

ASPEN CASEBOOK SERIES

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**ETHICAL PROBLEMS
IN THE
PRACTICE OF LAW**

*Fourth
Edition*



Wolters Kluwer

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Ethical Problems in the Practice of Law

Fourth Edition

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To Sam and Sarah, who continue to light up our lives



Preface to the Fourth Edition for Teachers and Students

This book is an introduction to the law that governs lawyers. It includes two chapters on the history, structure, and future of the legal profession.

Our goals

Our principal goals in writing this book were to offer an overview of the law governing lawyers and to provide materials through which law students may explore some of the ethical problems that lawyers encounter in practice. Also, we sought to provide opportunities for law students to consider the various professional roles that lawyers occupy and the moral quandaries that students will struggle with when they begin to practice law. For example, in negotiating a settlement for a client, a lawyer might say that his client would refuse to accept less than \$100,000, even though the client has told the lawyer that she would be delighted to receive \$50,000. This is deceptive, but lawyers commonly use this tactic to obtain favorable outcomes for their clients. Does the pervasiveness of this type of deception make it acceptable? Is a lawyer's only duty to get the best result for his client, or does he also owe his opposing counsel a duty of honesty?

This book introduces students to many aspects of the law that governs lawyers. The book does not include an encyclopedic analysis of every ethical rule, much less the entire body of law governing the legal profession. We focus primarily on the subjects that are most likely to arise during the first years of an individual's law practice. For example, many new lawyers become associates in law firms, so this book explores what an associate should do when a more senior associate or a partner asks the associate to do something that seems improper. Also, most new lawyers in private practice make frequent decisions about how to record their time for billing purposes. This book includes many problems that arise from everyday practice issues. Most of the examples and problems in this book involve lawyers who represent individuals or businesses in matters involving contracts, torts, criminal prosecution and defense, civil litigation, real



estate, and family law. We have sought to develop problems and to select cases in which a student can understand the facts and the ethical issues regardless of whether the student has taken advanced courses in law school.

The problem-based approach

This book offers opportunities to explore ethical dilemmas that have actually arisen in practice, some of which have resulted in published judicial decisions. While we have excerpted or summarized some important judicial opinions in the book, we have transformed a larger number of cases into problems for class discussion. Instead of reprinting the appellate opinions, we have presented the essential facts of these cases as one of the lawyers saw them, walking the cases backward in time to the moment at which the lawyer had to make a difficult choice based on both ethical and strategic considerations. Rather than building the book primarily around predigested legal analyses by appellate judges, we invite students to put themselves in the shoes of lawyers who face difficult

choices among possible actions. The dilemmas in most of our problems are based on tough situations that have confronted real lawyers.

Evaluating ethical dilemmas in class will help students to handle similar quandaries when they encounter them in practice. A student who has worked through the problems assigned in this course will know where in the law a particular issue might be addressed, how to begin to analyze the relevant rules, and what questions to ask. Grappling with these problems also will increase students' awareness of ethical issues that otherwise might have gone unnoticed.¹

We set out to write an introduction to the law governing lawyers that students would enjoy reading. Studies show that by the third year of law school, the class attendance rate is only about 60 percent and that a majority of those students who do attend class read the assignments for half or fewer than half of the classes they attend.² Increasingly, law students use their computers to play solitaire or write e-mail during class.³ Law schools seem to be failing in their efforts to retain the interest and attention of their students, particularly third-year law students. We have sought to write a book whose content and methodology capture and sustain the reader's interest. This aspiration is reflected in our choice of topics and materials, our concise summaries of the law, our challenging problems, and our use of graphic materials.

Defining features of this book

We built a number of unique features into this book based on our experience teaching professional responsibility classes:

- Almost every section of the book begins by summarizing the relevant doctrine that provides the legal background students need to analyze the problems that follow.
- Most summarized rules and doctrines appear in question-and-answer format. This structure provides an ongoing roadmap, anticipating readers' questions and forecasting the content of the next subtopic.
- Numerous concrete examples, set off from the text, further illustrate the general doctrinal principles.

1. See Steven Hartwell, Promoting Moral Development Through Experiential Teaching, 1 Clin. L. Rev. 505, 527 (1995) (reporting on his empirical research, which shows that professional responsibility students' moral reasoning skills made significant advances during a course in which students discussed simulated ethical dilemmas); and Lisa G. Lerman, Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals, 39 Wm. & Mary L. Rev. 457, 459 (1998) (explaining the reasons to use experiential methodology in professional responsibility classes).

2. Mitu Gulati, Richard Sander & Robert Sockloskie, The Happy Charade: An Empirical Examination of the Third Year of Law School, 51 J. Legal Educ. 235, 244-245 (2001).

