## Contents

Preface .......................................................... xxv
Acknowledgments ............................................. xxvii
Author Biographies ............................................ xxix

### Part One: The Big Picture

The Daunting Task ............................................. 1

#### Chapter 1: Five Steps to a Fair Fight

§ 1.01 Step One: Identify Your Client Obligations—The Six Cs .................................. 5
§ 1.02 Step Two: Clarify Your Fee ........................................... 6
§ 1.03 Step Three: Attend to the Six Cs
   - Client Identification .................................................. 7
   - Competence .......................................................... 8
   - Control .................................................................. 9
   - Communication ..................................................... 10
   - Confidentiality ..................................................... 11
   - Conflicts of Interest ............................................. 12
§ 1.04 Step Four: Observe the Limits of the Law ...................................................... 13
§ 1.05 Step Five: Recognize Remedies ..................................................... 14
§ 1.06 Our Problem Approach
   - LinkedIn ............................................................ 15

### Part Two: Who Is Your Client?

Why Identifying Your Client Matters ......................... 17

#### Chapter 2: Beginning a Client-Lawyer Relationship: Actual, Implied, and Prospective Clients

§ 2.01 Introduction: When Does It All Begin? ..................................................... 19
§ 2.02 Marketing
   - Modern Marketing .................................................. 20
§ 2.03 Engagement Agreements
§ 2.04 Crafting an Engagement Letter
  The Engagement Letter
§ 2.05 Engagement Letters: Wrap-Up
§ 2.06 Non-engagement Letters
§ 2.07 The Meaning of the Initial Meeting
  The Nonexistent Non-engagement Letter
§ 2.08 Implied Clients
  The Speech
§ 2.09 Social Meetings
  Casual Advice
§ 2.10 E-lawyering
  Website Advertising
§ 2.11 Prospective Clients
  Beauty Contests

Chapter 3: Ending a Client-Lawyer Relationship:
Former Clients
§ 3.01 Introduction: Completing a Representation
§ 3.02 Disengagement Letters
§ 3.03 Staying In or Getting Out
  Completing a Case
§ 3.04 What Do You Intend?
  The Ambiguous Disengagement Letter
§ 3.05 Keeping Confidences
  The Wrong Use
§ 3.06 Lawyers Changing Jobs
  Departing General Counsel

Chapter 4: Court Appointments, Pro Bono,
and Unpopular Clients
§ 4.01 Introduction: Clients Who Have Difficulty Finding a Lawyer
§ 4.02 Court Appointments in Criminal Cases
  The Obstinate Defendant
§ 4.03 Court Appointments in Civil Cases
  Appointed Pro Bono
§ 4.04 Pro Bono Clients
  The Legal Services Hotline
§ 4.05 Unpopular Clients
  But They Can Pay

Chapter 5: Joint Clients
§ 5.01 Introduction: Joint Clients and Joint Loyalty
§ 5.02 Marriage Dissolution
  Prohibited Joint Clients
Contents

§ 5.03 Group or Aggregate Settlements 51
  The Homeowner’s Settlement 51
§ 5.04 Accommodation Clients 53
  Accommodating the Client’s Employee 53
  Prospective Waivers 55
  Confidential Information and Third-Party Payment 56
§ 5.05 Employer and Employee 57
  The Company Accident 57
§ 5.06 Co-plaintiffs 58
  All in the Family 58
§ 5.07 Common-Interest Arrangements 60
  Coerced Cooperation 60

Chapter 6: Insurance Defense and Other Third-Party Funders 63
§ 6.01 Introduction: The Triangular Relationship 63
§ 6.02 Third-Party Funders 64
  Professional Independence? 64
§ 6.03 Insurers 65
  The Eternal Triangle 65
§ 6.04 Offers to Settle Within Policy Limits 71
  The Unreasonable Insurance Company 71
§ 6.05 Policy Defenses 72
  Learning Too Much 72

Chapter 7: Entity and Government Clients 75
§ 7.01 Introduction: The Legal Fiction 75
§ 7.02 Close Corporations 76
  Who Is the Client, Really? 76
§ 7.03 Corporate Families 77
  Do I Have to Tell the Parent? 77
§ 7.04 Entity Client Depositions 79
  Accommodating the CEO, CFO, and the Board 79
§ 7.05 Identifying a Government Client 82
  The State or the Department? 82
§ 7.06 The Government Client 83
§ 7.07 Government Consent 85
  For Want of a Writing 85
§ 7.08 The Departing Government Lawyer 86
  Ordinary Former Lawyers? 86

