**Professional Responsibility**

1. **Essay Organization**
   1. “The lawyer has a duty of \_\_\_\_\_\_\_\_ to \_\_\_\_\_\_\_\_.”
   2. Key Duties Owed to Client: Confidentiality, Loyalty, Financial Responsibility, Competence, and other reasonable things. (Clients Love Fierce Counsel).
   3. Key Duties Owed to Others: Candor, Fairness, Dignity/Decorum, & other reasonable things. (Courts Feel Differently).
2. **Duty of Confidentiality**
   1. **Rule**: cannot reveal *anything* related to the representation of a client.
      1. **Scope**: applies regardless of whether client requested confidentiality or disclosure will harm the client.
      2. **Timing**: can attach *before* a lawyer-client relationship is formed, and even if none is ever formed. To ensure it does not, there must be clear and specific language warning no confidentiality. Continues beyond death.
      3. **Distinguish A-C** **Privilege**: overlaps, but Confidentiality is *broader*. Applies regardless of source of information and prevents any kind of disclosure.
   2. **Consent**: if client consents after consultation, lawyer may reveal otherwise confidential information. Also, implied consent to reveal what is necessary to render legal services.
   3. **Self-Defense**: may reveal information necessary to establish claim or defense in suit involving malpractice, discipline, or payment.
   4. **Compulsion**: may reveal if compelled by final court order, law, or ethical duty.
   5. **Future Crimes**
      1. **Death/Bodily Harm**: attorney *may* reveal what’s reasonably necessary to prevent reasonably certain death or substantial bodily harm. Attorney must first, only if reasonable, (1) make a good faith effort to persuade client not to commit act and (2) inform client of decision to reveal confidences.
      2. **Fraud/Crimes Causing Financial Injury**:
         1. ABA: attorney *may* reveal to prevent future crime if (1) client used or using attorney’s services to commit crime and (2) disclosure would prevent or mitigate substantial financial loss. Attorney *must* reveal confidential information if it is only way lawyer can avoid assisting in the crime.
         2. CA: no exception. Cannot reveal.
3. **\*Duty of Loyalty / Conflict of Interest**
   1. **\*Rule**: cannot have any other interest that *materially limits* loyal representation *or is adverse* to client. If so, and neither absolutely prohibited or permitted, representation is allowed if (1) attorney reasonably believes she can represent everyone effectively, (2) attorney informs each affected client (but if duty of confidentiality prevents disclosure, consent may not be possible), and (3) client’s consent is confirmed in writing. Unlike the ABA, CA does not use a “reasonable attorney” standard, applies also to potential conflicts, and only requires written disclosure, not consent, of the client.
      1. **Potential vs. Actual Conflicts**: both should be discussed. Same conflict, as question evolves, may be both, and both should be discussed in turn.
      2. **Knowledge of Conflict**: responsible even if ignorant of conflict, unless it is short-term legal services under court, agency, or non-profit program, in which attorney is responsible only if aware of conflict.
      3. **Imputed Disqualification**: any group of lawyers that work together share each other’s conflicts (but in CA, lawyer won’t be *disciplined* for imputed conflict).
         1. **Attorney With Conflict Joins**: conflicts will not be imputed if (1) timely and effectively screen, (2) conflicted attorney receives no direct part of the fee, (3) former client receives notice and periodic certifications of compliance with conditions. Same for Former Government Lawyers, but no periodic certifications required.
         2. **Attorney With Conflict Leaves**: group cannot represent client in matter adverse to leaving attorney’s client if (1) matters are substantially related and (2) any remaining lawyer has confidential, material information.
         3. No imputed conflicts for short-term legal services in public interest.
      4. **Remedies/Options**: (1) refuse to take the case; (2) advise multiple clients to get separate counsel; (3) withdraw. Also, screening or an “ethical wall” for imputed disqualification, and client consent might be required.
   2. **Client-Client Conflicts**
      1. **Opposite Sides of Same Matter/Representation**: prohibited.
      2. **Opposing Current Client In Another Matter**: a representation adverse to a current client in another matter permitted if rule is met, prohibited otherwise.
         1. CA Statutory Exception: no conflict when lawyer represents policyholder and his insurer as joint client’s where insurer’s interest in each matter is as an indemnitor. Thus, may sue same indemnitor insurer in another case.
