Class Notes— Professional Responsibility (Dzienkowski)

General Class Information
• Grading
  o Aside from the final exam, a short paper (due on the last class day) will comprise
    10% of your total grade in the class.
    ▪ A document with last year’s titles and topics will be posted on Blackboard
      later in the semester.
• Final Exam
  o The final exam is open note, open book (but you must use printed hard copies of
    your notes, not electronic ones).
  o The exam will be a total of 3 hours.
    ▪ The first part is a two-hour multiple choice exam, with about 80 questions.
    ▪ Extensive sample questions will be posted on Blackboard later in the semester.
    ▪ You can qualify up to three questions on the back of the exam. If
      enough people think the question is ambiguous, it may be thrown out.
    ▪ All of the MCQ focus on the Model Rules, not state law. They may
      also include cases and hypotheticals that we have discussed in
      class.
      o The questions are designed so that one answer is right, and
        4 are wrong. They are not designed to have answers that are
        just “more right” than the others.
    ▪ The second part is a one-hour essay exam, with 1-2 questions.
    ▪ Obviously the essay questions will involve significantly more
      ambiguous ethical questions.
    ▪ [The first part will be collected before you begin the second part, so you
      cannot choose to allocate more time to one or the other].
• MPRE (Multi-state Professional Responsibility Exam)
  o The MPRE is comprised of 60 multiple choice questions in 2 hours. The exam is
    given three times a year, and is required in about 40 states.
    ▪ This test is one part of the bar exam that you can take before graduation
      (although select states require that the exam be taken within one year of
      the bar exam). Make sure the state you want to practice in is not on the list
      of those that require it within one year of the bar exam!
  o Students sign up for the exam on the National Conference of Bar Examiners
    website (ncbex.org)
    ▪ Test is administered in November, April, and August (see website for
      exact dates). Sign ups for 2013 text administrations will begin in January
      2013.
  o The ncbex.org website has a free sample test, as well as an interactive paid test.
    ▪ The CALI (“computer aided legal instruction) website also has some
      sample questions, as do most bar prep services (i.e. Barbri).
  o Study Tips:
When studying for the MPRE, make a bulleted list of bright-line rules.

- [The MPRE tends to be more rule-driven, while the in-class final exam tends to focus more on the concepts and materials presented in class).
- If you have an emergency and need to miss class, email Professor Dzienkowski and he will post a recording of the class on Blackboard.

**Part One— Professional Responsibility of Lawyers**

I. The Legal Profession

- In 1971, the ABA mandated that all students graduating from ABA-accredited law schools receive instruction in professional responsibility (instituted because of the Nixon Watergate scandal).
- What differentiates law and other professions from other commercial activities?
  - Barrier to entry
  - Higher learning/education
  - Regulation of members of the profession by other members
  - Spirit of public service
  - This fourth distinguishing characteristic (added later by a Harvard professor) is based on the idea that if we are forcing people to utilize lawyers and legal services (need a will when you die, etc.) than those who cannot afford these services shouldn’t have to pay for them.
    - By controlling who is admitted to the profession, lawyers are essentially creating a monopoly in who is able to provide these services.
- In the early history of the American legal profession, admission to the bar was very informal (through apprenticeship, etc.) and the bar exam was administered orally by a judge.
- Role of the ABA (American Bar Association)
  - The ABA is a completely voluntary group of lawyers that started in the early 1800s (small, insular group of attorneys representing big corporations).
    - The ABA has since greatly expanded from its insular roots. The organization has transformed into a leadership group, largely through promulgating the Model Rules.
      - These Model Rules have no force of law until formally adopted by a state.
  - ABA Models
    - Canons (1908)
      - The canons included clear wrongs and broad statements (i.e. loyalty, confidentiality, etc.)
    - Model Code (1969)
      - The Model Code gave structure to the nine canons, by setting out disciplinary rules and ethical considerations (aspirations) for each of the nine canons (broad statements).
Some states (e.g. New York) still use this formulation of disciplinary rules and ethical considerations.

