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Legal Ethics

Kauffman • Rybicki

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Kent D. Kauffman
Erin Elizabeth Rybicki

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Kent D. Kauffman and Erin Elizabeth Rybicki

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This edition is dedicated to my wife Karen, and my son Reagan.
The first provides inspiration and the second perspiration (just a little). Both make any book worth writing if it gives me the chance to tell them in print how wonderful they are and how I am forever charmed by their ebullience.

-Kent D. Kauffman

To my parents, for a lifetime of love and support
To my husband, for your generous heart and quiet brilliance
To my darling son Sebastian-Ari, for your endlessly magical mind and loving heart
To my precious daughter Ava-Kathleen, for joyously roaming this earth with me again
I wouldn't want to roam this world any other way.

Erin Elizabeth Rybicki

Contents

Preface xiii
About the Author xv
Table of Cases xvii

1 Legal Ethics: The Essentials for Professional Responsibility

Introduction 2
Who Regulates Lawyers and the Practice of Law? 3
What Are Rules of Ethics? 6
A Summary of the Disciplinary Process 8
Why Doesn't the Legislature Regulate the Practice of Law? 11
How to Brief a Case 14
- The Facts 14
- The Issue 15
- The Holding 15
- The Reasoning 15
- The Decision 15

Final Thoughts on the ABA's Role in Regulating Lawyers 26
Summary 27

2 Paralegals and Their Profession

Introduction 35
A Short History of Legal Support Work 35
- American Bar Associations Standing Committee on Paralegals 36
- The American Association for Paralegal Education 38

Paralegal Associations 39
- The National Federation of Paralegal Associations 39
- The National Association of Legal Assistants 41

Paralegal Compensation 42
The Great Debate: Licensure versus Certification 45
Perhaps the Greatest 45
- Minimum Qualifications: When Does One Become a Paralegal? 45
- The Licensing of Paralegals: Not Yet 49
- The Cons and Pros of Licensure 52

Paralegal Discipline: Is It Possible to Sanction a Paralegal? 53
Paralegal Associations Can Sanction Their Members 54
The Lawyer's Duty of Supervision: The Stick, Not the Carrot 54
Can a Paralegal Be Directly Sanctioned by a Court? 63
Miscellaneous Issues for the Paralegal Profession 68
Salary versus Overtime Pay: Does That Make One a "Professional"? 68
Disbarred or Suspended Lawyers Working as Paralegals 72
Paralegals as Members of Bar Associations 74
Summary 75

3 The Unauthorized Practice of Law

Introduction 80
What Is the Practice of Law? 80
Paralegals and UPL: Key Concepts 82
How Will I know What Constitutes the Practice of Law in My Jurisdiction? 82
When Is UPL a Crime? 83
Who Can Commit UPL? 89
What Types of Legal Work Can a Paralegal Do? 89
What about Professionals outside of the Legal Industry? 90
Statutes Prohibit UPL 90
Practical Legal Ethics 91
Can a Paralegal Work Independently? 91
Attorney Rules of Professional Conduct Prohibit UPL 92
Paralegal Codes of Conduct Prohibit UPL 92
What Activities Are Paralegals Prohibited from Performing? 94
Giving Legal Advice 95
Establishing the Attorney-Client Relationship 96
Establishing Legal Fees 97
Miscellaneous Prohibitions 97
What Activities Are Paralegals Permitted to Perform? 105
What Do the Paralegal Ethics Rules Authorize? 105
Paralegals and the Representation of Others before Administrative Agencies 107
Summary 117

4 Confidentiality and the Attorney-Client Privilege

Introduction 121
The Duty of Confidentiality 123
When Does the Duty of Confidentiality Begin? 127
Unsolicited Emails and Prospective Client Confidentiality 127
For How Long Does the Duty of Confidentiality Apply? 128

Do the Principles of Confidentiality Apply to the Lawyer's Employees? 130
How Is Confidentiality Affected When the Client Is an Organization? 131
Are Certain Kinds of Client Information Considered Not Confidential? 133
Exceptions to the Duty of Confidentiality 133
Implied Authorizations 133
The Prevention of Client Criminal Conduct or Fraud 134
The Defense of a Claim Against the Lawyer 136
The Collection of Fees 137
The Order of a Court 138
Technology and Client Confidentiality 139
Email Messages and Client Confidentiality 139
Cloud Computing and Client Confidentiality 141
Fax Machines and Client Confidentiality 142
Mobile Phones and Client Confidentiality 142
The Attorney-Client Privilege: Related to the Duty of Confidentiality 143
Are Certain Types of Information Not Covered by the Attorney-Client Privilege? 151
The Basics of Discovery 156
The Basics of the Work Product Rule 157
Inadvertent Disclosure: What to Do When Mistakes Occur 158
Inadvertent Disclosure and Technology: Metadata 159
The Paralegal and Confidentiality 168
How Does the Attorney-Client Privilege Cover the Paralegal? 168
Tips to Protect Confidentiality and the Attorney-Client Privilege 170
Summary 172

5 Conflicts of Interest

Introduction 178
The Model Rules' Starting Point for Conflicts of Interest 179
Common Conflicts of Interest 179
Double Representation: One Lawyer Representing the Plaintiff and the Defendant 180
Simultaneous Representation of Clients in Different, but Related, Matters 181
Suing an Existing Client in an Unrelated Suit 182
Joint Representation: Two Clients with the Same Lawyer 184
Conflicts Caused by the Lawyer's Own Interests 189
Conflicts Between Present and Former Clients 201
Specific Circumstances: Prohibited Transactions 203
Business Transactions with Clients 203
Agreements Limiting the Lawyer's Liability 208

Related Lawyers Opposing Each Other 208
The Lawyer's Ownership of the Client's Case 209
Sexual Relationships with Clients 209
Conflicts When the Client is a Corporation or Other Organization 210
Who Is the Client? 210
What If the Organization Is Engaging in Illegal Activity? 211
Imputed Disqualification: One Lawyer's Conflict Affecting the Firm 214
The General Policy: Disqualification 214
Imputed Disqualification: Formerly Associated Lawyers 215
The Presumption of Shared Confidences 216
Imputed Disqualification and Client Consent 217
Imputed Disqualification: The Use of Screens for the Affected Employee 217
The Use of Screens for Affected Lawyers 217
Screens for Nonlawyer Employees: The News Is Quite Good 219
Not All Courts Approve of Screens for Paralegals and Legal Assistants 231
The Paralegal and Conflicts of Interest Rules 234
Tips on Avoiding Conflicts of Interest 235
Protecting the Interests of Present and Former Clients 235
Protecting Oneself When Seeking Different Employment 235
Summary 236

6 Advertising and Solicitation

Introduction 242
A Short History of Lawyer Advertising 242
From the Nineteenth Century to the 1950s 243
The Supreme Court's View Shifts from the 1940s through the 1970s 245
An Overview of the Rules on Advertising 250
Information About Legal Services Shall Not Be False or Misleading 251
Lawyer Advertising: The Nuts and Bolts 258
Types of Truthful Information That Can Be Included in an Advertisement 260
Advertising and the Paralegal 269
The Paralegal as Part of the Law Firm's Advertising 277
Direct Advertising by Independent Contracting Paralegals: Be Careful 279
Solicitation: Specifically Seeking Clients 279
The Rules Against Direct Contact with Prospective Clients 280
Solicitation Other Than in Person 280
Permissible Solicitation 291
Solicitation and the Paralegal 292
A Case Study in Illegal Solicitation 293
Summary 295

