

West  Nutshell Series

Legal Ethics

in a
nutshell

RONALD D. ROTUNDA

4TH EDITION

 WEST®

LEGAL ETHICS IN A NUTSHELL

FOURTH EDITION

By

RONALD D. ROTUNDA

The Doy & Dee Henley Chair and

Distinguished Professor of Jurisprudence

Chapman University



WEST®

A Thomson Reuters business

Thomson Reuters created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson Reuters does not render legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

Nutshell Series, *In a Nutshell* and the Nutshell Logo are trademarks registered in the U.S. Patent and Trademark Office.

© West, a Thomson business, 2003, 2006, 2007

© 2013 Thomson Reuters

610 Opperman Drive

St. Paul, MN 55123

1-800-313-9378

Printed in the United States of America

ISBN: 978-0-314-28224-8

WEST'S LAW SCHOOL ADVISORY BOARD

JESSE H. CHOPER

Professor of Law and Dean Emeritus,
University of California, Berkeley

JOSHUA DRESSLER

Professor of Law, Michael E. Moritz College of Law,
The Ohio State University

YALE KAMISAR

Professor of Law Emeritus, University of San Diego
Professor of Law Emeritus, University of Michigan

MARY KAY KANE

Professor of Law, Chancellor and Dean Emeritus,
University of California,
Hastings College of the Law

LARRY D. KRAMER

President, William and Flora Hewlett Foundation

JONATHAN R. MACEY

Professor of Law, Yale Law School

ARTHUR R. MILLER

University Professor, New York University
Formerly Bruce Bromley Professor of Law, Harvard University

GRANT S. NELSON

Professor of Law, Pepperdine University
Professor of Law Emeritus, University of California, Los Angeles

A. BENJAMIN SPENCER

Professor of Law,
Washington & Lee University School of Law

JAMES J. WHITE

Professor of Law, University of Michigan

to
Don

PREFACE

Most lawyers practicing today took a required course in Legal Ethics while in law school, followed by a specific bar examination on that same subject. It was not always so. When I started teaching, my law school did not even offer the course. In those days, it was easy for law students to learn the Golden Rule: Thou shalt not lie, cheat, steal, . . . or advertise.

Times have changed. The emphasis on legal ethics began in 1974 as part of what Spiro Agnew then referred to as our “post-Watergate morality.” I started teaching legal ethics because the Dean knew I was the new boy on the block, and had been a lawyer for the Senate Watergate Committee.

Some people think that ethics can be taught only at mother’s knee. It’s a little more complicated than that. Those who think of ethics as intuition are often the same people whom courts routinely disqualify because they do not appreciate the complexities of the rules of conflicts of interest. Many lawyers today are, for instance, ignorant of recent developments regarding conflicts of interest and attorney disqualification. Several years ago, one of my former academic colleagues, who also practiced law, said she did not buy malpractice insurance because her contract with her clients required them

PREFACE

to waive their malpractice claims. Her listeners nodded knowingly, oblivious to the fact that her standard waiver agreement violated state ethics rules, was not enforceable, and could cause her to lose her license.

One need not rely on anecdotal analysis. The few existing empirical studies show that many lawyers often are unaware of basic information about the law governing the practice of law. Consequently, many malpractice suits arise out of violations of professional ethics. In recent years, several major law firms have settled for substantial sums various malpractice claims based on ethical violations, and several criminal actions have brought into focus the role of lawyers.

What we call "lawyer's ethics" is real "law" in the same way that the Rules of Civil Procedure are law. These ethics rules are not mere advice. Instead, they impose substantive requirements on lawyers and judges and are just as complex as the rules of civil practice or the rules of evidence. Many ethics rules cannot be known through some sort of innate awareness nor are they automatically infused into ordinary human beings once they are admitted to the bar.

This Nutshell is intended to offer an initiation to this complex topic. Because the American Bar Association has been the undisputed leader in developing ethics rules, this book is organized around the ABA Model Rules of Professional Conduct. Almost all jurisdictions base their ethics rules on this ABA product. Even when a jurisdiction, such as Califor-

PREFACE

nia, uses a different format, the substantive rules reflect the substantial ABA influence.

