

LEGAL ETHICS AND CORPORATE PRACTICE

Milton C. Regan, Jr.
Jeffrey D. Bauman

American Casebook Series®

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By

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To Nancy, Rebecca, and Ben

— Mitt

To my parents, whose moral compass made
this possible.

— Jeff

*

Preface

Believe it or not, we began teaching the course that is the basis for this book a few years before the recent parade of corporate scandals that began with Enron's collapse in late 2001. Why? Because a huge percentage of law students graduate and go on to represent corporate clients in either law firms or corporate legal departments—but few receive systematic guidance on the distinctive and complex ethical questions that corporate practice raises. In light of the substantial number of lawyers representing corporations, and the enormous impact that these business entities have on modern life, this seemed to us a serious omission. Convinced that it was important to fill this gap, we resolved to publish the first major casebook on ethical issues in corporate practice.

The events since Enron's fall, of course, have only strengthened our conviction. The behavior of corporations and the professionals who advise them are now the object of searching scrutiny. Why, critics ask, didn't the lawyers stop the looting, the fraud, and the manipulation of loopholes? They must have been blinded by greed, or co-opted by management, or motivated simply to look the other way. In light of this behavior, is there anything we can do to make lawyers take the role of gatekeeper more seriously?

We have no laundry list of reforms whose adoption we are certain will lead to more ethical behavior by lawyers. We believe, however things are not as simple as some critics charge. Training law students and corporate lawyers to be sensitive to ethical issues must begin with a detailed appreciation of precisely what corporate lawyers do. We need to understand the organizational and social settings in which they work, the tasks that they perform, and the judgments that they are called upon to make.

In other words, we need a feel for the texture of the corporate lawyer's daily experience, and the ways in which it shapes her understanding of the situations in which she is immersed. Focusing on these issues is crucial because ethical issues rarely come labeled as such. Awareness that any given set of circumstances has an ethical dimension instead is the product of a complicated process of perception and interpretation—in essence, the exercise of judgment.

Our firm belief that fostering ethical conduct requires helping students and lawyers develop good judgment leads us to structure this book in specific ways. First, it is organized primarily not around traditional ethical concepts but around work flow—the various kinds of work that corporate lawyers do. The questions that arise when lawyers are engaged in different tasks typically cut across a range of ethical categories. A lawyer experiences the world not as someone focused on confidentiality or conflict of interest, but as someone involved in drafting an opinion letter, or advising on disclosure for a securities filing, or conducting an

internal investigation. We therefore use these and other tasks as the point of departure in most chapters.

Second, we include within the chapters extensive material on just what a lawyer does when she is engaged in a particular type of work. This ideally will make students and lawyers more sensitive to the how the lawyer's work is organized, the various parties with interest in and influence on that work, and the kinds of decisions that the lawyer must make when involved in a particular matter. Combining awareness of these considerations with knowledge of regulatory provisions relevant to the lawyer's conduct should allow the reader to imagine more vividly how events can unfold and ethical issues may arise.

Finally, most chapters close with problems that ask students to respond to a complex situation calling for the exercise of practical and ethical judgment. This requires familiarity not only with ethical rules, but often with statutory provisions and common law doctrines that are more relevant to corporate lawyers. Furthermore, fashioning a suitable response also may require taking account of organizational structures, group processes, business objectives, psychological tendencies, and other factors. Our hope is that this will enable students and lawyers to cultivate their capacity for judgment, rather than simply acquire knowledge of legal rules.

We believe that the approach we take in this book is valuable not only for those who are interested in or practice corporate law, but for anyone concerned with legal ethics. One reason is that the book covers as wide a range of functions that lawyers perform—including criminal prosecution and defense—as do most traditional casebooks. More important, as we have witnessed, learning this subject by developing an appreciation of how ethical issues arise in the course of the lawyer's work flow can be an especially powerful way of coming to "know" legal ethics. This is the case regardless of the field in which a student or lawyer ultimately practices. Knowledge acquired with sensitivity to how daily experience unfolds is valuable in any human endeavor. In legal ethics, we are firmly convinced that it is indispensable.

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Finally, we want to thank the students over the past few years who have taken the course that has been the impetus for this book. They have encouraged us in the belief that this topic is of vital importance, and have pushed us to clarify ideas that were imprecise or incompletely reasoned. Most of all, they have reinforced our faith that, notwithstanding the complexity and pressures of modern law practice, students on the cusp of becoming lawyers still hope to lead lives whose sense of purpose is shaped by commitment to the profession's highest ideals.

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LEGAL ETHICS AND CORPORATE PRACTICE

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