

Contents

<i>Preface</i>	<i>xix</i>
<i>Acknowledgments</i>	<i>xxi</i>
<i>Citations and Other Stylistic Practices</i>	<i>xxiii</i>

Chapter 1 The Many Ways of Regulating Lawyers 1

Introduction	1
Who Should Regulate Lawyers?	4
The Organized Bar: Models and Legally Binding Rules	4
Courts and Legislatures	6
A Bit of Ancient History, and Why It Matters	8
The ABA Canons	8
The Model Code	9
The Model Rules	11
Recent Developments	12
Ethics 2000	12
The Restatement	13
A Word About the MPRE	14

PART I. THE ATTORNEY-CLIENT RELATIONSHIP 17

Chapter 2 Formation and Termination 19

Introduction	19
Shall We Dance? Formation of the Relationship	20
Quasi-Client Relationships	21
Prospective Clients and “Beauty Contests”	23
Fifty Ways to Leave Your Client: Termination of the Professional Relationship	27
Client Fires the Lawyer	28
Lawyer Fires the Client	29
Breaking Up Is Hard to Do: Relationship Erodes over Time	29

Contents

Chapter 3	Aspects of an Ongoing Relationship	33
	Introduction	33
	Division of Labor in the Attorney-Client Relationship	34
	Some Basic Agency Principles	34
	Allocation of Authority Between Attorney and Client	36
	Clients with Diminished Capacity	43
	Duty to Communicate	44
	Interference with the Attorney-Client Relationship	50
	Anti-Contact Rule	50
	Anti-Contact Rule Where an Entity Is the Client	53
	Surveillance, Surreptitious Taping, and Other Sneaky Evidence-Gathering	57
	Anti-Contact Rule in Criminal Cases	59
Chapter 4	Attorneys' Fees and Transactions with Clients	67
	Reasonableness of Fees	67
	Contingent Fees	74
	Taking Stock in Clients	79
	Splitting Fees with Other Lawyers	81
	Holding Client Funds: Trust Accounts	82
Chapter 5	Representing Entities and Groups	87
	Introduction	87
	Complex Clients: Understanding the Beneficiary of the Lawyer's Duties	88
	Publicly Traded Corporations	93
	Structure of MR 1.13	93
	Corporate Wrongdoing	95
	The Sarbanes-Oxley Act	96
	Shareholder Derivative Actions	101
	Corporate Families	102
	Dealing with Agents of the Entity	105
Chapter 6	Incompetence: Remedies for Malpractice and Constitutional Ineffectiveness	111
	Introduction	111
	The Duty of Competence	111
	The Tort of Malpractice	112

Contents

	Duty and Standard of Care	113
	Breach of Duty	115
	Causation	118
	Damages	119
	The Sixth Amendment	125
Chapter 7	Confidentiality and Secrecy	133
	Introduction: Why Lawyers Should Keep Secrets	133
	Voluntary and Involuntary Disclosure	137
Chapter 8	Attorney-Client Privilege and Work Product Doctrine	147
	Elements of the Attorney-Client Privilege	147
	Communication	148
	Privileged Persons	148
	In Confidence	149
	Purpose	150
	Facts Not Protected	150
	The Attorney-Client Privilege for Entities	157
	Exceptions to the Privilege and Waiver	163
	Crime-Fraud Exception	163
	Intentional Revelation and “Selective Waiver”	165
	Inadvertent Disclosure	167
	Putting in Issue and Subject-Matter Waivers	169
	No “Borrowed Wits”: The Work Product Doctrine	173
Chapter 9	Professional Duty of Confidentiality	181
	Introduction	181
	Our Lips Are Sealed: The Professional Duty of Confidentiality	182
	Exceptions to the Professional Duty	186
	Authorized in Order to Carry Out Representation	186
	Informed Consent	187
	Disclosure to Prevent Wrongdoing	188
	Physical Injury to Others (and Crimes) — MR 1.6(b)(1)	189
	Financial Harms — MR 1.6(b)(2), (b)(3)	190
	Securing Legal Advice — MR 1.6(b)(4)	191
	Self-Defense — MR 1.6(b)(5)	191
	Compliance with Law — MR 1.6(b)(6)	193

PART II. SECRETS AND LIES: PERJURY AND THE PROBLEM OF CLIENT FRAUD	201
Chapter 10 Perjury in Civil and Criminal Litigation: The Lawyer’s “Trilemma”	203
Introduction	203
Model Rule 3.3 on Perjury	204
Prospective	204
Active Participation by the Lawyer	204
Passive Involvement by the Lawyer	205
Actual Knowledge of Falsity	206
Retrospective	208
Disclosure of Adverse Authority	209
Criminal Cases: Professional Duties in Tension	218
Alternative Responses to Perjury in Criminal Cases	221
“Tell the Court What Happened”: The Narrative Solution	221
Passing the Buck: Withdrawal	223
Chapter 11 Attorney Conduct in Litigation: Forensic Tactics, Fair and Foul	231
Introduction	231
Ex Parte Contacts with Judges and Jurors	232
Taking Advantage of Your Opponent’s Mistakes	233
Lying in Negotiations	236
Frivolous Pleadings, Motions, and Contentions	238
Witness Coaching	242
First Amendment Issues	247
Trying a Case in the Press	247
Criticism of Judges	249
Chapter 12 The Client Fraud Problem	255
Introduction	255
Lawyer Liability for Participating in Client Wrongdoing	255
Common Law Fraud	256
Securities Fraud	256
Aiding and Abetting Breach of Fiduciary Duty	257
Legal Malpractice	257
Discipline for Making False Statements	259
Another “Trilemma”: Confidentiality, Withdrawal, and Liability (Pre-2003 Model Rules)	262

