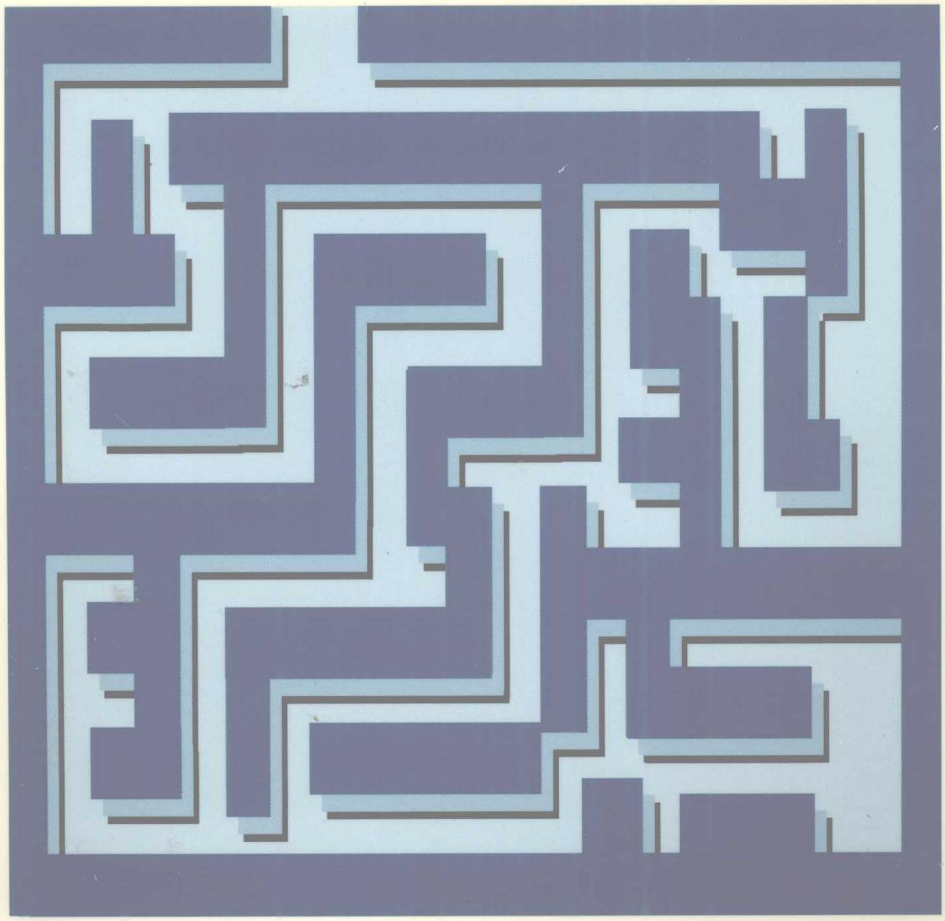
EXAMPLES & EXPLANATIONS

Professional Responsibility

W. Bradley Wendel



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For Ben and Hannah

Preface

No matter what area of law you choose to specialize in, I guarantee that you will practice the subject of this course. You may never file a motion for summary judgment, appear at a preliminary hearing or sentencing, perfect a security interest, prepare a will, or draft comments on proposed new regulations, but you will, at some time, think about what you are learning in your professional responsibility course. You may have to decide whether you can represent a new client, in light of your obligations to an existing client. You certainly will have to keep client confidences, and at some point you may need to assert a privilege covering certain confidential communications, to prevent them from being discovered by others. You may bill clients for your services, in which case you need to know the rules governing attorneys' fees, and you may even advertise for business. One way or the other, you will have to know the law of professional responsibility.

