

伊曼纽尔法律精要影印系列

Professional Responsibility

[美] 詹姆斯·E·莫利泰尔诺/著

(James E. Moliterno)

# 律师职业责任



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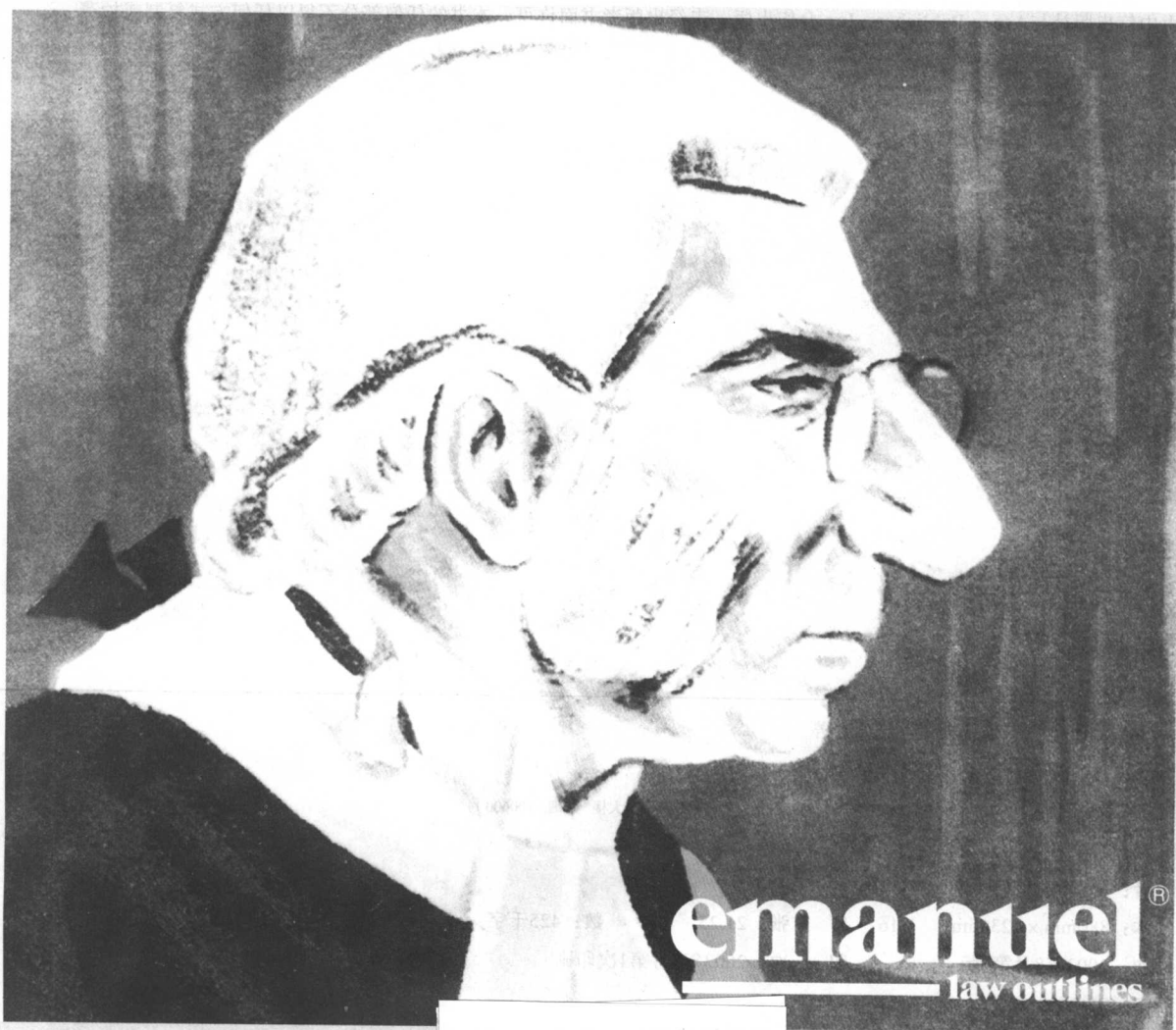
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# 总 序