Contents

Getting Mixed up with a Crooked Client	264
The Effect of Generally Applicable Law	265
Silence Is Not Golden: “Noisy” Withdrawals	266
“State of the Art” Law on Confidentiality and Client	
Fraud: MR 1.6 and Sarbanes-Oxley	271

PART III. CONFLICTS OF INTEREST **275**

Chapter 13 Overview of Conflicts of Interest **277**

Introduction	277
A Note on the Appearance of Impropriety	281
Discipline and Punish: Remedies for Conflicts	284
Disqualification	285
Malpractice	285

Chapter 14 Current Client Conflicts **287**

Introduction	287
Analysis of Current Client Conflicts Problems	287
Identify Client Relationships	287
Identify Conflicts	288
Significance of Direct Adversity and Material	
Limitation Language	289
Actual and Potential Conflicts	291
Confidentiality-Related Conflicts	294
Ascertain Consentability	295
Prohibited by Law	295
Client v. Client in the Same Litigation	295
Zero-Sum	296
See if There Has Been Effective Consent	297
Requirement of Written Consent	301
Advance Waivers	301
Imputation	312
Summing Up	314

Chapter 15 Current Client Conflicts Issues in Specific Contexts **321**

Criminal Cases	321
Transactional Matters	331
The Intermediation Rule	339
Positional Conflicts	340

Contents

The “Eternal Triangle” for Insurance Defense Lawyers	342
Client Identification	343
Conflicts	343
Reservation of Rights	344
Settlement	345
Multiple Parties	346
Duty to Communicate and Confidentiality	346
Chapter 16 Former Client Conflicts and Migratory Lawyers	349
Introduction	349
Side-Switching Former Client Conflicts	349
Review: Termination of the Attorney-Client Relationship	350
Analysis of Side-Switching Former Client Conflicts Problems	351
Representing a Client	352
Identify the Matter	353
The “Substantial Relationship” Test	353
Material Adversity	357
Consent	357
Coming in Second Place in a Beauty Contest	357
Migratory Lawyers	364
Analysis of Migratory Lawyer Problems	365
Definition of “Representation”: The Silver Chrysler Rule	365
Substantial Relationship	368
The “Typhoid Mary” Problem: Imputed Conflicts and Screening	369
Elements of an Effective Screen	372
Lingering Taints of the Departed Lawyer	374
Migratory Non-Lawyers	375
The Special Situation of Former Government Lawyers	378
Chapter 17 Personal-Interest Conflicts	383
Introduction	383
Business Transactions with Clients — MR 1.8(a)	384
Adverse Use of Confidential Information — MR 1.8(b)	387
Gifts to Lawyers — MR 1.8(c)	387
Media Rights — MR 1.8(d)	388
Problems of Litigation Funding and Client Support	389
Keeping the Client Afloat — MR 1.8(e)	390
Investing in Litigation — MR 1.8(i)	391

Contents

Third Party Fee-Payor Conflicts — MR 1.8(f)	392
Aggregate Settlements — MR 1.8(g)	392
Prospective Waivers and Settlements — MR 1.8(h)	394
Sexual Relationships with Clients	394
Imputation of Lawyer-Client Conflicts	397
Lawyer-Witness Rule	397

PART IV. ORGANIZATION AND REGULATION OF THE LEGAL PROFESSION 405

Chapter 18 Attracting Clients: Advertising and Solicitation 407

Introduction	407
Constitutional Decisions	411
Advertising Cases	411
Solicitation Cases	414
Disciplinary Rules	421
General Prohibition on False or Misleading Communications	421
Generally Advertising Is Permitted	424
Lawyer Referral Services	424
Solicitation Is More Tightly Restricted	425

Chapter 19 Associations of Lawyers 429

Practicing with Other Lawyers	429
Responsibilities of Supervising Lawyers	429
“Just Following Orders”: Responsibilities of Subordinate Lawyers	431
Intra-Firm Fiduciary Duties	432
Practicing with Non-Lawyers: The MDP “Problem”	436
Fee-Splitting	437
Partnerships and Corporations with Non-Lawyer Members	437
Professional Judgment	438
Attorney-Client Privilege and Confidentiality	439

Chapter 20 The Organized Bar 441

Regulating Entry into the Profession	441
Legal Authority to Regulate	441

Contents

Requirements for Admission	444
Physical Presence Requirements	444
Character and Fitness Screening	444
The Organized Bar: Regulating the Practice of Law	449
Reporting Professional Misconduct	449
Unauthorized Practice of Law (UPL)	450
Multi-Jurisdictional Practice	456
The Birbrower Bombshell	456
Multi-Jurisdictional Practice Reform	459
<i>Index</i>	465