

MPRE REVIEW

Taking notes while watching the online lecture isn't necessary. If you prefer to take notes, this document provides a space to write notes next to topics as they are covered in the lecture.

For exam review, be sure to use your **Comprehensive Outline and Conviser Mini Review**.

1 REGULATION OF THE LEGAL PROFESSION

INTRODUCTION TO THE MPRE

Exam Format

- 60 multiple choice questions
 - 50 graded questions
 - 10 experimental questions (indistinguishable)

Answer every question!

- Two hours
- Tests ABA Model Rules

Study Process

Step 1: Watch this lecture and do the Learning Question sets.

- The Learning Questions are there to teach you, not to quiz you

Step 2: Read the Comprehensive Outline in your book for finer points and more examples.

Step 3: Do the Practice Questions and read the explanatory answers.

POWER TO REGULATE THE LEGAL PROFESSION

State's Highest Court

- Adopts ethical rules
- Enforces through disciplinary commission or bar association

NOTES**Congress and State Legislatures**

Have enacted laws that govern certain aspects of law practice (e.g., attorney-client privilege).

ADMISSION TO THE LEGAL PROFESSION**Admission Requirements**

Must be **rationally related** to the practice of law, e.g.:

- Graduation from accredited law school
- Oath to uphold the constitution
- Good moral character

Effect of Criminal Acts and Other Misconduct

To result in rejection, misconduct must involve **moral turpitude**:

- Crimes involving intentional dishonesty
- Crimes of violence
- Lying is always moral turpitude even if not crime

Requirements That Are NOT Rational

- Citizenship
- Residency

DUTY TO COOPERATE WITH CHARACTER INVESTIGATIONS

- No knowingly false statements of material fact
- Respond to all requests for information
- Correct any misapprehensions

But **NOT** required to disclose confidential information.

WHAT CONSTITUTES PROFESSIONAL MISCONDUCT?

Violating Rules of Professional Conduct

- Violating the RPC
- Attempting to violate the RPC
- Helping someone else violate the RPC
- Using someone else to violate the RPC

Committing Certain Crimes

Crimes relevant to **honesty, trustworthiness, or fitness.**

Committing Certain Acts

Acts of **dishonesty, fraud, deceit, or misrepresentation.**

Conduct Prejudicial to Administration of Justice

Harassment or Discrimination in Connection with Law Practice

- No harassment or discrimination based on race, sex, religion, national origin, ethnicity, age, sexual orientation, gender identity, marital status, or socio-economic status
- Does not affect ability to accept, decline, or withdraw from a case
- Trying to promote diversity is not a violation

NOTES

DUTY TO REPORT MISCONDUCT OF OTHERS

Mandatory Reporting of Violation

Violation raises **substantial** question as to lawyer's **honesty, trustworthiness, or fitness to practice**.

When Reporting Is Not Mandatory

- Question raised was **not substantial**
- Suspect violation, but **don't know**

Exceptions to Mandatory Reporting

- Violation of **duty of confidentiality** to a client
- Learned of violation in **lawyer's assistance program**

DISCIPLINARY AUTHORITY

- Any state where lawyer is admitted
- Any state where lawyer provided or offered services

1 REGULATION OF THE LEGAL PROFESSION (CONTINUED)

UNAUTHORIZED PRACTICE OF LAW

Unauthorized practice = practicing without a license.

Subject to discipline for **engaging in** unauthorized practice or **assisting** someone else in unauthorized practice.

Practice of Law

- Appearing at judicial proceeding
- Drafting documents
- Negotiating settlements
- Giving legal advice

NOT the Practice of Law

- Interviewing people
- Filling in forms
- Preparing tax returns

Appearing pro se is **NOT** unauthorized practice! A lawyer can help someone do that.

MULTI-JURISDICTIONAL PRACTICE

Methods of Temporary Out-of-State Practice

- Associate with locally licensed attorney
- Admission pro hac vice
- Mediation or arbitration
- Matter reasonably related to home state practice

NOTES**Permanent Out-of-State Practice**

- In-house counsel and government lawyer can engage in non-litigation practice across state lines
- Lawyers in certain restricted fields are specifically authorized by law to practice in other states

RESPONSIBILITY OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS**Duty to Prevent Ethical Violations**

- **Partners and managers** must take reasonable measures to ensure compliance with RPC
- **Supervisory lawyers** have same duty with respect to subordinates

Vicarious Responsibility

- **Ordered or ratified** misconduct
- **Failed to avoid or mitigate consequences** of violation

Partners, managers, and supervisors have the **same duties as above** with respect to **nonlawyers** working on client matters (both inside and outside the firm).

