

## PROFESSIONAL RESPONSIBILITY

Professor Humbach

Fall, 2023  
9/8/2023

**Books (required):** Gillers, Regulation of Lawyers, Concise ed. (Aspen 2015)

Dzienkowski, Professional Responsibility: Standards, Rules, Statutes

\*\*\***Before you buy a digital book**, see important note re Open Book Exam **at end**\*\*\*

**Course Webpage:** For more info and materials, see our Course Webpage (link at [humbach.com](http://humbach.com))

Read the following pages of the Gillers casebook and the materials (including the Online Supplement) posted on the Professional Responsibility Course WebPage (link at my website, [humbach.com](http://humbach.com)). You should come to class with *answers to the questions* in the “Readings” for the day’s assignment posted on the Course WebPage. The point of these questions is to help you prepare for class and to highlight the main points in the readings,

Over the semester we will average about one “Reading” per 3-hour class.

Note that assignments to the:

- Model Rules (MR) include the “Comments.”
- NY Model Rules are designated “NY MR”
- ABA’s Model *Code* of Professional Responsibility is designated “MODEL CODE.”

**Class preparation is essential. It may affect your grade if, on three or more occasions, you are not present or not prepared when called on, or if you ask to not be called on.**

### Reading # 1      **Law Practice as a Profession**

pp. 6-14 (*beginning with “Judges vs. Lawmakers”*)

Lawyer’s Creed of Professionalism-excerpts (supp p.5)

pp. 253-59 (*Nix v. Whiteside*)

p. 298 (“*Maxwell’s Silver Handle .38*”)

McElhaney, *Putting on a Good Face* (supp p. 6)

Weiss, *Backlash Follows Lawyer’s Celebratory Comments* (supp p. 9)

pp. 467-69 (purposes of discipline; sanctions; disciplinary systems)

pp. 471-73 (*In re Warhaftig*); see MR 1.15(a) & (c) (Safekeeping of Property)

### Reading # 2      **Elements of Client-Lawyer Relationship: Competence**

MR 1.1 (competence); NY MR 1.1. *See also* MR 1.3 (diligence)

pp. 20-21 (competence)

pp. 486-87 (duty to report another lawyer’s misconduct)

MR 8.3(a)(reporting misconduct); MR 5.1 (responsibilities of a partner or supervisory lawyer)

*See* MODEL CODE CANON 9, EC 9-1 & 9-2.

### Reading # 3      **Elements of the Client-Lawyer Relationship: Agency**

MR 1.2(a) (Allocation of Authority Between Lawyer and Client)

pp. 53-54 (vicarious admissions; procedural defaults)

(continued on next page)

pp. 48-53 (Agency: *Taylor v. Illinois*; *Bakery Machinery Cotto v. United States* (supp; and set out in “Reading # 2-3” on WebPage)  
pp. 54-55 (confidentiality, fiduciary loyalty as other agency responsibilities)  
MR 1.2(c) (Scope of representation)  
pp. 55-58 (*Nichols v. Keller*; Client’s Right to Know)  
p. 58-59 (“*In a box*”; see MR 1.4; MR 1.6(a); MR 1.7(a)(2))  
MR 1.16 (Withdrawal)  
pp. 72-74 (Terminating the lawyer-client relationship)

**Reading # 4 Elements of Client-Lawyer Relationship: Loyalty**

pp. 55 (loyalty and diligence-redux)  
MR 1.3 (diligence); NY MR 1.3; MODEL CODE Canon 7 and EC 7-1 (zealous representation)  
MR 1.2(d) (assisting in criminal or fraudulent conduct)  
pp. 346-48 (noisy withdrawals)  
MR 1.2(c) (limiting scope of representation)  
MR 1.2(b) (representation is not “endorsement”)  
pp. 247-50 (are lawyers morally accountable for their clients?)  
MR 1.2(a) (allocation of authority between lawyer and client)  
pp. 59 (the lawyer’s autonomy)  
pp. 62-66 (*Jones v. Barnes*; scope of lawyer’s autonomy)  
pp. 68-70 (*Olfe v. Gordon*; scope of client’s autonomy)  
pp. 60-62 (“*Ms. Niceperson*,” “*Lesser Included Offenses*” and “*I Don’t Plea Bargain*”)  
pp. 66-68 (“*I’d rather die*” and “*Accept the offer*”)

**Reading # 5 Elements of the Client-Lawyer Relationship: Confidentiality**

MR 1.6 (Confidentiality); MR 4.1 (Truthfulness in Statements to Others); NY MR 1.6  
pp. 29-32 (Privileged and ethically protected information; policies behind confidentiality)  
pp. 21-23 (“*The Case of the Innocent Lifer*” and “*My client is HIV positive*”)  
pp. 309-11 (“*The Client’s Loaded .45*”)  
pp. 311-15 (*In re Ryder*)  
MR 3.4(a)  
pp. 315-18 (Real evidence and criminal law)  
pp. 318-23 (*People v. Meredith*; The turnover duty: Does the source matter?)  
MR 1.13(a) and -(f). See also MR 4.3; MR 3.4(f)  
pp. 361-71 (representing corporations; *In re Grand Jury Subpoena*)  
pp. 25-28 (*Perez v. Kirk & Carrigan*)  
pp. 33-39 (Entity clients and *Upjohn v. United States*; **skip** “*Slip and Fall (Part I)*”)  
pp. 39-45 (Exceptions to the duty of confidentiality)  
p. 24 (“*Self-defense*”)  
pp. 46-48 (Lawyers and Social Media)

Reading # 6 **Improper Intrusions into Others' Lawyer-Client Relationships**

- pp. 75-78 (communicating with another lawyer's clients)
- pp. 85-86 (testers)
- pp. 87-89 (Prosecutor involvement in criminal investigations: **start just below top of 87**)
- pp. 89-92 (*United States v. Carona* & notes)
- pp. 92-96 (Improper/Accidental acquisition of confidential information)

Reading # 7 **Honesty in Negotiations**

*Settlement Negotiations:*

- pp. 17-18 (obligations to clients vs. obligations to others and to justice)
- MR 4.1 (*cf.* MR 3.3)
- pp. 340-41 top (lawyers in negotiations and transactional matters)
- pp. 345-48 (the "bad client: problem & noisy withdrawal (redux))
- pp. 348-49 (the lawyer's own statements)
- pp. 349-57 (*Fire Ins. Exch. v. Bell; Hoyt Properties v. Prod. Resources; Virzi v. Grand Trunk*)
- p. 345 ("*The Case of the Dead Witness*")
- pp. 358-59 (threatening criminal prosecution); NY MR 8.4(e)(1)

*Transactional negotiations:*

- pp. 459-64 (*Petrillo v. Bachenberg: start at middle of 459*)
- pp. 464-67 (lawyer liability beyond malpractice)
- pp. 357-58 (taking advantage of drafting errors)
- pp. 344 ("*The case of the complex formula*")

*Withholding critical information:*

- Schatz v. Rosenberg*, 943 F.2d 485 (4th Cir. 1991) (link on WebPage)

Reading # 8 **Candor in Advocacy**

- pp. 233-42 (introduction to advocacy ethics)
- pp. 246-47 ("*Justice as Fairness*")
- MR 3.3 (Candor Toward the Tribunal)
- pp. 250-52 ("*Out Carousing with Mickey*")
- P. 252 ("*Selma's False Testimony*")
- Michigan Opinion CI-1164 (1987) (Supp.)
- pp. 323-25 ("The White Women on the Walls Have to Go")
- pp. 252-53 (Truth and confidences, starting at middle of 252)
- pp. 267-68 (Robert Bennett's letter to Judge Wright)
- pp. 264-66 ("The Lecture" & "The Immigrant"—coaching witnesses)
- Do This, Not That, When Preparing Witnesses* (supp. p. 27)
- MR 3.4 (fairness to opposing party and counsel)
- MR 3.5 (ex parte communications, etc.)

Reading # 9 **Fostering Falsity or Advancing Truth?**

- pp. 269-72 (Intro; Literal truth: "*Parable of Billy*" and "*The Romance of Annie and Bill*")
- pp. 279-80 ("*Did you communicate with Cassie?*")
- pp. 272-78 (literal truth vs. perjury)
- p. 298 ("*Maxwell's Silver Handle .38*"--redux)

(continued on next page)

pp. 287-88 (boundaries of proper argument)  
“*Lucille Took Pills*” (contained in the “Reading # 9” questions)  
pp. 288-96 (“*I Hang a Key*”; “*The Eyewitness*”; arguing for false inferences)  
pp. 280-84 (cross-examining truthful witnesses)  
pp.284-87 (Appeals to Bias; *People v. Marshall*)  
Appeals to Racial Prejudice by Prosecutors (link on WebPage)  
MR 3.8 (special responsibilities of a prosecutor)  
pp. 325-37 (some issues concerning prosecutors; **skip Problem on p. 334**)  
Gershman Article, *Do Prosecutors Struggle with Innocence?* (link on WebPage)  
MR 3.1 (frivolous claims; harassment); MR 3.2 (expediting litigation)  
Article excerpt, “Abuse of Confidentiality and Fabricated Controversy” (Supp.)  
MR 8.4(g) (harassment and discrimination)  
Article “New formal ethics opinion on harassment and discrimination” (Supp.)  
pp. 300-04 (hardball and incivility—*Mullaney v. Aude*)  
pp. 483-86 (*In re Schiff*)  
pp. 304-08 (misstating facts; obligation to reveal adverse authority; *Thul v. OneWest Bank*)

#### Reading # 10 **Concurrent Conflicts of Interest**

MR 1.7 (Conflicts); MR 1.8 (Prohibited Transactions); MR 1.10 (Imputed Disqualification)  
pp. 129-34 (typology of conflicts)  
p. 134 (“*Lawyer. Realtor. Any Problem?*”)  
pp. 135-38 (*Matter of Neville* & note)  
pp. 138-40 (deals with clients, interests adverse to clients)  
pp. 140-42 (media rights)  
pp. 142-44 (financial assistance to clients)  
pp. 144-45 (fee-payer interests)  
pp. 196-97 (“*Ed’s Daughter Was Driving*”)  
pp. 200-01 (client identity & obligation to defend)  
p. 145 (Related lawyers, significant others, friends)  
*Gellman v. Hilal* (Supp.)  
pp. 145-49 (“conflicts” arising out of gender-religion-race)  
p.150 (*Murder One, Murder Two*)  
pp. 176-83 (*Fiandaca v. Cunningham* and notes)  
pp. 183-85 (acting adversely in unrelated matter)  
pp. 185-89 (confidentiality and privilege in multiple representations)  
pp. 175-76 (“*Will You Represent Us Both?*” and “*They’re on the Same Page*”)  
pp. 190-94 (malpractice for conflicts; *Simpson v. James*)  
pp. 201-02 (witness-advocate rule); MR 3.7

#### Reading # 11 **Successive Conflicts of Interest**

MR 1.9 (Conflict of Interest: Former Client)  
pp. 206-13 (*Analytica v. NPD* and notes on “substantial relationship”)  
pp. 213-17 (Continuing Duty of Loyalty, etc. **Stop** at “Conflicts in Class Actions”)  
pp. 220-23 (*Cromley v. Board of Education* & first note)

Rule 1.11 (Successive Government and Private Employment)

Reading # 12 **Acts Justifying Discipline**

MR 8.4 (Misconduct)

pp. 469-70 (“*A Defense Sting*” & “*A Research Shortcut*”)

pp. 471-72 (*n re Warhaftig* (redux))

pp. 473-75 (*In re Siderits* & Fraud, dishonesty, etc.; Neglect and Lack of Candor)

pp. 475-78 (Sex with clients; lawyers’ private lives)

MR 8.1; MR 8.3 (Reporting Misconduct)

pp. 486-88 (duty to report; defenses)

Reading # 13

**Malpractice and Beyond (Legal Liabilities of Lawyers)**

pp. 18-20 (Is There a Client Here?)

pp. 430-36 (*Togstad v. Vesely*)

pp. 440-42 (proving malpractice; *Smith v. Haynsworth*)

pp. 436-38 (breach of fiduciary duties; *Tante v. Herring*)

pp. 444-45 (Fee Forfeiture and Disgorgement)

pp. 445-51 (*Viner v. Sweet*)

pp. 453-57 (*Peeler v. Hughes & Luce*)

**And, as time allows:**

Reading # 14 **Bar Admission, Unauthorized Practice and Cross-Jurisdictional Practice**

Reading # 15 **Fees and *Pro Bono***

Reading # 16 **Advertising and Solicitation**

**Digital books and the Open Book exam:** It is currently expected that the final exam will be an “open book” exam that you will take on your laptop using the EXAM4 software system. In the past, students have found that the Exam4 software prevents access to books, notes and other materials on their computers during the exam. This means that students who want access to **digital** versions of books or other materials during the exam need to bring along a second device in addition to the laptop on which they take the exam. If you are thinking about buying **digital** versions of the books for this course, please be aware that this issue has existed and may still exist when you take the final in this course. Please see the Registrar’s Office for more information.