Chapter 8: Clients Who Morph 89
§ 8.01 Introduction: Clients Can Change 89
§ 8.02 Clients Who Die 89
  Disappearing Damages 89
§ 8.03 Clients with Diminished Capacity 90
  Getting Old 90
§ 8.04 Children 91
  Client Testimony Versus Client Best Interests 91
§ 8.05 Class Action Clients 92
  The Uncertified Class 92
§ 8.06 Companies That Fail 93
  Company Bankruptcy 93
§ 8.07 Changes in Management 94
  The New CEO 94

Part Three: Representing Clients 95
Lawyers and Clients: Fiduciary Duty 95

Chapter 9: Fees, Glorious Fees 97
§ 9.01 Introduction: Reasonable Limitations on Fee Contracts 97
§ 9.02 Chart: Written Fee Agreements Requirements by State 99
§ 9.03 Reasonable Hourly Fees 102
§ 9.04 Calculating and Charging Hourly Fees 103
  The Honest Hour 103
§ 9.05 Disbursements 104
  Contract Lawyers as Profit Centers 104
§ 9.06 Reasonable Contingent Fees 106
§ 9.07 Contingent-Fee Look Backs 109
  20-20 Hindsight 109
§ 9.08 Reverse Contingent Fees 114
  Avoiding the Billable Hour 114
§ 9.09 Reasonable Fixed Fees 115
  Flat-Fee Insurance Defense 116
§ 9.11 Fee Splitting 116
  Earning That Referral Fee 116
§ 9.12 Changing Fee Agreements 117
  Owning the Store 117
§ 9.13 Fee Modification 118
§ 9.14 Lawyer Hindsight 119
  The Bad Deal 119
§ 9.15 Fees on Termination 120
§ 9.16 The Client’s Power to Terminate 121
  Fired! 121
§ 9.17 Statutory Fee-Shifting Agreements 123
  Our Contract 123
§ 9.18 Court-Awarded Fee Enhancements 124
  No Good Deed Goes Unpunished 124
§ 9.19 Statutory Fees 125
Chapter 10: Competence

§ 10.01 Introduction: Why You Were Hired in the First Place
§ 10.02 Reasonable Competence
  Expanding Your Practice
§ 10.03 Reasonable Diligence
  Diligence: Not to Worry
§ 10.04 Chart: Legal Malpractice and Breach of Fiduciary Duty
§ 10.05 Obvious Errors
§ 10.06 Obvious Negligence
  Missing a Deadline
§ 10.07 How to Respond to Errors
§ 10.08 Chart: Lawyer Tort Liability to Nonclients
§ 10.09 Lawyer Liability to Third Persons
  Third-Party Obligations
§ 10.10 Third-Person Obligations: The Law of Deceit
§ 10.11 Third-Person Obligations When Opining
  The Opinion Boilerplate
§ 10.12 Lawyer Legal Accountability to Nonclients
§ 10.13 Third-Person Obligations When Representing Fiduciaries
  You Can Break the Contract

Chapter 11: Control

§ 11.01 Introduction: Who’s in Charge?
§ 11.02 Chart: Authority Between Client and Lawyer
§ 11.03 Client Control
§ 11.04 Settlement Authority
  Who Decides?
§ 11.05 Settlement Offers
  A Client’s Change of Mind
§ 11.06 Aggregate Settlements
  The Union Members’ Agreement
§ 11.07 Plea Bargains
  Buyer’s Remorse
§ 11.08 Client Instructions
  Don’t Talk to Mama
§ 11.09 Advance Consent
  Reasonable Settlement Agreements
§ 11.10 Negotiation Strategy
  What Does the Client Know?
§ 11.11 Lawyer Authority
§ 11.12 Lawyer or Client?
  Lawyer Accepts an Offer
§ 11.13 Exclusive Lawyer Control
   The Lawyer’s Prerogative 161
§ 11.14 The Middle Ground: Client-Lawyer Consultation 162
§ 11.15 Litigation Strategy
   Who Knows Best? 163
§ 11.16 Limited Scope Agreements 163
§ 11.17 Insurance Defense Control
   Insurance Intermeddlers 165
§ 11.18 Chart: Lawyer’s Authority to Act for Client 166

