EDITED BY
LESLIE C. LEVIN & LYNN MATHER

LAWYERS IN PRACTICE

ETHICAL DECISION MAKING IN CONTEXT

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Preface

There is a tendency in law schools and the legal profession to look at lawyers' conduct from a narrow legalistic perspective—that is, do lawyers follow the rules and laws that govern them, and if not, how can we get them to do so? This focus on the law of lawyering ignores the reality that lawyers are people, too (notwithstanding lawyer jokes to the contrary), and their conduct is inevitably affected by a host of factors that have little to do with the substantive law. This book investigates these factors along with the governing law to understand what influences lawyers' conduct.

By examining lawyers' decision making in the context of their day-to-day practices, the book also fills a gap in sociolegal research by fleshing out many specialty areas of lawyers' work that have not been systematically explored. The book brings together leading and emerging legal scholars and social scientists (including an anthropologist, sociologists, and political scientists) to describe and explain lawyers' conduct in different areas of legal practice with a particular focus on ethical dilemmas. Because this research field is still growing, we are not able to cover in this first volume all the practice areas we would like to address. Nevertheless, our contributors describe lawyers who work in a wide range of settings, including private practice, government service, legal services, and in-house counsel, and who represent individuals, organizations, and the public interest.

The book should appeal to anyone interested in the everyday work of lawyers. Most obviously, it will interest law students, lawyers, judges, and legal regulators. It is also designed for undergraduate and graduate students in courses in sociology of law, law and society, and legal studies, and for anyone considering a career in law.

In order to generate conversation about lawyers' decision making and to provide feedback on the authors' research, we held a conference at the University at Buffalo Law School in April 2010. We would like to thank the Baldy Center for Law and Social Policy at the University at Buffalo and the University of Connecticut for funding this conference. We are grateful to the Baldy Center for logistical support and, in particular, to Laura Wirth, assistant director of the Center. The book benefited from the comments of conference speakers whose views are not represented here: Milton Regan, Tanina Rostain, and Eli Wald. We also thank Buffalo faculty, students, and other attendees who participated in the discussion.

Most important, we want to thank all of our authors. Each of their chapters constitutes an important contribution to the literature on the legal profession. They uncomplainingly responded to numerous requests for revision, often under very tight deadlines. We also thank the many lawyers—well over 1,000 overall—who cooperated with our contributors by answering their survey questions, sitting for lengthy interviews, or allowing themselves to be observed.

The book is much improved as a result of careful reading and suggestions from Richard Abel and two anonymous outside reviewers for the University of Chicago Press. We especially thank John Tryneski for his encouragement and wise counsel, and Rodney Powell for his fine attention to detail.

Finally, Lynn Mather would like to thank Sue Martin for her excellent administrative support and the Baldy Center for Law and Social Policy for financial assistance. She also thanks Mike for his love and understanding for the many occasions on which this project took over our lives. Leslie Levin is grateful to the University of Connecticut School of Law for financial assistance and to Claudia Norsworthy for administrative support. She also thanks Steve, David, Rachel, and Adam Kaplan for knowing when to act as cheerleaders and when to suffer in silence.

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Contents

Part I

Introductory Perspectives on Ethics in Context

CHAPTER ONE

Why Context Matters

Lynn Mather and Leslie C. Levin

How do lawyers resolve ethical problems in the everyday context of law practice? Does zealous advocacy mean the same thing for corporate litigators, criminal defense attorneys, and divorce lawyers? How are lawyers' decisions influenced by their roles within an organization, such as in-house counsel or law firm associate? What do disclosure requirements mean in practice for prosecutors—or for securities lawyers? This book examines lawyers' ethical decision making in context, that is, through close attention to different office settings and practice areas. Lawyers now specialize in specific legal fields more than ever before. Hence, the research reported here deconstructs the general obligations of professional responsibility to show how lawyers specializing in different areas of law understand them. While there are continuities across fields, we also find that each practice area has its own particular norms and challenges, shaped not only by substantive, procedural, and ethical legal rules, but also by clients, practice organizations, economics, and culture.

Rather than address the professional responsibility of lawyers primarily through professional rules and the substantive "law of lawyering," or through individual case studies, this book combines empirical research on lawyers with analysis of ethical issues that arise in particular areas of legal practice. A central feature of the volume is its interdisciplinary nature, in which lawyers' decision making is firmly embedded both in the professional world of regulation and the sociological and economic setting of the workplace. By situating lawyers in their everyday practices, this book also builds on existing research to explore how organizational, economic, and client differences across the legal profession actually matter for the work that lawyers do and the decisions that they make.