7 Fees and Fee Sharing

Introduction 299
Types of Legal Fees 300
Hourly Rate 301
Fixed Fee 305
The Rules on Legal Fees 305
A Lawyer's Fee Shall Not Be Unreasonable 305
Legal Fees Must Be Clearly Explained to the Client 320
Where Is the Client's Money to Be Kept? 329
Special Rules Regarding Contingent Fees 333
Fee Sharing between Lawyers of Different Firms 335
Prohibition Against Fee Sharing Between Lawyers and Nonlawyers 335
Why Is Sharing Fees with a Nonlawyer Prohibited in Most Jurisdictions? 335
When Is a Compensation Scheme Not Fee Sharing and What Is the Difference? 340
Recovery of Paralegal Fees from the Opposing Party in Litigation 342
Separate Recovery of Paralegal Fees in Federal Cases 342
Richlin Security Services, Inc. v. Certoff, the Second Act to *Missouri v. Jenkins* *348*
Separate Recovery of Paralegal Fees in State Cases 349
Specific Ethical Considerations for the Paralegal 352
The Paralegal May Not Establish Fees 352
The Paralegal Must Report Accurate Hours 353
Summary 354

8 Ethics and Legal Practice

Introduction 360
Competence 360
Academic Preparation 361
Diligence 362
Communication and Competent Representation 363
Continuing Legal Education 366
Wellness Management 367
Technology Fluency and Information Literacy 368
Special Considerations for Paralegals and Competence 369
Professionalism 375
Truthfulness 376
The General Rule on Truthfulness 376
Clients and Truthfulness 378
Represented Persons and Truthfulness: The Anticontact Rule 382
Unrepresented Persons and Truthfulness 384
Ex Parte Communication and Truthfulness 386

Legal Research and Truthfulness 388
Prosecuting Attorney's Offices and the Truth 389
Malpractice Liability for the Nonlawyer 392
What Constitutes Malpractice? 393
The Theory Behind Nonlawyer Malpractice 393
Nonlawyer Malpractice Is Not a Universal View 396
Pro Bono Services 397
The Case for Pro Bono 397
Pro Bono Requirements: How Jurisdictions Differ 398
Should Lawyers Be Required to Perform Pro Bono Services? 398
Pro Bono Services and the Paralegal 405
Summary 407

Appendix A: Model Rules of Professional Conduct 412
Appendix B: National Federation of Paralegal Associations, Inc. Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement 414
Appendix C: Copyright® 2007; Adopted 1975; Revised 1979, 1988, 1995, 2007. – National Association of Legal Assistants, Inc. 423
Appendix D: Legal Ethics Viewing Guide 425
Appendix E: Case Briefs: A Tutorial 428
Appendix F: Case Brief Template and Explanation 430
Glossary 432
Index 437

Preface

This book introduces undergraduate students to legal ethics. Many students begin their learning journey thinking that legal ethics is a conversation of good versus bad behavior. The truth is that legal ethics concepts are defined by each jurisdiction and the rules can vary considerably. Upon reading this book, students will quickly learn the need to remain aware of their own jurisdiction's current rules concerning each legal ethics issues throughout their careers.

This book uses rule of law from state bars and ethics boards, state court decisions and the model rules espoused by professional organizations. The professional organizations include the American Bar Association (ABA), National Federation of Paralegal Associations (NFPA) and National Association of Legal Assistants (NALA). While professional organizations cannot govern legal professionals, these model rules provide guidance for the state bars when determining each jurisdiction's binding rules concerning legal ethics. For this reason, students will find that the book includes many state bar and state supreme court decisions that govern legal ethics in the correlating jurisdictions.

It is important to note that legal ethics concepts, much like case law and statutes, never operate in a vacuum. Legal ethics concepts and rules vary from state to state and may change over time. Students and readers should confirm their state's current rules.

Organization

This book is designed to cover the most significant areas of legal ethics concepts. Each chapter focuses on a significant area of legal ethics, including the unauthorized practice of law, competence and confidentiality. Concepts are discussed in the perspective of the legal professional, with examples including attorneys, paralegals and judges facing legal ethics issues.

Students are encouraged to read the chapter's learning outcomes prior to reading the chapter so they can map out the intended learning. Each chapter provides an overview of a significant area of legal ethics without jurisdiction-specific barriers. Recognizing the ever-evolving nature of legal ethics and the states' varying approaches to govern ethics issues for attorneys, the book is designed to demonstrate universal concepts throughout legal ethics. Students will be invited to conduct jurisdiction-specific research at the end of the chapters in the Points to Ponder questions. Students are further encouraged to think about the role of legal ethics in their intended careers. The Legal Viewing Guide invites students to compare and contrast how television and film portray legal ethics issues.

Features

- ***Access to Justice*** features appear in each chapter of the book. These features allow students to explore emerging concepts in the legal field with a special focus on how paralegals are helping to build and expand legal representation for clients.

- ***Communication is Key*** features demonstrate the crucial role of effective communication in the legal field. Students will explore real-world examples of how communication can be used to better serve clients. Each chapter includes pointers, scripts for client communications, examples of written communication or related demonstrations that students can use in their professional roles.
- ***Case Law*** features highlight important cases, including well-established case law and emerging cases. Students will find the court's decision followed by questions designed to prompt critical thinking about the precedent set in each case.
- ***Chapter Summary*** features are located at the end of each chapter, providing an overview of the concepts for students to better understand the materials.
- ***Points to Ponder*** questions invite students to explore critical concepts and jurisdiction-specific research concerning legal ethics.
- ***Chapter Questions*** present students with realistic scenarios in hypothetical law office settings. Students are challenged to apply the rule of law, case law or ethics concepts to best resolve the issue.
- ***Legal Viewing Guide*** features television and film portrayals of legal ethics issues. Students are challenged to select and view legal ethics-focused story lines and identify the issues presented.
- ***Case Brief Template and Tutorial*** features guide students on the "how" and "why" of case briefing. Students are provided with a guide to write effective case briefs and better understand the case law.

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Additional instructor resources for this product are available online. Instructor assets include an Instructor's Manual, PowerPoint® slides, and a test bank powered by Cognero®. Sign up or sign in at www.cengage.com to search for and access this product and its online resources.

