Understanding

LAWYERS' ETHICS

FOURTH EDITION

Monroe Freedman
Abbe Smith

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UNDERSTANDING LAWYERS' ETHICS

Fourth Edition

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MATTHEW BENDER

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Dedication

In Memory of Audrey and Caleb

and

For Rebeca, Ana, Ben, and Andrew

and

For David and Anita Smith
Models of Devotion and Zeal

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Preface

A CAUTION AND A CHALLENGE

This book presents a systematic position on lawyers' ethics. We argue that lawyers' ethics is rooted in the Bill of Rights and in the dignity and the autonomy of the individual. This is a traditionalist, client-centered view of the lawyer's role in an adversary system, and corresponds to the ethical standards that are held by a large proportion of the practicing bar.

From this perspective, we analyze the fundamental issues of lawyers' ethics, and particularly the ABA's Model Rules. Also, we discuss the principal views of lawyers' ethics that differ from ours, and explain why we think they are wrong.

Students, in particular, should be aware that this book takes a distinct position in a continuing and often heated controversy regarding the lawyer's role. We hope we can persuade you to our point of view. Even if you are not persuaded, however, you can benefit from the presentation, because it challenges you to come to grips with the underlying reasons for the position presented. The best way to achieve a real understanding of legal rules is to test them against your own moral standards and reasoned judgment.

If you do that, the book will have been a success, regardless of whether you end up saying, "I agree with the authors because . . ." or "I disagree with the authors because. . . ." The whole thing is in the "because. . . ."

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§ 1.01 INTRODUCTION

Understanding the rules of lawyers' ethics is essential because so much turns on them. Wherever you practice in the United States, ethical rules will determine whether you can be a member of the bar and how you conduct your practice. Disciplinary sanctions against lawyers include private reprimands, public censure, suspension of the right to practice, and disbarment.

In addition, although rules of ethics are drafted principally with a view to professional discipline, courts are increasingly turning to ethical rules as sources of law in litigation. One area of major importance is malpractice actions, in which lawyers can lose substantial fees or suffer compensatory and even punitive damages for conduct that falls short of professional standards. Also, motions to disqualify counsel from representing adverse parties are increasingly common. As a result, lawyers are being ordered to stop representing valued clients, sometimes in circumstances in which disqualification could have been avoided by taking appropriate precautions.

The rules governing lawyers' conduct also have a profound effect upon the rights of our clients. In some cases, these rights run against us, the lawyers. If a client has the power to discharge a lawyer without cause, for example, the lawyer has lesser contract rights than, say, a construction worker who has been hired for the duration of a building project. Other obligations that we owe our clients may have considerable effect on the interests of others. For example, a rule of lawyer-client confidentiality might prevent the lawyer from informing the victim of a client's fraud when the lawyer has learned of the fraud from the client. Of course, if that

rule were changed to permit the lawyer to help the victim remedy the fraud, the client's rights would be diminished and some clients might be less willing to confide in their lawyers.

A further reason for studying the ethical codes is to learn how to draft and analyze statutes. Some of the ethical rules deal with specific, narrow issues, like forbidding a lawyer to commingle her funds with a client's or to talk with a judge about a case when the other party's lawyer is not present. Others are the loosest of canons, forbidding conduct that "adversely reflects on fitness to practice law" or that is "prejudicial to the administration of justice." All the rules present questions of policy, drafting, and interpretation.

§ 1.02 ABOUT THIS BOOK

This book presents a systematic position on lawyers' ethics. We argue that lawyers' ethics is rooted in the Bill of Rights and in the autonomy and dignity of the individual. This is a traditionalist, client-centered view of the lawyer's role in an adversary system, and corresponds to the ethical standards that are held by a large proportion of practicing lawyers in the United States.

From this perspective, we analyze the fundamental issues of lawyers' ethics, and particularly the ABA's Model Rules. We also discuss other perspectives on lawyers' ethics that differ from ours.

Students, in particular, should be aware that this book takes a distinct position in a continuing and often heated controversy regarding the lawyer's role in law and society. We hope we can persuade you to our point of view. Whether or not we manage to persuade you, the book will help you understand the arguments for our approach to adversarial ethics and the arguments for other approaches.

§ 1.03 SELF-GOVERNANCE

Because of the far-reaching effects of lawyers' ethical rules — extending as broadly as the administration of justice itself — we might wonder why Congress and state legislatures have, for the most part, delegated this important public function to lawyers. With the exception of occasional statutes that deal with specific issues, the rules that govern lawyers' professional conduct have been drafted into comprehensive codes by a private organization, the American Bar Association, and these codifications ordinarily have been adopted by state courts rather than by legislatures.[1] Whatever merit it may have, this procedure is contrary to democratic ideals.

One justification might be that law practice is too esoteric and complex for nonlawyers to regulate. When we consider, however, that legislatures regularly draft laws governing criminal law and procedure, taxation, nuclear policy, and

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[1] Before a code or rule of ethical conduct can be enforced against a lawyer, it must be adopted by the jurisdiction in which the lawyer is practicing. A private bar association can criticize a lawyer who acts contrary to its rules, and can expel the lawyer from membership in the organization, but it cannot affect the lawyer's status as a member of the bar.

defense procurement, it becomes obvious that legislators are not ordinarily discouraged by the fact that they do not fully understand everything they are legislating about.

