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ETHICAL PROBLEMS IN THE PRACTICE OF LAW

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ETHICAL PROBLEMS IN THE PRACTICE OF LAW

SECOND EDITION

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FOREWORD

by Peter R. Jarvis

Three things are true about the rules of professional conduct or legal ethics rules. First, the rules provide a significant part of the glue that holds American lawyers together as a profession. Lawyers in a different state may have entirely different practices, but they are all subject to the same rules. In fact, and even though there are many state-to-state variations, the rules are generally more alike than different from one state to the next.

Second, the rules leave much — some would say too much — to interpretation or to the imagination. The rules often operate at a high level of abstraction, and the ability to travel back and forth between the abstract and the concrete is therefore critical. Put another way, the rules themselves do not provide a complete guide for lawyer conduct. They provide a starting point for analysis which ethical and successful practitioners must then learn to apply in the particular contexts of their own careers.

Third, most practicing lawyers care deeply about their own ethics and about the ethics of the profession. We understand that we play critical roles in the operation of our society and in the lives of our clients and others, and we want to play those roles to the best of our ability.

I have been a practicing lawyer for 28 years. My practice has emphasized attorney professional responsibility and risk management issues for 20 of those years. During that time, I have answered thousands of professional responsibility and risk management questions for lawyers throughout the country. There is an old joke to the effect that an optimist is someone who believes that we live in the best of all possible worlds while a pessimist is someone who fears that the optimist is correct. Through my practice, I have come to believe that we need to avoid both of these extremes.

Yes, we have our share of bad apples in the profession just as we have "good" lawyers who, for whatever reasons, may at times do "bad" things. But this is

true of every profession and, for that matter, of humankind as a whole. And yes, too, the malefactors in the legal profession sometimes seek to justify aberrant behavior by asserting that they were only giving their clients the zealous representation that they often incorrectly assert our professional norms require. But once again, they are not alone. One need look no further than modern-day religious extremists to see similar ideas. Nevertheless, few of us would condemn all religions and religious beliefs because some are taken to an extreme.

I submit that the proper attitude toward the profession and toward lawyers' professional responsibility issues today is one of guarded optimism. There has never been a time in the past in which the professional responsibility rules were better than they are today. There also has never been a time when disciplinary enforcement has been as widespread or when as many practicing lawyers received continuing training in professional responsibility. And there has never been a time when bar membership was as diverse in terms of ethnicity, gender, sexual orientation, religion, or other factors as it is today. We still have a lot of ground left to cover, but we have already covered a lot of ground. Contemporary professional responsibility professors and their students are privileged to stand on the shoulders of those who have come before.

There are limits on the extent to which professional responsibility as experienced in the field by practicing lawyers can truly be understood by law students. It is very hard to think through how to handle multiple would-be incorporators who would all like to become a lawyer's clients if one is not yet certain how to form a corporation or where and how future disagreements between the incorporators may arise. Similarly, there is only so much one can understand about client perjury or countless other problems until one has "been there" and "done that." Nor can purely theoretical classroom exercises fully inoculate future lawyers against the pressures that they will have to face from future colleagues, clients, adversaries, and judges.

On the other hand, a lot can be learned — even in a single-term course. One can come to a better understanding of the importance to society at large of how we lawyers conduct ourselves. One can come to a better understanding of the interrelationships between the duties that lawyers owe to their clients, to nonclients, and to themselves. And one can come to a better understanding that our law of professional responsibility will continue to evolve as long as our society continues to evolve.

This is an outstanding book. The authors have avoided any hint of sanctimony or of talking down to practicing lawyers. They have covered issues that are of day-to-day and cutting edge importance to contemporary lawyers and have done so in a way that is both practical and professional. In addition, the method of presentation — principles first followed by

factually oriented materials which call upon the students to apply the principles they have just learned — is particularly well-suited to this subject. When those of us in the "real world" are confronted by new or difficult questions of professional responsibility, we go back and forth between the rules and the facts in search of an appropriate balance — exactly what students must do here.

It is possible to be both ethical and successful just as it is possible to be both unethical and unsuccessful. The links between ethics and success include the ability to balance emotion and objectivity, pride of craft, love of the law, and a decent respect for oneself and for the rights of others. Neither we nor any subsequent generation of lawyers will see an end to debate about the ethics of our profession. This is as it should be. How else can each new generation claim this essential but evolving body of law as its own?

Peter Jarvis is a partner in the Portland, Oregon office of Hinshaw & Culbertson, LLP. Before joining Hinshaw in 2003, Jarvis was a partner at Stoel Rives, LLP, which he joined in 1976. He handled in-house ethics and risk avoidance issues at Stoel Rives for more than 15 years. His practice focuses on attorney professional responsibility and risk management matters, as well as general contract and business matters. Jarvis has served as president of the Association of Professional Responsibility Lawyers and as chair of the Planning Committee for the ABA National Conference on Professional Responsibility. He has authored or co-authored several books and articles on issues of attorney professional responsibility and risk management.

Preface to the Second Edition for Teachers and Students

Lawyers make, interpret, and apply law, but the legal profession is also governed by law. This book is an introduction to the law that governs lawyers and to 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 he 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 provides an overview 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 numerous 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 those lawyers saw them, walking them backward in time to the moment at which that lawyer had to make a difficult choice based on both ethical and strategic considerations. Rather than reviewing the predigested legal analysis of a judicial opinion, we invite students to put themselves in the shoes of a lawyer who faces a difficult choice 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 will 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 the

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).