The Cengage Instructor Center is an all-in-one resource for class preparation, presentation, and testing. The instructor resources available for download include:

- **Instructor's Manual.** Provides activities and assessments for each chapter (including business cases with corresponding assessment activities) and their correlation to specific learning objectives, an outline, key terms with definitions, a chapter summary, and several ideas for engaging with students with discussion questions, ice breakers, case studies, and social learning activities that may be conducted in an on-ground, hybrid, or online modality.
- **Test Bank.** A comprehensive test bank, offered in Blackboard, Moodle, Desire2Learn, and Canvas formats, contains learning objective-specific true-false, multiple-choice, and essay questions for each chapter. Import the test bank into your LMS to edit and manage questions and to create tests.
- **PowerPoint Slides.** Presentations are closely tied to the Instructor's Manual, providing ample opportunities for generating classroom discussion and interaction. They offer ready-to-use, visual outlines of each chapter that may be easily customized for your lectures.
- **Transition Guide.** Highlights all of the changes in the text and in the digital offerings from the previous edition to this edition.

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To the many professionals who helped with the creation of this book- thank you. From subject matter experts who reviewed my manuscripts to the graphic artists who brought the concepts to life and everyone in between, I thank you.

This book is greatly improved through the inclusion of case law and materials owned by professional organizations. I thank these organizations for their generous permission to use these materials, as there is no better way for students to learn that to see the sources.

My career has been touched by some very special angels, including the truly remarkable Ed Miller, whose light shines on through the many lives he touched with his special brand of kindness and support.

William Kapac's advice helped me to navigate the process of writing a book and taught me how to translate a mere thought into reality; making your own blueprints into a magnificent house in small bits of time between jobs is no easy feat. His example of humble tenacity is the reason this book became a reality.

My ability to write this book while working as a full time professor was made possible through the incredible support of my dean, Dr. Laura Sosa, who is a true champion of faculty and students, and through encouragement of my fabulous faculty colleagues and supportive administrators at Mercer County Community College. I am forever thankful to be a part of the magic that happens at Mercer.

The work of writing a book is incredibly challenging. My husband was my brilliant sounding board, always resetting me when I fell off course. My mom and dad's wonderful support and unending love cannot be explained in words, and Sebastian's loving patience as I waded through case law and emerging concepts to make this book a reality. And no part of this book would be possible without my life coach and greatest champion, Ava, with spot-on advice and wisdom that reaches far beyond her years.

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Table of Cases

In the Matter of Anonymous 16–18
In the Matter of Hein 18–21
In the Matter of Malone 21–25
People v. Smith 56–60
Attorney Grievance Commission of Maryland v. Ficker 61–63
State v. Robinson 65–67
Overview 81–82
Spotlight 85–89
The Florida Bar v. We The People Forms and Service Center of Sarasota, Inc. 112–116
In re Anonymous 124–125
In re MI Windows & Doors Prods. Liab. Litig., 2013 U.S. Dist. LEXIS 9468 145–147
Mayberry v. State 147–150
People v. Harris 152–153
Corey v. Norman, Hanson & DeTroy 161–163
Lipin v. Bender 164–166
Florida Bar v. Mastrilli 186
Florida Bar v. Clark 187–188
Nasdaq, Inc. v. Miami Int'l Holdings, Inc., 2018 U.S. Dist. LEXIS 199167 190–197
In re Guaranty Insurance Services, Inc. 222–226
In re Complex Asbestos Litigation 226–231
Bates v. State Bar of Arizona 245–250
The Case of the Super Lawyer 264–265
Florida Bar v. Went For It, Inc. 281–284
Richlin Sec. Serv. Co. v. Chertoff 312–320
Missouri v. Jenkins 343–348
Absher Const. Co. v. Kent School Dist 350–351
Mays v. Neal 370–373
Intentional Obstacles to Justice 380
Prosecutorial Duty 384
Pruett v. State 401–404

Legal Ethics: The Essentials for Professional Responsibility

1

Chapter Highlights

- To practice law in the United States, a person must be admitted to the bar of a state jurisdiction. Admission to the practice of law is jurisdiction-specific, with most states administering their own bar examination.
- Prospective lawyers must demonstrate on their bar application that they have sound character and a solid understanding of the rules concerning professionalism and legal ethics.
- The legal field's sources of ethics rules include persuasive or guiding rules, such as the American Bar Association's ABA Model Rules of Professional Conduct and binding law, which includes the legal ethics rules for each jurisdiction. While the ABA Model Rules are not binding, these rules serve as a guidepost for most biding law, and many jurisdictions have adopted the rules verbatim.
- The ABA Model Rules are continually reviewed and updated to reflect the evolving nature of legal practice. While many current rules mirror the original version, there are numerous updates to the language and spirit of the rules reflecting the legal industry's efforts to remain current and relevant.
- Due to the principle of judicial review, the practice of law is regulated by the courts, *not* the legislature.
- An attorney who violates their jurisdiction's ethics rules is subject to the discipline of the court that granted their law license. Attorneys admitted to more than one jurisdiction must abide by the rules of each jurisdiction, which may require significantly more work and effort.
- A jurisdiction's ethics rules are one part of the ethical framework; case law is the key to understanding the application of the rules to lawyer conduct.
- Paralegals are required to maintain the rules of professionalism and their law firm or legal employer's policies concerning ethical representation of clients. Most legal employers base internal policies concerning ethics and professionalism on the core principles set forth in the ABA Model Rules and/or jurisdiction-specific rules.
- A paralegal is not professionally responsible for violating the rules of ethics; however, such a violation may result in a sanction against the supervising attorney—including revocation of the license to practice law.

Chapter Learning Outcomes

After reading this chapter, students will:

explain the role of legal ethics and professional responsibility within the legal practice and how legal professionals are regulated

compare and contrast the role and function of the American Bar Association's Model Rules with jurisdiction-specific rules concerning legal ethics

explain how paralegals and attorneys can contribute to maintaining legal ethics in the workplace

demonstrate the relevance of important legal ethics cases and draft a case brief

assess opportunities for ethical contributions to the legal field, including ethical communication and access to justice

Introduction

Lawyers are often the source of jokes, many of which focus on the questionable ethics at the heart of the joke. While some lawyer jokes may be fun to laugh at, the reality is that there are very few fields of work that are subject to the same level of ethical and professional scrutiny. Ethics are not a suggestion, or even a subjective concept, for legal professionals. Ethics are defined through jurisdiction-specific rules and case law.

The rules concerning legal ethics guide the work of each legal professional, including paralegals. In fact, the rules concerning legal ethics provide the pathway for paralegals to complete their work and hold their roles within legal employment settings. While every jurisdictions defines legal ethics for the professionals working in that state, each set of legal ethics rules allows lawyers to employ paralegals as long as the lawyer supervises and reviews paralegal-generated work.

According to the American Bar Association, there are more than 1.325 million lawyers in the United States, up 14 percent from only ten years ago. This means that the field is growing rapidly, and the role of paralegals and attorneys will be shaped by this sudden explosion of new attorneys in the legal workplace. With the growth of the numbers of lawyers and legal professionals in the United States comes the important job of upholding the public's view of legal work. While any professional wants their work to be held in esteem, legal work is especially important. Legal work includes the role of ensuring access to justice, fairness, and zealous representation of clients. Legal work ensures that each client's issue matters, and that the professionals representing the client provide effective and extensive work needed to ensure the client's best chance at a favorable outcome.

