evaluation for Use by Third Persons	331
Rule 2.4. Lawyer Serving as Third-Party Neutral.....	335
Rule 3.1. Meritorious Claims and Contentions	339
1. Meritorious v. Frivolous Claims.....	339
2. Nondisciplinary Sanctions for Frivolous Advocacy	343
Rule 3.2. Expediting Litigation	347
Rule 3.3. Candor Toward the Tribunal	349
1. Introduction	349
2. Making False Statements of Fact or Law: Rule 3.3(a)(1)	350
3. Disclosure of Adverse Legal Authority: Rule 3.3(a)(2)	352
4. Offering Evidence That the Lawyer Knows or Comes to Know Is False: Rule 3.3(a)(3)....	354
5. Remedies: Withdrawal from the Case and Protection of a Client's Secrets: Rule 3.3(b)	359
6. Time Limits on the Lawyer's Duty to Disclose: Rule 3.3(c).....	361
7. <i>Ex Parte</i> Proceedings: Rule 3.3(d)	362

Rule 3.4. Fairness to the Opposing Party and Counsel.....	365
1. Distinction Between the Lawyer's Duties of Candor to the Court and the Duty of Fairness to Opposing Counsel	365
2. Obstructing Access to Evidence.....	368
A. The Lawyer's or Client's Obstruction of Physical Evidence of a Crime	368
B. Discovery Abuses in Civil Cases.....	371
3. Money Payments to Fact and Expert Witnesses	372
4. Coaching Witnesses, Preparing Witnesses, and Counseling a Witness to Testify Falsely	377
5. Responses to Discovery Requests.....	378
6. Disobeying a Tribunal's Orders.....	379
7. Trial Tactics, Inadmissible Evidence, and Closing Arguments.....	380
8. Asking Witnesses Not to Volunteer Information	381
 Rule 3.5. Impartiality and Decorum of the Tribunal	 383
 Rule 3.6. Trial Publicity	 385
 Rule 3.7. Lawyer as Witness	 389
 Rule 3.8. Special Responsibilities of a Prosecutor	 393
1. Introduction	393
2. Criminal Cases	393

Rule 3.9. Advocate in Nonadjudicative Proceedings.....	401
Rule 4.1. Truthfulness in Statements to Others	405
Rule 4.2. Communication with a Person Represented by Counsel	411
1. The General Principle	411
2. Securing Consent from the Other Person's Lawyer: The Rule, and Sanctions for Its Breach	412
3. Criminal Prosecutions.....	416
4. Some Limitations on the Coverage of Rule 4.2	419
5. Employees and Agents of Organizations and Other Parties	421
Rule 4.3. Dealing with Unrepresented Person.....	425
Rule 4.4. Respect for Rights of Third Persons	427
Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers	433
Rule 5.2. Responsibilities of a Subordinate Lawyer.....	437
Rule 5.3. Responsibilities Regarding Nonlawyer Assistance.....	441

Rule 5.4. Professional Independence of a Lawyer	445
1. Sharing Fees with Laypeople	445
2. Sharing Managerial Responsibility with Nonlawyers	449
Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.....	453
1. Defining the “Practice of Law”	453
2. Rationale and Sanctions for Unauthorized Practice.....	458
3. Aiding in the Unauthorized Practice of Law.....	460
A. <i>Pro Se</i> Litigants	460
B. Aiding Disbarred or Suspended Lawyers in the Practice of Law	460
C. Practice of Law by Corporations, Associations, and Partnerships	461
D. Jurisdictional Limitations and Crossing State Lines	462
Rule 5.6. Restrictions on Right to Practice	471
Rule 5.7. Responsibilities Regarding Law-Related Services.....	477
Rule 6.1. Voluntary <i>Pro Bono Publico</i> Service	481
Rule 6.2. Accepting Appointments	487
Rule 6.3. Membership in Legal Services Organizations	489

Rule 6.4. Law Reform Activities Affecting Client Interests.....	493
Rule 6.5. Non-Profit and Court-Annexed Limited Legal-Services Programs	495
Rule 7.1. Communications Concerning a Lawyer's Services	497
1. The Origins of the Restrictions on Legal Advertising.....	497
2. The <i>Bates</i> Case and Its Progeny.....	498
A. Allegedly Misleading Advertising	499
B. Solicitation of Legal Business.....	503
3. The Overarching Principle: No Misleading Speech	508
Rule 7.2. Advertising.....	511
Rule 7.3. Direct Contact with Prospective Clients.....	515
1. Introduction	515
2. Departing Lawyers Soliciting Clients of the Former Law Firm	517
3. Solicitation and Legal Service Plans.....	520
4. Solicitation and “Real-Time” Electronic Solicitation	521
Rule 7.4. Communication of Fields of Practice and Specialization	525
Rule 7.5. Firm Names and Letterheads.....	527

Rule 7.6. Political Contributions to Obtain Government Legal Engagements or Appointments by Judges	531
Rule 8.1. Bar Admission and Disciplinary Matters	535
Rule 8.2. Judicial and Legal Officials	539
Rule 8.3. Reporting Professional Misconduct	541
1. The Lawyer's Role Regarding Reporting Disciplinable Violations of Lawyers.....	541
2. The Different Reporting Obligation of the Model Rules	544
3. Applicability of Privileges	548
4. Reporting Misconduct of Judges.....	550
Rule 8.4. Misconduct	551
1. Defining Professional Misconduct	551
2. Categories of Misconduct	553
A. Violating or Attempting to Violate a Disciplinary Rule: Rule 8.4(a).....	553
B. Violating a Disciplinary Rule Through Another: Rule 8.4(a)	553
C. Criminal Acts: Rule 8.4(b).....	555
D. Conduct Involving Dishonesty: Rule 8.4(c)	556
E. Conduct Prejudicial to the Administration of Justice: Rule 8.4(d)	558

F.	Implying an Ability to Influence Improperly a Government Official: Rule 8.4(e)	558
G.	Assisting a Judicial Official to Violate the Judicial Code: Rule 8.4(f)	559
H.	Engaging in Verbal or Physical Conduct a Lawyer Should Reasonably Know Is Harassment or Discrimination on the Basis of Race, Sex, Religion, National Origin, Ethnicity, Disability, Age, Sexual Orientation, Gender Identity, Marital Status or Socioeconomic Status in Conduct Related to the Practice of Law: Rule 8.4(g)	560
Rule 8.5. Disciplinary Authority: Choice of Law		563
INDEX		567