One of the major themes of this book is that you cannot understand your duties and responsibilities as a lawyer just by looking at the disciplinary rules, sometimes called "ethics codes" or "rules of ethics." The ABA's Model Rules of Professional Conduct, in whatever version they are adopted in your state, are the basis for potential professional discipline by state bar authorities, but this discipline is not the only thing lawyers must worry about in practice. Your day-to-day actions also will be influenced by the possibility of liability for malpractice to your client, sanctions imposed by a court under its inherent power or rules of procedure, potential loss of entitlement to fees, disqualification from representing a client, and waiver of evidentiary privileges. Not to slight the importance of the disciplinary system, but by the calculations of some scholars, a lawyer is over a ***thousand*** times more likely to pay out in excess of $10,000 in a malpractice lawsuit, by way of judgment or settlement, than to be disbarred. Which risk do you think is more likely to focus one's attention? Furthermore, many significant areas of professional responsibility law, such as conflicts of interest and the attorney-client privilege, are driven almost entirely by considerations unrelated to professional discipline, such as disqualification and loss of fees in the case of conflicts, or the desire to protect client communications from disclosure in court in the case of the attorney-client privilege. Thus, it is vitally important to consider the whole field of the law governing lawyers, not just the disciplinary rules.

This does not mean we will not consider the disciplinary rules carefully. In fact, the Model Rules will be central to much of the book. In many cases, however, we will move beyond the state bar disciplinary rules and discuss the relationship with other sources of law. For example, the professional duty of

confidentiality, stated in Model Rule 1.6, is often confused with the attorney-client privilege, which is a creature of the law of evidence. By looking at the evidentiary privilege with some care, you can see the distinctions and overlap between these two doctrines. Even if your law school course is limited to study of the Model Rules, the contrast with the attorney-client privilege can sharpen your understanding of the precise boundaries of the duty of confidentiality. It is more likely, however, that your professional responsibility course will touch on other areas of law, such as the evidence rules governing privileges, the Sixth Amendment doctrines pertaining to ineffective assistance of counsel, the law of agency, partnership, and corporations as it pertains to conflicts of interest, client identification, and fiduciary duties, and the tort and regulatory law of fraud.

Thus, the first goal of this book is to integrate these other sources of law with specific professional responsibility rules, so that you can get a complete picture of your duties as a lawyer. Unlike some other textbooks, this book does not draw an artificial distinction between analysis of the disciplinary rules and other law that applies to lawyers representing clients. In some places the result of this integration may be greater complexity and length of treatment, but I believe it is warranted by the importance of understanding the interaction between the bar's own rules and other legal norms that lawyers must take into account. The second goal of the book is to make you aware of the theory and policy reasons underlying the law governing lawyers. Your law school course may be aimed more at ethics (in the philosophical sense of reasoning about right and wrong) than law. In other words, you may be asked to step back from the law and understand the role of lawyer in terms of its function in our society, the history of the profession, general rational standards of right and wrong, or the perspective of some other discipline. Although no textbook of reasonable length can do justice to these alternative perspectives on the legal profession, I do hope to at least introduce them, and show how they affect the law as it develops.

The field of professional responsibility law has never been more exciting. Since the year 2000 the ABA completed a major revision to the Model Rules, the American Law Institute completed its Restatement of the Law Governing Lawyers, and there has been renewed attention on the role of lawyers in large-scale abuses of trust by powerful clients. As I was preparing this book, there were news stories almost every day that touched on the ethical and legal responsibility of lawyers, of which the participation of professionals in the massive accounting frauds of the late 1990's were only the most prominent example. I hope you come away from your professional responsibility course with some appreciation for just how fascinating and important this subject is for all lawyers, and also with a better understanding of the law governing the practice of law and its basis in public policy.

Acknowledgments

The influence of a number of professional responsibility scholars, several of whom are authors of casebooks and treatises, will be evident in this book. I owe an additional debt of gratitude to the lively and diverse community of lawyers and academics who populate the *legalethics* listserv, whose informative discussions of many issues were extremely helpful to me along the way. A number of those list members generously shared their course materials and exams with me. Special thanks are due to those who maintain free online resources, from which I have frequently learned a great deal, in particular William Freivogel and Lucian Pera for their electronic newsletter *Ethics and Lawyering Today*, William Freivogel for his online mini-treatise *Freivogel on Conflicts*, and Tom Spahn for his periodic bulletin *Privilege Points*. I also am grateful to my colleagues in other fields who helped clarify specialized points of law as they relate to the professional responsibility issues presented here. Finally, thanks to the many students at Washington and Lee and Cornell who have challenged me to think more carefully about the law of lawyering. At many points in the evolution of this book, I can recall a student pressing a point in class or in an e-mail exchange afterwards, and these discussions are often reflected in the text or the examples. As convenient as it would be to blame any remaining errors on my students or the community of professional responsibility specialists, I of course take sole responsibility for them.

Finally, thanks to the editorial staff at Aspen Publishing for their skilled and cheerful assistance. Particular mention is owed to Richard Mixter, Barbara Roth, Troy Froebe, Lisa Polikov, and numerous anonymous reviewers of the book proposal and the resulting drafts, who provided extremely useful feedback.

Citations and Other Stylistic Practices

Other than citations to sources of law, such as disciplinary rules and the restatement, I will be sparing with cites. In some cases you may wish to refer to a more detailed reference work for additional guidance, so there are occasional citations to treatises, Restatement commentary, and the like. I have tried to keep footnotes to a minimum, except for citations, but occasionally there is some parenthetical information in a footnote, such as a definition of a word used in the text or an aside on some point that is interesting, but peripheral to the discussion in text. Alterations and omissions to text are indicated by ellipses or brackets, but I have freely italicized text for emphasis without putting "emphasis added" notices everywhere. You can assume that italics are mine unless otherwise indicated.

I will not be a stickler for the Bluebook here. Instead, to save space, I will use the following abbreviations.

Sources of Law

Model Rules	ABA Model Rules of Professional Conduct (2002 version, also known as Ethics 2000 or E2K version), as amended in August 2003
MR	Model Rule
1983 vers.	Version of the Model Rules adopted by the ABA House of Delegates in 1983 and amended through August 2001
Model Code or MC	ABA Model Code of Professional Responsibility (adopted in 1969, as amended through 1981)
EC	Ethical Consideration

DR	Disciplinary Rule
Rest. § __	Restatement (Third) of the Law Governing Lawyers (2000)
cmt.	Comment (to Model Rules or Restatement section)
ABA Formal Op.	Formal "ethics" opinion issued by the ABA Standing Committee on Ethics and Professional Responsibility.

Reference Works

H&H	Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* (3d ed. 2001)
Wolfram	Charles Wolfram, *Modern Legal Ethics* (1986)
Rotunda	Ronald D. Rotunda, *Professional Responsibility: A Student's Guide* (2002)

In comparing the 1983 and Ethics 2000 versions of the Model Rules, I have drawn in many places from the very useful article by Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 Georgetown Journal of Legal Ethics 441 (2002).

Unless otherwise specified, the examples and explanations in the book take place in the fictional U.S. State of Perplexity, which has adopted the ABA's Model Rules of Professional Conduct (2002 or "Ethics 2000" version) verbatim as its disciplinary rules.

A brief note about pronouns is also in order. The problem is, of course, that English lacks a third-person singular pronoun that is not gender-specific. Arguably, the masculine pronoun once carried the conventional meaning "he or she" but this usage is increasingly less acceptable. There really is not a good alternative. I tend to use the feminine pronoun generically in academic writing, but I am the first to admit it makes no sense, because "she" has never carried the conventional meaning "he or she." My justification for this practice is based on the observation that people make unconscious use of images in what purports to be purely logical analysis. Try an example. A partner at a law firm gets a call . . . Stop! You've probably already formed a mental picture of the setting. The partner is a man, probably white, with

graying hair, wearing a gray pinstriped suit and conservative tie, in a corner office with spectacular views, sitting behind a mahogany desk on which are piled neat stacks of correspondence and documents. We cannot help using images like this, but it is troublesome that men figure so prominently in our images of people in power. Using the feminine singular pronoun is my feeble effort to introduce alternative images of women as lawyers, judges, and clients. Light a candle or curse the darkness. Some people find this practice distracting, and others will cry "politically correct!" Of course, an equal number of people are distracted or politically provoked by the incessant use of the masculine pronoun. My solution — sure to satisfy no one — is to mix-up he and she, pretty much at random, unless it is possible to write around the pronoun in some fashion.

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Examples and Explanations

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