In addition to the ABA Model Rules, each jurisdiction has its own rules, which are derived from the ABA Rules but often with non-uniform amendments. There is also case law, the commentators, and influential advisory ethics opinions of various bar associations and the ABA Ethics Committee. In addition, the *American Law Institute's Restatement of the Law Governing Lawyers, Third*, has been an important and helpful tool. I will refer to all of these sources but, given the limited nature of a Nutshell, I am limited in discussing them in detail. For that, one should turn to other secondary sources such as (please forgive the shameless self-promotion): Rotunda & Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA & Thomson West, 2012 ed., updated yearly) (a treatise on legal ethics, published jointly by the ABA & Thomson West Publishing), or, Rotunda & Dzienkowski, *Professional Responsibility: A Student's Guide* (ABA & Thomson West, 2012 ed., updated yearly) or Rotunda, *Professional Responsibility* (Thomson West, 9th ed., 2011) (Black Letter series). Finally, do not forget that ethical lawyering goes well beyond the four corners of the ABA rules: the kind of lawyer you are affects, and is affected by, the kind of person you are.

In completing this new edition, I am thankful for the help I have received from Travis M. Casey, J.D., 2013 and Jacob Cole Genzuck, J.D., 2012, and Maria Sanchez, my faculty assistant.

PREFACE

If I might miss something here or there, please bear in mind the words of Judge Henry de Bracton, who beseeched over 750 years ago: “I ask the reader, if he finds in this work anything superfluous or erroneous, to correct and amend it, or pass it over with eyes half closed, for to keep all in mind and err in nothing is divine rather than human.”

RONALD D. ROTUNDA

October, 2012
Orange, California

TABLE OF CASES

References are to Pages

A

- Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 453 S.E.2d 719 (Ga.1995), 16
- Allstate Ins. Co. v. Keller, 17 Ill.App.2d 44, 149 N.E.2d 482 (Ill.App. 1 Dist.1958), 194
- Alpert, Goldberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J.Super. 510, 983 A.2d 604 (N.J.Super.A.D.2009), 48, 50
- Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), 29, 328
- Anonymous (1974-5), State v., 31 Conn.Supp. 179, 326 A.2d 837 (Conn.Super.1974), 325
- Attorney Grievance Com'n of Maryland v. Brooke, 374 Md. 155, 821 A.2d 414 (Md.2003), 184
- Attorney Grievance Com'n of Maryland v. Gansler, 377 Md. 656, 835 A.2d 548 (Md.2003), 373
- Attorney Grievance Com'n of Maryland v. Stein, 373 Md. 531, 819 A.2d 372 (Md.2003), 185

B

- Bailey v. Morales, 190 F.3d 320 (5th Cir.1999), 189
- Balla v. Gambro, Inc., 145 Ill.2d 492, 164 Ill.Dec. 892, 584 N.E.2d 104 (Ill.1991), 299, 419
- Barton v. United States Dist. Court for Central Dist. of Cal., 410 F.3d 1104 (9th Cir.2005), 98, 309
- Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), 470
- Baylson v. Disciplinary Bd. of Supreme Court of Pennsylvania, 764 F.Supp. 328 (E.D.Pa.1991), 383

TABLE OF CASES

- Beatty v. NP Corp., 31 Mass.App.Ct. 606, 581 N.E.2d 1311 (Mass.App.Ct.1991), 48
- Becraft, In re, 885 F.2d 547 (9th Cir.1989), 328
- Bell Atlantic Corp. v. Bolger, 2 F.3d 1304 (3rd Cir.1993), 274
- Bertagnolli, People v., 861 P.2d 717 (Colo.1993), 337
- Binney v. State, 384 S.C. 539, 683 S.E.2d 478 (S.C.2009), 119
- Birbrower, Montalbano, Condon & Frank v. Superior Court, 70 Cal.Rptr.2d 304, 949 P.2d 1 (Cal.1998), 440
- Board of Ed. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Ass'n, Inc., Local 1889 AFT AFL-CIO, 38 N.Y.2d 397, 380 N.Y.S.2d 635, 343 N.E.2d 278 (N.Y.1975), 331
- Board of Overseers of Bar v. Warren, 2011 WL 6097747 (Me. 2011), 511
- Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), 379
- Brand v. 20th Century Ins. Co./21st Century Ins. Co., 21 Cal. Rptr.3d 380 (Cal.App. 2 Dist.2004), 215
- Breen, Matter of, 171 Ariz. 250, 830 P.2d 462 (Ariz.1992), 180
- Brown v. Legal Foundation of Washington, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003), 294, 459
- Burghoff, In re, 374 B.R. 681 (Bkrcty.N.D.Iowa 2007), 522