So why do many lawyer jokes exist? Perhaps it stems from the public's frustrations with legal issues altogether. Many members of the public do not want to ever need the services of a lawyer. Legal services can start from a positive event, like an adoption or starting a new business. However, legal services can also be needed for the harder times, including clients facing lawsuits and criminal charges. One may argue that lawyers cannot escape being the brunt of a few good jokes as a result of the client's need to blow off some steam. In reality though, lawyers and paralegals work to help clients with a variety of legal matters, and this can be challenging but rewarding work.

Legal ethics and professionalism are an important part of each legal professional's studies. The American Bar Association requires professionalism and legal ethics education for all law students seeking to earn their juris doctor. Similarly, the ABA requires legal ethics content for undergraduate degree or certificate programs for paralegals and pre-law students. Beyond ABA requirements, nearly all colleges offering legal courses will include content addressing legal ethics as part of the law-based classes. Ethics and the law are inherently related concepts, with critical importance placed on how legal professionals must uphold professionalism and legal standards at all times (see Exhibit 1–1).

Exhibit 1–1 Rules Affecting Legal Education

• ABA Standards and Rules of Procedure for Approval of Law Schools	• Standard 303(a) requires "one course of at least two credit hours in professional responsibility that includes substantial instruction in rules of professional conduct, and the values and responsibilities of the legal profession and its members."
• ABA Paralegal Education Guideline G-302-(I)(3)	• The curriculum must cover the full range of ethical and professional responsibility concerns applicable to paralegals.
• American Association for Paralegal Education (AAfPE)	• The association supports ethics education for all undergraduate legal programs, including paralegal certificates and degrees.

The creation of legal ethics courses in American law schools is largely a result of the Watergate scandal of the 1970s. What might have gone unnoticed in the months following that national crisis was that dozens of lawyers—mostly government lawyers—were the focus of disciplinary charges. Many of those charges resulted in disbarments for those involved, including lawyer G. Gordon Liddy (one of the chief planners of the Watergate break-in), White House Counsel John Dean (chief plotter of Watergate and its cover-up), and U.S. President Richard Nixon himself. Even the most famous scandals can lead to silver linings. The legal community's collective embarrassment and hand-wringing did have a positive outcome, however. It led to a realization that a formal emphasis on ethics and professional responsibility was missing from the curricula of America's law schools. So if you are taking your own ethics course while reading this book, you have former President Nixon to thank for what you are about to encounter.

Paralegals and legal assistants continue to become more of an integral part of the legal team. Where once attorneys considered that there was a divide between themselves and everyone else in the firm, a bridge has been built and paralegals cross that bridge every day. When paralegals are used effectively, they do substantive legal work, not solely clerical tasks. Interviewing, case management, research, and writing are just some of the functions in which legal assistants can engage, thereby allowing attorneys to work on other projects. However, with more responsibility in the law office comes a recognition that paralegals need to be fully acquainted with the same rules of ethics (commonly called rules of professional responsibility or professional conduct) that their supervising attorneys are obligated to follow, or else the belief that paralegals are professionals might be proven incorrect.

To put the paralegal's role and ethical obligations in perspective, it is necessary to first examine how one becomes a lawyer and then determine what rules of ethics are incumbent on that profession. The subsequent chapters will analyze specific themes of the ethics rules, with emphasis on how they affect paralegals.

Who Regulates Lawyers and the Practice of Law?

Once a law student graduates from law school, having endured years of torture, tedium, and triviality, the next step is to take—and pass—the bar exam. The practice of law is jurisdiction-specific; there is no such thing as a national bar exam. An applicant to the bar must take the bar exam of the state (including the District of Columbia) where one wants to be licensed to practice law. Proving right away in this text that for every "law" there is an exception, not every state requires law school as a prerequisite to sit for the bar exam. While law school is certainly required for nearly all jurisdictions, a few states offer special opportunities for individuals who are uniquely qualified to attempt the state bar. For example, California residents who complete a qualified apprenticeship with a lawyer or judge for four years may qualify to take the state bar exam even if they have not successfully earned a juris doctorate from a law school. And as one might suspect, those who didn't go to law school before taking the bar exam have a much lower passing rate than those who did.

In the absence of a national bar exam, there are **multistate bar exams**.

multistate bar exam
A bar exam that allows the successful applicant to be licensed in more than one jurisdiction. Such an exam is a result of a reciprocity agreement between the jurisdictions.

Jurisdictions that allow out-of-state applicants to be licensed will likely use the Multistate Bar Exam (MBE), which is created by the National Conference of Bar Examiners. The Multistate Bar Exam tests the applicant's general knowledge about particular subjects of the law (such as contracts, constitutional law, and evidence) or legal analysis and problem-solving skills without regard to state specifics and peculiarities. Scores are scaled (similar to a curve). Just a few jurisdictions will license an attorney based solely on the applicant's MBE score without requiring the applicant

to take a concurrent or separate bar exam. Attorneys also can practice law in another jurisdiction on a limited basis by seeking permission from that jurisdiction's highest court, which is called ***pro hac vice***.

pro hac vice
A Latin phrase that means "for this turn" or "for this event." This refers to an attorney who is not licensed to practice in a particular jurisdiction but is granted permission by a court in that jurisdiction to practice law there for a specific case.

The National Conference of Bar Examiners has also created the **Uniform Bar Exam (UBE)**, which is an exam designed to test knowledge and skills that law graduates should be able to demonstrate prior to being granted law licenses.

Uniform Bar Exam (UBE)
A two-day exam created by the National Conference of Bar Examiners, designed to test knowledge and skills that law graduates should be able to demonstrate prior to being granted law licenses. The exam is part essay, part multiple choice. Currently, five jurisdictions offer it.

The UBE is given in November and July, and each UBE administration takes two testing days. The UBE is administered in more than forty states, with many states including an additional jurisdiction-specific component. A premium is placed on ethics as a prerequisite to being admitted to the bar. As part of applying for permission to take the bar exam, an applicant must be found morally fit to practice law. Permission can be refused based on prior conduct, including possession of a felony conviction. Recently, state bar associations have debated whether members of hate groups who advocate violence should be denied entrance to the bar. Some have argued that one cannot swear to uphold the Constitution—which is part of a lawyer's oath—and, at the same time, seek to deny, by violence or other methods, the constitutional rights of others. For example, white supremacist Matthew F. Hale graduated from law school in 1998 and passed the Illinois bar exam that year but was denied admission to the Illinois Bar on the grounds that his hateful and violent speech concerning minorities demonstrated his lack of moral character and fitness to practice law. (Hale is currently serving a forty-year prison term for attempting to hire an FBI informant to murder a federal judge in Chicago.)

Beyond the bar exam, applicants to practice law in all but two jurisdictions must also pass the Multistate Professional Responsibility Exam (MPRE), a legal ethics exam created by the National Conference of Bar Examiners. The MPRE tests the applicant's specific knowledge and application of the rules of professional responsibility. The exam is also scaled, and, depending on the jurisdiction, a passing score ranges from 75 (several jurisdictions) to 86 (California, Utah). So, after paying one's examination fees, passing the bar exam, passing the ethics exam, and paying the appropriate court bar fees, the applicant now becomes an attorney and is obligated by the oath of admission to the bar to honor his jurisdiction's rules of ethics.