Chapter 12: Communication 169
§ 12.01 Introduction: The Foundation of the Six Cs 169
§ 12.02 Informed Consent 170
§ 12.03 Informed Consent: When?
   Bad News 171
§ 12.04 Reasonable Consultation
   The Profitable Summary Judgment Motion 172
§ 12.05 Keeping the Client Reasonably Informed
   Client Consultation 173
§ 12.06 Reasonable Alternatives
   ADR 174
§ 12.07 Hiring Another Lawyer
   Hiring Reinforcements 175
§ 12.08 Chart: Eight Events That Trigger a Lawyer’s Duty to Communicate with a Client 176

Chapter 13: Confidentiality 177
§ 13.01 Introduction: The Never-Ending Obligation 177
§ 13.02 Chart: Source and Scope of Client Confidentiality Obligations 178
§ 13.03 Scope of the Confidentiality Protection 179
§ 13.04 Client Identity and Public Documents 179
§ 13.05 Client Information in Public Records 181
   Currying the Favor of the Press 181
§ 13.06 Client Identity and Client Matters 183
   The Law-Firm Website 183
§ 13.07 Using Confidential Information
   The Great Opportunity 185
§ 13.08 Advanced Waivers of Confidentiality
   Don’t Bother the Client 187
§ 13.09 Informed Consent or Waiver?
   Confidentiality Waivers 187
§ 13.10 Chart: Confidentiality Duties to Current, Former, and Prospective Clients 189
§ 13.11 Confidentiality in Joint Representations
   Multiple Clients/Multiple Secrets/Former Clients 190
§ 13.12 Prospective Client Confidentiality 191
   The Juicy Tidbit from a Prospective Client 191
§ 13.13 Chart: Client Confidentiality Exceptions 194
§ 13.14 Confidentiality Exceptions 195
   Defending Yourself . . . Cleverly 195
§ 13.15 Confidentiality Exceptions: Threats of Substantial Bodily Harm or Death 196
   Client Threats 196
§ 13.16 Confidentiality Exceptions: Wrongful Conviction 198
   The Shoe Pinches 198
§ 13.17 Confidentiality Exceptions: Seeking Advice 199
   Getting Advice Outside Your Firm 199
§ 13.18 Confidentiality Exceptions: Lawyer Self-Defense 200
   The Turncoat Lawyer 200
§ 13.19 Confidentiality Exceptions: Law or Court Order 201
   Can You Trust the Trustee? 201
§ 13.20 Confidentiality Exceptions: Law or Court Order 202
   Is This a Tribunal? 202
§ 13.21 Confidentiality Exceptions: Law or Court Order 203
   Staying Out of Jail 203
§ 13.22 Rule 1.6 Exceptions to Client Confidentiality by State 205

Chapter 14: Privilege and Work Product 233
§ 14.01 Introduction: The Privileges: Scope of the Protections 233
§ 14.02 Privileged Communications 235
   Privilege or Pretense 235
§ 14.03 Privileged Persons 236
   Sometimes You Don’t Want Privilege 236
   The Consulted Accountant 237
§ 14.04 Employee Email 238
   It’s Our Computer 238
§ 14.05 Privilege and Shareholders 240
   The Derivative Suit 240
§ 14.06 Creating Work Product 241
   The Investigation 241
§ 14.07 Work-Product Protection 242
§ 14.08 Investigations 243
   The Supervised Expert 243
§ 14.09 Ordinary and Opinion Work Product 243
   What Is Ordinary about Ordinary Work Product? 243
§ 14.10 Privilege and Work-Product Waivers 244
   Who Has the Right to Waive? 244
§ 14.11 Waiver by Sharing 245
   The Nosy Accountants 245
§ 14.12 Waiver by Reliance on Legal Advice 246
   Advice Regarding Advice 246
§ 14.13 Selective Waiver  248
   Beware Selective Waiver 248
§ 14.14 Lawyer’s Authority to Waive the Client’s Privilege  249
   Does Breaching Confidentiality Waive the Privilege? 249
§ 14.15 The Crime-Fraud Exception: Innocent Client  250
   Visiting the Sins of the Lawyer on the Client 250
§ 14.16 The Crime-Fraud Exception: Innocent Lawyer  251
   The Duped Lawyer 251
§ 14.17 The Crime-Fraud Exception: Ignoring Legal Advice  253
   Irresponsible Clients 253
§ 14.18 The Testamentary Exception  253
   Does the Privilege Die? 253

