

ASPEN CASEBOOK SERIES

**Regulation of Business
Problems of Business Ethics**



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Ninth Edition

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Why It's Important: A Preface for Students

You're busy. I know. Reading a preface is not high on your to-do list. But this one is written with you in mind. And short. So give me five minutes. Maybe ten.

Four quick points:

First, this casebook has a personality, a voice: mine. In that way, it may be unlike other casebooks. Its voice is conversational. And here and there, it takes a position directly, not only through the views of others or with rhetorical questions.

Second, this book contains many problems. Some are one paragraph, others a page or more. Many are based on real dilemmas I've heard or read about. Mostly, the problems are dense and messy, like life. They arose yesterday or will arise tomorrow, in one form or another.

Third, the book contains many short essays (a/k/a, notes). The legal ethics world (indeed, Lawyerland generally) must be mapped through stories along with doctrines. Detail offers nuance and variation and a context within which to test doctrine.

Fourth, this is your second most important class. *Yeah, right*, you think. It's a bold statement, and here's why I make it. Say you become an antitrust lawyer. Your criminal procedure class will fade into a remote corner of memory. Or if you become a criminal defense lawyer, you won't need to know much copyright. But whatever work you do as a lawyer, you will practice what you learn in this book and the class that assigns it every day of your professional life. Other courses teach lessons that bear on a client's legal problems. This course is about you and your work. There are two exceptions: Knowledge of these rules enables you to protect clients against misconduct of other lawyers. And representing law firms in trouble (or needing advice to avoid trouble) is a growing practice area.

As you approach the starting line of your legal career, most important are the rules that constrain your behavior. You will want to know—in such areas as competence, fees, marketing, confidentiality, conflicts of interest, negotiation, and the client-lawyer relationship—what may or must you do or not do with confidence that your conduct will not land you before a disciplinary committee, create civil liability, invite court sanction, forfeit your fee, or damage your reputation. “Ethics,” while a

useful term, does not accurately describe these lessons. The law business is heavily regulated, and the regulations have grown more complex in recent decades. This has led to new terms — *the law governing lawyers* and *the law of lawyering*—lest anyone be fooled by the word “ethics” into believing that the subject is simply about how to be a good person (although there’s some of that too).

Avoid two errors. First, do not believe that the right way to act — toward clients, courts, adversaries, or colleagues — will be intuitively obvious. Sure, sometimes it will be. But no one needs to teach you not to lie or steal, and certainly not with hundreds of pages of text. The rules here may be obscure; they may even be counterintuitive, and they can be subtle in application. Application in turn calls for judgment, and judgment is mostly learned through experience. Indeed, much of what lawyers do for clients is make judgments — about where the law is and is likely to go, what a particular judge or court will do in a pending litigation, and the risks of a contemplated strategy or decision. You develop that judgment across years of practice, but it begins now.

Second, you don’t want to make the mistake of assuming that your employer will provide all the protection you need. Many law offices do have systems to detect and avoid mistakes and they have people to whom lawyers can turn for advice. But the best systems and resources are still not perfect, and anyway, the professional responsibility of a lawyer cannot be handed to others. Furthermore, you need to know enough about the subject to be aware when you have a problem that requires advice.

A broader perspective from which to view the laws and rules that regulate lawyers looks at their effect on civil society and the administration of justice. These rules and laws help define the nature and work of the entire profession and therefore the behavior of our legal institutions and the quality of our social justice. For example, a rule that restricts how lawyers may advertise will influence the conduct of individual lawyers. But it will also affect public awareness of legal rights and lead to price competition. A rule that prohibits or requires a lawyer to reveal a client’s confidential information to protect others from harm will influence a lawyer’s own behavior, but it may also affect what clients are willing to reveal. In short, many rules have social and political consequences (sometimes profound ones) beyond any single representation or practice.

As you enter law practice, you may be more interested in such questions as “How do I behave?” and “How can I stay out of trouble?” than in asking the broader question, “What are the consequences to civil society and justice if one or another version of a particular rule is applied to America’s one million licensed lawyers?”* Still, the last question is

* I say one million licensed lawyers but estimates vary. Some sources count licensed lawyers, some count practicing lawyers, and others count law school graduates. Some count the total number of licensed lawyers, but double count lawyers licensed in more than one state. A million sounds about right, though. And if the figure is 50,000 more or less, does it matter?

important and, if not as immediate, will surely arise in the course of your professional life. You may someday be in positions to resolve the broader questions—as manager of a law office, member of a bar committee, legislator, government lawyer, or judge.

Asking about the consequences to justice and civil society if a rule is resolved one way rather than another—asking which resolution is best—engenders different, sometimes vehement, responses from practicing lawyers and the public. Why is that? In part, it is because the answers depend on political and moral values more fundamental than the “ethics” that inform various codes. And, of course, the political and moral values of different people differ. In addressing these questions, we should also try to be honest about the interests we mean to protect. Those of society generally? Those of a particular client population? The legal profession’s? Our own? Law school and law practice, it is sometimes said, encourage more rather than less self-interest in answering the questions raised here. In transition as you are, your answers may vary from what they would have been before you entered law school, and they will likely be different five years on.