RESPONSIBILITIES OF A SUBORDINATE LAWYER

Acting on orders of another lawyer does not excuse misconduct unless it was a **reasonable** resolution of an **arguable** question of professional duty.

PROFESSIONAL INDEPENDENCE

- No partnerships with nonlawyers if any partnership activities involve practice of law
- No nonlawyer control or ownership interest in firm
- No fee splitting with nonlawyers (with limited exceptions below)

When Fee Splitting with Nonlawyer Permitted

- Death benefits to lawyer's estate
- Funds to purchase practice from deceased, disabled, or disappeared lawyer
- Bonus plans and regular salaries
- Court-awarded legal fees to nonprofit that retained or recommended lawyer

RESTRICTIONS ON RIGHT TO PRACTICE LAW

- **Law firm-related agreements** can't restrict right to practice when relationship ends, **except** for retirement benefit agreements
- **Settlement agreements for clients** can't restrict right to practice

SELLING AND PURCHASING A LAW PRACTICE

Seller's Duties

- Sell **entire practice** or **practice area**

NOTES

- **Written notice to clients** that includes notice of sale, right to obtain other counsel or take possession of their files, and the fact that consent to transfer is presumed after 90 days
- Generally **cannot continue private practice** in local area

Buyer's Duties

Must honor existing fee arrangements.

RESPONSIBILITIES FOR LAW-RELATED SERVICES

Lawyers can provide law-related services alongside legal services.

When RPC Apply to Law-Related Services

- When services are **not distinct** from legal services
- When **lawyer owns or controls entity** providing services and **does not take reasonable steps** to ensure recipients understand that protections of attorney-client relationship don't apply

2 THE CLIENT-LAWYER RELATIONSHIP

FORMATION OF RELATIONSHIP

- Lawyer and client agreement
- Implied assent and reasonable reliance
- Court appointment

FEES IN GENERAL

Types of Fees

- Hourly fee
- Flat fee
- Contingency fee
- Can be in the form of non-monetary property

Formalities

- Written fee agreement **required** for **contingent** fees
- Written fee agreement **preferred for all other fees**

All Fees Must Be Reasonable

Many factors considered, including:

- Time and labor
- Complexity
- Nature of relationship
- Fixed or contingent fee

NOTES

CONTINGENT FEES

When Contingent Fees Not Allowed

- Criminal cases
- Domestic relations cases (but allowed in collections cases)

Formalities for Contingent Fee Agreements

Must be **in writing** and **signed** by the client, and must disclose:

- Who is paying expenses
- How fee will be calculated
- Which expenses will be deducted and when

Must also provide written statement at case conclusion.

DIVIDING FEES WITH OTHER LAWYERS

Fee Splitting with Lawyers Within Firm—Allowed

Lawyer can share fees with current lawyers in their firm, retired members of their firm, and former firm members with pending cases.

Fee Splitting with Lawyer from Different Firm—Requirements

- Both lawyers must be **involved or responsible**
 - Option 1:** Split proportionate to services performed by each
 - Option 2:** Each assumes joint responsibility and split the fee any way they like

- **Client consent** to arrangement and shares, confirmed in writing
- Total fee must be **reasonable**

SCOPE OF REPRESENTATION AND DECISION-MAKING AUTHORITY

Representation

- Client generally decides scope, but lawyer can limit
- Can't advise or help to do something illegal or fraudulent

Client's Decision-Making

- **Civil Cases:** Whether to settle
- **Criminal Cases:** What plea to enter, whether to waive a jury trial, whether client will testify
- **All Cases:** Whether to appeal

Lawyer's Decisions

Lawyer generally makes strategic decisions, but must consult with client about how the work is done.

LAWYER'S AUTHORITY TO BIND CLIENT

Lawyer's actions will bind client when lawyer has actual or apparent authority.

Actual authority: Communicated by client to lawyer expressly or impliedly.

Apparent authority: Third party believes lawyer has authority based on client's actions.

NOTES

VULNERABLE CLIENTS

- Maintain normal relationship to the extent possible
- If client at risk of substantial harm, can take **protective action**
- When taking protective action, lawyer **impliedly authorized to disclose client's confidential information** to the extent necessary to protect client's interests

COMMUNICATING WITH THE CLIENT

Required Communication with Client

- Case status updates
- Game plan
- Response to reasonable requests for info
- Anything that requires informed consent

Settlement and Plea Offers

Must **promptly** inform client of settlement and plea bargain offers unless client has expressly authorized acceptance or rejection of certain offers.