C

- Camden v. Maryland, 910 F.Supp. 1115 (D.Md.1996), 397
- Carter v. The Mississippi Bar, 654 So.2d 505 (Miss.1995), 333
- Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), 471
- Clark v. State, 140 Md.App. 540, 781 A.2d 913 (Md.App.2001), 379
- Clinton v. Jones, 520 U.S. 681, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997), 343
- Comish, In re, 889 So.2d 236 (La.2004), 438
- Concat LP v. Unilever, PLC, 350 F.Supp.2d 796 (N.D.Cal.2004), 221
- Connor v. Statewide Grievance Committee, 2002 WL 31898063 (Conn.Super.2002), 203
- Cooperman, Matter of, 83 N.Y.2d 465, 611 N.Y.S.2d 465, 633 N.E.2d 1069 (N.Y.1994), 45

TABLE OF CASES

- Cox, State ex rel. Oklahoma Bar Ass'n v., 48 P.3d 780 (Okla. 2002), 367
Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), 160

D

- DeFrancesch, In re, 877 So.2d 71 (La.2004), 313
DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987), 458
Disciplinary Proceeding Against Boelter, In re, 139 Wash.2d 81, 985 P.2d 328 (Wash.1999), 116
Diversified Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977), 95
Downes, State ex rel. Oklahoma Bar Ass'n v., 121 P.3d 1058 (Okla.2005), 209
Duggin v. Adams, 234 Va. 221, 360 S.E.2d 832 (Va.1987), 32, 331

E

- El Gemayel v. Seaman, 72 N.Y.2d 701, 536 N.Y.S.2d 406, 533 N.E.2d 245 (N.Y.1988), 439
Estate of (see name of party)

F

- Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), 25
Fiandaca v. Cunningham, 827 F.2d 825 (1st Cir.1987), 176
Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), 241
Florida Bar v. Slater, 512 So.2d 191 (Fla.1987), 451
Florida Bar v. Weinstein, 624 So.2d 261 (Fla.1993), 493
Florida Bar v. Went For It, Inc., 515 U.S. 618, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995), 478
F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990), 166

TABLE OF CASES

G

- General Dynamics Corp. v. Superior Court, 32 Cal.Rptr.2d 1, 876 P.2d 487 (Cal.1994), 418
- General Motors Corp. v. City of New York, 501 F.2d 639 (2nd Cir.1974), 246
- Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), 370
- Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F.Supp. 1516 (S.D.Fla.1994), 360
- Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), 166
- Gould, Inc. v. Mitsui Min. & Smelting Co., 738 F.Supp. 1121 (N.D. Ohio 1990), 153, 279
- Grand Jury Investigation, In re, 399 F.3d 527 (2nd Cir.2005), 111
- Grand Jury Subpoena Duces Tecum, In re, 112 F.3d 910 (8th Cir.1997), 111
- Green Acres Trust v. London, 141 Ariz. 609, 688 P.2d 617 (Ariz.1984), 331
- Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir.1987), 316
- Grievance Commission v. Howe, 257 N.W.2d 420 (N.D.1977), 502
- Grievance Committee of Bar of New Haven County v. Payne, 128 Conn. 325, 22 A.2d 623 (Conn.1941), 431