Passing the bar exam, by the way, is no walk in the park. Although it is human nature to exaggerate the difficulty of accomplishing something even mildly difficult, many smart and diligent people who take the bar exam fail on their first or second attempt (or more). Passing rates vary jurisdictionally, and some jurisdictions have notoriously difficult rates. New York's 2010 pass rate for those taking its bar exam in February was 50 percent, while Wisconsin's 2010 pass rate in February was 87 percent. That does not necessarily mean that New York law students are not as smart as those in Wisconsin.

Communication Is Key

Lawyers and Public Communication

Throughout the chapters in this book, features will highlight how communication plays a critical role in legal ethics. Whether through formal writing, emails, conversations, or social media posts, lawyers must ensure that their public communications are ethical. This responsibility is ever-expanding. For example, as more lawyers post on social media, they must ensure that they do not violate ethics rules, including matters of client confidentiality and unauthorized practice of law in jurisdictions where they are not admitted to practice law. If a lawyer provides legal advice in a blog article or in a podcast, for example, these seemingly well-intended forms of public communication may inadvertently create legal ethics violations.

While lawyers are certainly permitted to participate in podcasts, post online, and to author law blogs, they must be careful of the content they produce. Lawyers are required to

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ensure that their public communications within their professional capacity do not constitute a violation of legal ethics. In fact, as new media emerges, lawyers must become increasingly vigilant to ensure that all forms of public communication are complaint with their jurisdiction's legal ethics rules.

While concerns about lawyer communications may seem to be overly stringent, it is important to remember that all legal ethics rules are designed to protect the public. Each jurisdiction will carefully implement rules deemed to protect clients, prospective clients, and members of the general public from potential harm. For example, if a lawyer is a guest on a podcast and she provides legal advice on how to proceed in a particular case, listeners may mistakenly believe that the lawyer's advice applies to their own legal matters. For this reason, lawyers will often include disclaimers before communicating in a public platform and will often explain that their legal commentary is for educational purposes and does not include legal advice for listeners or readers. Clear and effective communication is a key component of legal ethics, so lawyers take special considerations when communicating publicly within their professional role.

Question:

As you listen to podcasts, read blogs, or watch shows that include lawyers, carefully observe any disclaimer provided. Consider the content and purpose of the lawyer's communication and determine whether it effectively explains to the intended audience that the lawyer's communications do not constitute legal advice for their legal matters.

Practicing law is not for the faint of heart or those who like to sleep. According to a 2012 piece in the *New York Times*, lawyers comprise the second-most sleep-deprived profession or occupation. Evidently, a mattress sales chain store named Sleepy's looked at data from the 2011 Centers for Disease Control and Prevention's National Health Interview Survey and concluded that only home health aides get less sleep than lawyers. Even doctors sleep more than lawyers.

Depending on where lawyers practice, they might need to keep a copy of another set of rules in their offices. They will first have consulted the Admission and Discipline Rules, which procedurally control how one might get into (and get kicked out of) the bar, and the Rules of Professional Conduct, which control how lawyers (and their paralegals and legal assistants) are to behave professionally. In addition to the just-stated rules, many state and local bar associations have passed codes or creeds of civility or courtesy—an attempt, perhaps, to combat the abject opinion of lawyers held by many of those who are not their parents. These nonbinding codes are those to which lawyers should aspire, not the kind whose violations might result in a lawyer being held in **contempt**.

They include standards or maxims that focus on how lawyers should agree to treat one another, judges, their clients, and the general public in the course of their professional lives.

All clients want their lawyers to be aggressive and zealous—part pit bull with glaring eyes and froth-covered teeth and part Franciscan monk with a monastic attention for detail and (hopefully) a vow of poverty. Zealous representation is even mentioned in the ABA's and states' rules of attorney conduct. But despite the lawyer TV ads that claim, "We'll fight for you," no one really takes that slogan literally—or do they?

By contrast, Alabama (the first state with a formal code of ethics) has a State Bar Code of Professional Courtesy with nineteen sentence-length directives, including "A lawyer should always be punctual." The Boston Bar Association Civility Standards for Civil Litigation has a section that concerns depositions, and part of it states, "A lawyer should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the **deposition**."

Included in the Virginia Bar Association Creed is a statement on the treatment lawyers should accord each other, which states, "As a professional, I should always . . .

contempt
Also known as contempt of court, this is an act or omission that tends to obstruct the administration of justice or shows disrespect for the court; it can include disobeying the instructions or orders of the court.

deposition
A litigation discovery device, similar to testifying at trial, whereby the deponent is put under oath and subject to lawyer's questions. Depositions occur in law offices or conference rooms, but not in courtrooms.

[a]ttempt to determine compatible dates with opposing counsel before scheduling motions, meetings and depositions . . . [and avoid] personal criticism of another lawyer." The Beverly Hills Bar Association Guidelines of Professional Courtesy announces its opposition to unnecessarily emptying an opponent's pockets when it says, "I will advise my client that I will not engage in tactics intended to delay unreasonably resolution of the matter or to harass, abuse or drain the other party's financial resources."

State and local bar associations do not regulate their members' conduct the way the courts do, but bar associations have a role in discipline in several ways. First, a bar association has its own membership bylaws and can sanction its members for bylaw violations. Second, a bar association can contact its jurisdiction's highest court (the regulating court) to make recommendations regarding the regulation of the practice of law, including the unauthorized practice of law. Some jurisdictions have a **unified bar association**, which means that membership is required upon being granted a law license. More than thirty states have mandatory bar associations, which are also known as **integrated bar associations**.

unified bar association (integrated bar association) A bar association whose members must join upon being admitted to the practice of law in a particular jurisdiction. It is also known as integrated bar association.

Other jurisdictions make the decision to join the bar association a voluntary one. The U.S. Supreme Court ruled in 1990 that attorneys may be required to join state bar associations, but the mandatory dues may not be used for political purposes. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

All those who want to keep their law licenses in good standing need to pay their annual bar fees, in addition to getting their minimum required annual continuing legal education (CLE) credits. This type of membership fee is often tied to the length one has been licensed to practice law, so that newer lawyers might pay a lower annual bar fee than those who have been licensed for many years. According to the *Indiana Lawyer*, the median bar fees in America are $335 per year.

Access to **Justice**

Paralegals, Lawyers, and Collaborative Work

As the role of the paralegal continues to expand, new opportunities arise for legal teams to reach more clients. For decades, lawyers and paralegals have collaborated and contributed to client cases. Each jurisdiction requires that a lawyer oversees and approve all of their paralegal's substantive legal work. However, the nature of the professional relationship between paralegals and lawyers is largely collaborative. Lawyers and paralegals within a firm share the same goal: zealous representation of their client's legal interests and rights. Without paralegals, most law firms would be forced to assist far fewer clients. This professional relationship allows lawyers to complete more work and reach more clients as paralegals complete essential contributions to case work.