TERMINATION OF REPRESENTATION

Must Decline or Withdraw

- Physical or mental condition materially impairs ability to represent client
- Representation requires violation of RPC
- Fired by client

Permissive Withdrawal

- Any reason if no material adverse effect
- Reasonable belief client doing something criminal or fraudulent involving lawyer's services
- Client used lawyer's services in past crime or fraud
- Client's actions repugnant
- Client makes representation unreasonably difficult
- Client hasn't paid and has been warned
- Unreasonable financial burden
- Other good cause

POST-TERMINATION ISSUES

- Reasonable notice to client
- Refund advance payments if not earned
- Return client's file unless permitted by law to retain

NOTES

3 CLIENT CONFIDENTIALITY

ATTORNEY-CLIENT PRIVILEGE VS. DUTY OF CONFIDENTIALITY

Attorney-Client Privilege

- Communications only
- Applies only to disclosures in proceedings

Duty of Confidentiality

- All information relating to representation
- Applies to disclosures in any setting

SUMMARY OF ATTORNEY-CLIENT PRIVILEGE

Attorney: Any person the client consults to obtain legal assistance.

Client: Anyone seeking lawyer's legal services.

Agents: Includes support staff, someone else brought in to assist with the matter, and someone who's there to help client communicate.

Communication: Information passed between lawyer and client for the purpose of obtaining legal assistance for the client.

- Does NOT cover communications not made for legal assistance
- Does NOT cover pre-existing documents or records

Confidential: Reasonable belief that outsiders will not learn the contents of the communication.

- Eavesdropper—communication generally remains privileged

Who Holds Privilege: Client holds the privilege and decides to claim or waive it, but lawyer must claim on client's behalf in client's absence.

Waiver of Privilege: Attorney, agent, or client can waive privilege by **failing to object**, or **disclosing** to third party.

Major Exceptions to Privilege:

- Aid in **future** crime or fraud
- Self-protection
- Litigation between former joint clients
- Competency or intent of deceased client

SUMMARY OF WORK-PRODUCT DOCTRINE

Anything made in anticipation of litigation generally isn't discoverable UNLESS opponent shows **substantial need** and **undue hardship** (but even in that case, mental impressions or opinions don't need to be disclosed).

DUTY OF CONFIDENTIALITY

- Broader than privilege
- Third party's knowledge does not affect duty
- Information need not come from client
- Cannot disclose to anyone

Informed Consent and Implied Authority

- Can disclose with client consent

NOTES

- Authority to disclose may be implied if disclosure is in client's interests

EXCEPTIONS TO DUTY OF CONFIDENTIALITY

- Prevent death or substantial bodily harm
- Prevent/rectify substantial financial injury to another if services used in furtherance
- Defend self in dispute concerning lawyer's conduct
- Obtain legal ethics advice
- Detect and resolve conflicts of interest due to change of employment, merger, or sale of practice
- Comply with court order or law

Note: Duty of candor to tribunal > duty of confidentiality.

ACTING COMPETENTLY TO PRESERVE CONFIDENTIALITY

Must **safeguard confidential information** by making reasonable efforts to prevent disclosure or access.

4 CONFLICTS OF INTEREST

Conflicts can result in discipline, disqualification from the case, and even malpractice liability.

RULE OF IMPUTATION

Conflicts are imputed to everyone at firm, **except**:

- Conflict uniquely personal to lawyer
- Certain conflicts based on past work of lawyer screened from case

GENERAL CONFLICTS WITH CURRENT CLIENTS

Rule

Can't represent client if:

- Representation will be **directly adverse** to another client, or
- **Significant risk** that representation will be **materially limited** by another interest

Requirements for Waiving General Conflicts

- **Reasonable belief** can represent each competently and diligently
- **Informed consent, confirmed in writing** from each affected client

Note: Being on opposite sides of the same litigation → unwaivable.

Direct Adversity Examples

- Clients on opposite sides of same matter

NOTES

- Representing client's opponent in another matter
- Cross-examining current client in another matter

Material Limitation

When representation will be materially limited by:

- Lawyer's responsibilities to different client, former client, or third person
- Lawyer's personal interests

Representing Co-Parties in a Case

In **criminal cases**, the risk of conflict is high and joint representation isn't advisable.

In **civil cases**, the conflict can usually be addressed:

- Must reasonably believe can represent all parties well
- Must explain consequences
- Must get informed consent
- Must re-address conflict if potential conflict becomes real
- Must withdraw if reasonable lawyer would advise any client against consent
- Must get consent of dropped clients if continuing to represent any co-parties

Lawyer's Personal Interests

- Representation may continue with client consent
- Uniquely personal conflict (e.g., family member is opposing counsel) is not imputed to firm

Lawyer's Duties to Former Clients and Third Parties

Representation may be limited:

- Where lawyer owes a duty of confidentiality to a former client
- Where lawyer is corporate director
- When lawyer acts as fiduciary

SPECIFIC CONFLICTS WITH CURRENT CLIENTS

Misuse of Client's Confidential Information

Must not use client's information against them without informed consent.

