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TRAVERSING THE
ETHICAL MINEFIELD
Problems, Law, and
Professional Responsibility

*Third
Edition*



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ASPEN CASEBOOK SERIES

Traversing the Ethical Minefield

**Problems, Law, and Professional
Responsibility**

Third Edition

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Stoepler Professor of Law and Values

Distinguished University Professor

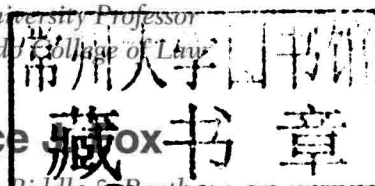
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For Our Grandchildren

Vivienne Reece

Juliet Maeve

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Roger Edward

Preface

This book represents a unique collaboration between a law professor with extensive academic experience (Susan Martyn) and a long-time practitioner who teaches law students and has dealt with most of the issues in this book (Larry Fox). We suspect that our casebook is unlike many you have encountered so far in law school, so we begin your study by introducing you to our pedagogical goals as well as several distinctive features of the book you are about to use.

Overall, we intend these materials to accomplish four goals. First, we seek to engage you in a fascinating and dynamic subject. Second, we expect to teach you the rapidly expanding law governing lawyers. Third, we want to remind you of the need to pay careful attention to facts and context. Fourth, we invite you to recognize good lawyering, or the need to develop practical ethical judgment, a task that often may require lawyers to do more than simply comply with the law. To achieve these goals, we provide you with a combination of short problems, professional code provisions, interesting cases, short stories, and a series of continuing notes that introduce and develop themes in the material.

The Problems

The short problems that introduce each section of the book ask you to evaluate the actions of a hypothetical law firm, Martyn & Fox. Each set of problems is followed by citations to the relevant rules of professional conduct and sections of the Restatement of the Law Governing Lawyers found in your rules supplement. You should prepare for each class by formulating answers to the problems after considering these provisions along with the relevant cases and other materials in the book.

As you address the dilemmas faced by Martyn & Fox, you will discover that the firm is capable of great inconsistency. At times, the lawyers at Martyn & Fox may seem wise and capable. On other occasions, you will wonder at their fallibility. In many situations, you may identify with their confusion and angst. Most often, the firm can be rescued from disaster by sage advice.

We intend these problems to promote all of our pedagogical goals, so you should expect to approach them on several levels. First, we hope they will engage you in interesting issues faced by modern lawyers. Second, we want them to motivate you to study the relevant provisions in various lawyer codes, the Restatement of the Law Governing Lawyers, and the cases and other materials that explain and construe them. Third, we anticipate that the relative brevity of each problem will lead you to conclude that the answer “depends on” additional

facts that might change the advice you offer Martyn & Fox. We invite you to articulate your assumptions and to anticipate how additional facts might change your answer. For example, does it matter whether Martyn & Fox is a two- or two-hundred-person law firm? Whether it focuses primarily on litigation or transactional work? Whether its practice is located in a rural area or a major city? Whether the lawyer is a partner or an associate? Whether Martyn & Fox's client is an individual or an entity? How much Martyn & Fox's client can pay?

Finally, once you get into the law that governs the situation described in a problem, you will discover occasions when Martyn & Fox has a range of options. In these instances, you should identify the discretion ceded to the lawyer's individual moral conscience and articulate how you believe that discretion should be exercised. Here, we hope to assist you in developing practical ethical judgment as well as learning the law.

The Cases

Most people new to this subject are surprised at the vast array of cases that explain and expand on the professional code provisions and other remedies that make up the law governing lawyers. We offer you a rich assortment of these cases, emphasizing those decided in the past decade. Each of the seventy-two cases in this book has been edited for clarity. We use ellipses or brackets to indicate omissions from the court's opinion, but omitted citations and footnotes are not identified.

The Short Stories

The five short stories in this book offer you the opportunity to engage in a difficult issue of legal ethics from the viewpoint of the lawyers confronting the situation. Larry wrote each these stories as chapters in his books, *Legal Tender: A Lawyer's Guide to Handling Professional Dilemmas* and *Raise the Bar: Real World Solutions for a Troubled Profession*. We have included these vignettes to offer you a break from traditional law study and an alternative way to learn some substantive law. Primarily, however, we intend these excerpts to show you the human face of some of the legal issues raised in the story. The extended detail of the story will enable you to understand more fully the context in which the lawyer must make a practical ethical judgment.

The Continuing Notes

Unlike the note material in most casebooks, the twenty-nine notes in this book are short essays organized around five general themes. These notes detail important background law relied on in the law governing lawyers, further explanation of a case or series of cases, and an opportunity to explore a topic at an accessible but more advanced level. They also serve as occasions to connect and integrate the basic ideas and themes that the courts have woven throughout the law governing lawyers.

The first set of continuing notes, entitled **Lawyers' Roles**, makes explicit the often-unnoticed roles lawyers assume when they represent clients, with

particular emphasis on the balance of power in the professional relationship. Six notes on this theme appear throughout the book:

Chapter 1:	The Client-Lawyer Relationship	page 11
Chapter 6:	The Directive Lawyer and Fiduciary Duty	170
Chapter 7:	The Instrumental Lawyer and the Bounds of the Law	243
Chapter 8:	Zealous Representation within the Bounds of the Law	297
Chapter 13:	Finding Your Own Way	518
Chapter 16:	Judicial Ethics	605

In these notes we identify various client-lawyer relationships and examine the legal risks created by each of these roles. We consider both philosophical issues, such as whether a lawyer who serves a client also can serve the interest of justice, and personal matters, such as the effect of various client-lawyer relationships on the personal and professional happiness and success of the lawyer. We hope these notes prod you to think about why some of the lawyers who became the subject of cases in this book got into trouble, as well as encourage you to consider the kind of lawyer you want to be.

