The Three Perspectives: A Preface to Students Acknowledgments		xxiii xxv	
Introduction:	Where Do "Ethics" Rules Come From?	1	
Chapter I:	Are Lawyers Useful?	7	
A. Critic	s: Friendly and Not So	9	
	Jerold S. Auerbach, Welcome to Litigation	9	
	Lawrence M. Friedman, A History of American		
	. Law	12	
	Derek Bok, 1981-1982 Report to the Harvard		
	University Board of Overseers	14	
	Russell Baker, Lawyers for Cars	17	
B. Defen	aders	19	
	Simon H. Rifkind, The Lawyer's Role and		
	Responsibility in Modern Society	19	
•	Irving R. Kaufman, Utopia Without Lawyers?	23	
	Charles Fried, The Artificial Reason of the Law		
	or: What Lawyers Know	25	
C. Can t	he Ambivalence Be Explained?	27	
	Robert C. Post, On the Popular Image of the		
	Lawyer: Reflections in a Dark Glass	27	
	Questions 1.1 to 1.4	31	
Chapter II:	Legal Advertising and Solicitation of Clients	35	
A. Profes	ssional Advertising	35	
	Bates v. State Bar of Arizona	36	
	Zauderer v. Office of Disciplinary Counsel	44	

	Does the First Amendment Protect Legal Advertising	
	on Radio and Television?	57
	Can States Require Disclaimers?	58
	Can Legal Ads Carry Endorsements?	59
	Which Way Through the Labyrinth?	59
	Further Reading	60
	Questions 2.1 to 2.3	61
В.	Direct Solicitation of Clients	62
	Ohralik v. Ohio State Bar Assn.	64
	Shapero v. Kentucky Bar Assn.	71
	Ohralik, Shapero, and Schaumburg: How Does the	
	Supreme Court Know Things?	82
	Professionalism and Money	83
	Further Reading	85
C.	Solicitation Through Intermediaries	86
	In re Alessi	86
	What Did Alessi Accomplish?	90
	Questions 2.4 to 2.5	92
D.	Solicitation by Public Interest and Class Action	
	Lawyers	93
	In re Primus	93
	Communication with Class Members	100
	Questions 2.6 to 2.7	102
		4 0 0
Chapte	r III: Legal Fees	103
A.	The Role of the Marketplace	103
	Brobeck, Phleger & Harrison v. Telex Corp.	103
	Is There a Double Standard?	108
В.	Unethical Fees	109
	Bushman v. State Bar of California	109
	Question 3.1	111
	Courts May Reduce Unethical Fees	112
	Should a Lawyer Be Required to Put Fee Agreements	
	in Writing?	113
C.	Contingent Fees	114
	Roa v. Lodi Medical Group	116
	Statutory Fee Ceilings	122
	Contingent Fees in Criminal and Matrimonial	
	Cases	122
	Question 3.2	124
D.	Minimum Fee Schedules	125
	Goldfarb v. Virginia State Bar	126

		Antitrust and Legal Ethics	130
F	E. Co	urt-Awarded Fees	131
		City of Riverside v. Rivera	131
		Should Court-Awarded Fees Far Exceed the Client's	
		Recovery?	146
		Should Courts Increase Fees When There Is a Risk of	
		Non-Recovery?	146
F	F. Wh	no Gets the Money?	147
		Dividing Money Within a Firm	148
		Division of Fees Outside Firms	148
	3.	What Is a Law Firm?	149
		In re "Agent Orange" Product Liability Litigation	150
		Question 3.3	157
Chap	ter TV	: Control of Quality: Reducing the Likelihood	
	CCI I V	of Professional Failure	159
		of a folessional famore	100
			4.00
A		mission to the Bar	160
	1.	Geographical Exclusion	160
		Supreme Court of New Hampshire v. Piper	160
		The New Jersey Problem	168
	2.		169
		Supreme Court of Virginia v. Friedman	170
		After Piper, Frazier, and Friedman, What Can a State	
		Do to Discourage Out-of-State Lawyers?	176
		Do We Need Another System of Bar Admission?	177
	3.	Education and Examination	178
		Isaac Shapiro, Japan: Land of Law Graduates, If	
		Not Lawyers	180
	4.	Character Inquiries	181
		Cord v. Gibb	182
		Question 4.1	184
	,	Law Students Civil Rights Research Council v.	
		Wadmond	184
		Question 4.2	190
		Frequently Cited Grounds for Delaying or Denying	
		Admission to the Bar	190
		Questions 4.3 to 4.6	193
		Disbarment for Preadmission Conduct	194
		Procedures Regarding Character Inquiry	195
	5.		196
			197
		In re Roberts	198