Business Transactions with Clients

- Transaction must be **fair and reasonable to client**
- Lawyer must disclose **all terms** to client **in writing**, in a way the client understands
- Lawyer must **advise client in writing** to get **independent counsel**
- Client must give **informed consent** in a **signed writing**

Acquiring an Interest in the Subject Matter of Litigation

No proprietary interest in cause of action or subject matter of litigation, **except:**

- Contingent fees
- Lien on client's recovery (if authorized by law)

NOTES**Gifts from Clients**

A lawyer cannot:

- **Solicit** substantial gift from client unless relative
- **Prepare instrument** giving lawyer or relative substantial gift unless donee related to client

Literary or Media Rights

- Cannot have interest in book, movie, or other portrayal during representation
- Lawyer can have interest in media rights when case is completely over

Financial Assistance to Client in Litigation

- No financial help to client in connection with pending or contemplated litigation
- Cannot guarantee loan from someone else to client

Exceptions

- May advance court costs and expenses
- May pay court costs and expenses for indigent client

Aggregate Settlement Agreements

- Fully explain the claims and what everyone's getting
- Get informed consent from each client in a **signed writing**

Third Party Paying for Representation

- Client must give informed consent

NOTES

- Third party cannot interfere with relationship
- Cannot reveal client's confidential information

Sexual Relations with Clients

- Preexisting sexual relationship generally OK
- Subject to discipline if sexual relationship follows attorney-client relationship
- Conflict not imputed to the firm

NOTES

4 CONFLICTS OF INTEREST (CONTINUED)

FORMER CLIENT CONFLICTS

Ongoing Duty of Confidentiality

Can't reveal confidential information or use it to former client's disadvantage without consent, unless information has become generally known.

Opposing Former Clients

Cannot represent new client against former client if matter is **same or substantially related** to former client's matter, unless former client consents.

Meaning of "Substantially Related"

- Same transaction/legal dispute, OR
- Substantial risk confidential information would materially advance new client's position

Former Firm's Client

Cannot work on opposite side if actually acquired confidential information about the matter while at former firm.

Former Client Conflicts—Disqualification of Lawyer's New Firm

If incoming lawyer has conflict, firm can screen the disqualified lawyer:

- No sharing of fees
- No access to case files

- Notice to former client with disclosures about procedures
- Updates to former client

Former Client Conflicts—Disqualification of Lawyer’s Old Firm

When client leaves, firm disqualified from representing other side in same or substantially related matter if **even one lawyer remaining at firm** has confidential information about the case, unless former client consents.

PROSPECTIVE CLIENT CONFLICTS

- No adverse representation in **same or substantially related matter** if confidential information would be **significantly harmful** to prospective client
- Conflict imputed to firm but can be cured with screening

GOVERNMENT CONFLICTS

Government → Private Practice

Cannot represent private client without government agency’s consent if:

- Same “matter” (must involve specific facts and parties)
- Lawyer worked **personally and substantially** on matter while in government
- Conflict imputed to firm but cured with screening

NOTES**Confidential Government Information**

If lawyer acquired confidential government information about a person during government employment, can't represent private client against them later.

Private Practice → Government

Normal conflict rules, plus:

- Cannot take part in any matter **personally and substantially** involved in while in private practice, unless government agency consents

FORMER JUDGE OR THIRD-PARTY NEUTRAL

- Cannot represent client in matter lawyer was personally and substantially involved in as a judicial actor or third-party neutral, or as a law clerk, unless **all parties to the proceeding consent**
- Conflict imputed to firm but cured by screening, notice to all parties, and notice to the affected tribunal

GOVERNMENT EMPLOYEE, JUDGE, OR THIRD-PARTY NEUTRAL NEGOTIATING FOR EMPLOYMENT

- Government employee, judge, or third-party neutral cannot negotiate for private employment with any party in a matter they are personally or substantially involved with
- Exception for law clerks who give advance notice to judge

5 COMPETENCE, LEGAL MALPRACTICE, AND OTHER CIVIL LIABILITY

DUTY OF COMPETENCE

Must act with the knowledge, skill, thoroughness, and preparation necessary to do the work.

Avoiding a Competence Problem

- **A**ssociate
- **L**earn it in time
- **E**mergency

DUTY OF DILIGENCE

Must act with reasonable diligence and promptness.

CIVIL LIABILITY TO CLIENT

Negligence

- Duty of care
- Breach of duty
- Causation
- Damages

Duty of Care

- Competence and diligence exercised by attorneys in similar circumstances
- Specialist held to higher standard

NOTES

Examples of Breach

- Missing deadlines
- Failure to send to specialist
- Bad advice

Note: No breach if judgment was well-informed and reasonable.