A generation of sociolegal scholarship has pointed out the implications of legal stratification for the construction of bar rules, differences in the meaning and enforcement of ethical codes for different segments of the bar, the ways in which personal identity intersects with professionalism, and the limited ability of a single set of professional rules to promote appropriate conduct in work settings as diverse as those that exist within the legal profession (Wilkins 1990; Nelson and Trubek 1992). Yet the organized bar and many law schools continue to focus their discussion of legal ethics primarily on bar rules of professional conduct. That approach, this book suggests, is a serious mistake. Those rules are extremely general, unevenly understood and enforced, and sometimes at odds with the realities of legal practice. But that does not mean that lawyers lack normative ideals and constraints. We agree with Robert Nelson and David Trubek that legal professionalism exists "not [as] a fixed unitary set of values, but instead . . . [as] multiple visions of what constitutes proper behavior by lawyers" (1992, 179). Through empirical studies of ethical decision making by lawyers in different practice areas, this book provides a partial answer to the challenge Nelson and Trubek posed: "to explain how different professional ideologies emerge in various contexts and with what effects" (179).

To identify and understand lawyers' professional ideologies and the informal norms that shape their conduct requires engagement with particular "communities" of legal practice—"groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards" (Mather, McEwen, and Maiman 2001, 6). The ideals and norms of professionalism vary across networks or groups of lawyers practicing in different areas of law, among lawyers in the same practice area but with different clienteles, between large law firms and small firms, and across firms with different law firm cultures (Mather, McEwen, and Maiman 2001; Carlin 1966; Kelly 1994). Definitions of acceptable lawyering conduct are constructed by lawyers within their offices; in interactions with one another in negotiations and litigation; in contacts with agencies; through appearances before judges; as well as through professional rules, disciplinary boards, and other third parties that regulate lawyer conduct. Legal professionalism, in other words, emerges from the bottom up as well as the top down, and indeed, the most powerful normative constraints on lawyers likely stem from their clients, colleagues, and practice organizations and not from edicts of the organized bar.

In order to examine the ethical decision making of lawyers, it is necessary to fully understand—in a fundamental sense—the context in which they work.

Jerome Carlin (1966) was one of the first to do so when he studied the social setting of lawyers' work and its impact on lawyers' ethics. He described significant differences in the work lives and ethical responses of New York City lawyers in large firms and those in solo and small firm practice. Carlin documented the stratification of the New York City bar and found that the type of clients a lawyer serves affected the lawyer's ability to conform to ethical standards, as did the lawyer's work setting (166–167). In a similar vein, but with a focus on geographic community rather than firm size, Joel Handler (1967) studied the bar in a middle-sized midwestern city. He showed how the continuing relationships and homogeneity of the local community powerfully affected lawyers' conduct and their understanding of their professional responsibilities. Donald Landon's (1990) account of rural lawyers added further to our knowledge of how geographic context can shape lawyers' norms and behavior.

John Heinz and Edward Laumann's (1982) study of the Chicago bar provided even more information about the differences in the backgrounds, work, incomes, and status of urban lawyers. In particular, they emphasized the importance of clients—organizational or individual—to distinguish the "two hemispheres" of the legal profession according to the type of client a lawyer represents. In a follow-up survey conducted in 1995, Heinz et al. (2005) found that almost two-thirds of Chicago lawyers' time was devoted to working for large organizations (including work for nonbusiness entities such as labor unions and the government), while only 29% was devoted to individuals and small business clients. David Wilkins revisits the two hemispheres thesis in chapter 2. He explains how this evidence on contextual differences among lawyers led to his 1990 proposal for context-specific rules for lawyer regulation. Wilkins also identifies six major trends in the profession that have emerged in recent years. These trends—lawyer mobility, technology, unbundling and outsourcing of legal tasks, new organizational forms for providing legal services, institutionalization of pro bono, and globalization—break down and complicate some of the contextual distinctions among groups of lawyers. Wilkins also cites more recent Chicago data showing that substantive or skill-type specialization now plays a greater role than it did 20 years earlier in explaining differences in the bar. His conclusions point to the vital importance of understanding context when thinking about the ethical decisions lawyers make in their everyday work.