      3. **Representing Multiple Clients in Same Matter**, or acting as intermediary: permitted if rule is met, prohibited otherwise. In CA, potential conflicts also subject to rule. Once actual conflict materializes, attorney should withdraw from both and advise clients to get separate counsel. Must at least withdraw from representing client that attorney possesses favorable confidential information for but cannot use. In criminal cases, dual representation could violate 6th Amendment right to effective counsel.
      4. **New Clients in Matters Related to Former Client**: cannot take on new client with interests materially adverse to former client without the former’s consent. Moreover, using non-public, confidential information against a former client is unreasonable without consent.
         1. **Former Government Attorneys**: ABA: former government attorney who personally and substantially worked on a “matter” cannot work on same matter in private practice without government’s consent. “Matter” is a specific dispute, not simply interpretation of the same rules. CA disqualifies a prosecutor from later defending in same case.
      5. **Clients With Inconsistent Positions**: positions usually don’t create conflicts, but if either client would be disadvantaged, consent of both must be obtained.
   3. **Lawyer-Client Conflicts**
      1. **Gifts**: attorney cannot solicit substantial gift from client, or draft legal instrument for client who is not a close relative if instrument provides a substantial gift to attorney or relative.
      2. **Limiting Liability**: cannot limit client’s right to report for ethical or other violations. Cannot limit malpractice liability, but ABA (not CA) permits if client is independently represented in making agreement. If client makes a malpractice claim, attorney can only settle after written advice to client to consult an outside attorney first.
      3. **Publication Rights Contracts**
         1. ABA: lawyer cannot accept before representation has ended.
         2. CA: discouraged, but may accept if judge is satisfied that client clearly understands and consents.
      4. **Loans & Advances to Clients**
         1. ABA: forbids financial assistance, except for litigation expenses for an indigent client, and the advance of litigation expenses in contingency cases.
         2. CA: more liberal: forbids promising to pay a prospective client’s debts but permits loans to a client in all matters for any purpose with a written loan agreement.
      5. **Use of Information**: covered by duty of confidentiality to a client’s disadvantage without consent violated both loyalty and confidentiality.
      6. **Business Transactions or Adverse Interests** (First Discuss Over Coffee): may enter into business with client or obtain adverse interest only if (1) terms are fair to client, (2) disclosed in understandable writing, (3) client has opportunity to consult outside attorney, and (4) client provides consent (in CA, must be written). E.g., payment in stock.
         1. Board Service: permitted for both non-profit legal services organization and corporate client, but discouraged for corporate client as likely to compromise loyalty and confidentiality.
      7. **Trial Counsel as Necessary Witness**
         1. ABA: cannot be counsel and witness in same trial unless (1) testimony is uncontested, (2) testimony regards nature and value of services rendered, or (3) attorney’s distinctive value to case means withdrawal would impose a substantial hardship on client. If testimony might prejudice client, consent required.
         2. CA: less restrictive: attorney can testify in any bench trial, and if client consents in a jury trial.
      8. **Close Relationship With Adversary’s Lawyer**
         1. ABA: cannot oppose party represented by a relative (immediate family) without client consent.
         2. CA: cannot oppose party represented by an immediate family or other “intimates,” but only requires written disclosure, not consent.

This conflict is personal, and thus *not* imputed to others.

* + 1. **3rd Party Payment**: sole duty is to client, not to any third party. Payment from 3rd party is permitted if (1) informed consent (CA, in writing), (2) no interference, and (3) confidentiality of client information protected.
    2. **Organizational Clients**: lawyer must act in the best interest of the entity. Must report legal violations up the chain. If lawyer reasonably believed disclosure necessary to prevent fraud, perjury, or substantial injury to organization or investors, *may* report to SEC. CA prohibits “reporting out,” but federal preemption permits reporting out in securities cases.

1. **Financial Duties**
   1. **Attorney Fees**
      1. **Non-Contingent**: agreement (can be oral) must include (1) how fee calculated, (2) what services are covered, and (3) lawyer’s and client’s duties. In CA, agreements *must* be in *writing*, unless either (1) fee is under $1000, (2) corporate client, (3) for routine services for a regular client, or (4) emergency or impractical.
      2. **Contingent**: agreement must be (1) in writing, (2) signed by client, stating (3) contingent percentage, (4) expenses to be deducted from recovery, (5) whether percent is taken from before after expenses, (6) how work not covered by contingent fee will be paid, and (7) that lawyer fees are negotiable.
         1. **When Prohibited**: ABA: not in family or criminal cases. CA: is silent, but caselaw allows contingency in DR if doesn’t promote dissolution.