	Question 4.7	200
B	. Transient Lawyers and Multijurisdictional Firms: Local	
	Interests Confront a National Bar	200
	1. Admissions Pro Hac Vice	202
	Leis v. Flynt	202
	Ford v. Israel	209
	Hahn v. Boeing Co.	212
	Is Pro Hac Vice the Solution?	215
	2. Services Other Than Litigation	217
	Ranta v. McCarney	217
	The "No Payment" Disincentive	222
	Question 4.8	223
	3. Multijurisdictional Firms	223
C	. The Ethical Duty of Competence	225
	Question 4.9	227
D	Continuing Legal Education	228
E		229
	State v. Buyers Service Co.	231
	The Troubled World of Unauthorized Practice	236
	Constitutional Limitations	236
	Uncontested Divorces	238
	Will Courts Share Power?	238
	Questions 4.10 to 4.11	239
F	. Specialization	240
Chapt	er V: Control of Quality: Remedies for Professional Failure	243
A.	Malpractice	243
	1. Liability to Clients	244
	Togstad v. Vesely, Otto, Miller & Keefe	245
	What Is the Required Standard of Care?	251
	2. Third Parties as "Client-Equivalents"	254
	Question 5.1	256
	3. Vicarious Liability	256
B.	Proving Malpractice	257
	1. Expert Testimony	257
	Wagenmann v. Adams	258
	2. The Place of Ethical Rules in Actions Against	
	Lawyers	262
	Miami International Realty Co. v. Paynter	262
	Which Court Is Correct?	264
	Ethical Violations as a Basis for Reduction or Denial	
	of Fees	265

	0.0
Contents	XII
COLLECTIO	

	Further Readin	g	266
	3. Causation		266
	Question 5.2		268
	Causation in Crimi	nal Cases	269
	Carmel v. Lunney		269
	Acquittal or Innoce	ence?	271
	4. Damages or Injury		271
	Question 5.3		273
C.	Beyond Malpractice: O	ther Grounds for Attorney	
	Liability to Clients and		273
	Greycas, Inc. v. F	roud	273
	The Expanding Un	iverse in Professional	
	Liability		280
147	Question 5.4		286
	Further Reading	g	287
D.	Discipline		287
	1. Purposes of Discipli	ne	287
	2. Sanctions		288
	3. Acts Justifying Disc	ipline	289
		nlawful Conduct	290
	In re Warhaftig		290
	In re Austern		292
	Question 5.5		297
	In re Colin		298
	b. Neglect and La	ick of Diligence	299
	c. Sexual Relation	ns with a Client	300
	In re McDow		300
	Should Lawyers Be	Forbidden to Have Sexual	
	Relations with Clie	nts?	300
	d. The Lawyer's l	Private Life	301
	Question 5.6		302
	4. Disciplinary Proced	lures	303
	In re Ruffalo		303
	The Zauderer Court's	's Treatment of Ruffalo	306
	Other Rights in the	Disciplinary Process	308
	5. Readmission		309
	6. Discipline in a Fede	eral System	310
E.	Constitutional Protection	n in Criminal Cases	310
	Strickland v. Wa.		313
	United States v. Croni	c: Inadequate Time	
	to Prepare		319
	Some Reasons for I	neffectiveness Claims	322
	Morris v. Slappy: Eff	ectiveness Does Not Include	
	Rapport		323
	An Ounce of Preve	ntion?	324