吴志攀

加入世界贸易组织表明我国经济发展进入了一个新的发展时代——一个国际化商业时代。商业与法律的人才流动将全球化,评介人才标准将国际化,教育必须与世界发展同步。商业社会早已被马克思描绘成为一架复杂与精巧的机器,维持这架机器运行的是法律。法律不仅仅是关于道德与公理的原则,也不单单是说理论道的公平教义,还是具有可操作性的精细的具体专业技术。像医学专业一样,这些专业知识与经验是从无数的案例实践积累而成的。这些经验与知识体现在法学院的教材里。中信出版社出版的这套美国法学院教材为读者展现了这一点。

教育部早在2001年1月2日下发的《关于加强高等学校本科教学工作提高教学质量的若干意见》中指出:“为适应经济全球化和科技革命的挑战,本科教育要创造条件使用英语等外语进行公共课和专业课教学。对高新技术领域的生物技术、信息技术等专业,以及为适应我国加入WTO后需要的金融、法律等专业,更要先行一步,力争三年内,外语教学课程达到所开课程的5%~10%。暂不具备直接用外语讲授条件的学校、专业,可以对部分课程先实行外语教材、中文授课,分步到位。”

引进优质教育资源,快速传播新课程,学习和借鉴发达国家的成功教学经验,大胆改革现有的教科书模式成为当务之急。

按照我国法学教育发展的要求,中信出版社与外国出版公司合作,瞄准国际法律的高水平,从高端入手,大规模引进畅销外国法学院的外版法律教材,以使法学院学生尽快了解各国的法律制度,尤其是欧美等经济发达国家的法律体系及法律制度,熟悉国际公约与惯例,培养处理国际事务的能力。

此次中信出版社引进的是美国ASPEN出版公司出版的供美国法学院使用的主流法学教材及其配套教学参考书,作者均为富有经验的知名教授,其中不乏国际学术权威或著名诉讼专家,历经数十年课堂教学的锤炼,颇受法学院学生的欢迎,并得到律师实务界的认可。它们包括诉讼法、合同法、公司法、侵权法、宪法、财产法、证券法等诸多法律部门,以系列图书的形式全面介绍了美国法律的基本概况。

这次大规模引进的美国法律教材包括:

**伊曼纽尔法律精要 (Emanuel Law Outlines)** 美国哈佛、耶鲁等著名大学法学院广泛采用的主流课程教学用书,是快捷了解美国法律的最佳读本。作者均为美国名牌大学权威教授。其特点是:内容精炼,语言深入浅出,独具特色。在前言中作者以其丰富的教学经验制定了切实可行的学习步骤和方法。概要部分提纲挈领,浓缩精华。每章精心设计了简答题供自我检测。对与该法有关的众多考题综合分析,归纳考试要点和难点。

**案例与解析 (Examples and Explanations)** 由美国最权威、最富有经验的教授所著,这套丛书历经不断的修改、增订,吸收了最新的资料,经受了美国成熟市场的考验,读者日众。这次推出的是最新版本,在前几版的基础上精益求精,补充了最新的联邦规则,案例也是选用当今人们所密切关注的问题,有很强的时代感。该丛书强调法律在具体案件中的运用,避免了我国教育只灌输法律的理念与规定,而忽视实际解决问题的能力培养。该丛书以简洁生动的语言阐述了美国的基本法律制度,可准确快捷地了解美国法律的精髓。精心选取的案例,详尽到位的解析,使读者读后对同一问题均有清晰的思路,透彻的理解,能举一反三,灵活运用。该丛书匠心独具之处在于文字与图表、图例穿插,有助于理解与记忆。

**案例教程系列 (Casebook Series)** 覆盖了美国法学校院的主流课程,是学习美国法律的代表性图书,美

国著名的哈佛、耶鲁等大学的法学院普遍采用这套教材，在法学专家和学生中拥有极高的声誉。本丛书中所选的均为重要案例，其中很多案例有重要历史意义。书中摘录案例的重点部分，包括事实、法官的推理、作出判决的依据。不仅使读者快速掌握案例要点，而且省去繁琐的检索和查阅原案例的时间。书中还收录有成文法和相关资料，对国内不具备查阅美国原始资料条件的读者来说，本套书更是不可或缺的学习参考书。这套丛书充分体现了美国法学教育以案例教学为主的特点，以法院判例作为教学内容，采用苏格拉底式的问答方法，在课堂上学生充分参与讨论。这就要求学生不仅要了解专题法律知识，而且要理解法律判决书。本套丛书结合案例设计的大量思考题，对提高学生理解概念、提高分析和解决问题的能力，非常有益。本书及时补充出版最新的案例和法规汇编，保持四年修订一次的惯例，增补最新案例和最新研究成果，保证教材与时代发展同步。本丛书还有配套的教师手册，方便教师备课。

**案例举要 (Casenote Legal Briefs)** 美国最近三十年最畅销的法律教材的配套辅导读物。其中的每本书都是相关教材中的案例摘要和精辟讲解。该丛书内容简明扼要，条理清晰，结构科学，便于学生课前预习、课堂讨论、课后复习和准备考试。

除此之外，中信出版社还将推出教程系列、法律文书写作系列等美国法学教材的影印本。

美国法律以判例法为其主要的法律渊源，法律规范机动灵活，随着时代的变迁而对不合时宜的法律规则进行及时改进，以反映最新的时代特征；美国的法律教育同样贯穿了美国法律灵活的特性，采用大量的案例教学，启发学生的逻辑思维，提高其应用法律原则的能力。

从历史上看，我国的法律体系更多地受大陆法系的影响，法律渊源主要是成文法。在法学教育上，与国外法学教科书注重现实问题研究，注重培养学生分析和解决问题的能力相比，我国基本上采用理论教学为主，而用案例教学来解析法理则显得薄弱，在培养学生的创新精神和实践能力方面也做得不够。将美国的主流法学教材和权威的法律专业用书影印出版，就是试图让法律工作者通过原汁原味的外版书的学习，开阔眼界，取长补短，提升自己的专业水平，培养学生操作法律实际动手能力，特别是使我们的学生培养起对法律的精细化、具体化和操作化能力。

需要指出的是，影印出版美国的法学教材，并不是要不加取舍地全盘接收，我们只是希望呈现给读者一部完整的著作，让读者去评判。“取其精华去其糟粕”是我们民族对待外来文化的原则，我们相信读者的分辨能力。

是为序。

# **PROFESSIONAL RESPONSIBILITY**



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**To my Mother and Father, my first great teachers.**  
**JEM**



## Preface

The Professional Responsibility course (by whatever name it is called at your school) is about the law and ethics that govern relationships lawyers have with clients, other lawyers, the profession, the justice system, and the public. It is the only law course in the typical law school curriculum that is about what lawyers do. In Torts, Contracts, and so on, you study law that affects clients' relationships with others and that lawyers interact with as an expert a step removed from the actual effect of the law. In Professional Responsibility, by contrast, the law you study is directly about the lawyer's relationships and your future role as a lawyer. In other words, Professional Responsibility is the course in which the lawyer is the "client," the one on whom the law studied actually operates. Arguably, Professional Responsibility is the most important course in the law school curriculum.

The law governing lawyers is a complicated mix of many different areas of substantive law from many different sources. Most obvious are the organized bar's self-regulations, enforced through the courts (as ethics codes adopted in the states), but other law fields have important applications to the various relationships of which lawyers are a part. Agency, contract, tort, procedure and evidence law, among others, have specific applications to lawyers. All of these are interwoven in this outline.

In particular, the organized bar, through the American Bar Association, has promulgated model ethics codes. The ABA models have dominated the law of lawyering because these models, with some modification, have been adopted by the states as law. These models have also dominated law school courses in Professional Responsibility. They have dominated law school teaching of the subject because they are easily accessible and because they serve as simple proxies for what the law of lawyering is in the states. At some schools, you may study the ABA models and your particular state's modifications of them. At other schools, the modifications made in your state will be largely irrelevant to your course. In either event, when you study ethics codes in your course, the models will be the main focus.

Between the two models, the Model Code and the Model Rules, the Rules now dominate. The Code was originally adopted by the ABA in 1969 and was amended from time to time thereafter. When the Rules were adopted by the ABA in 1983, the ABA ceased its effort to amend and update the Model Code. The Code is now almost entirely out of date in some respects. (See Chapter 10.) States whose law reflects the Model Code as their basis have gone from a high point of nearly fifty to under ten and falling. More than forty states now have adopted ethics codes based on the Model Rules. In most courses, the Model Rules dominate with the Model Code being referred to occasionally and regarding particular topics (notably confidentiality, see Chapter 5) as contrast. This outline takes the approach with regard to the models that has come to be most prevalent in law school courses: The Model Rules are the basic document of study; The Model Code is used as contrast in particular areas. This trend in law school courses should continue. If your course makes more use of the Model Code than the usual, you will want to become familiar with the cross-reference charts that take you quickly back and forth between Model Code provisions and Model Rules provisions. Such charts are found in most statutory supplements that are required books for the Professional Responsibility course.

Important changes in the law governing lawyers have taken place since 2000. First, in 2000 the American Law Institute completed its work and published the Restatement of the Law Governing Lawyers, Third. The Restatement is now a critically important document of study. Second, in February 2002, the ABA adopted significant amendments to the Model Rules as a result of a report by the ABA-created Ethics 2000 Commission. These amendments are fully reflected in this outline.

All of this talk of ethics codes must not be read to mean that law other than the ethics codes is unimportant. On the contrary, the other significant trend in Professional Responsibility courses is toward the recognition that lawyers' conduct is governed largely by law outside the ethics codes. That law is a significant part of this outline.

This outline makes use of frequent examples, some of which are drawn from decided cases. In many instances, the cases chosen as examples are leading cases in the field that are also among those excerpted in the leading casebooks.

Many Professional Responsibility courses end with exams that are at least partially multiple choice. Bar applicants in nearly every state must pass a Multistate Professional Responsibility Exam, which is a multiple-choice exam. As a result, more teachers of Professional Responsibility than of some other subjects include multiple-choice questions on their exams. For this reason, a Multistate-Style Exam Question section is included in this book.

*James E. Moliterno*

December 2002

# Casebook Correlation Chart

Note: general sections of the outline are omitted for this chart. NC = not directly covered by this casebook.

<b>Emanuel's Professional Responsibility Outline</b> (by chapter and section heading)	<b>Crystal: Professional Responsibility: Problems of Practice and the Profession</b> (2nd edition)	<b>Gillers: Regulation of Lawyers</b> (6th edition)	<b>Hazard, Koniak &amp; Cramton: The Law and Ethics of Lawyering</b> (3d edition)	<b>Morgan &amp; Rotunda: Professional Responsibility</b> (7th edition)	<b>Schwartz, Wydick &amp; Perschbacher: Problems in Legal Ethics</b> (5th edition)
<b>CHAPTER 1 INTRODUCTION AND THE ROLE OF LAWYER</b>					
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<b>Emanuel's Professional Responsibility Outline</b> (by chapter and section heading)	<b>Crystal: Professional Responsibility: Problems of Practice and the Profession</b> (2nd edition)	<b>Gillers: Regulation of Lawyers</b> (6th edition)	<b>Hazard, Koniak &amp; Cramton: The Law and Ethics of Lawyering</b> (3d edition)	<b>Morgan &amp; Rotunda: Professional Responsibility</b> (7th edition)	<b>Schwartz, Wydick &amp; Perschbacher: Problems in Legal Ethics</b> (5th edition)
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# CASEBOOK CORRELATION CHART

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<b>Emanuel's Professional Responsibility Outline</b> (by chapter and section heading)	<b>Crystal: Professional Responsibility: Problems of Practice and the Profession</b> (2nd edition)	<b>Gillers: Regulation of Lawyers</b> (6th edition)	<b>Hazard, Koniak &amp; Cramton: The Law and Ethics of Lawyering</b> (3d edition)	<b>Morgan &amp; Rotunda: Professional Responsibility</b> (7th edition)	<b>Schwartz, Wydick &amp; Perschbacher: Problems in Legal Ethics</b> (5th edition)
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# Capsule Summary

This Capsule Summary is intended for review at the end of the semester. Reading it is not a substitute for mastering the material in the main outline. Numbers in brackets refer to the pages in the main outline where the topic is discussed.

## CHAPTER 1

### INTRODUCTION AND THE ROLE OF LAWYER

#### I. COURSES CALLED PROFESSIONAL RESPONSIBILITY, LEGAL ETHICS, AND LEGAL PROFESSION

The law of professional responsibility and, therefore, the course in which it is studied are about the relationships of lawyers to their clients, their peers, the justice system, the profession, and the public. [1]

#### II. MORAL PHILOSOPHY, RIGHT AND WRONG, AND THE LAW GOVERNING LAWYERS

##### A. Moral philosophy

*Moral philosophy* informs the study of professional responsibility law, but moral philosophy does not replace legal analysis as the tool for determining the application of professional responsibility law. [1]

##### B. Right and wrong

There is a great deal more to the law governing lawyers than the difference between right and wrong. The law governing lawyers must be studied and mastered like any other law field. [2]

##### C. The law governing lawyers

The *law governing lawyers* is a complicated mix of many different areas of substantive law from many different sources. [2]