A growing focus of practice is increasing access to justice. This concept simply means that through collaborative work and expanded roles, legal teams can increase the number of clients they assist across a variety of legal practice settings. There are many ways this can be achieved, including cost-free representation, alternative-model representation, and traditional legal work. Throughout the book, each chapter will include features that further explain the many ways that legal professionals are expanding the public's access to justice. These features will demonstrate that paralegals play a critical role in increasing access to justice. As you will learn in future chapters, some jurisdictions are working toward implementing new ideas, including limited independent licensure for paralegals, expanded use of technology-aided legal work, and alternative models for law firm ownership. As the world changes, so does the legal field.

What Are Rules of Ethics?

Rules of ethics, more formally known as rules of professional responsibility or professional conduct, are those rules created by the American Bar Association (ABA), the largest and most powerful national bar association in America. Founded in New York in 1878 and headquartered in Chicago, Illinois, with a significant branch in

Washington, D.C., the ABA has over 410,000 members. The ABA's first set of ethics rules was its Canons of Professional Ethics in 1908, which was based in large part on the Alabama Bar Association Code of Ethics, from 1887. The inspiration for Alabama's Code of Ethics can be traced to the lectures of Judge George Sharswood in the 1850s; Sharswood's lectures were later published as a book, *Professional Ethics*.

In 1969, the ABA adopted the Model Code of Professional Responsibility. The Model Code was organized by three distinctions: *canons*, which were general statements of ethical ideals; *ethical considerations*, which were aspirational statements associated with the Canons and signified as *EC*; and *disciplinary rules*, which were the mandatory portions of the Model Code and signified by *DR*.

After a six-year process, in 1983 the ABA adopted the Model Rules of Professional Conduct, which were designed to replace the Model Code of Professional Responsibility. Formatted differently and including some substantive changes, the Model Rules consist of mandatory rules, followed by advisory paragraphs on the meaning of the rules, called **comments**.

comments
In this context, a comment is the official commentary of the rules committee that follows specific rules of court. Comments are designed to give meaning to the specific rules.

In 2001 and 2003, the ABA adopted extensive revisions to the Model Rules of Professional Conduct, as a result of the work initiated by the ABA's Ethics 2000 Commission. Some of these revisions concerned expanding the duties owed to clients in their fee agreements, expanding the confidentiality rules, prohibiting the real-time Internet solicitation of clients, and expressly prohibiting sexual relationships between lawyers and their clients.

In 2009, the ABA impanelled a new commission, Ethics 20/20, to work on reviewing the Model Rules of Professional Conduct again, this time with a focus on recommending revisions concerning advances in technology and global legal practice developments. For example, the Commission on Ethics 20/20 proposed that a revision be made to ABA Model Rule 1.1, which concerns competence, recommending that clients be made aware of and consent to before any outsourcing of their legal work. In 2012, the Commission decided against submitting a proposal that would permit some form of nonlawyer ownership interest in U.S. law firms. Historically, only a lawyer may have an ownership or partnership stake in a law firm. The ABA continues to consider and revise the Model Rules as needed. Considered one of the most active professional groups in the nation, the American Bar Association's many standing committees and professional groups make recommendations concerning updates. While many lawyer jokes may remain popular, the legal field is perhaps one of the most active in ensuring that ethical standards remain at the forefront of the work.

Throughout this book's chapters that concern specific ethics issues, the ABA Model Rules will be discussed. Please see Exhibit 1–2 for a family tree of legal ethics.

Exhibit 1–2 A Legal Ethics Genealogy

• **1850s**	Alabama Judge George Sharswood's lectures lead to the book, *Professional Ethics*
• **1887**	Alabama Bar Association Code of Ethics
• **1908**	ABA Canons of Professional Ethics
• **1969**	ABA Model Code of Professional Responsibility
• **1983**	ABA Model Rules of Professional Conduct
• **1997**	ABA Ethics 2000 Commission created
• **2002**	ABA House of Delegates votes on the Ethics 2000 recommendations
• **2003**	ABA House of Delegates votes on a few more Ethics 2000 amendments
• **2009**	ABA Commission on Ethics 20/20 created
• **2011**	ABA Ethics 20/20 Commission recommends various changes to the ABA Model Rules
• **2012**	ABA House of Delegates votes on Ethics 20/20 resolutions

jurisdiction
In this context, jurisdiction means a particular place over which a court has authority, usually a state.

It is important to understand that the ABA's various sets of ethics rules are not operative on lawyers, even those who are members of the ABA. This is because the ABA, being a private organization, does not license attorneys. The rules that apply to any lawyer are the particular ABA version that has been adopted by the highest appellate court in the state where a lawyer is licensed. A state supreme court, having **jurisdiction** over its lawyers and their professional behavior, always has the authority to change the language of an ABA ethics rule it chooses to adopt or to refuse to adopt certain parts of the ABA ethics rules.

For example, Florida's Rules of Professional Conduct are based on the ABA Model Rules. However, Florida's rule on the solicitation of clients differs from the ABA Model Rules version in that it prohibits a lawyer from contacting in writing a prospective personal injury client for thirty days after an accident. Florida Rules of Professional Conduct, Rule 4-7.4(b)(1)(A). Once adopted by a jurisdiction, though, a jurisdiction's rules of conduct are the ones that jurisdiction's attorneys must follow, and not the ABA's rules.

rules of court
Sets of rules that are adopted by the highest appellate court of a jurisdiction and apply to the practice of law, unlike statutes, which are passed by a legislature and apply to all.

Rules of professional responsibility, being adopted by state supreme courts instead of passed by legislatures, are **rules of court**, rather than statutes. Be advised, though, that some jurisdictions have placed their lawyer ethics codes in their statutory codes.

For instance, New York's Code of Professional Responsibility is located in the Appendix of the "Judiciary Law" section of the New York Statutes. The more common kinds of rules of court with which legal and paralegal students are familiar include rules of trial procedure, rules of appellate procedure, and rules of evidence. A student who truly wants to grasp the principles in this textbook must, in addition to reading it, study his or her own state's rules of professional responsibility. The nuances of those rules instruct legal assistants how to protect their professionalism and, most critically, the licenses of their employers. Such protection is important because, as discussed in detail in Chapter 2, supervising attorneys are responsible for the conduct of their nonlawyer employees and assistants.

annotated
When a rule of court or statute is annotated, that means it is privately published and comes with research material in addition to the statute or rule.

When studying your jurisdiction's rules of court, it is always preferable to use an **annotated** rules of court, as opposed to an official set of rules.

Both sets have the same rules in them, but an annotated rules of court (similar to an annotated statutory code), which is published by a company instead of the government, contains more than just the rules. Following the rules and comments are case summaries—specific to that jurisdiction—that correspond to the particular rule. For instance, if you are using an annotated version when looking at your state's rule on client confidentiality (likely to be Rule 1.6 if your state has adopted the ABA Model Rules), you can find summaries of cases in your state, with their citations, that have interpreted the meaning of the rule on confidentiality. By measuring all three angles to this triangle—the rules, the official commentary, and any cases interpreting the rules—you will find yourself as capable as any lawyer of understanding the significance of professional ethics.

grievance
One's allegation that something denies some equitable or legal right, or causes injustice.

disciplinary commission
A panel consisting mostly of lawyers and authorized by a state's highest court to investigate and prosecute lawyer misconduct.