2.4

XI	V

		Further Reading	326
Chapt	er VI:	Control of Quality: Lay Participation in Law Firms and the Delivery of Legal	
		Services	327
		Datan Waldman Das Daid I amal Dlana Offen	
		Peter Waldman, Pre-Paid Legal Plans Offer Consultations, Follow-up Calls and Referrals at	
		Low Cost	327
		gislative History	330
A.	-	ofit Entities and Intermediaries	332
	1. Pu	blic Interest Organizations	332
		NAACP v. Button	333
	Ma	aintenance, Barratry, Champerty, and Change	340
	2. La	bor Unions	341
		United Transportation Union v. State Bar of Michigan	343
		Questions 6.1 to 6.2	346
\mathbb{B} .	For-Pro	ofit Enterprises	347
		ABA Formal Opinion 355 (1987)	348
	Th	e North Carolina Perspective	354
	La	y Participation in Entities That Sell Legal Services	355
		Gina Kolata, Being Thorough Can Be Costly —	
		To the Doctor	355
		Question 6.3	356
		Simulated Case History	356
Chapt	er VII:	Free Speech Rights of Lawyers	361
A.	Public	Comment About Litigation	362
		Chicago Council of Lawyers v. Bauer	362
	Otl	her Resolutions of the Free Speech-Fair Trial Issue	368
B.	Public	Comment About Judges and Courts	369
		In re Snyder	369
	La	wyers Criticizing Judges	377
		Questions 7.1 to 7.3	379
C.	Can La	awyers Be Required to Join a State Bar Association?	381
Chapt	er VIII:	Defining and Protecting the Client-Lawyer Relationship	383
		rectationsinp	JOJ
	Wh	no Is a Client?	383

A.	Ele	ments of the Client-Lawyer Relationship	385
	1.	Confidentiality	385
		Legislative History	386
		Individual Clients	387
		In re James M. Pool	387
		New York State Opinion 479 (1978)	389
		Questions 8.1 to 8.2	392
		Corporate Clients	393
		Upjohn Co. v. United States	393
		Questions 8.3 to 8.4	396
		Exceptions to the Privilege or the Ethical Duty	397
		Questions 8.5 to 8.8	401
	17	Would the Answers Differ if Accountants Wrote the	
		Rules?	402
.*		Further Reading	403
	2.	Agency	404
		Taylor v. Illinois	404
		Cine Forty-Second Street Theatre v. Allied Artists	
		Pictures	407
		Binding the Client	407
	3.	Fiduciary	409
	4.	Loyalty and Diligence	411
	5.	Duty to Inform	412
		Mark Spiegel, Lawyering and Client	
		Decisionmaking: Informed Consent and the	
		Legal Profession	412
		Question 8.9	415
B.	Au	tonomy of Attorneys and Clients	415
	1.	The Lawyer's Autonomy	417
		Jones v. Barnes	417
		The Scope of the Lawyer's Autonomy	423
	2.	The Client's Autonomy	424
		Olfe v. Gordon	424
		The Scope of the Client's Autonomy	425
		The Medical Analogy	426
		Questions 8.10 to 8.13	427
C.	Te	rminating the Relationship	430
	1.	Termination by the Client	430
	2.	Termination by the Lawyer	431
D.	Pro	tecting the Client-Lawyer Relationship Against	
	Ou	tside Interference	432
	1.	Communicating with Another Lawyer's Clients	432
		a. Civil Cases	433
		Chancellor v. Boeing Co.	434
		Has Secrecy Gone Too Far?	437

0)

	When the Government Is a Party	438
	Questions 8.14 to 8.16	439
	b. Criminal Cases	440
	United States v. Hammad	442
	Ethics and Crime Fighting	448
	Question 8.17	451
	2. Improper Acquisition of Confidential Information	451
Chapte	r IX: Ethics in Advocacy	457
A.	Reflections on Adversary Justice	459
	Simon H. Rifkind, The Lawyer's Role and	
	Responsibility in Modern Society	459
	Marvin E. Frankel, Partisan Justice	462
•	Murray L. Schwartz, The Zeal of the Civil	
	Advocate	465
	Milner S. Ball, Wrong Experiment, Wrong	
	Result: An Appreciatively Critical Response to	
	Schwartz	467
	Questions 9.1 to 9.2	469
B.	Truth and Confidences	470
	Pre-Rules History	470
	Legislative History of the Rules	471
	In re A	472
	Questions 9.3 to 9.4	476
	ABA Opinion 353 (1987)	477
	What Does a Lawyer "Know"?	481
	Doe v. Federal Grievance Committee	481
C.	Fostering Falsity	488
	1. Cross-Examining the Truthful Witness	488
	E. R. Shipp, Fear and Confusion in Court Plague	
	Elderly Crime Victims	488
	Question 9.5	491
	United States v. Wade	491
	Daniel J. Kornstein, A Tragic Fire — A Great	
	Cross-Examination	492
	Amy Ruben and Emily Ruben, Letter to the	
	Editor	495
	2. Arguing for False Inferences	496
	John B. Mitchell, Reasonable Doubts Are Where	
	You Find Them: A Response to Professor	
	Subin's Position on the Criminal Lawyer's	
	"Different Mission"	497

