

PROFESSIONAL RESPONSIBILITY
Fall 2011 (4 Course Credit Hours)
SYLLABUS

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Class: Monday – Tuesday 3:00 – 4:15
Wednesday 3:00 – 3:50 P.M.
Classroom 1

I. Introduction to the Course

More than any other course in the law school curriculum, this course is about you. You will learn rules and principles that you must know for survival as a respected legal professional. We will also critique those rules, principles and the legal profession as currently structured. You are encouraged to explore your own values and to consider how you can act on them in the ethical practice of law.

A more appropriate title for the “Professional Responsibility” course is “The Law and Ethics of Lawyering.” The primary course goal is to acquaint you with the substantive law governing lawyers (LGL), derived from numerous sources, including enforceable (but not always enforced) Rules of Professional Conduct, and from diverse areas of law, including contracts, torts, agency, evidence, procedure, constitutional and criminal law. Perhaps more than other areas of law, the LGL undergoes constant change. In 1998 the American Law Institute adopted the Restatement of the Law Governing Lawyers, gathering in one place the relevant principles developed from those diverse areas of law, and taking positions on several controversial ethical questions. In response to the Restatement and other changes in the law, in February 2002 the American Bar Association (ABA) adopted comprehensive revisions to the Model Rules of Professional Conduct, which are often referred to as “e2k.” A strong push for national uniformity has been largely successful, with forty-six jurisdictions adopting rules based in substantial part on the updated ABA Model Rule language. The revised Oklahoma Rules of Professional Conduct went into effect January 1, 2008. Meanwhile, the Supreme Court of the United States has shown a marked increase in the LGL during the last few terms and the ABA Ethics 20/20 Commission is evaluating whether to recommend rule changes in light of new technology and globalization.

A second goal of the course is to have you begin to consider the “ethics” of the profession and their relation to your own individual morality. In other courses we often see how the law is uncertain in areas of great concern to clients. Indeed, one of the most critical skills a lawyer needs is to counsel a client when the legal outcome of some proposed action is uncertain. In this course we confront similar uncertainty, but this time it is our own conduct that is at stake. In addition, we will talk about practices (like client solicitation) where the conduct is clearly unlawful (i.e., violates a disciplinary rule) but where it is also clear that lawyers frequently violate the rule and that disciplinary authorities typically choose not to prosecute (usually for lack of resources). Finally, there are many areas where the law explicitly gives a lawyer discretion to act or not to act. Thinking through the ethical and moral aspects of all the various

options at this early stage of your careers may prove helpful later as you begin to confront these dilemmas in your daily law practice.

A third goal is to develop familiarity with the concept of emotional intelligence and how improved competence in these skills leads to higher competence in professional skills critical to good lawyering.¹ A forthcoming article by Professor Robin Wellford Slocum² states:

Over the past thirty or more years, numerous studies have evaluated employee performance across a broad spectrum of industries and disciplines and have documented the importance of emotional competency to effective performance in the workplace. From this research, certain propositions have achieved a strong consensus. The studies suggest that, while important, IQ and academic success are not alone good predictors of success in the workplace. Instead, professional success depends upon a combination of IQ, expertise, and emotional competence. One study of 181 competency models from 121 organizations worldwide concluded that emotional competency skills account for 67% of the abilities deemed “essential for effective performance,” with numerous studies suggesting that the importance of emotional competence increases with the complexity of the job requirements. Of particular importance to educators, the studies provide strong evidence that emotional competency skills can be taught and learned. Indeed, the importance of emotional competence is a reality that some of the best business schools in the country now recognize, where courses designed to develop the emotional competencies are becoming standard fare.

The inconvenient truth is that effective lawyering requires emotional competence, because it is the emotional competencies that help form such essential lawyering skills as good judgment, sound perspective, and effective relational skills. These important qualities of lawyering demand at least a certain level of emotional competency across four basic domains: 1) Self-Awareness (including emotional awareness); 2) Self-Management (including control of one’s emotions); 3) Social Awareness (including empathy); and 4) Relationship management (including the ability to persuade and influence others, and to manage conflict effectively).