The second series of continuing notes, entitled **The Law Governing Lawyers**, encompasses six notes:

Chapter 1:	Sources of Law	page 17
Chapter 2:	Admission and Discipline	44
Chapter 3:	Actual and Accidental Clients	79
Chapter 5:	Tort Liability to Clients	137
Chapter 9:	Losing a Client by Disqualification or Injunction	307
Chapter 10:	Loss of Fee or Other Benefits	364

Here, we explore the fiduciary obligations lawyers assume when they say “yes,” or agree to represent clients and the remedies provided by the cases and materials when these obligations are ignored. We emphasize the difference and connections between professional discipline and the other legal consequences that can flow from lawyer malfeasance, such as disqualification, malpractice, and fee forfeiture.

In the third group of notes, entitled **The Bounds of the Law**, six notes explain when lawyers may or must say “no” to clients, because of the applicability of other law that imposes a limit on the lawyer’s advocacy.

Chapter 5:	Duties to Nonclients	page 155
Chapter 6:	Court Orders	208
Chapter 7:	Client Fraud	252
Chapter 8:	Criminal Conduct	270
Chapter 14:	A Reprise	528
Chapter 15:	The Constitution	575

In these notes, we explore the vast law of fraud, the ever-expanding criminal law, procedural sanctions, and the impact of the Constitution on the regulation of lawyer conduct. Each of these bodies of general law has been read into the professional codes to create an explicit boundary beyond which lawyers tread only at great risk both to themselves and to their clients.

The fourth series of continuing notes, entitled **Practice Pointers**, offers you practical advice about how to avoid or mitigate the legal consequences raised by the problems, cases, and other materials. Here we showcase six topics:

Chapter 3:	Engagement, Nonengagement, and Disengagement Letters	page 77
Chapter 11:	Implementing a Conflicts Control System	419
Chapter 12:	Trust Fund Management	464
Chapter 12:	Fee Agreements	479
Chapter 13:	Wrongful Discharge	506
Chapter 15:	The Globalization of Law Practice	598

The final set of notes focuses on **Lawyers and Clients** in five common practice settings. Here, we examine specialized legal regulation of the client's rights and responsibilities, which in turn shapes, enhances, and also can limit a lawyer's advocacy on behalf of the client.

Chapter 3:	<i>Service Pro Bono Publico</i>	page 64
Chapter 4:	Criminal Defense	118
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The Combination

Overall, we intend the problems, rules, cases, stories, and continuing notes in this book to serve as a guide to identifying, understanding, and avoiding the minefields and mistakes that the lawyers in these materials have confronted. We also hope you enjoy this study as much as we have enjoyed preparing it.

Susan Martyn and Larry Fox
November 2012

Acknowledgments

We could not have completed this casebook without the accumulated wisdom of hundreds of lawyers who have taught and refined our understanding of these issues. In particular, we thank our colleagues who served as reporters and advisors to the American Law Institute's Restatement (Third) of The Law Governing Lawyers and those who served with us on the ABA Ethics 2000 Commission. We also are indebted to many at the ABA Center for Professional Responsibility, who provided us with information about recent developments exactly when we needed it.

The two of us first met in 1987 in a windowless conference room at the American Law Institute during a meeting of the advisors to the Restatement of the Law Governing Lawyers. These meetings clearly are an acquired taste. The Reporters to Restatement projects circulate a draft weeks before each meeting, then sit on a raised dais facing a semicircle of twenty-five or thirty judges, professors, and lawyers to defend each section, comment, and example line by line, usually for several days at a time. Only the good will and good humor of the participants can make such a process bearable, and we soon found that we were providing large doses of both for each other. From our thirteen-year sojourn with the ALI, a broad friendship developed that also took us into new adventures, including CLE programs and the ABA's Ethics 2000 project in which we both served as Commissioners to undertake a stem-to-stern review of the ABA Model Rules of Professional Conduct.

For us, nothing has been quite like our work on this volume. After Larry returned from a stay in Ithaca, Susan learned of the problems he had developed for his Professional Responsibility course at Cornell Law School and decided they could form the backbone of a casebook. Susan selected and edited the cases, organized the materials, and wrote the continuing notes in the book while teaching the materials to students at Toledo, Marquette, and George Washington Law Schools. Larry contributed to the third edition while teaching at Harvard and Yale Law School. Susan wrote the essay materials with irreverent but helpful editorial critiques from Larry, which more than occasionally led to another conversation that benefited us both. In short, we could not have completed this book without each other, and we both feel free to blame the other for the flaws that remain.

The faculties and students at seven law schools—Cornell, George Washington, Harvard, Marquette, Yale, the University of Pennsylvania, and the University of Toledo—contributed to these materials by consulting, arguing, and correcting many of our mistakes. Others across the country also commented on and helped us formulate our ideas. Special thanks to Susan Becker, Kathleen

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Our ideas never would have taken shape without the capable, cheerful, and knowledgeable assistance of Bea Cucinotta.

Susan would not have had the time to devote to this project without a sabbatical leave granted by the University of Toledo and the assistance of the Eugene N. Balk Fund, which provided the funds to carry out most of the research in the continuing notes. Larry never would have been able to develop the problems if it were not for the invitation from Charles Wolfram to escape practice and teach at the Cornell Law School.

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Kentucky Bar Association, Ethics Opinion E-430 (2010)

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Oxford University Press, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* by Deborah L. Rhode (2000). 2,488 words from pp. 49-79. By permission of Oxford University Press, Inc.

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