##### D. Role morality

Important to an understanding of lawyer ethics is the concept of *role morality*. Lawyers' moral decision-making involves a balancing process. Lawyers owe many duties, not all of which point in a single direction at any given moment. Lawyers owe duties to clients, the justice system, third parties generally, opposing parties, the society, and the profession. [2-3]

#### III. THE ROLE OF LAWYER

The professional responsibility codes are an attempted expression of the limits of conduct by people acting in *the role of lawyer*. [3]



**A. Differing conceptions of the lawyer's role**

Different lawyers perceive themselves and the appropriate role of lawyer in differing ways. See descriptions of these alternate roles in §§III.A.1-II.A.3. [3-4]

**B. Differences between lawyers' litigation and planning roles**

1. **Litigation context:** In a litigation context, most of the lawyer's work is backward looking. The litigation seeks to assess legal responsibility for the client's and the opposing party's past conduct. The lawyer's work involves the operation of the justice system on the client's behalf. [4-5]
2. **Planning context:** In the planning context, most of the lawyer's work is forward looking. The planning seeks to predict the consequences of proposed future conduct. [4]
3. **Responsibility for clients' acts:** A lawyer bears more responsibility for a client's acts in the planning context than in the litigation context. The lawyer's planning work, advice, and assistance in execution help shape future client conduct. [4]

**C. Practice setting**

A lawyer's practice setting affects the law governing that lawyer in a variety of ways. Essentially, lawyers in different practice settings have different lawyer-client relationships. The differences on those lawyer-client relationships drive a variety of adjustments in the law governing lawyers. Aside from the private law firm representing a natural person as a client in civil matters, lawyers practice as, for example, prosecuting attorneys, other government lawyers, criminal defense lawyers including public defenders, and in-house and external corporate counsel. Some practice settings trigger the application of practice-setting-specific rules; others create adjustments by implication of attributes of the lawyer-client relationship. [5-6]

1. **Prosecutors** [5]
2. **Other government lawyers** [5]
3. **Criminal defense** [5]
4. **Corporate or other organization counsel** [6]
5. **Legal aid** [6]

**CHAPTER 2****REGULATION OF THE LEGAL PROFESSION**

The institutional framework within which lawyers and the law of lawyering exist has a significant effect on the interpretation of the law of lawyering.

**I. ORGANIZATION OF THE BAR**

The legal profession has organized itself in a variety of ways. Membership in some organizations is voluntary, whereas membership in others is required of those who wish to practice law in a particular jurisdiction. See §III. [10-11]

### A. The American Bar Association

The *American Bar Association* (ABA) is a national, *voluntary* association of lawyers. [10]

### B. Alternative national bar associations

National organizations of lawyers have been established, in some instances, to express alternative views from those held by the ABA. [10]

### C. State bar associations

The ABA does not license lawyers to practice law. States, through their courts and sometimes legislatures, license lawyers to practice law within the relevant jurisdiction. [10-11]

1. **Voluntary state bar associations:** In some states, voluntary bar associations exist that licensed lawyers may or may not join at the individual lawyer's discretion. [11]
2. **The integrated bar:** In some states, membership in the state bar association is mandatory. This mandatory membership establishes what is called an "integrated bar," of which all the lawyers licensed to practice in the state are members. [11]

## II. SOURCES OF LAW GOVERNING LAWYERS

The law that governs lawyers comes from a variety of sources and exists in a variety of forms. [11-15]

### A. Ethics codes

Every state has an adopted code of ethics for lawyers that operates as a set of mandatory legal rules governing lawyer conduct. [11]

1. **ABA models and their organization:** Beginning in 1908, the ABA adopted a series of three model ethics codes that have served as models for state adoption. [11]
  - a. **The 1908 Canons of Ethics:** The 1908 Canons of Ethics (Canons) were adopted by the ABA but were not initially expected to be routinely enforced as rules by courts and bar authorities. [11-12]
  - b. **The 1969 Model Code of Professional Responsibility:** The Model Code was the ABA's first effort to influence the setting of mandatory, national standards for lawyer conduct. [12]
  - c. **The 1983 Model Rules of Professional Conduct:** The Model Rules was drafted in the late 1970s and early 1980s and then adopted in 1983. Extensive amendments were adopted in 2002. [12]
2. **State-adopted codes:** The states have adopted ethics codes. Although all but one of the state-adopted codes are based on the ABA models, it is the state-adopted code, not the ABA model, that actually controls in the particular jurisdiction. [12-13]