~	. 00
Contents	XVII
COLLECTIO	VZ A TI

1		Harry I. Subin, Is This Lie Necessary? Further	
1		Reflections on the Right to Present a False	
		Defense	500
		Richard H. Underwood and William H. Fortune,	
		Trial Ethics	501
		3. Literal Truth	502
		4. Coaching	502
		5. Exploiting Error	503
		Michigan Opinion CI-1164 (1987)	503
		6. Silence	506
	D.	Frivolous Positions and Abusive Tactics	507
		Thomas v. Capital Security Services, Inc.	509
		Is There a Continuing Duty?	520
		Concluding Words from Elihu Root	521
	E.	Dilatory Tactics	521
		The Washington Monthly	521
		Legislative History	523
	F.	Hardball	524
		Lisa Belkin, Bare-Knuckles Litigation Jars Many	
		in Dallas	524
		Morton Mintz, At Any Cost: Corporate Greed,	
		Women and the Dalkon Shield	527
,		Is It Possible to Require or Encourage "Softball"?	528
	G.	Misstating Facts, Precedent, or the Record	529
	H.	The Obligation to Reveal Adverse Legal Authority	531
		Jorgenson v. County of Volusia	531
		Is There an Obligation to Reveal That Your Client	
		Has No Case?	533
		Further Reading	535
~=			
Cha	iptei	r X: Special Issues in Criminal Advocacy	537
	A.	Prosecution and Defense: Critiquing Each Other	537
		Richard Uviller: Critiquing the Defense Bar	537
		Anthony Amsterdam: Critiquing the Prosecution	540
	B.	The Perjurious Criminal Defendant	543
		Nix v. Whiteside	544
		ABA Opinion 353 (1987)	560
		After Nix, What?	564
	C.	Blaming the Victim	567
	.	Kirk Johnson, Slashed Model Cross-Examined in	507
		Attack Trial	567
		David Margolick, At the Bar	569
		David Iviai golick, 1 kt the Dai	303

		Question 10.1	570
	D.	Destruction or Concealment of Physical Evidence	571
		Note, Legal Ethics and the Destruction of Evidence	572
		Legislative History	575
		People v. Meredith	575
		Question 10.2	581
		Could Nixon Have Destroyed the Tapes? (And Other	
		Intriguing Questions)	582
		Spoliation of Evidence	583
		Additional Authorities and Further Reading	583
		Simulated Case History	584
	E.	Subpoenas to Criminal Defense Lawyers	588
		In re Grand Jury Subpoena Served Upon Doe (Slotnick)	588
		Preliminary Showings: The Massachusetts Exception	597
	F.	Fee Forfeitures	599
	G.	Reporting Cash Receipts	602
Cha	ıpteı	XI: Concurrent Conflicts of Interest	603
	A.	Attorney-Client Conflicts	606
		1. Business Deals	606
		Goldman v. Kane	606
		Agreements During the Professional Relationship	607
		2. Media Rights	608
		3. Financial Assistance and Proprietary Interests	609
		4. Fee-Payor Interests	610
		5. Other Lawyer Interests	612
		Simulated Case History	613
	B.	Client-Client Conflicts	615
		1. Criminal Cases (Defense Lawyers)	615
		Cuyler v. Sullivan	616
		Wheat v. United States	623
		Appealability of Criminal Disqualification Orders	632
		The Joint Defense Privilege	632
		Questions 11.1 to 11.2	633
		2. Criminal Cases (Prosecutors)	634
		Young v. United States ex rel. Vuitton et Fils S.A.	634
		Question 11.3	639
		3. Civil Cases	639
		Fiandaca v. Cunningham	639
		Levine v. Levine	648
		Questions 11.4 to 11.6	649
		The Insurance Triangle	650

Contents	
COLLCIUS	X1X

.

