

GILLERS

REGULATION OF LAWYERS
Problems of Law and Ethics

*Concise
Edition*



Wolters Kluwer

ASPEN CASEBOOK SERIES

Regulation of Lawyers Problems of Law and Ethics

Concise Edition

Stephen Gillers

Elihu Root Professor of Law
New York University School of Law



Wolters Kluwer

Copyright © 2015 Stephen Gillers.

Published by Wolters Kluwer in New York.

Wolters Kluwer serves customers worldwide with CCH, Aspen Publishers, and Kluwer Law International products. (www.wolterskluwerlb.com)

No part of this publication may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopy, recording, or utilized by any information storage or retrieval system, without written permission from the publisher. For information about permissions or to request permissions online, visit us at www.wolterskluwerlb.com, or a written request may be faxed to our permissions department at 212-771-0803.

To contact Customer Service, e-mail customer.service@wolterskluwer.com, call 1-800-234-1660, fax 1-800-901-9075, or mail correspondence to:

Wolters Kluwer
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-5645-0

Library of Congress Cataloging-in-Publication Data

Gillers, Stephen, 1943- author.

Regulation of lawyers : problems of law and ethics / Stephen Gillers, Elihu Root Professor of Law, New York University School of Law. — Concise edition.

pages cm. — (Aspen casebook series)

Includes bibliographical references and index.

ISBN 978-1-4548-5645-0 (alk. paper)

1. Legal ethics—United States. 2. Lawyers—United States—Discipline. 3. Practice of law—United States. 4. Casebooks I. Title.

KF306.G55 2015a

174'.30973—dc23

2014049372

CasebookConnect.com

REGISTER NOW to access the Study Center for:

- Hundreds of practice questions
- Progress trackers to save you time
- Selections from popular study aids
- Tutorial videos

Combine this wealth of resources with an enhanced ebook and outlining tool and you will **SUCCEED** in law school

Use this unique code to connect your casebook today



**Go to www.casebookconnect.com
and redeem your access code
to get started.**

PLEASE NOTE: Each access code can only be used once. This access code will expire one year after the discontinuation of the corresponding print title and must be redeemed before then. CCH reserves the right to discontinue this program at any time for any business reason. For further details, please see the Casebook Connect End User License Agreement.

PIN9111149088

43823

REGULATION OF LAWYERS

EDITORIAL ADVISORS

Erwin Chemerinsky

Dean and Distinguished Professor of Law
Raymond Pryke Professor of First Amendment Law
University of California, Irvine School of Law

Richard A. Epstein

Laurence A. Tisch Professor of Law
New York University School of Law
Peter and Kirsten Bedford Senior Fellow
The Hoover Institution
Senior Lecturer in Law
The University of Chicago

Ronald J. Gilson

Charles J. Meyers Professor of Law and Business
Stanford University
Marc and Eva Stern Professor of Law and Business
Columbia Law School

James E. Krier

Earl Warren DeLano Professor of Law
The University of Michigan Law School

Richard K. Neumann, Jr.

Professor of Law
Maurice A. Deane School of Law at Hofstra University

Robert H. Sitkoff

John L. Gray Professor of Law
Harvard Law School

David Alan Sklansky

Professor of Law
Stanford Law School

About Wolters Kluwer Law & Business

Wolters Kluwer Law & Business is a leading global provider of intelligent information and digital solutions for legal and business professionals in key specialty areas, and respected educational resources for professors and law students. Wolters Kluwer Law & Business connects legal and business professionals as well as those in the education market with timely, specialized authoritative content and information-enabled solutions to support success through productivity, accuracy and mobility.

Serving customers worldwide, Wolters Kluwer Law & Business products include those under the Aspen Publishers, CCH, Kluwer Law International, Loislaw, ftwilliam.com and MediRegs family of products.

CCH products have been a trusted resource since 1913, and are highly regarded resources for legal, securities, antitrust and trade regulation, government contracting, banking, pension, payroll, employment and labor, and healthcare reimbursement and compliance professionals.

Aspen Publishers products provide essential information to attorneys, business professionals and law students. Written by preeminent authorities, the product line offers analytical and practical information in a range of specialty practice areas from securities law and intellectual property to mergers and acquisitions and pension/benefits. Aspen's trusted legal education resources provide professors and students with high-quality, up-to-date and effective resources for successful instruction and study in all areas of the law.

Kluwer Law International products provide the global business community with reliable international legal information in English. Legal practitioners, corporate counsel and business executives around the world rely on Kluwer Law journals, looseleafs, books, and electronic products for comprehensive information in many areas of international legal practice.