A Summary of the Disciplinary Process

Although not identical in every jurisdiction, the disciplinary process generally includes four similar components: complaint, investigation, prosecution, and appeal. Anyone can file a complaint against an attorney, called a **grievance**, with the **disciplinary commission**, or similarly titled agency, of that attorney's jurisdiction.

immunity
A grant of protection made by prosecutors to witnesses, which prevents them from being prosecuted for their testimony or written statements, except where their assertions are lies.

While it is natural to think of a disgruntled client filing a grievance, fellow attorneys, judges, bar associations, and even members of the public also may and do file them. Regardless of who makes the complaint, all grievances are formally made in writing and under oath. Jurisdictions often provide **immunity** to those who file grievances, which protects those persons filing from being sued by those against whom they have complained.

And as interpreted by many courts, the doctrine of immunity protects grievants from being sued for defamation if their complaints are false, intentional or otherwise. Anonymous complaints might be made against an attorney, but any consequent grievance would have to be formally filed by a jurisdiction's disciplinary commission, which has the authority, on its own initiative, to file a grievance against an attorney. An example of an anonymous complaint would be if one attorney believes another's social media advertisement violates the rules on advertising, and then the attorney forward screenshots of the ads to the disciplinary commission.

Once filed with a state's disciplinary commission, it is the task of that agency, generally operating under the authority of that state's highest court, to investigate the allegation. If a complaint is groundless on its face, or without merit, the commission then disposes of it. For example, if a client files a grievance against their lawyer, complaining that the fees were too high, that type of complaint is likely to be dismissed unless something in the grievance shows a fee that was unreasonable. (See Chapter 7 on what makes a fee reasonable.) It is obvious that we all would prefer to pay less for every product or service we have purchased, especially when those products or services do not meet our lofty expectations. However, when a grievance warrants investigation, the disciplinary commission notifies the attorney that he or she is the subject of a grievance. The lawyer is then required to respond in writing to the investigative team. At this stage, it is advisable that the lawyer hire legal representation because occasionally a lawyer will land himself in trouble after writing an obscenity-laced, incomplete, or even damning answer to the charges the irate lawyer thinks are unfounded. During this phase, members of the disciplinary commission gather facts related to the grievance in conjunction with the lawyer's response.

If the commission finds after its investigation that there is reasonable cause to believe the attorney committed the alleged misconduct, the commission will file a formal complaint against the attorney. Attorneys from the disciplinary commission act in the **adjudication** similarly to prosecuting attorneys, and lawyers who are the subject of formal ethics charges would be remiss not to have representation by this time.

adjudication
The process of formally resolving a controversy, based on evidence presented.

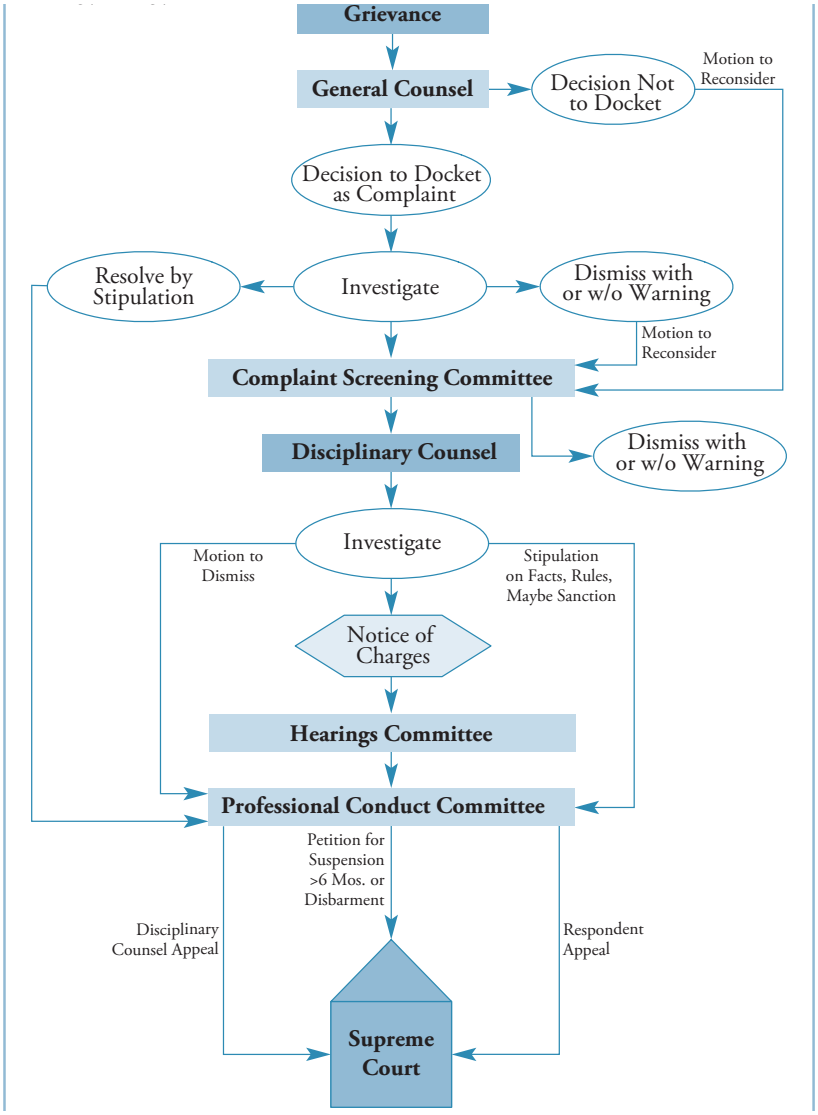
This brings to mind the tired but true cliché: "He who represents himself has a fool for a client." A special hearing officer, often a judge, will be appointed to preside over the eventual disciplinary hearing and the accompanying evidentiary disputes. If the attorney is found to be in violation of the rules, then a sanction will be recommended. Sanctions can range from a reprimand (private or public) to suspension or disbarment. When an attorney is suspended for a short term (less than six months), reinstatement usually occurs automatically at the conclusion of the suspension. When more severe violations result in a long-term suspension, the attorney must apply for reinstatement at the suspension's end. Disbarment usually means forever, but some jurisdictions, such as Florida, allow a disbarred attorney to apply for readmission to the bar some years after the disbarment.

Disciplinary sanctions are generally not final until they have been approved by the highest court in the jurisdiction (i.e., the state supreme court), because that court has authority over the lawyers licensed in its jurisdiction. Furthermore, an attorney has the right to appeal any finding of misconduct and/or sanction issued against him. Results of those appeals can range from approving the hearing officer's findings and sanction, rejecting them completely (including when the hearing officer finds in favor of the attorney), or agreeing with the "verdict" while altering the recommended discipline. When the appellate court renders its decision, the opinion it provides serves two purposes: first, to explain to the attorney the basis for the court's decision; and, second, to make precedent so that other attorneys in the jurisdiction—and their paralegals and legal assistants—can better understand how to follow the legal ethics rules. Please see Exhibit 1–3 for the summary of the common types of attorney discipline, and Exhibit 1–4 on how one state manages its attorney grievance, investigation, and disciplinary process.