3. Ian Ayres, Lectures vs. Laptops, N.Y. Times, Mar. 20, 2001, at A25; David Cole, Laptops vs. Learning, Wash. Post, Apr. 7, 2007, at A13.

- This book has very few judicial opinions. Law students read an abundant number of judicial opinions in other courses. Professional responsibility is best taught using a problem-based approach. The few opinions in the text, which will be familiar to teachers of professional responsibility, are edited carefully to present only the most relevant sections. Some opinions are summarized rather than reprinted so that students can move quickly to the book's challenging application problems.
- Reproduced court opinions contain both original headings and our inserted ones to help orient students to the logic of the opinions.
- The approximately 70 problems that appear in the book are designed to focus class discussion and immediately engage students by describing real-life ethical dilemmas.
- The problems present facts from real cases in narrative form to allow students to analyze the issues as if they were the lawyers facing those dilemmas. This structure tends to produce livelier discussion than does the autopsy method traditionally used in law classes, in which teachers invite post hoc dissection of court opinions.
- Pertinent rules of professional conduct are included in the book so that students do not need to flip constantly back and forth between this text and a statutory supplement. When studying a particular rule, however, students should review the entire rule and comments. Every student should study with a printed version of the rules beside the textbook for ease of reference. With our co-author, Professor Anjum Gupta, we wrote a concise supplement as a companion to this textbook. It is *Ethical Problems in the Practice of Law: Model Rules, State Variations, and Practice Questions* (Wolters Kluwer).
- The book's many bulleted lists and tables clarify legal doctrines and other conceptual material in easily reviewable sections.
- Photographs, diagrams, and cartoons break up the text. Some of these, like the photographs of some of the lawyers, parties, judges, and scholars, add important context. Others, like the cartoons, offer a change of pace from the textual narrative.
- The book has an associated website on which we provide updates. This allows us to keep readers up to date between the publication of one edition of the text and another. If the Model Rules of Professional Conduct are amended, important cases decided, or other major developments occur, information will be posted to the website. The URL for the website is http://www.aspenlawschool.com/books/lerman_ethicalproblems/default.asp.

What's new in the fourth edition

Teachers who have used the third edition of this book will discover much that is familiar, along with numerous additions and some changes:

- The book reflects all changes made in the ethics codes and other lawyer law since the third edition was published. We have added many new examples and several new problems. We have updated countless empirical statements in the book about the law and the legal profession. The book discusses recent cases, bar opinions, institutional changes, and scholarship. It includes discussions of such new developments as the revised versions of Model Rules 1.6 and 1.18, regulatory issues relating to lawyers' use of social media, the challenges to confidentiality and attorney-client privilege resulting from computer hacking and governmental spying, and the dramatic changes taking place in the legal profession in the United States and abroad.
- The final chapter of the book now includes all of the material on the American legal profession. It combines the historical and sociological material that appeared in Chapter 14 of the third edition with discussion of the recent and ongoing changes in the profession that were presented in Chapter 15 of that edition.
- To reduce the volume of footnotes, we have not provided URL citations for legal journal, newspaper, and magazine articles that are easily searchable online using the title of the article.⁴
- We have increased the number of *New Yorker* cartoons from 31 to 42. We continue to believe that there is much to learn about lawyers and the legal profession from the jokes made about both, and that the use of graphic material of all sorts makes reading a textbook more engaging and therefore a better learning experience.

We hope that you enjoy this book. We welcome your reactions and suggestions, small or large, for the next edition. Please send any comments or questions to lerman@law.edu.

Lisa G. Lerman
Philip G. Schrag

4. In some cases, the date cited is the date of the online version of an article, which may have appeared in the printed publication on the previous or subsequent day.

Acknowledgments

Hundreds of law professors, practitioners, and judges have worked to regulate the practice of law, to study its regulation, and to publish their ideas. Decades of effort have gone into the drafting of successive model codes for lawyers, rules of state bars, and the Restatement. Academics have made countless contributions in the form of books and law review articles on the legal profession and papers delivered to conferences convened under the auspices of the American Bar Association, the Association of American Law Schools, the Keck Foundation, and other organizations. This book is in part a summary of many of those efforts.

We particularly want to acknowledge our intellectual debt to the authors of the Restatement and of the other treatises and textbooks that are used in courses on legal ethics and the American legal profession. We have consulted these books frequently in the course of writing this volume.

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We note with sorrow the passing in 2010 of Leo Cullum, who drew most of the *New Yorker* cartoons in this book. Mr. Cullum was an extraordinary cartoonist and a perceptive and acerbic observer of the legal profession.

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