Loislaw is a comprehensive online legal research product providing legal content to law firm practitioners of various specializations. Loislaw provides attorneys with the ability to quickly and efficiently find the necessary legal information they need, when and where they need it, by facilitating access to primary law as well as state-specific law, records, forms and treatises.

ftwilliam.com offers employee benefits professionals the highest quality plan documents (retirement, welfare and non-qualified) and government forms (5500/PBGC, 1099 and IRS) software at highly competitive prices.

MediRegs products provide integrated health care compliance content and software solutions for professionals in healthcare, higher education and life sciences, including professionals in accounting, law and consulting.

Wolters Kluwer Law & Business, a division of Wolters Kluwer, is headquartered in New York. Wolters Kluwer is a market-leading global information services company focused on professionals.

In loving dedication to

Gillian Gillers

and

Heather Gillers

les enfants du paradis

Why It's Important: A Preface for Students

Reading a preface is not high on your to-do list. I get it. But this one is written with you in mind. And it's short. So give me five minutes. Maybe ten.

Three quick points:

First, this casebook has a personality, a voice: mine. In that way, it is unlike some other casebooks. Its voice is conversational. And here and there, it takes a position directly, not only through the views of others.

Second, the book contains many problems. Some are one paragraph, others a page or more. Many are based on real dilemmas I've heard or read about. Mostly, the problems are dense and messy, like life. They arose yesterday or will arise tomorrow. A problem may not have all the information required to answer it. You may have to identify what more you need to know.

Third, this is your second most important class. *Yeah, right*, you think. It's a bold statement, and here's why I make it. Say you become an anti-trust lawyer. Your criminal procedure class will fade into a remote corner of memory. Or if you become a criminal defense lawyer, you won't need to know much about copyright. But whatever work you do as a lawyer, you will practice what you learn in this book and the class that assigns it every day you go to work. Other courses teach lessons that bear on a client's legal problems. This course is about you, with two exceptions: Knowledge of these rules enables you to protect your clients against misconduct of other lawyers. And representing law firms in trouble (or needing advice to avoid trouble) is a growing practice area that might appeal to you.

As you approach the starting line of your legal career, most important are the rules that constrain your behavior. You will want to know—in such areas as competence, fees, advocacy, confidentiality, conflicts of interest, negotiation, and the client-lawyer relationship—what may or must you do or not do with confidence that your conduct will not land you before a disciplinary committee, create civil liability, invite court sanction, forfeit your fee, or damage your reputation. “Ethics,” while a useful term, does not accurately encompass all the lessons learned here. The law business is heavily regulated, and the regulations have grown more complex in recent decades. This has led to new terms—the law

governing lawyers and the law of lawyering—lest anyone be fooled by the word “ethics” into believing that the subject is simply about how to be a good person (although there’s some of that too).

Avoid two errors.

First, do not believe that the right way to act—toward clients, courts, adversaries, or colleagues—will be intuitively obvious. Sure, sometimes it will be. But no one needs to teach you not to lie or steal, and certainly not with hundreds of pages of text. The rules here may be obscure, some may be counterintuitive, and they can be subtle in application. Application in turn calls for judgment, and judgment is mostly learned through experience. Indeed, much of what lawyers do for clients is make judgments—about where the law is and is likely to go, what a particular judge or court will do in a pending litigation, and the risks of a contemplated strategy or decision. You develop that judgment across years of practice, but it begins now.

Second, don’t assume your employer will provide all the protection you need. Many law offices do have systems to detect and avoid mistakes and they have people to whom lawyers can turn for advice. But the best systems and resources are still not perfect, and anyway, the professional responsibility of a lawyer cannot be delegated wholesale to others. Furthermore, you need to know enough about the subject to be aware when you have a problem that requires advice.

But it’s not only about you and your clients. A broader perspective from which to view the laws and rules that regulate lawyers looks at their effect on civil society and the administration of justice. These laws and rules help define the nature and work of the entire profession and therefore the behavior of our legal institutions and the quality of our social justice. For example, a rule that prohibits or requires a lawyer to reveal a client’s confidential information to protect others from harm will influence a lawyer’s own behavior, but it may also affect what clients are willing to reveal.

As you enter law practice, you may be more interested in such questions as “How do I behave?” and “How can I stay out of trouble?” than in asking the broader question, “What are the consequences to civil society and justice if one or another version of a particular rule is applied to America’s one million licensed lawyers?”* Still, the last question is important and, if not as immediate, may arise in the course of your professional life. You may someday be in positions to resolve the broader questions—as a member of a bar association committee, a legislator, a government lawyer, or a judge.

* I say one million licensed lawyers but estimates vary. Some sources count licensed lawyers, some count practicing lawyers. Some count the total number of licensed lawyers, but double count lawyers licensed in more than one state. A million sounds about right, though. And if the figure is 50,000 more or less, does it matter?