         2. **Termination Pre-Contingency**: can recover only if client wins, in proportion to work done.
      3. **When Is Fee Too High?**
         1. CA: fees cannot be *unconscionably high*.
         2. ABA: fees must be *reasonable* taking into account all circumstances.
      4. **Billing Multiple Clients For Same Time**: CA: permitted if (1) fee to each is not unconscionably high, (2) attorney clearly discloses billing practices at outset of relationship, and (3) client consented.
      5. **Arbitration**: ABA encourages, CA requires if client sues and requests.
      6. **Fee Splitting**
         1. Within Firm: generally OK to split fees with other lawyers in your law firm.
         2. Outside Firm: may split fees with lawyers outside your firm only if (1) the total fee is ethical and there is (2) written disclosure and (3) client consent. ABA further requires the division be proportional to work done by each attorney unless each is jointly responsible for action. Thus, large referral fee typically not OK under ABA because not proportional, whereas in CA permissible if not unconscionable and client consents.
         3. With Non-Lawyers: generally not permitted, unless (1) death benefits to attorney’s heirs, (2) fees passed on as salaries/benefits to firm employees, and (3) sharing court-awarded fee with non-profit that employed or recommended lawyer.
      7. **Partnership With Non-Lawyers**: prohibited. Non-lawyers cannot be partners, shareholders, officers, or control/direct professional judgment.
   2. **Client Trust Accounts**: duty to safeguard client’s property by labeling and storing in safe place. Must place money in client trust account. No borrowing or commingling.
      1. Normally, use an individual interest-bearing account (client gets interest). Smaller funds held for short periods of time for multiple clients can be deposited together in a pooled account with interest to State Bar to fund indigent services.
      2. Duty to keep good records and keep client notified. CA: must keep records for 5 years after final distribution.
   3. **Disclosure of Professional Liability Insurance**: liability insurance not required, but, must disclose in writing lack thereof at time of engagement if representation to require more than 4 hours of work. Exceptions for gov’t and in-house lawyers.
2. **Competence & Other Duties**
   1. **\*Duty of Competence**: must use the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. If you don’t know law, cannot take matter unless can learn without undue expense or delay, or associate with competent attorney.
   2. **Duty of Diligence**: must diligently, promptly and zealously pursue case.
   3. **Duty to Communicate**: must keep client informed and answer messages, including settlement offer.
   4. **Accepting Representation**: free to accept or reject any case. A lawyer *should* accept the case of defenseless or oppressed if only reason to refuse is selfish. A lawyer *must* reject a case if he would violate a law or ethical rule to take it.
   5. **Scope of Representation**: client makes decisions about substantive rights (testify, accept settlement), attorney makes decisions on legal strategy.
   6. **Duties on Withdrawal from Representation**
      1. **Mandatory Withdrawal**: must withdraw from pending case if fired or if continuing would violate a law or ethical rule.
      2. **Permissive Withdrawal**: if court satisfied for good cause and withdrawal will not cause undue delay or disruption. ABA: also if representation will result in unreasonable financial burden. CA: if client breaches fee agreement.
      3. **Procedures for Withdrawal**: must (1) provide timely notice to client and (2) promptly return unspent fees and advances and (3) all property and material papers of the client. *Cannot withhold material to get paid.*
   7. **Other Duties**: be reasonable and sensible.
      1. **Sex**: ABA: no consensual sex unless pre-existing relationship. CA: allows new relationships with cautions (look for something bad).
3. **Duty of Candor to Public & Duty of Dignity to Profession** (address separately even if analysis is the same)
   1. **Constitutional Floor**: state can regulate attorney advertising and solicitation subject to lawyer’s limited commercial speech rights under the 1st Amendment. Permissible if (1) government asserts a substantial interest, (2) regulation directly advances that interest, and (3) regulation narrowly tailored.
   2. **Advertising**: lawyer’s communication with public at large
      1. Must Not be False or Misleading: no material misstatement or omission. CA: presumes improper any claim that includes guaranties or prediction of result. No testimonials unless disclaimer.
      2. Claims of Legal Specialties: can explain practice, but cannot advertise specialization unless a certified specialist.
      3. Labeling & Records: Every ad must be labeled as ad, and dramatization must be noted. Must identify at least one lawyer responsible for contents. Must keep records of content and placement of ads.