Chapter 15: Conflicts of Interest  255
§ 15.01 Introduction: Your Loyalty Obligation  255
§ 15.02 Chart: Five Steps to Resolving Conflicts of Interest  257
§ 15.03 Conflicts-Control Systems  257
   Double the Clients, Double the Fun 259
§ 15.04 Zero-Sum Situations  259
   Not Solving the Problem 262
§ 15.05 Continuing Obligation  261
   Prosecutorial Control 261
§ 15.06 Simultaneous Adverse Representation in Unrelated Matters  262
   Losing a Client by Disqualification or Injunction 263
§ 15.07 Personal Injury Plaintiffs  266
   Father and Son 266
§ 15.08 Employer and Employee  268
   Investigating the Company Accident 268
§ 15.09 Entities and Affiliates  269
   Corporate Family Redux 269
§ 15.10 Entity-Created Conflicts  271
   The Client Merger 271
§ 15.11 The Corporate Family  272
   The Wholly Owned Subsidiary 272
§ 15.12 Insurance Defense  277
   Settling Within Limits 277
§ 15.13 Nonconsentable Conflicts  277
   Suing Your Current Client 277
§ 15.14 Business Transactions with Clients  279
   Timely Business 279
§ 15.15 Personal Conflicts and Undue Influence  280
§ 15.16 Media Rights  281
   Being Famous 281
§ 15.17 Financial Assistance  282
   The Client Needs Help: Can the Lawyer Do So? 282
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 15.19 Outside Financial Assistance</td>
<td>283</td>
</tr>
<tr>
<td>Litigation Funders—A Mixed Blessing</td>
<td>283</td>
</tr>
<tr>
<td>§ 15.20 Joint or Aggregate Settlements</td>
<td>284</td>
</tr>
<tr>
<td>The Lawyer’s Job</td>
<td>284</td>
</tr>
<tr>
<td>§ 15.21 The Equity of Fee Forfeiture</td>
<td>285</td>
</tr>
<tr>
<td>§ 15.22 Lawyer-Client Sexual Relationships</td>
<td>288</td>
</tr>
<tr>
<td>Sex with Clients</td>
<td>288</td>
</tr>
<tr>
<td>§ 15.23 Related-Lawyer Conflicts</td>
<td>288</td>
</tr>
<tr>
<td>Adam’s Rib</td>
<td>288</td>
</tr>
<tr>
<td>§ 15.24 Issue Conflicts</td>
<td>289</td>
</tr>
<tr>
<td>Inconsistent Legal Arguments</td>
<td>289</td>
</tr>
<tr>
<td>§ 15.25 Former Client Confidentiality Obligations</td>
<td>291</td>
</tr>
<tr>
<td>Summer Associate Blues</td>
<td>291</td>
</tr>
<tr>
<td>§ 15.26 Conflicts and Confidentiality</td>
<td>292</td>
</tr>
<tr>
<td>The Confidentiality Trap</td>
<td>292</td>
</tr>
<tr>
<td>§ 15.27 Former Client Conflicts</td>
<td>293</td>
</tr>
<tr>
<td>Hiring the Former General Counsel</td>
<td>293</td>
</tr>
<tr>
<td>§ 15.28 Screening</td>
<td>296</td>
</tr>
<tr>
<td>Screens: Not the Ones We Put Up in the Spring</td>
<td>296</td>
</tr>
<tr>
<td>§ 15.29 Prospective Client Screens</td>
<td>297</td>
</tr>
<tr>
<td>Prospective Client Solutions . . . Maybe</td>
<td>297</td>
</tr>
<tr>
<td>§ 15.30 Chart: Comparison of Former Client, Former Government Client, and Former Adjudicator Conflict-of-Interest Provisions</td>
<td>299</td>
</tr>
<tr>
<td>§ 15.31 Government Lawyers</td>
<td>299</td>
</tr>
<tr>
<td>The First Screens</td>
<td>299</td>
</tr>
<tr>
<td>§ 15.32 Screening Former Judges</td>
<td>301</td>
</tr>
<tr>
<td>Judges, Arbitrators, and Mediators: Which One Does Not Belong?</td>
<td>301</td>
</tr>
<tr>
<td>§ 15.33 Side Switchers</td>
<td>303</td>
</tr>
<tr>
<td>The Recent Addition</td>
<td>303</td>
</tr>
<tr>
<td>§ 15.34 Adequate Screens</td>
<td>304</td>
</tr>
<tr>
<td>Is It Really Adequate?</td>
<td>304</td>
</tr>
<tr>
<td>§ 15.35 Checklist for Effective Screens</td>
<td>306</td>
</tr>
<tr>
<td>§ 15.36 Chart: State Rules of Professional Conduct</td>
<td>308</td>
</tr>
<tr>
<td>Screening Provisions</td>
<td></td>
</tr>
</tbody>
</table>