**Model Rules (1983)**

- The 1983 Model Rules were an attempt to clarify the disciplinary rules set out in the Model Code. The Model Rules expanded the rules to apply to non-litigation practice, and removed the duty of zeal (“zealous representation”) in litigation.
  - The new format of the Model Rules involves a rule, followed by a comment.
    - In the late 1970s, a court used a conflicts rule to disqualify a firm from representing a client in court.
    - This ruling was significant because it meant that the aspirational language used in the Model Code was no longer sufficient and had to be disposed of.


- * This is the version we generally use today. It has been modified to reflect technological advances and modern practice.
  - However, it is important to note that Texas still follows the 1983 version of the Model Rules, as does California (California has a new draft, but it has not been acted on yet).

**Ethics 20/20 Version Model Rules (Today)**

- (The first set of changes took place just a few weeks ago in August).

**Changes in Legal Practice and the Legal Profession— Important trends over last 40 years**

- The legal profession was once self-regulating.
- Growth in the number of lawyers has increased competitive pressure on each of them.
- The impact of globalization has transformed the reality of many lawyers’ practices (now may find themselves dealing with entirely different legal systems).
  - The legal complexity created by globalization has contributed to making it nearly impossible to be the kind of generalist we once thought a lawyer could be.
- The technology revolution has transformed legal research and document discovery. Most importantly, however, technology promises to transform lawyer work that used to be seen as complex, unique, and worth of substantial fees into a series of commodities: simple, repetitive operations that will be sold to clients by the lowest bidder.
  - In addition, much of the information lawyers have traditionally sold is now freely available on the Internet.
- The growth of the size of organizations in which lawyers now practice, and the disappearance of the all-purpose, generalist lawyer.
- The transformation of the “hemispheres” of the bar (referring to the fact that less than one-third of legal professionals now focus on trying to meet the needs of individual clients).
The rising power of in-house counsel.
- The people most lawyers now have to please are other lawyers, acting in the role of general counsel to corporations, government agencies, and other organizations. In-house lawyers are the ones that tend to decide what services the client requires and why.
  - (The idea that today, private law firms can perhaps best be seen as inside counsel’s version of contract lawyers).

The growing significance of corporate counsel managing legal needs and the world-wide availability of help with legal matters has produced a declining need to have an American law license before providing legal services.

Dzienkowski— Because of advances in travel, communication, etc., people are practicing across state lines. Thus, the system of state-by-state regulation is breaking down. The historical system of self-regulation also does not work as well in the face of globalization.
- Now, the same problems that a company faces in the US are the ones they are confronting in a hundred other countries around the world.
- Globalization has raised new concerns regarding confidentiality— e.g. digitizing documents, storage on the cloud, etc. The Model Rules must adapt to set out rules and guidelines for how to deal with this new technology.
- One consequence of increasingly national and international legal practices has been the dramatic growth of the use of in-house counsel.
  - Around the world, investors finance litigation. In the US, however, lawyers are the ones who finance litigation (e.g. contingency fee plans).

Lawyer Regulation
- Lawyers are subject to a state-by-state system of regulation. The system typically uses the state Constitution as a starting point, with the state supreme court playing a central role.
  - However, the state supreme court may also be silent on the issue of lawyer regulation (but their inherent powers to regulate in this area may be express or implied).
  - Some states, e.g. California, have a system of dual administration or power between the state supreme court and the legislature. In Texas, the state supreme court holds most of the power to regulate lawyers.
- Some states (about 44) have an “integrated bar” model, where you must be a member of the state bar to practice law.
  - In many instances, the state bar actually has an action arm that gets to pass the rules. But even if the state bar also has the ability to enforce the rules, the state supreme court still plays a central role.
- States use these legislative and judicial mechanisms to create and enact variations with the ABA Model Rules.

