

CASES AND MATERIALS
ON THE
LAW GOVERNING LAWYERS

CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS, SECOND EDITION
JAMES E. MOLITERNO

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Dedication

“To Timothy, Emily, and Greg”

J.E.M.

Preface

The Professional Responsibility course (by whatever name it is called at your school) is about the law and ethics that govern relationships lawyers have with clients, other lawyers, the profession, the justice system, and the public. It is the only substantive law course in the typical law school curriculum that is about what lawyers do. In Torts, Contracts, and so on, you study law that affects clients' relationships with others and that lawyers interact with as an expert a step removed from the actual effect of the law. In Professional Responsibility, by contrast, the law you study is directly about your future role as a lawyer. In other words, Professional Responsibility is the course in which the lawyer is the "client," the one on whom the law studied actually operates. Arguably, Professional Responsibility is the most important course in the law school curriculum. At least it is the course whose subject matter will affect you most frequently and most directly.

The law governing lawyers is a complicated mix of many different areas of substantive law from many different sources. Most obvious are the organized bar's self-regulations, enforced through the courts (as ethics codes adopted in the states), but other law fields have important applications to the various relationships of which lawyers are a part. Agency, contract, tort, procedure and evidence law, among others, have specific applications to lawyers. All of these are interwoven in this casebook.

In particular, the organized bar, through the American Bar Association, has promulgated model ethics codes. The ABA models have dominated the law of lawyering because these models, with some modification, have been adopted by the states as law. These models have also dominated law school courses in Professional Responsibility. They have dominated law school teaching of the subject because they are easily accessible and because they serve as simple proxies for what the law of lawyering is in the states.

Between the two models, the Model Code and the Model Rules, the Rules now dominate. The Code was originally adopted by the ABA in 1969 and was amended from time to time thereafter. When the Rules were adopted by the ABA in 1983, the ABA ceased its effort to amend and update the Model Code. The Code is now almost entirely out-of-date in some respects. States whose law reflects the Model Code as their basis have gone from a high point of nearly fifty

to under three and falling. More than forty-five states now have adopted ethics codes based on the Model Rules. This casebook takes the approach with regard to the models that has come to be most prevalent in law school courses: The Model Rules are the basic document of study; the Model Code is used as contrast in particular areas.

All of this talk of ethics codes must not be read to mean that law other than the ethics codes is unimportant. On the contrary, the other significant trend in Professional Responsibility courses is toward the recognition that lawyers' conduct is governed largely by law outside the ethics codes and by control systems other than the bar disciplinary system. Malpractice liability, litigation sanctions, regulatory agency control, the evidentiary privilege, civil and criminal liability, among others, all serve to control lawyer conduct, most often with greater effect than the bar disciplinary process. That law, and those other systems, are a significant part of this casebook.

Preface to the Second Edition

The primary motivation for producing a second edition has been the important work of the ABA's Ethics 2000 Commission. The Commission has worked long and hard to accomplish its mission of revising the Model Rules of Professional Conduct. The work was largely completed in February 2002, when the ABA House of Delegates approved the Commission's Report, thereby amending the Model Rules in a number of significant respects. Of course, these amendments have affected the law governing lawyers and will undoubtedly have greater effect in the future. The amendments will almost immediately affect the law governing lawyers in some federal courts and agencies because by local rule many federal courts look to the ABA Model Rules as either their governing rules of ethics or as important guidance. Until states adopt the amendments, of course, their greatest impact will be inchoate. And it remains to be seen whether the states will adopt these amendments quickly (as they adopted the Model Code in the 1970s), slowly-but-surely (as they adopted the Model Rules in the 1980s and 90s), or not at all (as some states have declined to adopt past amendments and some of the original provisions of the Model Rules). However they are accepted by the states, the Ethics 2000 Commission revision of the Model Rules is important material to consider in the study of the law governing lawyers both because of the enormous energy and thought that the Commission has given to the project and because the new Model Rules will become the centerpiece text for the Multistate Professional Responsibility Bar Exam.

Interspersed through this second edition are various entries titled, "Notes on the February 2002 Amendment to Model Rule X." Through this device, the materials present all of the significant changes wrought by the work of the Ethics 2000 Commission. As the next few years pass, these entries may become more significant as states adopt or reject the new ABA approach to the particular issues.

Two critical topics facing the profession were left incompletely addressed by Ethics 2000: multidisciplinary practice and multijurisdictional practice. The latter is being thoroughly treated by the ABA Commission on Multijurisdictional Practice, having delivered its final report to the ABA for action at the 2002 annual meeting. Materials have been added to this edition that will allow classroom discussion of the main features of the multijurisdictional practice debate. Multidisciplinary practice presents perhaps the thorniest, weightiest, and most revealing issue currently facing the legal profession. Can the legal profession survive if it does not embrace multidisciplinary practice? Can it survive if it *does* embrace multidisciplinary practice? On no other question facing the profession are more divergent views held more strongly. Materials have been added to this edition to allow a classroom discussion of multidisciplinary practice issues. The international aspects of both issues loom large.

Not insignificantly, discussion problems have been added as well, allowing treatment of the material through class discussions of these hypotheticals.

Finally, the inevitable changes, re-editing of cases, and adding of notes and questions have occurred. I am grateful to those who have used the book and been kind enough to offer suggestions. I hope you will recognize your suggestions in the changes that have been made.

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