### Part Four: The Limits of the Law

When You Should or Must Say “No”: Boundaries                              | 313  |
Chart: Sources of Legal Limits and Corresponding Model Rules              | 314  |

**Chapter 16: Getting Out: When You Must or May Withdraw from a Representation** | 315  |
§ 16.01 Introduction: Legal Grounds for Withdrawal                        | 315  |
§ 16.02 Being Fired  
   The Nerve 316  
§ 16.03 Firing the Client  
   The Profession’s Dirty Little Secret 317  
§ 16.04 Withdrawing from Litigation  
   You Need the Judge 318  
§ 16.05 Mandatory Withdrawal  
   You Gotta Get Out 319  
§ 16.06 Confidentiality and Successor Counsel  
   Should We Alert Our Successor? 319  
§ 16.07 Permissive Withdrawal  
   Discretion to Desist 321  
§ 16.08 Permissive Reasons  
   No Reason at All 321  
§ 16.09 Solving a Conflict by Withdrawal  
   Taking Advantage of an Opportunity 322  
§ 16.10 Client Fraud  
   Not Sure 322  
§ 16.11 Moral Repugnance  
   A Lawyer’s Dismay 324  
§ 16.12 Unpaid Fees  
   Booting the Deadbeat 325  

Chapter 17: Supervisory and Supervised Lawyers 329  
§ 17.01 Introduction: When to Defer to Another Lawyer’s Judgment 329  
§ 17.02 Subordinate and Supervisory Lawyers  
   Juniors and Seniors 331  
§ 17.03 Supervisory and Subordinate Lawyers  
   Trust the Juniors 332  
§ 17.04 The Conciliatory Supervisor  
   Trouble . . . Everywhere 333  
§ 17.05 The Departing Associate  
   The Mistaken Associate 335  

Chapter 18: Court Orders and Court Rules 337  
§ 18.01 Introduction: The Power of a Court 337  
§ 18.02 Court Orders  
   Contempt 338  
§ 18.03 Statutes of Limitation  
   Going All Out for the Client 339  
§ 18.04 Frivolous Lawsuits 340  
§ 18.05 Procedure and Sanctions  
   Assert Any Claim, Offer Any Defense? 341  
§ 18.06 Procedure and Statutes of Limitations  
   Procedural Rules: The Last-Minute Client 343
## Contents

- § 18.07 Procedural Rules: Continuing Obligations  
  An Accumulation of Difficulties 344
- § 18.08 The Power of Court Sanctions to Control Discovery 345
- § 18.09 Discovery Abuse  
  The Damaging Documents 347
- § 18.10 Access to Privileged Information  
  Informal Discovery 348
- § 18.11 Insider Disclosure  
  Authority to Waive 349
- § 18.12 The Power of Disqualification  
  Help Behind the Scenes 350

### Chapter 19: Crime and Fraud 353
- § 19.01 Introduction: The Criminal Law and Professional Obligation 353
- § 19.02 Crime  
  Political Assistance 356
- § 19.03 Extortion  
  The Appropriate Threat 357
- § 19.04 Criminal Aiding and Abetting  
  Legitimate Advice 358
- § 19.05 Generally Applicable Law: Treasury Regulation 8300  
  Obeying the Law 359
- § 19.06 Generally Applicable Law: Fair Debt Collection Practices Act  
  Debt Collection 360
- § 19.07 Crime or Fraud  
  The Good-Deed Crime 361
- § 19.08 The Law of Fraud and Professional Obligation 362
- § 19.09 Discovery Deception  
  Facebook Discovery 366
- § 19.10 Fraud: Mistake of Law  
  Other Side’s Mistake 367
- § 19.11 Fraud: What Is a Tribunal?  
  The Tax-Fraud Interview 368
- § 19.12 Fraud: Mistake of Fact  
  Scrivener’s Error 369
- § 19.13 Aiding and Abetting a Client Fraud  
  Duties to Others 370

### Chapter 20: Bias 373
- § 20.01 Introduction: The Enduring Problem 373
- § 20.02 Bias  
  The Courtroom Bully 374
- § 20.03 Bias and Immigration Status  
  Using an Improper Advantage 375
- § 20.04 Bias in Jury Selection  
  Getting the Jury We Want 376
Part Five: Representing Clients Pretrial 379
Legal Ethics in the Context of Pretrial Representation 379

Chapter 21: The Investigation 381
§ 21.01 Introduction: The Ethics of Proper Investigation 381
§ 21.02 The Investigation 382
  Protecting the Privilege 382
§ 21.03 Interviewing Client Employees 384
  The Problematic Interview 384
§ 21.04 Privilege Waiver: Criminal Defense 385
  Settlement by Waiver 385
§ 21.05 Privilege Waiver: Civil Cases 386
  Insistent Auditors 386

Chapter 22: Contacting Nonclients 389
§ 22.01 Introduction: Legal Regulation of Third-Person Contact 389
§ 22.02 Communication with Represented Persons 390
  What's a Settlement? 390
§ 22.03 Distinguishing Represented from Unrepresented Persons 392
  Firing the Jerk 392
  Small Claims 393
§ 22.04 Client Communication with Represented Persons 394
  Unforwarded Settlement Offers 394
§ 22.05 Communication with Employees of Represented Entities 396
  Economical Discovery 396
§ 22.06 Communication with Former Employees 398
  of Represented Entities 398
  The Disgruntled Former Employee 398
§ 22.07 Authorized by Law Exception 401
  Government Lawyers 401

Chapter 23: Discovery 405
§ 23.01 Introduction: Legal Regulation of Discovery Abuse 405
§ 23.02 Inadvertent Document Receipt 406
  Inadvertent Email 406
§ 23.03 Electronic Documents 408
  Regret at Leisure 408
§ 23.04 Destroyed Documents 410
  The Deleted Files 410
  Who Knew? 410
§ 23.05 Manufactured Documents 412
  What to Do? 412
  Getting It Right 412
§ 23.06 Privilege Logs 413
  Privilege Log Rolling 413
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 23.07 Accuracy in Privilege Logs</td>
<td>414</td>
</tr>
<tr>
<td>Just One Document</td>
<td>414</td>
</tr>
</tbody>
</table>

### Chapter 24: Dealing with Experts 417

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 24.01 Introduction: The Importance of Experts</td>
<td>417</td>
</tr>
<tr>
<td>§ 24.02 The Dream Expert</td>
<td>418</td>
</tr>
<tr>
<td>The Big Case</td>
<td>418</td>
</tr>
<tr>
<td>§ 24.03 Client Approval</td>
<td>419</td>
</tr>
<tr>
<td>Do Not Forget the Client</td>
<td>419</td>
</tr>
<tr>
<td>§ 24.04 Finding the Best Expert</td>
<td>420</td>
</tr>
<tr>
<td>Shopping for the Right Expert</td>
<td>420</td>
</tr>
<tr>
<td>§ 24.05 Vetting the Opinion</td>
<td>421</td>
</tr>
<tr>
<td>Shopping for the Right Opinion</td>
<td>421</td>
</tr>
<tr>
<td>§ 24.06 Experts and Conflicts</td>
<td>423</td>
</tr>
<tr>
<td>Hiring an Opposing Expert from a Different Pending Case</td>
<td>423</td>
</tr>
<tr>
<td>§ 24.07 Former-Employee Experts</td>
<td>425</td>
</tr>
<tr>
<td>Hiring the Turncoat as an Expert</td>
<td>425</td>
</tr>
<tr>
<td>§ 24.08 Hiring the Other Side’s Former-Prospective Expert</td>
<td>425</td>
</tr>
<tr>
<td>The Undisclosed Consult</td>
<td>425</td>
</tr>
<tr>
<td>§ 24.09 Hiring All the Available Experts</td>
<td>426</td>
</tr>
<tr>
<td>Disqualifying by Shopping</td>
<td>426</td>
</tr>
<tr>
<td>§ 24.10 Compensating Your Expert</td>
<td>427</td>
</tr>
<tr>
<td>The Contingency Fee</td>
<td>427</td>
</tr>
<tr>
<td>§ 24.11 Influencing the Expert’s Opinion</td>
<td>428</td>
</tr>
<tr>
<td>Shaping Conclusions</td>
<td>428</td>
</tr>
<tr>
<td>§ 24.12 Ghostwriting the Expert’s Report</td>
<td>429</td>
</tr>
<tr>
<td>The Draft Disaster</td>
<td>429</td>
</tr>
<tr>
<td>§ 24.13 Preparing Your Expert</td>
<td>430</td>
</tr>
<tr>
<td>Practice, Practice, Practice</td>
<td>430</td>
</tr>
<tr>
<td>§ 24.14 An Expert Who Is Also Your Client in Another Matter</td>
<td>432</td>
</tr>
<tr>
<td>Squaring Off Against Your Client</td>
<td>432</td>
</tr>
<tr>
<td>§ 24.15 Contact with Opposing Experts</td>
<td>434</td>
</tr>
<tr>
<td>Cozying Up to the Other Side’s Expert</td>
<td>434</td>
</tr>
<tr>
<td>§ 24.16 Preventing Contact Between Your Expert and Opposing Counsel</td>
<td>435</td>
</tr>
<tr>
<td>Preventing Cozying Up to Opposing Counsel</td>
<td>435</td>
</tr>
</tbody>
</table>

### Chapter 25: Negotiations and Settlement 437

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 25.01 Introduction: Negotiation Ethics</td>
<td>437</td>
</tr>
<tr>
<td>§ 25.02 Duty to Correct</td>
<td>437</td>
</tr>
<tr>
<td>Correcting Mistakes</td>
<td>437</td>
</tr>
<tr>
<td>§ 25.03 Defining Material Fact</td>
<td>440</td>
</tr>
<tr>
<td>Puffing</td>
<td>440</td>
</tr>
<tr>
<td>§ 25.04 The Client’s Right to Settle</td>
<td>441</td>
</tr>
<tr>
<td>Settlement Negotiations</td>
<td>441</td>
</tr>
</tbody>
</table>
Contents

§ 25.05 Disclosing Offers 441
   Touching Base 441
§ 25.06 Offer Accepted Without Authority 442
   Surprised Lawyer, Surprised Client 442
§ 25.07 Client Direction Not to Discuss Settlement 443
   No Authority . . . Again 443
§ 25.08 Confidentiality in Settlement 444
   Disclosing the Offer 444
§ 25.09 Admissions During Settlement Discussions 445
   The Apology 445
§ 25.10 Mistakes of Fact 445
   Dangerous Fact Mistake 445
§ 25.11 Mistakes of Law 446
   The Incompetent Opposing Lawyer 446
§ 25.12 Aggregate Settlements 447
   The Smart Advance 447
§ 25.13 Plea Bargains 448
   The Exploding Offer 448
§ 25.14 Settlements in Divorce and Dissolution of Marriage 449
   Collaborative Law 449
§ 25.15 Agreements to Limit Future Practice 450
   The Buyout 450
§ 25.16 Revoking Settlement Authority 451
   Unreliable Clients 451
§ 25.17 Offering Settlement Advice 452
   Should Anyone Care What Lawyers Think? 452
§ 25.18 Disparaging Clients as Settlement Strategy 452
   Don’t Tell My Clients 452
§ 25.19 Secret Settlements 453
   Public Disclosure Versus Private Gain 453