J*	1:-	Employers Insurance of Wausau v. Albert D. Seeno	
1		Const. Co.	650
		Question 11.7	658
		Simultaneous Representation of Civil Clients with	
		(Potentially) Conflicting Interests	658
		Is There a Client-Lawyer Relationship?	659
		May a Lawyer Act Adversely to a Client on an	
		Unrelated Matter?	662
		Confidentiality in Multiple Representation	664
		Appealability of Civil Disqualification Orders	664
		Further Reading	665
		Simulated Case History	665
	C.	The Advocate-Witness Rule	669
		MacArthur v. Bank of New York	669
		Nuances and Mixed Signals on the Advocate-Witness	
		Rule	674
Cha	pte	r XII: Successive Conflicts of Interest	679
	A.	Private Practice	679
		Analytica v. NPD Research	679
		The "Substantial Relationship" Test	683
ATT.		The Consequences of Disqualification	685
		Who Is a Former Client?	686
		Conflicts in Class Actions	687
		Questions 12.1 to 12.3	689
	B.	Imputed Disqualification and Migratory Lawyers	690
		Schiessle v. Stephens	691
		Presumptions in Imputed Disqualification	694
		Rebutting the Presumptions	697
		Further Reading	699
		Questions 12.4 to 12.5	699
	C.	Government Service	700
		Armstrong v. McAlpin	701
		The Revolving Door in the Model Rules	705
		What Is the Meaning of "Matter" and "Substantial	
		Responsibility"?	708
	,	Further Reading	710
		Question 12.6	710
Cha	pte	r XIII: Special Masks Lawyers Wear	711
	A.	Negotiation	711

	Alvin B. Rubin, A Causerie on Lawyers' Ethics in	
	Negotiation	713
	Legislative History	718
	James J. White, Machiavelli and the Bar: Ethical	
	Limitations on Lying in Negotiation	719
	What Is "Fraudulent"?	725
	What Is "Assisting"?	726
	Questions 13.1 to 13.4	727
	Simulated Case History	728
B.	Subordinate and Supervisory Lawyers and the Duty to	
	Report Lawyer Misconduct	732
	1. Subordinate Lawyers	732
	ABA Informal Opinion 1202 (1972)	734
	New York City Opinion 82-79 (1982)	735
	2. Supervisory Lawyers	737
	Questions 13.5 to 13.8	739
C.	Public Interest Lawyers	740
	Evans v. Jeff D.	740
	Questions About Evans v. Jeff D.	757
D.	Lawyers for Entities	759
	Commodity Futures Trading Commission v. Weintraub	761
	Evans v. Artek Systems	767
	Privilege and Conflicts in Shareholder Actions	770
	Closely Held Entities	772
	Legislative History	774
	Whistleblowing	775
	Stephen Gillers, Model Rule 1.13(c) Gives the	
	Wrong Answer to the Question of Corporate	
	Counsel Disclosure	775
	Questions 13.9 to 13.11	780
E.	Mediators	781
	Meg Cox, Some Divorcing Couples Find	
	Mediation Cheaper and More Humane Than	
	Battles in Courtroom	782
	New York City Opinion 80-23 (1980)	785
	Further Reading	790
F.	Judges	790
	Due Process Limitations on Judicial Conflicts	790
	The Limits of Due Process Protection Against Judicial	
	Conflicts of Interest	791
	Beyond the Due Process Clause	792
	Liljeberg v. Health Services Acquisition Corp.	792
	What Conflicts Prevent a Judge from Presiding?	804
	Further Reading	807
	Question 13.12	808

Contents	XX
Chapter XIV: The Work Lives of Lawyers	809
Broderick v. Ruder Patricia Mairs, Bringing Up Baby Simulated Case Histories	809 822 828
Vanessa Merton, Basic Bibliography for Research in Legal Ethics ar Professional Responsibility	nd
Table of Cases	837
Index	853
	861

×

#

4