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# **THE LAW GOVERNING LAWYERS**

**National Rules, Standards, Statutes, and  
State Lawyer Codes**

**2011-2012 Edition**

**Susan R. Martyn  
Lawrence J. Fox  
W. Bradley Wendel**



**Wolters Kluwer**  
Law & Business

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## **National Rules, Standards, Statutes, and State Lawyer Codes**

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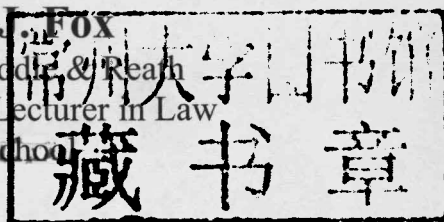
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## To the Reader

This volume introduces you to national standards (the American Bar Association's Model Rules of Professional Conduct, the American Law Institute's Restatement of the Law Governing Lawyers, and selected federal statutes and rules) to illustrate the growing body of law that governs lawyer conduct. We focus on these national standards because they provide the template for most state law.

Most of these documents appear in full, but others have been edited for clarity or for length. We offer here a guide to our editorial style.

1. We include the full text of the **ABA Model Rules of Professional Conduct** at pp. 6-101, along with the ABA Correlation Tables at pp. 102-108.
2. We prepared the **charts** that compare state lawyer code provisions at pp. 109-123. The rules cited in these charts are current through March 1, 2011. If you notice a discrepancy between any of the rules cited in these charts and the rules in a particular jurisdiction, please inform the publisher or send an e-mail to [susan.martyn@utoledo.edu](mailto:susan.martyn@utoledo.edu).
3. We include the full text of the Ethical Considerations (ECs) and Disciplinary Rules (DRs) of the **ABA Model Code of Professional Conduct** at pp. 124-162. We have, however, deleted all of the Model Code's voluminous footnotes.
4. We offer the full text of the black letter sections of the American Law Institute's **Restatement of the Law (Third), The Law Governing Lawyers** as well as a large number of selected comments and illustrations at pp. 163-287. We include comments and illustrations that either expand on coverage in the lawyer codes or address issues not covered by the lawyer codes at all, such as the evidentiary privileges. Comments and illustrations retain their original numbers or letters. We use ellipses to indicate edits within a comment or illustration but do not include them to designate completely omitted comments or illustrations.
5. We reproduce a few relevant **federal statutes, regulations, and rules** at pp. 289-317 and use ellipses to indicate edits within a statute or rule provision.
6. We include the entire **ABA Model Code of Judicial Conduct** at pp. 318-344. We have deleted only a few footnotes, and the rest retain their original numbers.
7. The CD in the back of this volume includes access to the text of the print volume as well as the full text of **each jurisdiction's lawyer code**, current through March 1, 2011. We have tried to ensure that the most up-to-date versions of the rules are included, but in some cases it was difficult to obtain this information. If you notice a discrepancy between the version of the rules on the CD and the rules in a particular jurisdiction, please inform the publisher or send an e-mail to [bradley-wendel@lawschool.cornell.edu](mailto:bradley-wendel@lawschool.cornell.edu).

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- The American Bar Association for permission to reprint in the book and to link on the CD to the *ABA Model Rules of Professional Conduct 2009*, the *ABA Model Code of Professional Responsibility 1981*, and the *ABA Model Code of Judicial Conduct 2008*. Copies of *ABA Model Rules of Professional Conduct 2009*, *ABA Model Code of Professional Responsibility*

1981, and ABA Model Code of Judicial Conduct 2010 are available from the American Bar Association, Service Center, 321 North Clark Street, Chicago, IL 60610, 1-800-285-2221, or at [www.abanet.org](http://www.abanet.org).

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- Thanks are also due to the Legal Information Institute at Cornell Law School for providing the text of many state rules.

We hope you find these sources of the law governing lawyers the basis for an interesting and enlightening law study.

Susan Martyn, Larry Fox, Brad Wendel March 2011



# **The Law Governing Lawyers**

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# INTRODUCTION: UNDERSTANDING AND FINDING THE LAW GOVERNING LAWYERS

## Understanding the Sources and Structure of the Law Governing Lawyers

The title of this volume mirrors the title of the Restatement, and, like the Restatement, refers to two intricate bodies of law: lawyer codes that are tied to professional licensure and general law that has been applied to lawyer conduct, such as agency, tort, contract, and trust law. Each body of law is linked to distinct legal consequences (professional discipline for violation of lawyer codes and malpractice, disqualification, fee forfeiture, and other judicial remedies for other breaches of professional duty). The lawyer codes and other law have developed in parallel and have cross-fertilized each other over the past century.