Asking about the consequences to justice and civil society if a rule is resolved one way rather than another—saying which resolution is best—engenders different answers among lawyers and also the public. Why is that? In part because the answers depend on political and moral values more fundamental than the “ethics” that inform various codes. And, of course, the political and moral values of different people differ. In addressing these questions, we should also try to be honest about the interests we mean to protect. Those of society generally? Those of a particular client population? The legal profession’s? Our own? Law school and law practice, it is sometimes said, encourage more rather than less self-interest in answering the questions raised here. In transition as you are, your answers may vary from what they would have been before you entered law school, and they will likely be different five years on.

Lawyers admitted to practice in the second decade of the 21st century will enter a profession in greater transition than was so at any other time in U.S. history. Three interrelated forces are reshaping the U.S. law industry: technology, globalization, and competition from abroad and from new sources of legal advice. These forces are upsetting a lawyer regulatory system that has served the United States well for more than a century, a system based on geography. In that system, lawyers get licensed by a place and serve clients from an office in the same place. But technology has disturbed the utility of geography as the basis to regulate. The Internet does not recognize borders. Neither may a client’s problems. Technology and globalization have encouraged competition from lawyers outside the U.S. and the ability of non-law businesses here and abroad to offer legal services at lower cost.

* * *

This is the tenth edition of the book, and the first concise edition. I started on the first edition in 1982 shortly before the birth of the first of two amazing daughters to whom all editions have been dedicated. I sent the manuscript to the publisher just after the birth of the second daughter in 1984. Since then, I spend a few hours weekly planning the next edition. The daughters are now out in the world, but the book never left home.

You think a lot about what a casebook is and can be when you live with one so long. The book’s primary purpose is to provide information, but that’s just the beginning. The minimum editorial task would allow me to pick good cases and other materials, edit them, order them logically, add interstitial notes and questions, and put the product between covers. Voila! A casebook. Of course, one must begin this way, but if nothing more were possible (even if not required), I wonder if I would have kept at it so long. Luckily, more is possible while still serving the book’s goal—to teach the subject.

For starters, we can strive for humor, variety, clarity, and good writing. The enterprise will not likely support the charm of a Hazlitt essay or the

quirkiness of a Vonnegut novel — assuming counterfactually that I had the talent to achieve either (in which case I'd probably be in a different line of work) — but a casebook is a book, after all, and it should have an authorial presence in so far as possible. That's what makes the book mine.

And then there are the stories lawyers tell each other. The legal profession is a culture of storytellers and stories. Harrison Tweed (1885-1969), a president of the New York City Bar Association, once said: "I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind." These words are inscribed on a wall at the Association's headquarters. As a young lawyer, I thought Tweed was overly effusive, if not downright sanctimonious. At that time, I was inclined to agree with the character in George Bernard Shaw's play *The Doctor's Dilemma* who said that "all professions are conspiracies against the laity." To some extent, I still find Tweed excessive and Shaw's character apt, even if hyperbolic. But now I think Tweed had a point. The profession and its members *are* fascinating to study, and its stories *are* fascinating to hear.

As with the study of any culture, understanding the bar requires density of information. We must know a thousand small details about the actual life within the society of lawyers, not merely a few doctrines and theories, if we are going to understand Lawyerland truly. I have tried to include some of those details here.

I invite your views on the book. What was dull? What worked well? How can the book be improved? Have you encountered a quote or story somewhere (true or fictional) that you think nicely highlights an issue? This edition is indebted to past users who alerted me to interesting sources. Send e-mail to stephen.gillers@nyu.edu. All comments will be gratefully acknowledged.

My ten minutes are up. Onto Chapter 1.

Stephen Gillers
January 2015

Acknowledgments

Like the first nine editions of this book, this edition is the beneficiary of the diligent work of NYU law students. They are:

Tochukwu Echezona Chikwendu, LL.M. 2015

Janice Pai Martindale, J.D. 2016

Ioanna Michael, LL.M. 2015

Michael R. Roberts, J.D./M.B.A. 2016

Emma C. Trotter, J.D. 2016

I also want to thank Emma Trotter for her work on professional issues and risks when lawyers use social media.

I have been fortunate beyond words to have the priceless administrative help of a single person — Shirley Gray — starting with the very first (typewritten) word of the very first edition and continuing, meticulously, to the very last word of this one, a span of some 32 years.