II. Admission to the Bar
- One of the key factors or distinguishing characteristics of being a profession is the existence of a barrier(s) to entry.
• For the legal profession, the rule is that only lawyers can practice law.
  • ABA-created admissions rules
    o Age 21
    o Education— Three years of instruction from an ABA-accredited law school
      ▪ This rule essentially gives students graduating from accredited institutions
        the ability to take the bar in any of the 50 states. If a student graduate from
        a non-accredited law school, often his only option is to take the bar exam
        in the state where that school is located.
    o Bar Exam— Administered by the states, with the score and pass rate set by the
      state supreme court.
      ▪ (This could potentially run into problems with antitrust laws, but the state
        action exemption applies).
      ▪ There is a trend towards using the standardized test that is written by the
        National Conference of Bar Examiners.
        • This is significant because it means that students would be able to
          sit for multiple state bars at once.
          o However, states with special sections (i.e. Texas for oil and
            gas, or Louisiana for civil law) may oppose this.
    o Character and Fitness
      ▪ Ex— Texas
        • First year— Filing of the Declaration of Intent to Study Law
          o This form collects information about your education, work
            history, civil or criminal violations of the law,
            psychological issues, etc.
        • Bar Admission Committee
          o The Committee investigates any/all information provided
            on the form, and sends a letter to the application if there is a
            problem. If the problem is not resolved, the Committee can
            take the applicant to a hearing.
          ▪ Different states have different rules regarding who bears the burden of
            proof for proving character fitness or unfitness.
          • Dzienkowski— Regardless, it is essential that the applicant hire a
            lawyer if the Committee’s investigation leads to a hearing.
      ▪ Possible results of the hearing
        • The hearing may result in a settlement.
          o I.e. The applicant promises not to drink for six months and
            agrees to be subject to random testing.
        • The applicant loses at the hearing. At this point, the applicant can
          choose to pursue the matter further to the highest state court.
          o Note, though, that at this point the hearing becomes a
            matter of public record.
          ▪ If the applicant chooses to pursue the matter, and it
            involves due process or some other constitutional
            issue, it may even get all the way to the Supreme
            Court of the United States.
For example, one SCOTUS case said that state residency cannot be used as the basis for denying bar admission.

• Reasons for Bar Admission Denial
  o Violations of the Law—Criminal or Civil
    • Some bar applications/investigations impose a time limit—i.e. they only ask for disclosure of offenses committed within the last five years. Some bars also impose a restriction for severity—i.e. felony vs. misdemeanor.
    • Obviously any kind of physical crime (i.e. assault) may be of greater concern and thus form a sufficient basis for denial.
      • Even as early as the admissions process, prior felony convictions (especially for physical crimes) may be of special concern to state schools, because the public and legislature sometimes get angry when state resources are used to educate someone who is not eligible to become a member of the bar.
    • For civil law violations, the biggest concerns are tax evasion and other fraud-type crimes.
      • This is due to the fiduciary duties and obligations that lawyers often assume in the ordinary course of business as an attorney (the bar is concerned with protecting clients).
    • Of similar concern are alcohol and drug issues. However, the Americans with Disabilities Act had a significant impact in shaping the rules in this area. If the problem qualifies as an addiction, it is protected by the ADA.
      • The ADA has also had a significant impact in how the bar considers psychological issues.
        o The ADA said that these inquiries cannot be too broad. For example, questions should be limited to whether the applicant has actually been prescribed drugs to treat the condition, etc. Furthermore, answers to these questions should be evaluated by a medical professional.
        o Although the ADA protects a lot of this information, the ABA still has a right to ask. The applicant cannot refuse to answer, because failure to cooperate is another basis for denial of admission to the bar.
          • But the important take away here is that the ADA has had a very significant effect in making the bar committees narrow their inquiries in this area.
      • Remember that it is also always easier to keep an applicant out of the bar than throw someone out who has already been admitted.
      • In general, it is always better to admit the issue from the outset and deal with any potential fallout from the bar committee investigation, rather than conceal the issue.
    o Business relationships and behavior (including contract disputes, bankruptcy, etc.)
      • Essentially, the bar is just wary of admitting someone who is lawsuit-crazy—either because they will use their admittance to further their Rambo litigation, or because they will reflect badly on the bar in general.
But realize that bankruptcy is a federal right, so it cannot be used to exclude someone from the bar.

- Again, the bar just wants to know about these issues out of concern for how you manage money. Even if you are in debt, that is usually not a problem so long as you are making progress through payments. The red flag is only raised if the applicant is in default.

- Model Rule 8.1—An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
  - (a) knowingly make a false statement of material fact; or
    - If an applicant receives a letter from the bar, he must respond to the lawful request for information within the time limit provided. If he needs more time, etc. he must contact the bar and negotiate/express why.
  - (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Model Rule 1.6.
    - This means that an applicant must correct a misunderstanding that arises, even if it occurs through no fault of his own. But note the exception of Model Rule 1.6. A lawyer does not need to disclose any information in a bar inquiry that was disclosed to him while the applicant was a client or prospective client, because then it is protected by attorney-client privilege.

- Model Rule 8.1—Bar Admission Hypotheticals
  - Character and Fitness on the Bar application
    - Problem One: Client is Gerry Smith (third year, bar applicant). He was caught cheating on a tax exam—the exam proctor saw him, but Smith denied cheating. He changed his name in college (then-name Patrick Saville), and had a misdemeanor conviction for marijuana possession under his former name. When he meets with the dean of the law school about the tax exam cheating allegations, the dean offers a deal. He tells Smith that he can take a grade of F and repeat the course in summer school. If he takes that deal, he will not be charged with an honor code violation, and the incident will not be disclosed to the bar character and fitness committee.
      - Answer—Remember that everything must be disclosed on your bar application. This includes crimes committed under different names, terms of settlements, etc.
        - Obviously things like academic dishonesty are taken much more seriously than things like dorm violations or failing to return a library book.

- Other Requirements for Bar Admission
  - Citizenship or Resident Alien Requirement
    - In re Griffiths (US 1973)—A state may not require a bar applicant to be a US citizen. In re Griffiths held that such a requirement denies aliens the 14th Amendment guarantee of equal protection under the law.
• A resident alien green card holder (anyone who has properly immigrated to the US) cannot be denied admission to the bar on the basis of not being a citizen.
  o California and New York voluntarily allow foreign citizens to take the bar, because they have an eye towards reciprocity.
  o Residency
    ▪ *The Supreme Court of New Hampshire v. Piper* (US 1985)— The US Supreme Court has also limited states’ efforts to limit bar admission to the state’s own residents. *The Supreme Court of New Hampshire v. Piper* held that the practice of law is a fundamental right that deserves protection under the privileges and immunities clause. Thus, states may not discriminate against nonresidents unless they demonstrate a substantial state purpose and a narrowly drawn restriction to advance that purpose.
      • E.g. Virginia allowed residents graduating from Virginia law schools to be admitted to the bar automatically, but required non-residents to pass the bar exam. The court said this was prohibited.
    ▪ It is also common practice in many states to grant reciprocity to an attorney after he or she has been in practice for five years.
  o Federal court admission
    ▪ A federal district court may not require a lawyer seeking admission to practice before it to either reside or maintain an office in the state where the federal court sits. *Frazier v. Heebe* (US 1987).
      • The old requirement to be admitted to the federal bar was that you had to live and/or work in the state (*Tolchin v. New Jersey* (3d Cir. 1997) upheld the mandatory attendance and bona fide in-state office requirements.
    ▪ The modern general rule is that an attorney has to be a member of the bar of one of the states over which that court presides.
      • E.g. For the 9th Circuit, the attorney can be a member of the bar in California, Oregon, Nevada, etc.
    o Pro hac vice admission— An attorney may always go to the court and ask for special, one-time admission. Most courts will allow this, but attorneys cannot abuse the privilege by trying to use it for too many cases.
      ▪ Some states impose more formal rules or limits on how many times an attorney can be granted pro hac vice admission.

III. Lawyer Discipline and Reporting Misconduct

• Purposes and Functions of Discipline (American Bar Foundation Researchers)
  o Cleansing Function— To identify and remove all seriously deviant members.
  o Deterrence Function— To deter lawyers from engaging in misconduct.
  o Public Image Function— To maintain a level of response to deviance sufficient to forestall public dissatisfaction.
• Model Rule 8.4 [Misconduct]
  o It is professional misconduct for a lawyer to:
(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) Commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
(c) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
(d) Engage in conduct that is prejudicial to the administration of justice;
(e) State or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
(f) Knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

Once you are a member of the bar, you are subject to constant monitoring and discipline.

Some attorneys do not want to be bound by the code of conduct or take the risk of getting caught for prohibited conduct and be subject to disbarment. As a result, some individuals choose to go inactive (this is most common with sports agents, corporate officers, etc.)

The entire disciplinary system basically has three prongs:
- **State bar prosecutor**
  - Chooses to dismiss the case, or move forward.
- **Administrative functions**
  - Meetings, hearings, etc. Most of these administrative functions are confidential and do not become public knowledge. The exception is that in Texas, applicants have the right to opt into a jury trial, which obviously becomes public knowledge as an open court proceeding.
  - Furthermore, applicants can always appeal this judgment to the state supreme court.
- **Complaint-based system (Model Rule 8.3)**
  - Requires the participation of clients, judges, and other lawyers. Judges and attorneys have a duty to report misconduct by other judges and lawyers. Partners also have a duty of supervision over associates (and associates over partners?)

Model Rule 8.3 [Reporting Professional Misconduct]
- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority; (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

Components of the duty to report under Model Rule 8.3
- *Actual* knowledge of another lawyer’s misconduct
- Only violations of the Model Rules that raise a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer.
Normally one error or slight act of misconduct is not enough to trigger the reporting duty. It is enough, however, if that act involves lying, cheating, or stealing.

Note that other members of the bar are only required to report instances of attorney misconduct that are not covered by privilege under MR 1.6)

- Keep in mind, however, that information is no longer privileged once a case is filed (filing constitutes a permitted “disclosure”) because the attorney is required to allege the facts in the pleading.
- A client can also choose to waive confidentiality.
  - Example— The General Counsel of Citibank finds out that Skadden Arps overbilled and cheated the company out of $100,000. Is the general counsel required to report this incident to the bar? No. Citibank can choose not to waive its privilege and then the general counsel has no duty to report (may do this for public relations reasons, to save face).
  - Example— Riehman’s friend did not hire him to provide legal advice on this matter, so he had no client in this case. Therefore it was clear that he had a duty to report.
- Furthermore, information that is out in the open (public knowledge) is not protected by privilege.

Who is the appropriate reporting authority?
- The state discipline system, lawyer cares committee, etc.

A range of disciplinary options can be imposed for lawyer misconduct, including:

- Doing nothing, issuing a private reprimand, issuing a public reprimand, suspension (usually for one year or less), or disbarment (disbarment is usually imposed for at least several years; lawyer can apply again when disbarment term is over but most choose to enter different profession).
  - Many of the punishments imposed in these types of cases are really a result of negotiations between the lawyer (and his or her counsel) and the disciplinary committee.

- There are always in-between options as well, such as attending an ethics class, giving money back to the client, completing a certain amount of pro bono work, etc.

The important take-away from this section is that Model Rule 8.3 requires actual knowledge, and only imposes a duty to report for those issues that raise questions of honesty, fitness, and trustworthiness as a lawyer.

- If the misconduct occurs within the context of a case, the property authority to report this misconduct to is the judge.
- If the concerns are general, the appropriate authority may be the state bar prosecutor or lawyer cares committee.

Hypo— Andrews and Black

Andrews knows Black has a drinking problem that is getting worse. Andrews wins a case against Black that he “should have lost.” He suggests