For example, the professional obligations of communication and competence were first articulated in malpractice cases, but are now restated in several lawyer code provisions. Confidentiality, which first appeared in the attorney-client privilege in evidence law, now exists as an independent professional obligation in every lawyer code. Similarly, the lawyer code loyalty obligation that requires lawyers to avoid and resolve conflicts of interest originated in agency law, which provided distinctive remedies, such as constructive trust, breach of fiduciary duty, and disqualification.

Today, courts look to the historical roots of the lawyer codes in general law to understand the application of lawyer code provisions in lawyer disciplinary cases. At the same time, they refer to and rely on lawyer code provisions to understand lawyer obligations that arise in contexts beyond professional discipline, such as malpractice or ineffective assistance of counsel, because lawyer codes provide a modern articulation of a common law rule applied to lawyer conduct. To further understand this interrelationship, we untangle and explain the basic sources of the law governing lawyers and then provide you with a step-by-step guide to finding jurisdiction-specific law.

### Lawyer Professional Codes

Lawyer professional codes govern the conduct of all lawyers admitted to practice law. Violation of any provision of an applicable code subjects a lawyer to professional discipline, with sanctions ranging from disbarment, suspension from practice, and fines, to public and private reprimands. A lawyer charged with a disciplinary violation has access to a hearing (most often before an administrative body designated by the highest state court), and a right to appeal, which usually results in a written court opinion.

Over the past twenty years, most jurisdictions have patterned their lawyer codes on the American Bar Association's original 1983 Model Rules of Professional Conduct. In 2002 and 2003, the ABA enacted extensive amendments to the Model Rules in response to the Ethics 2000 Commission's recommendations. The ABA's recent amendments have stimulated individual jurisdictions to consider similar changes. A good number already have enacted revised rules and others are somewhere in the process.

Before the 1983 Model Rules, nearly all jurisdictions adopted a version of the previous Model Code of Professional Responsibility, first recommended in 1969. The Tables at page 102 of this volume correlate related sections of the Model Rules and Model Code. Before 1969, each jurisdiction followed the ABA Canons of Professional Ethics, first promulgated in 1908. For judges, the ABA has recommended a Model Code of Judicial Conduct, which most jurisdictions have used to develop their own Judicial Codes.

## The Restatement

Published in 2000 after thirteen years of development, the Restatement of the Law (Third), The Law Governing Lawyers addresses nearly all the law governing lawyer conduct, including lawyer codes, common law, and statutes. It is organized by topic and covers most issues addressed by lawyer professional codes, with the exception of advertising and solicitation. It also includes in-depth coverage of some issues not specifically governed by lawyer codes, such as civil liability, the attorney-client privilege and work-product doctrine. Extensive comments and illustrations as well as Reporter's Notes, which include citations to relevant primary and secondary authority, follow each Restatement section.

While the Restatement was being developed between 1988-1999, many court opinions, articles, and books cited to section numbers of tentative drafts. The final text renumbered the section numbers consecutively, changing some of the earlier cited section numbers. The chart at page 287 of this volume will enable you to move between section numbers in the Restatement drafts and the final Restatement. You can search the full text of the Restatement on Westlaw or Lexis. Be careful to select the final version, not the archive database, which contains the numerous tentative drafts.

## Treatises

Treatises can help you understand the history, development, and current status of the law governing lawyers. We list some of these resources below in alphabetical order. Be careful to note the date of any volume you consult, because recent changes in lawyer code provisions or common law may create a different result or issue. Jurisdiction and practice specific treatises also may assist you. Increasing numbers of law review articles and ALR annotations also address a wide variety of issues about lawyer conduct. You may find one or several directly on point.

- A. ABA, *Annotated Model Rules of Professional Conduct* (6th ed. 2007).

Organized by Model Rule number, this series of case annotations provides representative examples of court and ethics opinions as well as selected citations to secondary authorities. A new edition is published every few years. Two tables at the end of the volume provide parallel tables between the ABA Model Rules and the ABA Model Code.

- B. ABA/BNA *Lawyer's Manual on Professional Responsibility* (2001).

3 loose-leaf volumes, monthly updates.

This resource is divided into three volumes. The first, called the "Manual," is organized by topics that generally follow the order of the Model Rules. Each topic begins with a short "practice guide," followed by "background" and "application" sections. Bibliographies follow each topic. The Manual includes a topical and case index and is available on Westlaw. The second volume includes the full text of ABA ethics opinions and some state ethics opinions. Other state opinions are described in annotations. The third volume contains "Current Reports" and an index to these reports; both are published every two weeks. The current reports are the most complete updates to case law, rules changes, and ethics opinions.

- C. Lawrence J. Fox and Susan R. Martyn, *Red Flags: A Lawyer's Handbook on Legal Ethics* (ALI-ABA 2d ed. 2010).