If you are using this book in a law school class, you are likely in Generation Y, whose members came of age after 2010. I believe that you will enter a profession in greater transition than any of your predecessors in U.S. history. Three interrelated forces are buffeting the law industry: technology, globalization, and competition both from abroad and from new sources of legal advice. These forces are upsetting a lawyer regulatory system that served the United States well for a century, a system based on geography. Traditionally and still lawyers are licensed by a place and had their clients and office in the same place. But technology has disturbed the utility of geography as an organizing principle. The Internet does not recognize borders. And technology and globalization have facilitated the efforts of others to make money in the law industry and the ability of businesses here and abroad to profit from U.S. law work by doing work once done by U.S. lawyers at much lower cost.

It is still too soon to know how the changes will play out, so there is not much we can say about them in this edition. But they are acknowledged in Chapters 12B and 14B and you must be aware of them as you plan for the future.

* * *

This is the ninth edition of the book. I started on the first edition in 1982 shortly before the birth of the first of two amazing daughters to whom all editions have been dedicated. I delivered the manuscript to the publisher a day after the birth of the second daughter in 1984. Since then, I spend an hour or two each week planning the next edition. The daughters are now out in the world but the book still resides at home.

You think a lot about what a casebook is and can be when you live with one so long. The book's primary function is to provide information, but that's just the beginning. The minimum editorial task would allow me to pick good cases and other materials, edit them, order them logically, add interstitial notes and questions, and put the product between covers. Voila! A casebook. Of course, one must begin this way, but if nothing more were possible (even if not required), I wonder if I would have kept at it so long. Luckily, more is possible while still serving the book's objective — to teach the subject.

For starters, we can strive for humor, variety, clarity, and good writing. The enterprise will not likely support the extended charm of a Hazlitt essay or the quirkiness of a Vonnegut novel — assuming counterfactually that I had the talent to achieve either (in which case I'd probably be in a different line of work) — but a casebook is a book, after all, and it should have an authorial presence in so far as possible. That's what makes the book mine.

The legal profession is a culture of storytellers and stories. Harrison Tweed (1885-1969), a president of the New York City Bar Association, once said: "I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind." These words are inscribed on a wall at the Association's headquarters. As a young lawyer, I thought Tweed was overly effusive, if not downright sanctimonious. At that time, I was inclined to agree with the character in George Bernard Shaw's play *The Doctor's Dilemma* who said that "all professions are conspiracies against the laity." To some extent, I still find Tweed excessive and Shaw's character apt, even if hyperbolic. But now I think Tweed had a point. The profession and its members *are* fascinating to study, and its stories *are* fascinating to hear.

As with the study of any culture, understanding the bar requires density of information. We must know a thousand small details about the actual life within the society of lawyers, not merely a few doctrines and theories, if we are going to understand Lawyerland truly. I have tried to include some of those details here.

I invite your views on the book. What was dull? What worked well? How can the book be improved? Have you encountered a quote or story somewhere (true or fictional) that you think nicely highlights an issue? This edition is indebted to past users who alerted me to interesting sources. Send e-mail to stephen.gillers@nyu.edu. All comments will be gratefully acknowledged.

Okay. My ten minutes are up. Onto Chapter 1.

Stephen Gillers
February 2012

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This ninth edition builds on the first eight and, therefore, reflects the work of New York University School of Law students whose energies contributed to its ancestors. They are: Lisa C. Kerr, NYU LL.M. class of 2009 (eighth edition); Anderson T. Bailey, New York University School of Law, J.D., class of 2006 (seventh edition); Howard Anglin, Cindy Hwang, and Eric R. Womack, J.D., class of 2003 (sixth edition); Leonard A. Ho and David F. Levine, class of 1999 (fifth edition); Julie C. Brain and Maria Lopotukhin, class of 1995 and 1996, respectively (fourth edition); Mary E. McDonald, class of 1993 (third edition); Laura Gilbert and Barbara

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My colleague Norman Dorsen was my co-author on the first two editions of this casebook. Other demands on his time caused Professor Dorsen to trust succeeding editions to my sole care. Nevertheless, in countless ways this edition, like its predecessors, benefits from Professor Dorsen's early work and advice.

My understanding of the subject of this book and whatever knowledge it may impart has been immeasurably enhanced by my conversations with one person whom I mention last but am grateful to most: Barbara S. Gillers, Esq., whose decades of professional work on lawyer regulation — in a government office, private practice, and with bar associations local and national — put her on the front lines of most of the developing issues recounted here. She has left private practice, but not the field. She now teaches about the law and ethical rules governing lawyers and judges as an adjunct professor at the law schools of both New York University and Columbia University.

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