Professor Slocum has generously authorized use of an electronic survey instrument she prepared for use in a course on “The Psychology of Conflict Resolution.” Professor Fox has agreed to be the technology manager, taking the SurveyMonkey results, stripping all identifying data and providing me with the aggregate results. The survey will be password protected so that only students enrolled in the class will have access to complete the survey. The aggregate results will be shared with the class in a secure format. We have yet to figure out this system, and to have your individual survey scored

¹ John E. Montgomery, *Incorporating Emotional Intelligence Concepts Into Legal Education: Strengthening the Professionalism of Law Students*, 39 U. TOL. L. REV. 323, 347 (2008). See generally, DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE (1998). A copy is on reserve in the library, listed under this class.

² An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers by Robin Wellford Slocum (last revised 7/25/11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1889756 (citations omitted).

and sent to you (and you alone). Because the survey results are being used as a classroom exercise and the data is not collected for the purpose of research, an authorized representative of the University of Oklahoma Institutional Review Board (IRB) has determined that IRB approval is not required. Students enrolled in this class are encouraged to take the survey (maximum 30 minute) once early in the semester and a second time at the end of the semester. Participation is voluntary; students are free to skip questions and can cease participation at any time. My pedagogical hope is that by becoming familiar with these competencies, we all can improve our emotional intelligence and thus become more effective lawyers.

II. Course Materials

Required:

1. Russell G. Pearce, Daniel J. Capra & Bruce A. Green, PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH (West 2011)(Text, or PCG)
2. Thomas D. Morgan & Ronald D. Rotunda, 2009 (or more current) SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (Supp.)
3. A registered clicker, obtained free from Faculty Support. It must be returned in good condition or else you will have to pay \$75 for its replacement and your grade may be withheld.

Recommended:

W. Bradley Wendel, PROFESSIONAL RESPONSIBILITY EXAMPLES & EXPLANATIONS (3d Ed. Aspen 2010)

Comment on Course Materials

This textbook is hot off the press. The three co-authors are highly respected colleagues at Fordham Law School. Russ Pearce and Bruce Green primarily work in the law and ethics of lawyering. Dan Capra is known best for his evidence expertise. Besides Russ used it in draft form last spring and an adjunct at Fordham who used it this summer, this semester is its official debut. I selected it after reviewing several new editions or new textbooks published in 2011. This is among the first generation of interactive West textbooks. If you choose to use the on-line version the license expires one year after registration. It is the only professional responsibility text that includes multiple choice questions, whether drafted by the editors, or taken from old or model MPRE questions,³ which are interspersed with the substantive material. The text has some on-line features with links to other sources of information, which I will often use in class to bring the materials to life. Some of the multiple choice questions are vehicles to guide discussion. Other multiple choice questions will be used for weekly quizzes that may count for up to 10% of your grade.

³ Used with permission of the National Conference of Bar Examiners. The text acknowledgements at pp. xii-xiii identify the specific questions used from a 2002 exam and Online Practice Exam 1.

III. Reading Assignments

1. Within the first month you should look over the entire set of ABA Model Rules, paying particular attention to organization (Parts 1-8), and how the blackletter text fits into that organization. By the end of the semester, you are responsible for having read all of the ABA Model Rules and comments. Although we will periodically refer to Oklahoma modifications, for the final exam you are responsible only for three Oklahoma modifications: 1.6 (confidentiality), 3.3 (candor to tribunal) and 3.6 (extrajudicial publicity).

2. For purposes of the quizzes and final exam, you are responsible for all of the assigned reading, whether or not we discuss a particular issue in class.

3. Because this textbook has not been used anywhere during an ordinary semester and because this semester's 4 hour course is new and experimental, it is difficult to forecast precise reading assignments. The syllabus identifies about 75 pages of reading each week, which you should plan on completing before the start of class each Tuesday, so that you can submit your weekly take-home quiz answers to Dawn Tomlins in Faculty Support, or by email dtomlins@ou.edu by the 2:50 P.M. Tuesday deadline. She will compile and record the quiz scores, and send to me Wednesday in anonymous format so that we can have follow-up discussion in Wednesday's class on the quiz questions and other open issues.

This syllabus identifies approximate reading assignments from the textbook for each week. You are expected to read the specific Model Rules, comments and Restatement (Rstmt) discussed in each day's reading, if they are in the Morgan & Rotunda supplement. It is likely that I will adjust (i.e., reduce) reading assignments to reflect the pace of class.

4. Everyone is on call everyday. Read the assigned material with care. Take notes. Think through answers to the questions posed in the text. Read all of cited Model Rules and comments and Restatement provisions that are in the supplement. I will facilitate the discussion, but you should be an active contributor. Volunteer to answer questions I ask, or questions other students ask. Come to class with questions or comments of your own on the assigned material.

IV. Housekeeping Rules

A. Grade

1. Your final grade will be based on the following three factors:
 - a. Quiz scores, up to 10% of final grade. The textbook includes many multiple choice questions suitable for periodic quizzes. There will be 10 or 11 take-home quiz covering Chapters 2-8. They will be graded and recorded by Faculty Support. The syllabus identifies weekly assignments and the page range from which the quiz questions will be selected. Although they are take-home, you may not collaborate on answering the questions once designated by me. The Code of Academic Responsibility applies. Submit your answers by hard copy or email to Dawn Tomlins in Faculty Support, dtomlins@ou.edu due by 2:50 P.M. each Tuesday. To preserve your anonymity, pick a username that she will use in compiling an Excel spreadsheet, and she will hide that username from the results she gives me.

- b. Final exam: 80%. A three hour examination will be administered on Tuesday, December 6 (2:00 - 5:00 P.M.). It will be a combination of multiple choice and essay questions. You are responsible for material contained in all of the assigned reading, including principles developed in the case law, rules and comments.
- i. The one hour multiple choice portion is closed book, with about 25 questions. It will be computer graded; no partial credit will be given for incorrect answers supplemented by explanations. The questions generally track the MPRE format and drafting conventions.
 - ii. The two hour essay portion is open book, with either one or two questions. You may bring in the text, statutory supplement, any class hand-outs, *a course outline which you personally prepared, and not the product of a group effort*. No commercial supplements may be used in the exam. The essay portion of the exam may be taken on laptops, with spellcheck and editing functions disabled.
- c. Class participation and attendance, up to 10% of final grade. Class participation will be evaluated based on quality, not quantity. Share the air time. If you tend to talk a lot, ration yourself to a few comments per class. On the other hand, if you wish for invisibility and live in fear of getting called on, force yourself to speak up on occasion. The small class enrollment should facilitate an environment of trust, where all are comfortable speaking.

B. Attendance, Preparation & Participation

1. You are expected to attend, be on time, and fully prepared for class each day of the semester. A roll sheet will be distributed at the beginning of each hour. *When you place your initials in the box for that date, you certify that you are present, sufficiently prepared for class and willing to participate. If you are not adequately prepared or otherwise do not wish to participate that day, you must so designate by placing an asterisk (*) by your initials on the attendance sheet and tell me before the start of class. The professor reserves the right to impose sanctions against a student who does not designate lack of preparation as set forth above, including to report as possible honor code violation. Attendance sheets are subject to the Code of Academic Responsibility: you may only sign in for yourself and generally only within the first five minutes of class.*

2. Absent extraordinary circumstances, such as a death in the family, jury duty, emergency military service or hospitalization of yourself or immediate family member, please do not ask me to consider an absence excused. Your presence in law school indicates that you are mature adults capable of making your own scheduling choices. You are free to choose how to spend your allowed absences or unprepareds.

3. You are allowed four absences or “unprepareds” over the semester. For purposes of this attendance policy, an “unprepared” counts as an absence. Five or more absences or “unprepareds” will result in grade reduction. If you have six or more absences or unprepareds, you will be dropped automatically from the class.

4. Students will be assigned a numerical score for attendance and participation, which will be recorded administratively and added to the exam score. Thereafter, where the student’s

total numerical score falls near the border between grade levels, the professor reserves the discretion to take into account particularly strong or particularly weak classroom performance.

C. Record Keeping

Use the space below to keep track of your own absences and asterisks. If you are in doubt about the accuracy of your records, you can check with me. In the event that your records differ from the file of daily attendance sheets, the official records will prevail.