Shorter than other resources, this book offers easy access to basic information. Topics are presented in the order a practicing lawyer might encounter them, from identifying client-lawyer relationships and fees, to fiduciary obligations, the limits of the law, and remedies. Brief questions and answers introduce each topic, followed by short footnoted



## Introduction

essays about relevant law. The book includes several charts that compare state lawyer code provisions. The last chapter, “When You Need to Seek Additional Advice and Perspective,” warns about the “ultimate red flags” that can ensnare unsuspecting lawyers.

- D. Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* (Aspen 3d ed. 2001). 2 loose-leaf volumes, yearly updates.

This resource is organized topically, following the order of the Model Rules of Professional Conduct. The treatise covers recent developments in the law of lawyering, including citations to the Restatement, ethics opinions, and case law. The authors discuss multiple remedies, including malpractice, disqualification, discipline, and fee forfeiture. Each section includes illustrations that apply the law governing lawyers to concrete situations.

- E. Thomas D. Morgan, *Lawyer Law* (ABA 2005). 825 pages.

Morgan compares the ABA Model Rules with the ALI Restatement (Third) of the Law Governing Lawyers in six subject matter chapters, broken into over 200 topics. Each topic includes the text of relevant sections of the Model Rules and Restatement (including comments and illustrations) as well as citations to representative cases.

- F. Ronald D. Rotunda & John S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (ABA 2009).

This treatise follows the organization and logic of the Model Rules. It includes footnotes with citations to cases, Restatement sections, the predecessor Model Code of Professional Responsibility, and ABA Ethics Opinions. Appendices include 12 ABA Model Rules or Standards, such as Trust Account Overdraft Notification, Fee Arbitration, Lawyer Disciplinary Enforcement, and Aspirational Goals for Lawyer Advertising.

- G. Charles W. Wolfram, *Modern Legal Ethics* (West 1987).

A comprehensive hornbook organized by topic. Though dated, it is especially helpful for understanding the historical development of the law governing lawyers, as well as comparisons between the Model Code and Model Rules provisions. Appendices include parallel tables between the ABA Canons, ABA Model Code, and ABA Model Rules.

## Finding the Law Governing Lawyers

Once you understand the various sources of the law governing lawyers, you can find and apply relevant law. Researching a legal ethics issue is comparable to any legal research, but requires that you understand the importance of finding both jurisdiction-specific lawyer code provisions and general law applied to lawyers. We list below the specific steps you can follow to find and understand this law, and emphasize some additional specialized resources and helpful research techniques.

### Step One: Spotting All of the Issues

When a problem involving the conduct of lawyers arises, you must first identify all of the relevant issues. Your legal ethics or professional responsibility course should help you do this by familiarizing you with sections of the lawyer codes that speak to lawyers' obligations, such as competence, confidentiality, and conflicts of interest, and by exposing you to various legal

consequences, such as professional discipline, malpractice, and disqualification. Consulting a treatise or the Restatement also can help you spot issues. When you identify an issue, stay open to the possibility that additional professional rules or other legal remedies also may be relevant to your inquiry.

## Step Two: Finding Lawyer Code Provisions

Once you spot legal ethics issues, you should recall that both lawyer code provisions and general law might apply. Even if you are not directly concerned with professional discipline, a lawyer code provision may speak to the underlying issue, and courts often cite code provisions in decisions involving other judicial remedies, such as disqualification, malpractice, or ineffective assistance of counsel. For this reason, you should always begin your search by finding any applicable lawyer code provisions.

The CD attached to this volume includes the full text of each jurisdiction's lawyer code. Because the judicial branch of government regulates lawyers, lawyer codes are found in state court rules. These court rules may often be found in a separate volume of a set of annotated statutes, as well as online at the website of the highest state court. On LEXIS or Westlaw, go to your state's court rules file ("XXRule" on LEXIS, "XXRules" on Westlaw, with "XX" being your jurisdiction's two-letter postal code). Most federal courts have adopted some version of the state court rules of the jurisdictions in which they sit. To find these lawyer codes, check each federal district court's local trial rules.

You may be surprised to find that your jurisdiction's code contains distinctive language or provisions not found in the ABA Model Rules. This occurs frequently, so never rely on the Model Rules (or Model Code) provisions alone. Further, nearly every jurisdiction has just completed or is in the process of reviewing its lawyer code. Be careful to identify the version of your jurisdiction's rules that applies to the conduct in question. To find the most recent version of a particular jurisdiction's lawyer code, go to <http://www.abanet.org/cpr/links.html> or <http://www.law.cornell.edu/ethics/>. If you are not sure when a particular code applies, check on your state bar or state supreme court website.