Part Six: Representing Clients at Trial 455
The Lawyer’s Role at Trial 455

Chapter 26: Candor to the Tribunal: Frivolous Claims, Expediting Litigation, and Disclosure Obligations 457
§ 26.01 Introduction: The Wide Scope of Litigation Candor 457
§ 26.02 Entering an Appearance 458
   Who Is My Client? 458
§ 26.03 Obligation to Disclose Adverse Legal Authority 459
   The Uncited Case 459
§ 26.04 Obligation to Disclose Adverse Facts 460
   The Misinformed Judge 460
§ 26.05 Obligation to Disclose a Client’s Death 461
   The Lost Client 461
§ 26.06 Limited Appearances
  Ghostwriting 463
§ 26.07 Improper Limitations
  No Good Deed . . . 464
§ 26.08 Obligation to Disclose Undiscovered Witnesses
  The Mystery Man 465
§ 26.09 Witness Preparation
  Refreshing Memory 465
§ 26.10 Witness Inducements
  Expensive Testimony 468
§ 26.11 Candor to the Judge
  The Forced Mediation 469
§ 26.12 Candor about Later-Discovered Fact
  The Prevaricating Proctologist 471
§ 26.13 Lying in a Deposition
  Recent Memory 472
§ 26.14 Obligation to Correct Crime or Fraud
  Reasonable Remedial Measures 474
§ 26.15 Documenting Testimony
  Creative Writing 476

Chapter 27: Tribunal Impartiality: Fairness, Ex Parte Contact, Publicity, and Lawyer as Witness 477
§ 27.01 Introduction: Tribunal Impartiality 477
§ 27.02 Access to Evidence
  The Draft Document 477
§ 27.03 Court Orders
  Too Clever by Half 479
§ 27.04 Court Orders: Confidentiality
  Settlement Agreement 480
§ 27.05 Witness Incentives
  Meeting Demands 480
§ 27.06 Ex Parte Contact with Judges and Jurors 482
§ 27.07 Ex Parte Contact with Courts
  The Emergency TRO 483
§ 27.08 Ex Parte Contact with Jurors
  The Postmortem 484
§ 27.09 Trial Publicity
  Winning on the Evening News 486
§ 27.10 Lawyer as Witness
  Lawyer for Everything 487
§ 27.11 Lawyer as Unanticipated Witness
  Lawyer Testifying at the Last Minute 489
§ 27.12 Closing Arguments
  Caring Too Much 489
# Chapter 28: Appeals

## § 28.01 Introduction: Ethics in Appellate Practice

### Scope of the Representation

The Ingrate Client

### Material Limitation

Thrust-Upon Grief

All for One and ... We Have Met the Enemy and ...

### Client Direction

The Merits

### It Never Occurred to Me

It’s the Principle

### Defeat from the Jaws of Victory

### chapter 29: judicial ethics for lawyers

## § 29.01 Introduction: The Importance of Judicial Ethics for Lawyers

## § 29.02 Judicial Competence and Diligence

The Duty to Sit

## § 29.03 Judicial Mediation

Coerced Mediation

## § 29.04 The Judge’s Responsibility

## § 29.05 Judicial Bias

Manifest Bias

## § 29.06 Impartiality and Fairness

## § 29.07 Ex Parte Communications

The Perfect Opportunity

## § 29.08 Avoiding and Curing Improper Ex Parte Communications

## § 29.09 Judicial Disqualification and Recusal

The High School Classmate

## § 29.10 Public Statements

A Previous Commitment

## § 29.11 Impropriety and the Appearance of Impropriety

## § 29.12 Judicial Campaigns

The Campaign Influence

## § 29.13 Judicial Selection

The Successful Campaign

## § 29.14 Judicial Campaigns and Judicial Speech
Contents

Part Seven: The Big Picture Redux  525
Zealous Representation Within the Bounds of the Law  525

Chapter 30: Fair Fight: Legal Ethics for Litigators  527
§ 30.01 Introduction: Fighting Fair as an Ethical Litigator (Chapter 1)  527
§ 30.02 Who Is Your Client? The First of Six Cs (Chapters 2–8)  528
§ 30.03 When You Agree to Represent a Client: Fees and the Other Five Cs (Chapters 9–15)  529
§ 30.04 The Limits of Your Advocacy (Chapters 16–20)  529
§ 30.05 Client Representation and the Limits of the Law in Litigation (Chapters 21–29)  529
§ 30.06 So What?  530

Table of Authorities  533
Index  539