H

- Haines v. Liggett Group, Inc., 814 F.Supp. 414 (D.N.J.1993), 296
- Harlan v. Lewis, 982 F.2d 1255 (8th Cir.1993), 367
- Hayes v. Eagle-Picher Industries, Inc., 513 F.2d 892 (10th Cir. 1975), 197
- Hayes v. New York Attorney Grievance Committee of the Eight Judicial Dist., 672 F.3d 158 (2nd Cir.2012), 475
- Hempstead Video, Inc. v. Incorporated Village of Valley Stream, 409 F.3d 127 (2nd Cir.2005), 235
- Hilton v. Barnett Banks, Inc., 1994 WL 776971 (M.D.Fla.1994), 280
- Himmel, In re, 125 Ill.2d 531, 127 Ill.Dec. 708, 533 N.E.2d 790 (Ill.1988), 507
- Hoffman, In re, 883 So.2d 425 (La.2004), 198

TABLE OF CASES

- Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), 159
- Holmes, In re, 304 B.R. 292 (Bkrtcy.N.D.Miss.2004), 424
- Horn v. New York Times, 100 N.Y.2d 85, 760 N.Y.S.2d 378, 790 N.E.2d 753 (N.Y.2003), 418
- Howard v. Babcock, 25 Cal.Rptr.2d 80, 863 P.2d 150 (Cal.1993), 447
- Howes, Matter of, 123 N.M. 311, 940 P.2d 159 (N.M.1997), 400

I

- Ibanez v. Florida Dept. of Business and Professional Regulation, Bd. of Accountancy, 512 U.S. 136, 114 S.Ct. 2084, 129 L.Ed.2d 118 (1994), 473
- INA Underwriters Ins. Co. v. Rubin, 635 F.Supp. 1 (E.D.Pa. 1983), 311

In re (see name of party)

- Iowa Supreme Court Attorney Disciplinary Bd. v. Howe, 706 N.W.2d 360 (Iowa 2005), 378
- Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 726 N.W.2d 397 (Iowa 2007), 199

J

- January 1976 Grand Jury, In re, 534 F.2d 719 (7th Cir.1976), 381
- Jeffers, Matter of, 1994 WL 715918 (Cal.Bar Ct.1994), 336
- Jeffers, United States v., 520 F.2d 1256 (7th Cir.1975), 158
- John Doe Grand Jury Investigation, Matter of, 408 Mass. 480, 562 N.E.2d 69 (Mass.1990), 105
- Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), 29, 328
- Jones v. Clinton, 36 F.Supp.2d 1118 (E.D.Ark.1999), 343

K

- Kachmar v. SunGard Data Systems, Inc., 109 F.3d 173 (3rd Cir.1997), 300
- Kelly v. Greason, 23 N.Y.2d 368, 296 N.Y.S.2d 937, 244 N.E.2d 456 (N.Y.1968), 143

TABLE OF CASES

L

- Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971), 504
- Lawyer Disciplinary Bd. v. Neely, 207 W.Va. 21, 528 S.E.2d 468 (W.Va.1998), 325
- Lettley v. State, 358 Md. 26, 746 A.2d 392 (Md.2000), 146
- Lindsey, In re, 158 F.3d 1263, 332 U.S.App.D.C. 357 (D.C.Cir. 1998), 111
- Lipin v. Bender, 193 A.D.2d 424, 597 N.Y.S.2d 340 (N.Y.A.D. 1 Dept.1993), 87
- Los Angeles Airways, Inc. v. Davis, 687 F.2d 321 (9th Cir.1982), 32

M

- MacArthur v. Bank of New York, 524 F.Supp. 1205 (S.D.N.Y. 1981), 376
- Macumber, State v., 112 Ariz. 569, 544 P.2d 1084 (Ariz.1976), 102
- Maldonado v. New Jersey ex rel. Administrative Office of Courts—Probation Division, 225 F.R.D. 120 (D.N.J.2004), 86
- Matter of (see name of party)**
- Maxwell v. Superior Court, 180 Cal.Rptr. 177, 639 P.2d 248 (Cal.1982), 186
- McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984), 25
- Memphis & Shelby County Bar Ass'n v. Sanderson, 52 Tenn.App. 684, 378 S.W.2d 173 (Tenn.Ct.App.1963), 143
- Morrell v. State, 575 P.2d 1200 (Alaska 1978), 355
- Musheno v. Gensemer, 897 F.Supp. 833 (M.D.Pa.1995), 273