Dates of Absences

Dates of Unprepareds

D. Computer & Internet Use in Class

Computers and wireless Internet access in the law school presents students with unlimited distractions which may be seriously harmful to your educational and professional development and distracting to others in the class. *I discourage the use of laptops in class, because students tend to act as scribes instead of active thinkers and problem solvers. That said, I will allow laptop use only for taking notes or accessing the on-line textbook.* After the bell rings, all cell phones and pagers must be turned on silent during class time. No text messaging is permitted.

My decision to limit laptop usage was made after careful thought, research and consultation with colleagues. Computers and wireless Internet access present students with unlimited distractions, which may be harmful to your educational and professional development. Research by neuroscientists, psychologists and other experts shows that continuous multi-tasking is changing the way the brain works, reducing the capacity to reason and deliberate, read, retain information and engage in critical thinking. *See* Kate N. Grossman, Controversy, Chi. Sun-Times B1 (March 4, 2007)(available at 2007 WLNR 4135298) “Stop interrupting yourself: If you keep multitasking . . . you may damage your ability to think deeply, learn and remember.”

V. Disability Policy

The University of Oklahoma is committed to providing reasonable accommodation for all students with disabilities. Students with disabilities who require accommodations in this course are requested to speak with the professor as early in the semester as possible. Students with disabilities must be registered with the Office of Disability Services prior to receiving accommodations in this course. The Office of Disability Services is located in Goddard Health Center, Suite 166, phone 405/325-3852 or TDD only 405/325-4173. The University’s official policy is available at <http://www.ou.edu/content/drc/home/students/policies.html> .

VI. Code of Academic Responsibility

All course work and conduct in law school is subject to the Code of Academic Responsibility. This includes *all* course work, attendance records, take-home quizzes and compliance with the Computer and Internet Policy.

VII. Office Hours

I generally maintain an open door policy, except the one hour before I teach. Besides this class, I teach Monday through Wednesday at 11:00 A.M. You may also contact me by e-mail, either to make an appointment or to ask a question or make a comment about the reading or the class discussion. I check my e-mail regularly and try to respond promptly.

VIII. Multistate Professional Responsibility Exam

Most states require that applicants for admission to the bar pass the Multistate Professional Responsibility Exam (MPRE), which in 2011 is being administered Saturday November 5. I recommend that you defer taking it until after completing this course. Registration deadlines are about five weeks before the test administration, although you can register later for a higher price. Dates have not yet been set for 2012, but it usually is the first week of March and August. Before the spring 2012 test administration, I will give an open lecture about the test coverage, format of questions, scoring and exam-taking strategies. My experience serving on the MPRE Test Drafting Committee (1991-98) has been augmented by actually taking the exam in August 2011, so my information about drafting conventions and coverage is more current.

The National Conference of Bar Examiners MPRE website is <http://www.ncbex.org/multistate-tests/mpre/>. It has sample questions available on line and other reliable study materials available for purchase. Study carefully the current MPRE Information Booklet available for free on that homepage.

IX. Supplemental Reading

For your convenience, I list the following research sources that you may wish to consult either in your studies, or in connection with outside work responsibilities.

Research Sources

American Bar Association, Annotated Model Rules of Professional Conduct (7th ed. 2011)

ABA/BNA Lawyers' Manual For Professional Conduct (only advance sheet series dedicated to law of lawyering; it is available on-line through the College of Law Library. See <http://lawyersmanual.bna.com/mopw2/> home page under BNA)

American Law Institute Restatement (Third) of the Law Governing Lawyers (adopted 1998)
Geoffrey C. Hazard, Jr. & W. William Hodes, with assistance of John Dzienkowski, The Law of Lawyering (3d ed. 2001)(updates on order) KF 306.H33

Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice (6th ed. 2010)

Ronald D. Rotunda & John S. Dzienkowski, Professional Responsibility, A Student's Guide (2010-11)

Charles F. Herring, Jr., Texas Legal Malpractice & Lawyer Discipline (10th ed. 2011)

Websites

<http://www.abanet.org/cpr/>

http://www.abanet.org/cpr/pic/ethics_2000_status_chart.pdf (provides rule status of all jurisdictions; some links broken; last updated Nov. 3, 2010)

<http://www.abanet.org/ethics2020/>

<http://www.law.cornell.edu/ethics> [American Legal Ethics Library]
www.okbar.org
<http://legalethicsforum.typepad.com/blog/> (legal ethics professors blog)
http://lawprofessors.typepad.com/legal_profession/ (Another legal ethics professors blog)
www.legalethics.com (David Hrcik & Peter Krakaur)
<http://www.freivogelonconflicts.com/> (William Freivogel)

TENTATIVE SCHEDULE OF ASSIGNMENTS

Weeks, Approx. Dates	Topics	Assignment
Week 1: Aug. 22-24	Ch. 1 Introducing Professionalism & Legal Ethics Ch. 2 The Basic Elements of Law Practice, II Defining the Practice of Law	Syllabus, pp. 1-23, Nutshell History of American Legal Ethics Regulation and the Law of Lawyering (see course webpage http://jay.law.ou.edu/faculty/Jmaute/) and pp. 24-34 (36 pp. + syll.)
Week 2: Aug. 29-31	Ch. 2, II Defining; III & IV Creating and Ending the L/C Rel'ship; V Competence A. Discipline B. Malpractice	pp. 34-114 (80 pp.) Rules 1.1, 1.16 and other specific rules and Rstmt sections cited in text. Okla. Discipline Flowchart (on course webpage) Take-home quiz selected from questions in pp. 28-91 in text, due to Dawn Tomlins in person or by email to dtomlins@ou.edu in Faculty Support by 2:50 P.M. Tuesday, August 30.
Week 3: Sept. 6-7	Ch. 2 Ch. 2, V Competence C. Ineffective Assistance VI Allocating Decision-Making Authority	pp. 114-122, 133-171 (46 pp.) Rules 1.2, 2.1, 1.4, 1.14 and other specific rules, comments and Rstmt sections cited in text. Take-home quiz selected from questions in pp. 96-161 in text, due to Dawn Tomlins in Faculty Support by 2:50 P.M. Tuesday, Sept. 6.
Week 4: Sept. 12-14	Ch. 3, II Finding Clients (marketing) III. Fees & Billing A. Hourly	pp. 173-248 (75 pp.) Rules 7.1-7.4, 1.5 and other specific rules, comments and Rstmt sections cited in text. Take-home quiz selected from assigned reading, due by Tues. Sept. 13, 2:50 P.M.

Week 5: Sept. 19-21	<p>Ch. 3, III B. Contingent</p> <p>Ch. 4 Lawyers' Duty of Confidentiality' II. Relationship to AC Priv. III. ACP A. Criteria</p>	<p>pp. 249-279, scan 279-284, read 284-296, Rule 1.5 & other specifics cited in text (52 pp.) pp. 297-330 and other specifics cited in text. (33 pp.) Take-home quiz selected from assigned reading, due by Tues. Sept. 20, 2:50 P.M.</p>
Week 6: Sept. 26-28	<p>Ch. 4 (cont'd) III. ACP B. Waiver C. Crime/Fraud Exception IV. Ethical Duty of Confidentiality V. Corporate Counsel and Sarbanes Oxley as it affects confidentiality duty</p> <p>Ch. 5 Conflicts of Interest, II. Simultaneous Representation of Multiple Clients</p>	<p>pp. 333-385 (52 pp.) Rule 1.6 (compare ABA and Okla.), Rule 1.13 and cited comments</p> <p>pp. 387-415 (28 pp.), Rule 1.7 and cited comments Take-home quiz selected from assigned reading, due by Tues. Sept. 27, 2:50 P.M.</p>
Week 7: Oct. 3-5	<p>Ch. 5, II Simultaneous Conflicts (cont'd), III CI/L Personal & Financial Conflicts, IV Advocate/Witness, V Former CI. Conflicts, VI T/P Neutrals, VII Vicarious Disqualification</p>	<p>pp. 415-486 (71 pp.) Rules 1.7, 1.8, 3.7, 2.4, 1.12, 1.10 and cited comments</p> <p>Take-home quiz selected from assigned reading, due by Tues. Oct. 4, 2:50 P.M.</p>
Week 8: Oct. 10-12	<p>Ch. 5, VIII Conflicts in Criminal Cases</p> <p>Ch. 6 Lawyers' Duties to Legal System, the Profession & Nonclients I. Duties to the Court & Tribunals</p>	<p>pp. 486-510 (24 pp.) Review 1.7, 1.9 and cited comments</p> <p>pp. 511-573 (scan Yagman, pp. 557-568) (62 pp.) Rules 3.1, 3.3 (compare to Ok), 3.4, 3.5, 3.9, 8.4(e), 3.6 (compare to Ok), 8.2, 8.3 and cited comments Take-home quiz selected from assigned reading, due by Tues. Oct. 11, 2:50 P.M.</p>