This tenth edition builds on the first nine and, therefore, reflects the work of New York University School of Law students whose energies contributed to its ancestors. They are: Abigail E. Belknap, J.D. Class of 2013 (ninth edition); Patrick Boyd, J.D. Class of 2013 (ninth edition); Marissa Elgrissy, J.D. Class of 2012 (ninth edition); Alina Fortson, J.D. Class of 2012 (ninth edition); Devina Gupta, LL.M. Class of 2012 (ninth edition); Krystan A. Hitchcock, J.D. Class of 2013 (ninth edition); Shreyas B. Jhaveri, LL.M. Class of 2012 (ninth edition); Terra Judge, J.D. Class of 2012 (ninth edition); Akshaya Kamalnath, LL.M. Class of 2012 (ninth edition); Mieke M. Krynauw, LL.M. Class of 2012 (ninth edition); Eric D. Lawson, J.D. Class of 2013 (ninth edition); Brian Leary, J.D. Class of 2012 (ninth edition); Uloma Onuma, LL.M. Class of 2012 (ninth edition); Kaihli M. Ross, J.D. Class of 2012 (ninth edition); Joshua Stager, J.D. Class of 2013 (ninth edition); John C. Vazquez, J.D. Class of 2012 (ninth edition); Paula M. Vera, J.D. Class of 2013 (ninth edition); Lisa C. Kerr, NYU LL.M. class of 2009 (eighth edition); Anderson T. Bailey, New York University School of Law, J.D., class of 2006 (seventh edition); Howard Anglin, Cindy Hwang, and Eric R. Womack, J.D., class of 2003 (sixth edition); Leonard A. Ho and David F. Levine, class of 1999 (fifth edition); Julie C. Brain and Maria Lopotukhin, class of 1995 and 1996,

respectively (fourth edition); Mary E. McDonald, class of 1993 (third edition); Laura Gilbert and Barbara Quakenbos, class of 1990 and 1988, respectively (second edition); and Patricia C. Hayashi, class of 1983, Virginia L. Richards, class of 1986, and Susan A. Waxenberg, class of 1982 (first edition).

My debt to members of the professional staff of the NYU School of Law Library also continues. Anyone who produces a book like this knows how important librarians are.

My colleague Norman Dorsen was my co-author on the first two editions of this casebook. Other demands on his time caused Professor Dorsen to trust succeeding editions to my sole care. Nevertheless, in countless ways this edition, like its predecessors, benefits from Professor Dorsen's early work and advice.

My understanding of the subject of this book and whatever knowledge it may impart has been immeasurably enhanced by my conversations with one person whom I mention last but am grateful to most: Barbara S. Gillers, Esq., whose decades of professional work on lawyer regulation — in a government office, private practice, and with bar associations local and national — put her on the front lines of most of the developing issues recounted here. She has left private practice, but not the field. She is a member of ethics committees at the New York City, New York State, and American Bar Associations. She also teaches about the legal and ethical rules governing lawyers and judges as an adjunct professor at New York University School of Law and previously at Columbia Law School.

I would like to thank the following for permission to reprint the identified material:

Kevin Deutsch, *Defense Lawyers Swear by Gimmick of Having Defendants Wearing Glasses at Trial*, *Daily News*, Feb. 13, 2011. Reprinted by permission.

Marvin E. Frankel, from *Partisan Justice* by Marvin E. Frankel. Copyright © 1980 by Marvin E. Frankel. Reprinted by permission.

Daniel J. Kornstein, *A Tragic Fire—A Great Cross-Examination*, *N.Y.L.J.*, Mar. 28, 1986, at 2. Reprinted by permission.

Jonathan R. Macey, *Mandatory Pro Bono: Comfort for the Poor or Welfare for the Rich?*, 77 *Cornell L. Rev.* 1115 (1992). Reprinted with permission of the *Cornell Law Review*.

Joan Mahoney, *Using Gender as a Basis of Client Selection: A Feminist Perspective*, 20 *W. New Eng. L. Rev.* 79 (1988). Reprinted by permission.

John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's Different Mission*, 1 *Geo. J. Legal Ethics* 339 (1987). Reprinted by permission.

Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 *Cal. L. Rev.* 379, 379-380, 387-389 (1987). Reprinted by permission.

Deborah Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 *Fordham L. Rev.* 2415 (1999). Reprinted by permission.

Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 *The Record of the Assoc. of the Bar of the City of N.Y.* 534 (1975). Copyright © 1975 by Simon H. Rifkind. Reprinted by permission.

Ann Ruben and Emily Ruben, *Letters to the Editor*, *N.Y.L.J.*, Apr. 14, 1986, at 2. Reprinted by permission.

Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 *Geo. J. Legal Ethics* 689, 690-691 (1988). Reprinted by permission.

Harry I. Subin, *The Criminal Lawyer's "Different Mission,"* 1 *Geo. J. Legal Ethics* 125 (1987). Reprinted by permission.

A Word About Case Editing

No case is reprinted unedited. Omissions are identified with ellipses or brackets, but there is no identification where only case citations or other authorities are deleted. Case citations do not include subsequent history denying review except that United States Supreme Court denials of certiorari are indicated for principal cases. In a few instances, decisions have been vacated on jurisdictional grounds and these are indicated. Where a holding other than the one for which the case is cited has been overruled or limited by statute or a later case, that is not shown. Internal quotes are sometimes omitted from quotations within cases for ease of reading.

REGULATION OF LAWYERS