N

- Nakasian v. Incontrade, Inc., 409 F.Supp. 1220 (S.D.N.Y.1976), 115
- Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976), 370
- Niesig v. Team I, 76 N.Y.2d 363, 559 N.Y.S.2d 493, 558 N.E.2d 1030 (N.Y.1990), 404

TABLE OF CASES

- Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986), 339
- North Carolina State Bar v. Graves, 50 N.C.App. 450, 274 S.E.2d 396 (N.C.App.1981), 367
- Novo Therapeutisk Laboratorium A/S v. Baxter Travenol Laboratories, Inc., 607 F.2d 186 (7th Cir.1979), 240

O

- O'Hagan, United States v., 521 U.S. 642, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997), 183
- Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), 475
- Oklahoma Bar Ass'n, State ex rel. v. Cox, 48 P.3d 780 (Okla. 2002), 367
- Oklahoma Bar Ass'n, State ex rel. v. Downes, 121 P.3d 1058 (Okla.2005), 209
- Ortiz v. Automotive Rentals, Inc., 2010 WL 3168656 (D.N.J. 2010), 352
- Osornio v. Weingarten, 21 Cal.Rptr.3d 246 (Cal.App. 6 Dist. 2004), 155

P

- Pacific Pictures Corp., In re, 2012 WL 1293534 (9th Cir.2012), 96
- Peel v. Attorney Registration and Disciplinary Com'n of Illinois, 496 U.S. 91, 110 S.Ct. 2281, 110 L.Ed.2d 83 (1990), 472
- Penda Corp. v. STK, LLC., 2004 WL 1628907 (E.D.Pa.2004), 398
- People v. _____ (see opposing party)**
- Phillips v. Washington Legal Foundation, 524 U.S. 156, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), 293
- Picker Intern., Inc. v. Varian Associates, Inc., 670 F.Supp. 1363 (N.D. Ohio 1987), 151
- Pinter by Pinter, Estate of v. Mc Gee, 293 N.J.Super. 119, 679 A.2d 728 (N.J.Super.A.D.1996), 51
- Pleasant Management, LLC v. Carrasco, 870 A.2d 443 (R.I.2005), 395
- Poff, In re, 394 S.C. 37, 714 S.E.2d 313 (S.C.2011), 425
- Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), 457

TABLE OF CASES

Primus, In re, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978), 475

R

Raggio, In re, 87 Nev. 369, 487 P.2d 499 (Nev.1971), 505
Richards, In re, 127 N.M. 716, 986 P.2d 1117 (N.M.1999), 325
Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985), 242
Riehlmann, In re, 891 So.2d 1239 (La.2005), 511
River West, Inc. v. Nickel, 188 Cal.App.3d 1297, 234 Cal.Rptr. 33 (Cal.App. 5 Dist.1987), 215
R. M. J., In re, 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), 472, 478
Ryder, In re, 263 F.Supp. 360 (E.D.Va.1967), 354

S

Santa Clara County Counsel Attys. Assn. v. Woodside, 28 Cal. Rptr.2d 617, 869 P.2d 1142 (Cal.1994), 167
Schapiro, In re, 144 A.D. 1, 128 N.Y.S. 852 (N.Y.A.D. 1 Dept. 1911), 358
Schware v. Board of Bar Exam. of State of N.M., 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957), 504
Schwarz v. Kogan, 132 F.3d 1387 (11th Cir.1998), 457
SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D.Conn.1976), 79
Sealed Case, In re, 162 F.3d 670, 333 U.S.App.D.C. 245 (D.C.Cir. 1998), 124
Sealed Case, In re, 877 F.2d 976, 278 U.S.App.D.C. 188 (D.C.Cir. 1989), 78
Sears, Matter of, 71 N.J. 175, 364 A.2d 777 (N.J.1976), 525
Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 108 S.Ct. 1916, 100 L.Ed.2d 475 (1988), 478, 487
Silbiger v. Prudence Bonds Corporation, 180 F.2d 917 (2nd Cir.1950), 241
Singleton, United States v., 165 F.3d 1297 (10th Cir.1999), 361
Smith, In re, 315 Or. 260, 843 P.2d 449 (Or.1992), 489
Spaulding v. Zimmerman, 263 Minn. 346, 116 N.W.2d 704 (Minn. 1962), 120