Substantive legal specialization provides the organizational framework for this book in order to highlight the contextual differences and informal norms

that influence lawyers' decision making in different communities of practice. The idea that attorneys in different fields of law might have different ethical standards and display different ethical conduct is something of a truism, but it receives some support in reputational rankings of Chicago lawyers by practice area (Heinz and Laumann 1982; Heinz et al. 2005). Evidence of ethical differences also comes from observations of lawyers about practitioners in their own areas of practice. Data from 5,892 Michigan alumni surveyed from 1997–2006 (including graduates 5, 15, 25, 35, and 45 years out of law school) found considerable variation in lawyers' responses to the following: "The lawyers with whom I deal (other than those in my own office) are highly ethical in their conduct."[1] Although only 57.1% of lawyers overall agreed (mildly to strongly) that their peers were highly ethical, more than 65% of attorneys in the areas of energy, securities, real property, and estates viewed lawyers in their fields as highly ethical. By contrast, less than 50% of lawyers in the areas of criminal (prosecution and defense), labor, antitrust, communications, and civil rights/discrimination law agreed that lawyers with whom they deal outside their offices were highly ethical.

While the Michigan survey data reveal differences by field of practice in lawyers' perceptions of their peers, no definition of "ethical conduct" was provided to respondents. Thus, they relied on their own definitions, so it is possible that lawyers who choose to work in different fields of law bring different ethical standards with them. Alternatively, it could be that lawyers were all using the same bar definition of ethical conduct (or perhaps their own moral sensibility) so that the resulting variation reflects real differences across areas of practice. Such speculation raises the crucial question Elizabeth Chambliss explores in chapter 3, "Whose Ethics? The Benchmark Problem in Legal Ethics Research." Chambliss identifies the difficulties in empirically assessing lawyers' ethics: "Should lawyers' ethical standards and conduct be compared to ordinary (lay) morality? To the formal rules of legal ethics? Or to the prevailing professional norms within a specialized area of practice (which may or may not be consistent with the formal rules)?" (chapter 3, 48). These questions, as she explains, have profound theoretical and practical implications for research on lawyers' professional conduct.

1. The survey was sent annually to Michigan law graduates over 40 years, with an average response rate of 67%. Respondents used a 7-point scale to indicate the strength of their agreement with the statement. For further details and analysis of responses to this question, see Mather (forthcoming). We thank David Chambers, co-director of the Michigan alumni survey, for making the data available for use in this chapter.

Before proceeding, it is important to define what *we* mean by "ethical" decision making. David Luban identifies four strands of legal ethics: the hard law of ethics, ethics of role, ethics of professionalism, and ethics of honesty (Luban 2005). When lawyers talk about "ethical" conduct, they often mean the first strand—conduct that is permitted or prohibited by the formal rules of professional responsibility (Suchman 1998; Levin 2004). Somewhat related to this conception is the second, the role morality lawyers assume when they act as one-sided partisans for clients, zealously advocating for them within the adversary system (Wasserstrom 1975). The third strand considers what values and conduct are expected of lawyers (and lawyers expect of themselves) as professionals, balancing obligations to the public and their clients with the need to make a living. Finally, legal ethics consists of basic honesty and truthfulness, what Chambliss refers to in chapter 3 as "ordinary (lay) morality" (48). We include in our definition of ethical decision making all four of these strands. The formal rules of professional conduct and the law of lawyering provide a useful starting point for analysis, along with the concept of role morality. But both "the rules" and lawyers' conceptions of professional role leave considerable room for individual discretion. Consequently, we define ethical decision making much more broadly to include the ways in which the rules and norms of lawyering, individual values, and considerations of justice, clients, and practice organizations, shape individual conduct.

With this broad definition in mind, we deferred to our contributors to select which ethical issues to address. Our only other criterion was that the ethical dilemmas be common or particularly troubling in the area of practice about which they were writing. As a result, the dilemmas discussed in part 2 of this book range from narrower ones involving possible violations of law or formal rules (e.g., responding to a lying client, how to advertise professionally, how much disclosure to provide an adversary) to broader ones of professional role and identity (e.g., the corporate litigator's obligation to the truth, the role of in-house counsel, the accountability of public interest lawyers). Each chapter describes the resolution of the ethical dilemma *from the practitioners' point of view in that particular area of practice.* Our goal in this book is to help students and scholars understand *how and why* lawyers make the decisions they do, invoking or ignoring formal rules, succumbing to self-interest or furthering the public good, acting in ways they consider moral or not. Such knowledge, we believe, could increase ethical self-awareness in lawyers as well as provide information to help construct more effective systems of professional regulation.