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] This data suggests that law schools are 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 will 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

These are some defining features that we built into this book:

- Compared to several other professional responsibility texts, this book is relatively short, so the reading assignments need not be burdensome.
- We have begun almost every section of the book with a summary of the relevant doctrine, which provides the legal background students need to analyze the problems that follow.
- Most of the summary of various aspects of the rules and doctrine is in question-and-answer format. This structure provides an ongoing roadmap, anticipating readers' questions, forecasting the content of the next subtopic, and explaining why one might want to understand it. In addition, numerous concrete examples, set off from the text, illustrate the general doctrinal principles.
- We have included several judicial opinions, most of which will be familiar to teachers of professional responsibility. We have edited those opinions carefully and have provided brief summaries of others. The book, however, is not built primarily around appellate decisions. Our main focus is on clear explanation of rules and doctrines, followed by challenging application problems.
- Many of the cases that are widely taught in professional responsibility classes are presented as problems rather than as judicial opinions. We recount the facts of the cases in narrative form to allow students to analyze the issues as if they were the lawyers facing those dilemmas. We believe that this structure produces livelier discussion than does the autopsy method traditionally used in law classes, in which teachers invite post hoc dissection of court opinions.

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

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

- We have included nearly 70 problems in this book. These may become the primary focus of class discussion.
- We have included the text of pertinent rules of professional conduct in the book so that students will not need to flip constantly back and forth between this text and a statutory supplement. When studying a particular rule, students will find it worthwhile to review the entire rule and comments in another published source or on the Internet.[4] However, this text is structured so that it can be read without constant reference to a supplement.
- When we reproduce court opinions, we have inserted headings into them to help orient students to the logic of the opinions.
- We have included many bulleted lists and tables to clarify legal doctrines and other conceptual material.
- We have included photographs, diagrams, and cartoons. 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.

What's new in the second edition

Teachers who have used the first edition of this book will discover much that is familiar as well as several new elements:

- We have reorganized the 10 chapters of the first edition into 15 shorter chapters in this edition, making each unit easier for students to digest.
- We have added new material on client protection funds, the Sarbanes-Oxley law, the controversy over the federal government's requests for corporate waivers of the attorney-client privilege, lawyers as counselors, aggregate settlements, the special responsibilities of prosecutors, advertising by lawyers, the ethical responsibilities of judges, and law firms' use of temporary and contract lawyers and of lawyers who work in India and other countries.
- We have added several new problems that are sure to stimulate lively class discussion.
- We have expanded the contextual material on the "buried bodies" case in Chapter 3.
- We have updated material throughout the book to take account of recent cases, bar opinions, institutional developments, scandals, and scholarship.

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4. For example, students will find the full text of the Model Rules of Professional Conduct and the explanatory comments interpreting each rule at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Feb. 11, 2008).

- We have increased the font size to make this book easy on the eyes of both students and teachers.
- We have increased the number of New Yorker cartoons from 9 to 22.

We hope that you will have a lot of fun with this book, and 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

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, and some of the materials we have used were called to our attention by other casebook authors.

We have received invaluable encouragement and assistance from our editors at Aspen, especially Susan Boulanger, Melody Davies, Troy Froebe, Richard Mixter, Barbara Roth, Mei Wang, and Lisa Wehrle. Several colleagues have reviewed various drafts of the book and have given us amazingly insightful and detailed comments and suggestions. These include Russell Engler, Susan Saab Fortney, William Freivogel, Steve Goldman, Peter Joy, Ann Juergens, Arlene Kanter, Judith Maute, Ben Mintz, Ted Schneyer, and Brad Wendell. Many other people assisted us by answering questions and providing needed information. These include Kathleen Clark, Nathan Crystal, Susanna Fischer, Art Garwin, Stephen Gillers, John Gleason, Bruce Green, James Grogan, Alexandra Lahav, David Luban, Carrie Menkel-Meadow, Nancy Moore, Lucian Pera, Jennifer Renne, John Rooney, Roy Simon, Leah Wortham, and Ellen Yaroshefsky. We also benefited from excellent research assistance by Dori Antonetti, Noel DeSantos, Jessica Kendall, Connie Lynch, Keith Palfin, Jason Parish, and Michael Provost. Special thanks go to Jason Parish, who cite-checked the entire manuscript of the first edition of this book and

drafted the tables of cases, rules, and articles. He did all of this work with amazing precision and care. For contributions to the second edition, we would like to thank Erica Pencak, Ruth Snively, and Taylor Strickling.

We appreciate the support given us (in the form of leaves of absence from teaching and summer writing grants) by our employers, Catholic University and Georgetown University.

We would like to thank our children, Samuel Schrag Lerman and Sarah Lerman Schrag (to whom the book is dedicated). Both of them are exquisitely sensitive to moral and ethical issues. Our understanding of ethical problems has been much advanced by our many conversations with them about the dilemmas that they have confronted. These conversations have informed our analysis of several problems in this book.[5] Besides being our ethics tutors, Sam and Sarah sat through an untold number of conversations about the book at dinner, on vacations, and elsewhere. They also provided us with many good ideas about teaching and learning.

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5. The ethical problems that lawyers encounter are often similar to those faced by nonlawyers, including adolescents; both kinds of problems involve issues such as loyalty, confidentiality, truthfulness, and conflicts of interest. For example, suppose that you are a teenager and that your friend tells you in confidence about a serious problem that she is having (e.g., with drugs or depression). Should you consult your parents despite your promise of confidence? What if your parents might inform your friend's parents who do not yet know about the problem? If your friend might pose a danger to others, should you tell the administration at your school or talk directly to your friend's parents?

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