Causation

- But for malpractice, client would have won
- But for malpractice, client would not have had to pay a large judgment

CIVIL LIABILITY TO NON-CLIENTS

Duty of care owed to:

- Prospective clients given legal advice
- Those intended to benefit from legal services
- Those invited to rely on opinion or legal services

LAW FIRM'S VICARIOUS LIABILITY

Firm is vicariously liable for damages caused by someone at firm if:

- Action was in ordinary course of business, or
- Person was authorized to act

In a **general partnership**, all partners are **jointly and severally liable** for firm obligations.

SETTLING MALPRACTICE CLAIMS

Before settling claim or potential claim with current or unrepresented former client, lawyer must:

- **Advise them in writing** to obtain **independent counsel**
- Give them **reasonable opportunity** to do so

PROSPECTIVELY LIMITING MALPRACTICE LIABILITY

Cannot make agreement with client saying:

- They can't sue the lawyer
- Lawyer has no responsibility for work
- Lawyer is liable only to certain amount

UNLESS client is **independently represented**.

NOTES

6 LITIGATION AND OTHER FORMS OF ADVOCACY

MERITORIOUS CLAIMS AND CONTENTIONS

Lawyer cannot:

- Bring frivolous claim
- Assert frivolous defense
- Take frivolous position

Meaning of Frivolous

- No good faith argument under current law, AND
- No good faith argument for changing law

Exception

When **representing criminal defendant** or one who could be jailed, can make prosecutor **prove every element**.

EXPEDITING LITIGATION

- Must make reasonable efforts to expedite litigation consistent with client's legitimate interests
- Financial benefit is **not** legitimate interest

CANDOR TO THE TRIBUNAL

Honesty when advocating before an official or body that issues binding legal judgment.

Candor Regarding Law

- Cannot **knowingly make false statements** of law

- Must **correct** unintentional, **material** false statements
- Must **disclose adverse controlling law** if opponent fails to

Candor Regarding Facts

- Cannot **knowingly make false statements** of fact
- Must **correct** unintentional, **material** false statements
- No duty to volunteer facts (except in ex parte proceedings)

False Evidence

- **Cannot** offer evidence lawyer **knows** to be false
- **May refuse** to offer evidence lawyer **reasonably believes** is false (except testimony of a criminal defendant)
- If false evidence offered, must take **reasonable remedial measures (supersedes confidentiality)**
- Duty to rectify continues until proceeding is **completely over, appeals and all**

False Testimony by Criminal Defendant Client

- Try to persuade otherwise
- Consider withdrawal
- If all else fails, disclose situation to judge

Note: Some jurisdictions allow narrative testimony, but that is not the ABA approach.

NOTES

FAIRNESS TO OPPOSING PARTY AND COUNSEL

Cannot:

- Hide, tamper with, or falsify evidence
- Make frivolous discovery requests
- Advise a person not to talk to the other side, UNLESS the person is the client, the client's relative, or the client's agent
- Make unlawful payments to witnesses
- Violate a court rule or order (but can openly refuse to obey on the basis that it is not valid)

Fairness in Trials

- Cannot allude to anything inadmissible
- Cannot assert personal knowledge
- Cannot state personal opinion about justness of cause, credibility of witness, or guilt or innocence of party

IMPARTIALITY AND DECORUM OF THE TRIBUNAL

- Cannot attempt to influence court or jurors in way prohibited by RPC
- Cannot disrupt proceedings
- Cannot speak to judge or court officials without other side present
- Cannot talk to jurors about **ANY subject** during case

- Post-discharge interviews of jurors allowed unless juror does not want to talk, or it involves misrepresentation, coercion, or harassment

TRIAL PUBLICITY

No public statement if lawyer should know it is likely to cause material prejudice, including:

- Character or credibility
- Results of examinations
- Whether defendant will plead guilty
- Whether defendant confessed
- Anything inadmissible at trial

Permitted Statements

- Dry facts of case
- “They started it”—can make statement to protect client from prejudice caused by another

ADVOCATE AS WITNESS

Lawyer can't act as **advocate** in case where lawyer is **likely** to be a **necessary** witness.

Exceptions to Disqualification

- Testimony concerns **uncontested matters or formality**
- Testimony concerns the **nature and value of legal services** in the case
- Withdrawal would cause **substantial hardship to client**

NOTES

If disqualified under this rule, **disqualification not imputed** to firm but generally need client consent, confirmed in writing, if another lawyer at the firm takes over.

7 TRANSACTIONS AND COMMUNICATIONS WITH PERSONS OTHER THAN CLIENTS

TRUTHFULNESS IN STATEMENTS TO OTHERS

- Must not knowingly make false statement of material fact or law to third person
- Must disclose material fact necessary to avoid helping client commit crime or fraud (BUT must stay within confidentiality rules)

COMMUNICATIONS WITH REPRESENTED PERSONS

- When representing a client in a matter, must get counsel's consent before talking to represented person **about the matter**
- Parties can communicate directly with each other

Organizations

Need permission from organization's counsel to talk to:

- Anyone with authority to obligate organization
- Anyone whose conduct can be imputed to organization
- Anyone who supervises or regularly consults with organization's lawyer

NOTES

COMMUNICATIONS WITH UNREPRESENTED PERSONS

- Can communicate with unrepresented person, but **must not act disinterested**
- Must not give unrepresented person **legal advice** if reasonably possible their interests will conflict with client's

HEAVY-HANDED TACTICS

Cannot do something with **no substantial purpose** other than to embarrass, delay, or burden someone.

RECEIVING DOCUMENTS SENT INADVERTENTLY

Must **promptly notify sender** so sender can take protective measures.

8 DIFFERENT ROLES OF THE LAWYER

LAWYER AS ADVISOR

Must be candid, and can give client moral, economic, social, or political advice in addition to legal advice.

EVALUATING CLIENT'S AFFAIRS FOR THIRD PARTY

Can evaluate client's affairs if doing so is compatible with other responsibilities to client.

- **No significant risk** to client → **impliedly authorized to disclose** to third party
- **Materially harmful** to client → client's **informed consent required** before disclosure

LAWYER AS NEGOTIATOR

No false statements of material fact in negotiations, but can "puff" (e.g., on estimates of price or value, or acceptable settlement limits).

LAWYER AS THIRD-PARTY NEUTRAL

When lawyer acts as mediator, arbitrator, etc., must make sure unrepresented parties understand that lawyer is not representing them.

LAWYER AS PROSECUTOR

Prosecutors must:

- Have probable cause

NOTES

- Ensure accused advised of right to counsel, how to get counsel
- Ensure accused given opportunity to get counsel
- Not attempt to get accused to waive important pretrial rights
- Disclose evidence favorable to defendant
- Promptly disclose any new, credible, and material evidence of wrongful conviction
- Try to remedy conviction if clear and convincing evidence of innocence, and conviction in own jurisdiction
- Not subpoena other lawyers to give evidence about clients unless evidence is essential, not privileged, and cannot be obtained in another way

LAWYER APPEARING IN NON-ADJUDICATIVE PROCEEDING

Must disclose if appearing on behalf of client (but **need not identify client**).

LAWYER REPRESENTING ORGANIZATION

Relationship with Constituents

- Duty of loyalty to organization, not people
- Representing both organization and person in organization requires both to waive with informed consent
- If interests conflict, lawyer must tell person working for organization they don't represent them and communications aren't covered by privilege

Violations

If counsel learns that someone in organization violated duty or law that may cause substantial harm to organization:

- Counsel normally has duty to report inside organization
- If no action taken, counsel **MAY report to outside authority** even if confidentiality applies

NOTES

9 SAFEKEEPING FUNDS AND OTHER PROPERTY

COMMINGLING AND TRUST ACCOUNTS

Safeguarding Property of Others

- No commingling with own property
- Held to standard of fiduciary

Trust Accounts

- Firm's money in office account
- Client money in trust account, including advance payments (firm can put own money in client trust account for bank services charges only)

RECORDKEEPING, NOTIFICATION, AND DELIVERY

Lawyer must:

- Keep complete records of all money and property
- Preserve records for five years after representation
- Comply if client requests accounting
- Promptly notify client or third party upon receipt of property in which they have interest
- Promptly deliver property

DISPUTED PROPERTY

Dispute Between Lawyer and Client

Must keep disputed portion in client trust account until dispute resolved.

Dispute Between Client and Third Party

If third party has a valid claim (e.g., creditor with lien), must keep disputed portion of recovery in client trust account until dispute resolved.

NOTES

10 COMMUNICATIONS ABOUT LEGAL SERVICES

COMMUNICATIONS MUST NOT BE FALSE OR MISLEADING

Must not make false or misleading statements.

Omitted facts: Misleading if leaves out fact necessary to make communication as a whole not materially misleading.

Unfounded conclusions: Misleading if substantial likelihood reasonable person will formulate specific conclusion without reasonable factual foundation.

Unjustified expectation based on past results: Misleading if reasonable person could think that lawyer could do as well in a similar case, without regard to facts and law in that case.

Unsubstantiated comparisons: Misleading if reasonable person would think comparison can be substantiated.