## Step Three: Identifying Judicial Remedies

When you have found relevant lawyer code provisions, you should turn your attention to the other part of the law governing lawyers: general common law and statutes that provide for additional obligations and remedies beyond professional discipline. Judicial remedies available to both clients and non-clients are catalogued in Sections 6, 51, and 56-57 of the Restatement. These consequences beyond professional discipline may crop up in your initial research, but often will require a specific search by topic, such as "disqualification," "fee forfeiture," "constructive trust," "malpractice," "fraud," or "attorney-client privilege."

Reference to cases or treatises may assist you in understanding your jurisdiction's view of these and other remedies. For some topics, a hornbook in a related area of law may come in handy. For example, a text on criminal procedure would help in understanding ineffective assistance of counsel, just as a treatise on evidence can assist you in understanding the finer points of the attorney-client privilege or work product doctrine.

## Step Four: Uncovering Case Law

After you have identified the relevant lawyer code provisions and common law rules and remedies, you can begin to search for cases that apply and construe these rules. Most instances of professional discipline result in written court opinions, which you can find in annotated volumes of court rules or by using other standard research techniques. You can easily start an online search by using the number or text of a relevant lawyer code provision. Once you have found some cases construing a lawyer code provision, be sure to search for cases construing parallel provisions from earlier or later lawyer codes. You also can check Shepard's Professional and

## Introduction

Judicial Conduct Citations, which collects citations to the ABA Model Code and Model Rules, Code of Judicial Conduct, and ethics opinions.

You also might begin your search with cases you have discovered in a secondary source. Professional responsibility treatises and the Restatement also can help you find cases, and are especially helpful in finding remedies and obligations in general law applied to lawyers. They also help when no prior authority exists in a given jurisdiction, or in identifying majority and minority rules. Before you decide to cite a treatise, the Restatement, or a case from another jurisdiction, be sure that the authority construes a lawyer code or common law or statutory rule similar to the one in your jurisdiction. If it addresses a judicial remedy, such as breach of fiduciary duty or disqualification, check what your jurisdiction has to say about the substantive and procedural requirements for that remedy.

### Step Five: Discovering Additional Guidance in Ethics Opinions

If you find no authority in your jurisdiction, or want to inquire about how the authority you have found may be construed or applied in the situation you face, ethics opinions can help. These opinions respond to lawyers' inquiries about the application of state rules to a proposed course of conduct. The American Bar Association has a rich tradition of addressing the application of its Model Rules to current issues in its ethics opinions. Most state and local bars have ethics committees that answer individual questions as well, often before they ever reach a court. Bar associations and disciplinary counsel in many states also offer ethics hotlines to answer questions or to get lawyers started on finding an answer. Although these opinions are not binding, courts are very reluctant to discipline a lawyer who complies with an ethics committee's advice. If you find an ethics opinion on point, be sure to search your jurisdiction's cases to see whether it has been addressed, approved, or disapproved by a court.

Ethics opinions are most easily accessed online. Most state bar associations have websites for their members, which often include the full text of recent ethics opinions. Many states also publish these opinions in state or local bar journals. Both LEXIS and Westlaw include ethics opinions, but neither service covers all jurisdictions. ABA ethics opinions can be found in both places, however. Here, the topical approach works well. For LEXIS, click on "Ethics"; for Westlaw, "Legal Ethics and Professional Responsibility." The menus that follow list the jurisdictions included in that service. Because ethics opinions construe and apply a given jurisdiction's lawyer code, search by using the text or number of a relevant rule. Remember that ethics committees usually do not address the rest of the law governing lawyers, so you will have to research other remedies, such as disqualification or malpractice, and other issues, such as the attorney-client privilege, on your own.

### Step Six: Putting Your Research in Perspective

To put your findings in perspective, you may need to compare the result in your jurisdiction to results in other jurisdictions. If your jurisdiction lacks authority, other states may have addressed the issue in lawyer code provisions, cases, or ethics opinions. If the result in your jurisdiction strikes you as odd or even wrong, other jurisdictions may agree and offer you the opportunity to clarify or change local law. Many courts find the Restatement especially helpful in addressing a new issue or application of the law.

Overall, courts increasingly view the law governing lawyers the way they view contract and tort law: as a generally agreed-upon set of legal rules, with distinctive nuances in each jurisdiction. Judges also understand the interrelationship between the lawyer codes and the general law applied to lawyers, so they often will refer to one body of law in addressing a remedy available in another. We hope the materials in this volume help you discover both.

# 2009 AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT

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- 7.5 Firm Names and Letterheads
- 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

## MAINTAINING THE INTEGRITY OF THE PROFESSION

- 8.1 Bar Admission and Disciplinary Matters
- 8.2 Judicial and Legal Officials
- 8.3 Reporting Professional Misconduct
- 8.4 Misconduct
- 8.5 Disciplinary Authority: Choice of Law

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**PREAMBLE: A LAWYER'S RESPONSIBILITIES**

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer