

Attachment B: Legal Ethics Subjects Outline

Legal Ethics Subjects for the 10-Hour New Admittee MCLE Curriculum Draft Learning Objectives

(Rev. 8-3-17)

1. Attorney-Client Relationship 101

Course Objectives:

Participant will gain an understanding of key considerations in the formation and termination of the attorney-client relationship with an emphasis on the relevant professional obligations. Participant will improve their knowledge of ethical rules and standards regarding formation and termination issues that are common bases for lawyer misconduct.

Learning Outcomes:

- Distinguish between the elements of, and consequences of, express formation and implied-in-fact or putative formation of an attorney-client relationship
- Identify ethical and practical issues in the assessment and selection of potential clients
- Apply legal problem solving skills to analyze specific problem areas, including allocation of authority, limited scope representation, and interactions with officers/employees/constituents of a governmental or corporate client

Course Outline:

A. Formation of the A-C Relationship

- i. Express Relationships, including who is the client?
 - a) Scope of representation and limited scope services
 - b) Formation in private practice, including written fee agreements
 - c) In-house attorney duties to officers, employees and subsidiaries
 - d) Government attorney duties to officers, bodies, employees and stakeholders
 - e) Relationship with corporate promoters and start-ups
 - f) Allocation of authority among lawyer and client
 - g) Prohibited objectives of a representation
 - h) Limiting liability to a client
 - i) Sexual relations with a client
 - j) Willfully appearing for a party without authority as a cause for disbarment or suspension
- ii. Implied-in-Fact/Putative Relationships
 - a) social media example (casual advice to Facebook friends)
 - b) disclaimers and non-representation notices
 - c) disqualification risk
 - d) breach of fiduciary duty liability
 - e) misleading advertising/solicitation as a factor considered
- iii. Client Selection
 - a) Competence Issues
 - Financial ability
 - Time commitment

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- Area of law subject matter expertise
- Technology competence
- Personality fit
- Conflicts checking system
- b) Prohibited Discrimination

B. Termination of the A-C Relationship

- i. Tribunal's permission required when appearing before a tribunal
- ii. Client consent to end the A-C relationship (disengagement notices)
- iii. Permissive v. Mandatory termination
- iv. Prohibited unilateral termination/malpractice by abandonment
- v. Duties to client at termination
 - a) Due notice and reasonable steps to avoid prejudice
 - b) Release of client file and client property
 - c) Disbursement of any trust funds
 - d) Refund of any unearned advanced fee payments
- vi. The missing client
- vii. Securing a practice administrator to wind down a law office
- viii. Sale and purchase of a law practice

2. Traps for the Unwary in Communicating with Clients, Opposing Parties, Judicial Officers, Tribunals, Jurors, Witnesses and Others

Course Objectives:

Participant will gain an understanding of the basic requirements and restrictions on various types of communications that occur routinely in the practice of law. Participant will learn to identify circumstances where a lawyer must initiate communications with clients or others and where communications are limited or strictly prohibited.

Learning Outcomes:

- Recognize when communications with a client are required including the duties to: keep a client informed about their case; respond to inquiries; provide copies of documents; and convey information provided by opposing counsel and others
- Identify when certain communications are restricted or prohibited including: prohibited ex parte communications with represented parties, judicial officers and others
- Apply legal problem solving skills to analyze specific problem areas, including communications with: pro se litigants; employees or constituents of a corporate or agency client; and the State Bar

Course Outline:

A. Communication with clients

- i. Willful failure to communicate as a frequent disciplinary complaint
- ii. Keeping a client informed about significant developments
- iii. Promptly responding to a client's reasonable requests for information
- iv. Provision of copies of significant documents to a client

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- v. Requirement to inform a client in writing if a lawyer does not have professional liability insurance
- vi. Communication of settlement offers
- vii. Communication of terms and conditions offered to a criminal defendant
- viii. Communication with an organization as client, including corporations and government agencies

B. Communication with Opposing Parties, Jurors and Witnesses

- i. Prohibited communication with a party represented by counsel
 - a) Disciplinary exposure for both direct and indirect ex parte communications
 - b) Opposing party's permission for, or initiation of, ex parte communications
 - c) Communications when the opposing party is an organization
 - d) Exception for communications with a represented public officer, board, committee or other governmental body
 - e) Exception for communications authorized by law
 - f) Disqualification and exclusion of information as civil remedies for violations
 - g) Prohibited threats of criminal, disciplinary or administrative charges to obtain an advantage in a civil dispute
 - h) Misleading ex parte communications with a person represented by counsel in a separate but related matter as a basis for discipline for moral turpitude and breach of fiduciary duty
- ii. Restrictions on communication with Jurors
 - a) Contact with a member of the venire
 - b) Direct or indirect contact with any juror during trial
 - c) After discharge, communications with a juror that harass or embarrass the juror
 - d) Out of court investigations of a member of the venire or a juror or family members of such persons
 - e) Duty to inform the court about any known improper conduct by a member of the venire or a juror
 - f) Concept of "juror" as inclusive of empanelled, discharged or excused jurors
- iii. Restrictions on communication with witnesses
 - a) Prohibition against advising a witness to leave a jurisdiction for the purpose of being unavailable to a tribunal
 - b) Improper compensation contingent on testimony
 - c) Witness intimidation

C. Communication with Judicial Officers, Tribunals and Others

- i. Duty of candor to a tribunal, including misrepresentation by omission
- ii. Misquoting to a tribunal the language of a book, statute or decision
- iii. Citing to a tribunal a decision that has been overruled or a statute that has been repealed or declared unconstitutional

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- iv. In a proceeding before a tribunal, asserting personal knowledge of a fact at issue, except when testifying as a witness (including requirements imposed on attorneys who testify as a witness)
- v. Social media issues, including “friending” judicial officers
- vi. Duty to maintain respect due to the courts and judicial officers
- vii. Duty to advance no fact prejudicial to the honor or reputation of a party or witness unless required to seek justice
- viii. Duty to cooperate and participate in any disciplinary investigation against the attorney
- ix. Self-reporting duties to the State Bar

3. The Duty of Confidentiality, the Attorney-Client Privilege and the Work Product Protection Doctrine

Course Objectives:

Participant will improve their knowledge of attorney-client confidentiality. Participant will learn to identify the limited circumstances where an attorney is permitted to reveal confidential information without first obtaining a client’s informed consent.

Learning Outcomes:

- Distinguish between the ethical duty of confidentiality, the evidentiary attorney-client privilege and the work product protection doctrine
- Identify exceptions to confidentiality and the attorney-client privilege
- Apply legal problem solving skills to analyze specific problem areas, including: permissive disclosures of confidential information necessary to prevent a crime of death or substantial bodily injury; and the handling of inadvertently transmitted confidential information

Course Outline:

A. Duty of Confidentiality

- i. Codified in statute, guidance provided in the rules
- ii. Scope of the duty, including public record information and duties to prospective clients
- iii. Exception for information revealed with the informed consent of the client
- iv. Exception for information revealed to prevent a crime of death or substantial bodily harm
- v. Breach notification
- vi. Revealing confidential information in order to withdraw from a client’s representation

B. Attorney-Client Privilege

- i. Comparison with the duty of confidentiality
- ii. The privilege as an evidentiary principle
- iii. Definitions of “lawyer,” “client,” and “confidential communication” for purposes of the privilege
- iv. Holder of the privilege
- v. Duty to assert the privilege

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- vi. Codified exceptions, including the “self-defense” exception and the “joint-client” exception
- vii. The related privilege for information provided by a client of a lawyer referral service

C. Work Product Protection Doctrine

- i. Comparison with the duty of confidentiality and the attorney-client privilege
- ii. Scope of the protection
- iii. Exceptions

D. Inadvertent Transmission of Information

- i. Duties imposed by case law
- ii. Discipline, disqualification, exclusion of information and civil liability

4. Identifying, Avoiding and, When Necessary, Resolving Conflicts of Interests

Course Objectives:

Participant will gain an understanding of the basic concepts of the duty of loyalty and avoidance of adverse representations and interests. Participant will learn to identify the circumstances that require a lawyer to seek a client’s or former client’s informed written consent to an adverse representation and other conflicts of interests protocols imposed by the rules

Learning Outcomes:

- Using rules and case law principles, identify various circumstances that give rise to a conflict of interest
- Distinguish between conflicts protocols that require informed written consent and those that only require a written disclosure
- Apply legal problem solving skills to analyze specific problem areas, including: imputation of confidential information and vicarious disqualification; adverse business transactions; and relationships with other lawyers in a case or matter

A. Adverse Representations

- i. Representations adverse to a current client
- ii. Representations adverse to a former client
- iii. Joint or multiple client representations, including aggregate settlements, special standards for adoption matters and concurrent representations of an organization and an officer, employee or constituent of the organization
- iv. Accepting representation of an opposing party in an unrelated case
- v. Accepting payment of fees from a person other than the client
- vi. Definition of “disclosure” for purposes of the conflicts rules
- vii. Definition of “informed written consent” for purposes of the conflict rules
- viii. The substantial relationship test
- ix. California’s common law duty of loyalty
- x. Imputation, vicarious disqualification and ethical walls
- xi. Conflicts checks, including special standards for limited legal services

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- xii. Special standards for government lawyers and former judicial officers or employees of a tribunal
- xiii. Malpractice, breach of fiduciary duty, and the voiding of an attorney's entitlement to fees when a representation is tainted by a conflict

B. Disclosure of Interests and Relationships

- i. An existing legal, business, financial, professional or personal relationships with a party or witness in the same matter
- ii. A prior legal, business, financial, professional or personal relationships with a party or witness in the same matter
- iii. An existing legal, business, financial, professional or personal relationship with a person or entity that would be affected substantially by the resolution of the matter
- iv. Any legal, business, financial, or professional interest in the subject matter of the representation
- v. Representations where the opposing counsel is the attorney's spouse, parent, child or sibling of the attorney, lives with the attorney, is a client of the attorney, or has an intimate personal relationship with the member

5. The Lawyer as a Fiduciary of Funds and Property of Clients and Others, including Misappropriation and Commingling as a Frequent Basis for Lawyer Discipline

Course Objectives:

Participant will gain an understanding of a lawyer's role as a fiduciary in receiving, holding and disbursing the funds and property entrusted by clients and others. Participant will become familiar with basic, practical steps to avoid misappropriation, commingling, and interference with the rights of lienholders.

Learning Outcomes:

- Distinguish between funds that must be held in trust and funds that may be held in trust
- Apply trust account recordkeeping standards adopted by the Board of Trustees and statutory IOLTA requirements
- Apply legal problem solving skills to analyze specific problem areas, including: disputed funds; non-lawyer signatory/supervision; unclaimed funds; and duties to lienholders

Course Outline:

A. Client Trust Accounting

- i. Misappropriation and comingling as a frequent basis for client complaints and lawyer discipline
- ii. Funds and property regarded as received or held for the benefit of a client, including advances for cost and expenses and distinguished from advance payments of fees
- iii. Duty to segregate from attorney's funds or property (a.k.a., avoiding commingling)
- iv. Duty to label, deposit and keep funds and property safe
- v. Non-lawyer signatories on a client trust account

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- vi. Duty to promptly disburse, pay or deliver funds or property
- vii. Proper steps when trust funds or disbursement are in dispute, including interpleader
- viii. Duty to notify a client of the receipt of funds or property
- ix. Duty to maintain records
- x. Duty to respond to a client's requests for an accounting
- xi. Duty to collect interests for legal services programs (a.k.a., IOLTA)
- xii. Duties arising from unclaimed trust funds or property
- xiii. Bank reports to the State Bar of insufficient funds transactions on a client trust account
- xiv. State Bar audits of a trust account

B. Duties to Non-clients

- i. Duty to lien-holders
- ii. Duties where a lawyer has voluntarily accepted, or has been ordered by a court to hold, funds or property entrusted by a non-client including marital dissolution cases
- iii. No duties to mere creditors of a client

6. Statutory Duties under the State Bar Act, including Discipline for Criminal Convictions and Moral Turpitude in Activities Unrelated to the Practice of Law

Learning Objectives:

Participant will gain an understanding of selected statutory duties and other bases for discipline under the State Bar Act and discipline case law including duties arising from criminal convictions, misconduct arising outside of the practice of law and aiding in the unlawful practice of law. Participant will learn to identify professional responsibility obligations contained outside the Rules of Professional Conduct.

Specific Outcomes:

- Distinguish between misconduct involving moral turpitude and misconduct that does not constitute moral turpitude but nevertheless may serve as a basis for discipline
- Identify disparate, narrow topics of statutory duties outside of the Rules of Professional Conduct, including duties related to mortgage loan modification services, immigration services, and an attorney's failure to pay child or spousal support
- Become familiar with the special procedures triggered when an attorney is criminally charged with any felony or a lesser criminal charge where the surrounding circumstances involve moral turpitude or in which a victim was a client

Course Outline:

A. Criminal Charges and Convictions

- i. Disciplinary exposure for criminal charges or convictions may involve matters outside of the practice of law
- ii. A criminal prosecutor's requirement to provide notice to the State Bar when an attorney is charged with a felony or misdemeanor

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- iii. Interim suspension upon conviction of a felony or any crime involving moral turpitude
- iv. Special process for final disciplinary proceedings based on a certified copy of the record of the conviction of an attorney

B. Acts of Moral Turpitude, Statutory Law Violations and the Other Misconduct Doctrine

- i. Acts constituting moral turpitude, dishonesty or corruption whether or not the act is crime and irrespective of whether the acts occurred in the practice of law
- ii. Duty to support the Constitution and laws of the United States and California
- iii. The other misconduct doctrine, including discipline for driving under the influence violations
- iv. Discipline for failure to pay child or spousal support
- v. Discipline for advocating the overthrow of the government by force, violence, or other unconstitutional means
- vi. Insurance fraud statutory violations
- vii. Mortgage loan modification statutory violations
- viii. Immigration related statutory violations
- ix. ADA construction defect demand letters statutory violations
- x. Membership records statutory requirements
- xi. Statutory prohibition against the unlawful practice of law and rules prohibiting an attorney from aiding another person or entity in the unlawful practice of law