REQUIRED INFORMATION

All communications about lawyer or legal services must include:

- **Name of at least one lawyer or firm** responsible for content
- **Contact information** (can be phone number, physical office location, email address, or website address)

FIRM NAMES, LETTERHEADS, OR OTHER DESIGNATIONS

- Generally can include names of **deceased or re-tired partners**
- If named partner is in **public office**, cannot use name during any **substantial** period when lawyer is **not regularly and actively practicing** with firm
- Trade name misleading if it **implies that lawyers are practicing in a firm** when they are not (e.g., solo practitioner includes “and Associates” in firm name)
- Trade name misleading if it **implies a connection with a government agency or charity**; geographical names may require a disclaimer

FIELDS OF PRACTICE AND SPECIALIZATION

Lawyer can state that they practice in certain fields, or “specialize in” or “concentrate in” or are a “specialist” in certain fields if statement is based on their experience, specialized training, or education, and is not false or misleading.

Certified Specialist

If lawyer states or implies that they are a **certified** specialist:

- **Must be certified** by organization accredited by ABA or approved by state authority
- Must **clearly identify** certifying organization

NOTES

RECOMMENDATIONS

Generally cannot give or promise anything of value in return for recommendation.

Nominal Gifts

Permitted if token of appreciation, but not if lawyer already promised it in exchange for the recommendation or if there is an expectation of more gifts in the future.

Paying for Advertising and Other Services

Lawyer can pay:

- Reasonable costs of advertising
- Usual charges of legal service plan
- Cost of participating in nonprofit referral service

Reciprocal Referral Agreements

Lawyer may agree with lawyer or nonlawyer professional to send clients to each other, but:

- Must not be exclusive
- Shouldn't be of indefinite duration
- Referred client must be told of agreement

SOLICITATION

Definition: Communication initiated by or on behalf of lawyer and directed to a specific person known to need legal services in a particular matter.

Ban on Live Person-to-Person Contacts

Must not solicit employment by live person-to-person contact when significant motive is money:

- No in-person contact
- No live telephone contact
- No real-time audio or video

Ban applies **ONLY** when solicitation is motivated by pecuniary gain.

Texts, emails, letters, and recorded messages are all generally permitted because there is no live person-to-person contact.

Potential Clients Not Covered by Ban

Can use live person-to-person contacts when soliciting:

- Relatives
- Close friends
- Persons with prior business relationships
- Persons with prior professional relationships
- Other lawyers
- Routine business users of services

When All Solicitation Prohibited

Regardless of method or identity of potential client, all solicitation is banned in the following circumstances:

- Person has made known to lawyer that they do not want the solicitation
- Solicitation amounts to coercion, duress, or harassment
- Specific legal restrictions (civil or criminal penalties)

NOTES**GROUP AND PREPAID SERVICE PLANS**

- Lawyer can reach out to organizations about adopting plan
- Lawyer cannot reach out to potential members
- Plan can reach out to potential members if not known to need particular legal services
- Lawyer who owns or directs plan cannot provide legal services through the plan

11 LAWYERS' DUTIES TO THE PUBLIC AND THE LEGAL SYSTEM

PRO BONO SERVICES

ABA suggests 50 hours per year, but non-complying lawyer will not be subject to discipline.

ACCEPTING APPOINTMENTS

Must accept unless **good cause** not to, such as:

- Appointment would cause violation of law or RPC
- Appointment would be unreasonable financial burden
- Personally unable to represent client effectively

QUICK-ADVICE PROGRAMS

RPC apply to limited legal service programs (e.g., quick advice hotline), except the conflicts rules are relaxed because there is no time to run a conflicts check. Lawyer only subject to discipline if there was a known conflict problem.

MEMBERSHIP IN LEGAL SERVICES ORGANIZATIONS

When serving as a member, director, or officer, lawyer does not have attorney-client relationship with persons served by organization, but must not participate in actions that would harm lawyer's regular clients or persons served by the organization.

NOTES**LAW REFORM ACTIVITIES**

- Permitted even if reform will harm interests of client
- Must disclose to organization if **client may benefit** from reform

STATEMENTS ABOUT JUDGES AND PUBLIC LEGAL OFFICIALS

Cannot make statements about the qualifications or integrity of judges or public legal officials, or candidates for these positions, if such statements are **false** or made with **reckless disregard** as to truth or falsity.

ABILITY TO INFLUENCE GOVERNMENT OFFICIALS

Cannot state or imply ability to influence government agency or official, or to achieve results in an illegal or unethical way.

POLITICAL CONTRIBUTIONS

Cannot make a “pay to play” contribution to obtain a government position (rule does not apply to unpaid positions). Whether there is a violation depends on the purpose of the contribution.

