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TRAVERSING THE
ETHICAL MINEFIELD
Problems, Law, and
Professional Responsibility

*Second
Edition*



Wolters Kluwer

Law & Business

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Traversing the Ethical Minefield

**Problems, Law, and Professional
Responsibility**

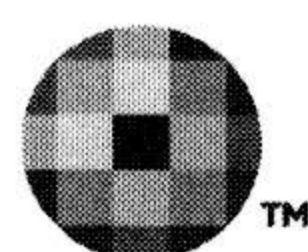
Second Edition

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Law & Business

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For Angela & Joshua, and Sarah & Aaron
For Carrie & Tony, and Emily & Peter

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Preface

This book represents a unique collaboration between a law professor with extensive academic experience (Susan Martyn) and a long-time practitioner who 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, and therefore 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.

In this second edition we again hope to accomplish four goals. First, we have updated the problems, cases, and materials to engage you in a fascinating and dynamic subject. Second, we have added two chapters (Control and Communication and Judicial Ethics) to teach you more about the rapidly expanding law governing lawyers. Third, we have included a series of notes to focus on practice context. Here we examine the ethical challenges unique to specialized areas of practice, including criminal and insurance defense, as well as representing organizations, governments and pro bono clients. Fourth, throughout these materials, we continue to invite you to recognize good lawyering, or the need to develop practical ethical judgment, a task that requires more than just compliance with the law. Overall, we hope that our combination of problems, cases, short stories, and continuing notes will engage and assist you in your study of the law governing lawyers.

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 professional code provisions 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. Indeed, issues of professional responsibility often require careful attention to facts as well as law. 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 55 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 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 these stories to offer you 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 notes in this book are short essays organized around six general themes. These notes provide transitions between various topics in the materials, 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.

In the first set of continuing notes, entitled **Lawyers’ Roles**, five notes make explicit the often-unnoticed roles lawyers assume when they represent clients, with particular emphasis on the legal risks created by each of these

roles. 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.

Chapter 1:	The Client-Lawyer Relationship	page 12
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The second series of continuing notes, entitled **The Law Governing Lawyers**, encompasses seven notes where 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.

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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 some external legal control that imposes a limit on the lawyer’s advocacy.

Chapter 5:	Lawyer Dishonesty, Fraud, Deceit, and Misrepresentation	page 139
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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 in the problems, cases, and other materials. Here we showcase six topics:

Chapter 5:	Engagement, Nonengagement, and Disengagement Letters	page 107
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Chapter 10:	Trust Fund Management	430
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The fifth set of notes, entitled **Lawyers and Other Professionals**, examines whether the courts treat lawyers and other professionals consistently. Here we examine five issues that confront a variety of professionals:

Chapter 2:	Professional Licensure	page 29
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Chapter 5:	Duties to Nonclients	152
Chapter 8:	Sexual Relationships with Clients	311
Chapter 11:	Wrongful Discharge	465

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

Chapter 3:	Service <i>Pro Bono Publico</i>	page 66
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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
February 2008

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 research data and 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 25 or 30 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 13-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 second edition while teaching at the University of Pennsylvania and Harvard Law Schools, providing several chapters of short stories from his previously published works. 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 six law schools—Cornell, George Washington, Harvard, Marquette, 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 Harry Bryants, James Caruso,

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Susan would not have had the time to devote to this project without 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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Cardozo Law Review, *Why Lawyers Are Unhappy* by Martin E.P. Seligman, Paul R. Verkuil & Terry H. Kang, 23 *Cardozo L. Rev.* 33-53 (2001).

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District of Columbia Bar Association Opinion 329 (2005).

Matthew Bender & Co., a member of the LexisNexis Group, *Understanding Lawyers' Ethics* by Monroe H. Freedman & Abbe Smith, pp. 7-8, 45, 46-47, 53-54, 62, 63, 71, 72 (3d ed. 2004). Reprinted with permission, © 2004, Matthew Bender & Co., a member of the LexisNexis Group. All rights reserved.

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Utah State Bar Association, Utah Ethics Advisory Opinion 99-04, by the Utah State Bar Association Ethics Advisory Opinion Committee (1999).

Traversing the Ethical Minefield

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