The suggestion is sometimes made that self-regulation is essential to maintaining the independence of the bar.[2] On one reading, the proposition is tautological: to be independent means simply to be free of regulation from others. It is true that legislative regulation of lawyers' ethics would impose restraints on lawyers, but any ethical regulation imposes restraints on lawyers. Another reading might be that the independence of lawyers to represent their clients zealously and without obligations to others would be in jeopardy if legislatures were to write rules of professional ethics. There is no evidence to support that notion, however, and the established bar has not been constant in its dedication to zealous, client-centered representation. In fact, as we will see, the principal concerns of the established bar often have been elsewhere.

Another reason for delegating such vast public responsibility to a private organization might be that the ABA has done the job so well. That proposition does not hold up either. Three times in the past century the ABA has attempted to draft a comprehensive, coherent, and enforceable code of professional conduct for lawyers. It has yet to do an adequate job.

§ 1.04 THE ABA'S ETHICAL CODES

The ABA's first codification of ethical rules was the Canons of Professional Ethics in 1908. The Canons consisted of about forty numbered paragraphs, each expressing a norm and, in some instances, a brief explanatory comment or explanation.

The chief motivation behind the Canons was not a desire to improve the ethical conduct of lawyers. Rather, the Canons were a reaction to the influx of Catholic immigrants from Italy and Ireland and Jews from Eastern Europe in the latter part of the nineteenth century. Just as labor unions of the time joined in demanding restrictive immigration laws to restrain competition for jobs, the established bar adopted educational requirements, standards of admission, and "canons of ethics" designed to maintain a predominantly native-born, white, Anglo-Saxon, Protestant monopoly of the legal profession. It is not coincidental that immigration into the United States reached a historic peak in 1908, the year the Canons were promulgated by the ABA.

Leaders of the bar left no doubt about why the new Canons of Professional Ethics were necessary. "What concerns us," a member of a bar admissions committee remarked, "is not keeping straight those who are already members of the Bar, but keeping out of the profession those whom we do not want."[3] In other public statements, establishment lawyers identified the ethical threat as coming from second-generation Americans who, they said, "are almost as divorced from American life and American traditions as though they and their parents had never

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[2] *See, e.g.*, Model Rules of Prof'l Conduct pmbl. 11 (2009).

[3] Jerold Auerbach, Unequal Justice 125 (1976).

departed from their native lands."[4] Because of the "historical derivation" of these new citizens, "it will be impossible that they should appreciate what we understand as professional spirit."[5] As if these failings were not enough, the pained observation was made of these aspiring lawyers that even their "gestures are unwholesome and over-commercialized."[6]

One of those who spoke out about the threat posed by new citizens to the bar's ethical standards was Henry S. Drinker, a chairman of the ABA's Committee on Professional Ethics and Grievances, and long regarded as the bar's leading authority on lawyers' ethics. Drinker complained publicly of lawyers who had come "up out of the gutter," and who were "merely following the methods their fathers had been using in selling shoe-strings and other merchandise."[7] His particular concerns were those he referred to as "Russian Jew boys."[8] Drinker's own ethical sensitivity is illustrated further by his analysis of the meaning of "conduct involving moral turpitude" as a ground for professional discipline.[9] A case that Drinker considered "difficult" to judge in terms of moral turpitude was that of a lawyer who had participated in the lynching of an African-American.[10]

Women, African-Americans, and lawyers of Asian and Latin descent were not a principal focus of the bar's new "ethical" rules because they were being excluded from the profession by rules and practices that denied them admission to law schools and membership in the bar. In addition, those few who finally did get into law schools faced widespread discrimination. Until 1954, the ABA denied membership to African-Americans.[11] When A. Leon Higginbotham, Jr. graduated from Yale Law School in 1952 with an outstanding record and a strong recommendation from the Dean, he was told by a Yale alumnus in Philadelphia that his only chance of a job was with "two colored lawyers" who practiced in the city. Higginbotham eventually became Chief Judge of the U.S. Court of Appeals for the Third Circuit.

Few law schools admitted women until the middle of the twentieth century, and then only in small numbers. When women were belatedly admitted to Harvard Law School, they were welcomed by the Dean with the announcement that he had opposed their admission because each of them was "taking the place of a good man." In 1952, Sandra Day O'Connor graduated near the top of her class at Stanford Law School. The future Supreme Court Justice was then offered a position at a good law firm as a secretary. Five years later, Justice Ruth Bader Ginsburg graduated first in her class at Columbia Law School, but was rejected by law firms in New York

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[4] *Id.* at 123.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 127.

[8] *Id.*

[9] *See, e.g.*, MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (1969).

[10] HENRY DRINKER, LEGAL ETHICS 43 (1953). Another close case of "moral turpitude" in Drinker's view was that of a bona fide conscientious objector who had refused to further the war effort. *Id.*

[11] The National Lawyers' Guild, an organization committed to pursuing social justice, was founded in 1936 as an alternative to the ABA. Black lawyers were welcomed into the Guild. *See* ANN FAGAN GINGER & EUGENE TOBIN, THE NATIONAL LAWYERS GUILD: FROM ROOSEVELT THROUGH REAGAN (1988).