   3. **Solicitation**: lawyer may not seek professional employment for pecuniary gain by initiating a live or telephone contact with a prospective client with whom you had no prior relationship. Solicitation must be labeled as advertisement.
      * 1. Live/Telephone Contact: ABA: chat room included. CA: no violation if solicitation by chatroom.
        2. **Presumed Improper**: solicitation at scene of accident, en route to or in medical facility, or to clients not in state to exercise judgment.
4. **\*Duty of Candor to Court & Duty of Fairness to Adversary** (discuss both, even if same analysis)
   1. **Rule**: cannot engage in conduct involving dishonesty, fraud or misrepresentation. These duties can trump conflicting duties of confidentiality and loyalty.
   2. **Present Facts & Evidence Truthfully**: cannot make material misrepresentation or fail to correct a material misrepresentation previously presented.
   3. **Client Perjury**: cannot *knowingly* facilitate client perjury (if does not know but reasonably believes, rules are permissive). In a civil case, must refuse to call witness if he intends to perjure himself. In a criminal case, must, in following order, going to each next step only if prior doesn’t work: (1) counsel client to testify truthfully or not testify, (2) try to withdraw from the case, and (3) (a) ABA: tell the judge, or (b) CA: allow defendant to testify in narrative fashion. Attorney’s duties end with proceedings. If client reveals perjury afterward, can counsel to recant, but need not do anything else.
   4. May pay basic expenses of witnesses so long as not contingent on content.
   5. **Duty to Produce Evidence**: attorney must not suppress any evidence that she or client has legal obligation reveal or produce, regardless of loyalty. Must not obstruct access to or tamper with fruits or instrumentalities of a crime. Contraband must be delivered to authorities. Money? If reasonably certain that instrumentality, should turn it over. If attorney/investigator sees contraband but does not touch, no problem. If touches, may be compelled to produce/testify because she moved or altered it.
      1. **Prosecutor’s Duty**: must timely disclose favorable evidence to defense, regardless of admissibility or impact on outcome. Broader than *Brady*.
   6. **No Ex Parte Communications** (unless permitted by law).
   7. **Duty to State Law Truthfully**: must also cite to adverse controlling precedent.
   8. **Duty to Uphold Law**: cannot assist in crime, and, under certain circumstances, may prevent client from committing a crime, as discussed above.
   9. **Mistaken Receipt**: If attorney knows document was inadvertently sent, must stop reading and notify opposing counsel.
5. **Additional Duties of Fairness**
   1. **Generally**: must behave honestly in all dealings, both in and out of legal practice. Must act to promote public confidence in integrity and efficiency of legal system and profession.
   2. **Communication With Represented Party**: must not communicate with a person you know is represented by counsel on the subject of your inquiry without counsel’s consent, unless authorized by law or in giving second opinion. For organizations, consent required to speak with officer, director, managing agent, or any employee whose communication might bind or be imputed to the organization.
   3. **Dealing With the Press**: Fair Trial: must avoid out-of-court statements with a substantial likelihood of materially prejudicing a case. Exceptions include statements required to protect your client from substantial undue prejudice from recent publicity not self-initiated.
   4. Prosecutor: duty to seek justice. Must have probable cause.
6. **Duty to Preserve Dignity of Court & Additional Duties**
   1. **Duty to Preserve Decorum & Impartiality of Tribunal**: no improper influence. No talking to prospective or impanelled jurors until case complete. No referring to inadmissible material. No belligerence or theatrics.
   2. **Duty to Expedite Cases**: ABA: duty to expedite; CA: duty not to delay.
   3. Policing Misconduct
      1. ABA: must report violation of ethical rules if it raises a substantial question as to honesty, trustworthiness, or fitness as a lawyer
      2. CA: does not require reporting, but can discipline if you did nothing to prevent, i.e., did not counsel against violation.
7. **Unauthorized Practice of Law**: cannot engage in or facilitate. Practice of law is anything requiring professional legal judgemtn.
8. **Duties of Subordinate Lawyers**
   1. Subordinates: if supervisor ratifies or orders action violating ethical rule: if clearly a violation, subordinate subject to discipline; if debatable, supervisor is solely responsible.
   2. Supervising partner: if ratified or failed to take action to remedy subordinate’s violation, is in violation.
   3. Managing Partners: must make reasonable efforts to ensure that firm’s conduct comports with professional obligations.

Essay Tips:

Always discuss remedies and remedial action, such as withdrawal, counseling against fraud/crime, giving proper warnings about confidentiality and representation.