<p>Week 9: Oct. 17-19</p>	<p>Ch. 6, II. Duties to T/Ps & to Law, III Duties to Lawyers & to Bar</p> <p>Ch. 7 Special Rules for Prosecutors & Judges, I Prosecutors (Charging decision & factors, Selective Prosecution)</p>	<p>pp. 573-628 (55 pp.) Rules 4.3,[review 1.13(f)], 4.1, 8.4(c), 4.4, [review 1.2(d), 1.6(b), 1.13, 4.2, 5.6, 8.3 and cited comments</p> <p>pp. 629-654 (25 pp.) Rule 3.8 and cited comments</p> <p>Take-home quiz selected from assigned reading, due by Tues. Oct. 18, 2:50 P.M.</p>
<p>Week 10: Oct. 24-26</p>	<p>Ch. 7, I (cont'd) (Respecting Right to Counsel, Discovery & Brady, Rule based Requirements, Trial Conduct, post-conviction evidence of innocence) II Ethical Standards for Judges (duties of office and disqualification)</p>	<p>pp. 660-745 (84 pp.) Rules 3.8 and cited comments</p> <p>Read cited provisions of the Code of Judicial Conduct</p> <p>Take-home quiz selected from assigned reading, due by Tues. Oct. 25, 2:50 P.M.</p>
<p>Week 11: Oct. 31-Nov. 2</p>	<p>Ch. 7, II (extrajudicial activities, elections, return to practice)</p> <p>Ch. 8 Proper role of Lawyer? II. Role Morality of Neutral Partisan, Moral Responsibility</p>	<p>pp. 745-766 (21 pp.) Read cited provisions of the Code of Judicial Conduct</p> <p>pp. 767-814 (47 pp.), review any specific rules cited</p> <p>Take-home quiz selected from assigned reading, due by Tues. Nov. 1, 2:50 P.M.</p>
<p>Week 12: Nov. 7-9</p>	<p>Ch. 8, II Competing Visions (feminist, religious lawyering, racial justice, civics teacher)</p>	<p>pp. 814-901 (87 pp.), review any specific rules cited. Class will be divided into groups to present and lead discussion on each of the competing visions.</p> <p>Take-home quiz selected from assigned reading, due by Tues. Nov. 8, 2:50 P.M.</p>

Week 13: Nov. 14-16	Ch. 9 Why Do Lawyers Have Special Privileges & Responsibilities? I The Prof'l Privilege (reconsider UPL restrictions, bar admission & discipline)	pp. 903-976 (73 pp.) Review any specific rules cited, including 5.4 and 5.6, the NCBE Character & Fitness Questionnaire that you completed, admissions standards for jurisdiction where you plan to first apply. Take-home quiz selected from assigned reading, due by Tues. Nov. 8, 2:50 P.M.
Week 14: Nov. 21-22	I (cont'd) C. Who Should be Permitted to Provide Legal Services: multidisciplinary practices?, II Special Responsibilities: Pro Bono; Respecting Nation's Diversity	pp. 977-1016, 1032 (22 pp.) Rule 8.4 cmt. 3, Rules 6.1, 6.2 No take-home quiz
Week 15: Nov. 28-29 (per OU calendar, Tuesday is treated as Wednesday, so just 50 minute class)	Catch-up & wrap-up	none