12 JUDICIAL CONDUCT

WHAT GOVERNS JUDICIAL CONDUCT

CJC applies to all who perform judicial functions at state level.

MAINTAINING INDEPENDENCE AND IMPARTIALITY

Must uphold and promote judiciary's independence, integrity, and impartiality.

- Must avoid **impropriety** or even the **appearance of impropriety**: conduct that creates reasonable perception that judge has violated CJC, or conduct that reflects poorly on judge's honesty, impartiality, temperament, or fitness
- **Letters of recommendation** may be on official letterhead if reference is personal, and not perceived as attempting to exert pressure; otherwise, must not use judicial letterhead for personal business
- Must not **abuse prestige of office** to advance personal interests, or permit others to abuse it

PERFORMING DUTIES IMPARTIALLY, COMPETENTLY, AND DILIGENTLY

- Must hear and decide all matters assigned, unless disqualification is required
- Must not let outside interests influence conduct or judgment
- Must not allow impression that judge can be influenced
- No bias, prejudice, or harassment
- May encourage settlement, but must not coerce

NOTES

EX PARTE COMMUNICATIONS

Definition: Communication between judge and representative from one side when no representative from other side is present. Usually prohibited.

When Allowed

- Expressly authorized by law or court order
- In mediation or settlement, with consent of parties
- Emergencies (when non-substantive and won't give one side an advantage)

Inadvertent Receipt of Ex Parte Communication

Judge must promptly notify parties and give opportunity to respond.

COMMUNICATIONS ABOUT PENDING CASES

Court Personnel and Other Judges

Can discuss cases with court personnel and other judges, but must not discuss facts not on the record.

Legal Experts

- Advice must be in writing
- Expert must be disinterested
- Must notify parties in advance

Interfering with Case

Judge must not make comments about **any case**, in **any court**, that might affect case's outcome or interfere with fair trial.

Jurors

No commending or admonishing jurors for the substance of their verdict.

INDEPENDENT INVESTIGATION

- Must not independently investigate the facts in a case
- Must consider only the evidence presented

DISQUALIFICATION

Judge must disqualify self when impartiality might reasonably be questioned.

Grounds for Disqualification

- Bias or personal knowledge
- Prior involvement in the case
- Judge or family member has economic interest
- Family member is involved in proceeding
- Excessive contributions to judge's election campaign
- Judge publicly committed to a position or result

Remitting Disqualification

Parties can remit (waive) disqualification for all grounds, **EXCEPT:**

- **Personal bias** concerning a party or lawyer, OR
- **Personal knowledge** of relevant facts

NOTES

EXTRAJUDICIAL ACTIVITIES

Teaching, Speaking, Writing, Etc.

Judge may be reasonably compensated unless it would reasonably appear to undermine independence, integrity, or impartiality.

Reporting Requirements

Judge must publicly report amount or value of:

- Extrajudicial compensation
- Reimbursement
- Certain gifts, loans, bequests, and other things of value

Participating in Organizations

Judge may take part in activities sponsored by:

- Organizations concerned with law or administration of justice
- Educational, religious, charitable, fraternal, or civic nonprofits

Prohibited Activities

- Cannot participate in activities that would lead to **frequent disqualification**
- Cannot accept appointment to **governmental position** or voluntarily testify at a **government hearing** unless it relates to law or the administration of justice
- Cannot serve as officer, director, manager, general partner, advisor, or employee of a **business** (exception for personal/family investments and businesses)

- Cannot testify as **character witness**, except when duly summoned
- Cannot be **affiliated with organization** that practices **invidious discrimination**
- Cannot serve as executor, administrator, guardian, or other **fiduciary** (except for family members)

Practicing Law

Full-time judge must not practice law, unless:

- Appearing pro se
- Giving legal advice to family
- Drafting legal documents for family

Third-Party Neutral

Full-time judge must not act as arbitrator, mediator, or private judge unless expressly authorized by law.

POLITICAL AND CAMPAIGN ACTIVITIES

- Can speak on behalf of own candidacy, but must keep independent from political organizations
- Cannot make pledges or promises inconsistent with impartial performance of duties
- Cannot personally solicit campaign contributions
- Cannot publicly endorse or oppose other candidates
- Can make factually accurate public response to false or misleading statements
- Judge who becomes candidate for nonjudicial elective office must resign from judicial office

NOTES**DISCIPLINARY ISSUES****Misconduct by Lawyers or Other Judges**

- Judge **knows** -> Must **report**
- Judge receives information but **isn't certain** -> Must take **appropriate action**

Disability or Impairment of Lawyers or Other Judges

Must take **appropriate action** if judge reasonably believes that lawyer's or other judge's performance is impaired by drugs, alcohol, or their mental, physical, or emotional condition.