Exhibit 1–3 Types of Attorney Discipline

- **Reprimand or Censure**
  For slight infractions, the attorney's name might be protected from disclosure (e.g. In re Anonymous)
- **Short Suspension**
  Usually, the attorney's reinstatement is automatic after the suspension
- **Significant Suspension**
  Usually, the attorney needs to apply for reinstatement
- **Law License Resignation**
  In lieu of an impending disbarment, an attorney might be allowed to resign his or her law license and acknowledge the wrongfulness of the conduct that led to the ethics charges being brought
- **Disbarment**
  Disbarment is not always permanent (Florida has a five-year disbarment option)

Exhibit 1–4 NH Disciplinary Process Flow Chart: Types of Attorney Discipline



Source: New Hampshire Supreme Court Attorney Discipline Office

Not Quite **Lincoln**

With a Transcript Like That, This Guy Could Be Vice President

While running for the 1988 Democratic presidential nomination, U.S. Senator Joe Biden—who became vice president in 2009—was caught in a plagiarism flap, wherein it was discovered that his speeches borrowed quite liberally from the speeches of British politician Neil Kinnock, as well as Robert Kennedy and Hubert Humphrey, without attribution. It also came to light that he plagiarized a law review article for a legal paper he wrote during his first year at Syracuse University School of Law. Then-candidate Biden called it "a mistake" in his youth. But he also falsely claimed that he had been given a full academic scholarship to law school and that he had graduated in the top half of his law school class. Those curious gaffes got the best of Senator Biden and he ceased campaigning in September 1987.

So often, the key to a superior job after graduating law school is having a fittingly qualified summer associate job while in law school. And the bait needed to snag that summer job is uniquely high grades from a highly rated (and connected) law school.

Loren Friedman climbed the first rung on that steeply inclined success ladder; he was attending the University of Chicago Law School. And there he landed a summer associate job in 2002 at the prestigious law firm of Sidley Austin, headquartered in Chicago. Friedman must be a great interviewee, because after law school he leap-frogged his Sidley Austin gig into a job at Skadden, Arps, Slate, Meagher & Flom, a corporate law firm so prestigious that chapters in books have been written about its history and astonishing reputation. Skadden Arps is so valuable that in 2008, it reported record revenues of $2.2 billion.

But Mr. Friedman left an ink stain on the first rung of that ladder. His first-year grades included C's and B's, so he whited them out on his transcript and rewrote them as B's and A's, and he changed grades on his second-year transcript, before applying to Sidley Austin. After flunking the Delaware bar exam twice, Friedman left Skadden Arps and landed at the firm of Curtis, Mallet-Prevost, Colt & Mosle, which would be Friedman's third job at a top-100 law firm.

In 2007, Friedman got the bug to head back to the Midwest, where it all started for him, so he hired a headhunter to help in his job search. The headhunter circulated Friedman's resume and transcripts to various firms, one of which was Sidley Austin. A hiring partner looked at Friedman's resume, which showed that Friedman had worked there as a summer associate, and then saw Friedman's actual, undoctored transcript: The partner thought "there is no way in the world" the firm would have hired a guy with such uninspiring grades. Being unable to change the handwriting on the wall, Friedman reported his transcript alterations to the Illinois Attorney Registration and Disciplinary Commission. He also then informed the Commission that he never included on his law school application that he had flunked out of medical school. And then there was the matter where Friedman was caught plagiarizing another author's writing in his own class paper while at the University of Chicago Law School. Friedman called that a careless mistake and the Dean considered it so, as well, because no academic disciplinary sanctions resulted.

A three-year suspension from the practice of law was recommended, but it was cut in half by the Illinois Attorney Review Board, which took into consideration Friedman's remorse and that his legal career wasn't by dishonesty or plagiarism. Friedman then went to business school at the University of Illinois—the same institution that kicked him out of its medical school for bad grades. And because in 2006 Friedman had been licensed to practice law in New York, it suspended him for the same time Illinois did.

Sources: http://www.nytimes.com/1987/09/18/us/biden-admits-plagiarism-in -school-but-says-it-was-not-malevolent.html http://www.slate.com/id/2198543/ http://abovethelaw.com/2010/01/an-update-on-loren-friedman-the-u-chicago -transcript-tinkerer/#more-2550 http://lawshucks.com/2009/04/flunked-out-of-med-school-disbarred-what-next/. http://blogs.wsj.com/law/2010/01/15/transcript-doctoring-former-chicago -student-cleared-to-practice/

Why Doesn't the Legislature Regulate the Practice of Law?

Much of the law that regulates the daily lives of citizens is statutory, coming from the legislature. Trades and occupations, such as construction, and professions, such as medicine, are regulated by a variety of legislative and administrative rules. But the legal profession is different. With limited exceptions, state supreme courts, rather than legislatures, regulate the practice of law. There are two primary reasons for this. One reason is connected to the fact that courts are composed of lawyers, and the second concerns the principle of **judicial review**.

judicial review
The doctrine from *Marbury v. Madison* that gives appellate courts the right to review the constitutionality of the acts of the legislative and executive branches, in addition to reviewing the decision of lower courts.

The first reason seems obvious. Lawyers become judges, and judges work in courts. Even though most lawsuits are settled before trial and many lawyers are not litigators, everything a lawyer does for a client may end up in a court. Because the practice of law is very much like a regulated monopoly (one cannot do legal work for someone else without first being licensed to engage in the practice of law), then tradition dictates that courts will be the most appropriate regulator of the legal profession. In fact, some state constitutions grant their state's highest court the power to set the requirements for the right to practice law. For example, the Indiana constitution, in the fourth section of Article Seven, grants the Indiana Supreme Court the exclusive right to regulate the practice of law.

That, however, does not explain why legislatures rarely intrude into the regulation of the practice of law. After all, state legislatures are filled with lawyers, so it would seem that they would also be inherently knowledgeable about the legal profession. Furthermore, nothing requires legislators to have worked as carpenters, for example, in order to have the right to draft laws concerning the construction industry. This brings us to judicial review, a hallowed doctrine in constitutional law with which all legal students should be acquainted. The doctrine of judicial review comes from *Marbury v. Madison*, 5 U.S. 137 (1803), a case whose significance is not to be underestimated and is worthy of background explanation.

The U.S. Constitution replaced the Articles of Confederation as the first document governing the country. Two camps opposed each other in the constitutional ratification fight: **Federalists**, who believed in the need for a powerful, even unlimited federal government, and **Anti-Federalists**, who did not.

Federalists
A founding father who believed in the need for the federal government to have unlimited power, as designed in the Constitution.

Anti-Federalists
A founding father who opposed the design of the Constitution because it provided for an unlimited federal government.

The second president, John Adams, was a Federalist who, as he was leaving office, appointed a number of Federalist judges after Congress passed what became known as the Midnight Judges Act. After Thomas Jefferson, an Anti-Federalist, took office as the third president, it was discovered that, through an oversight by Adam's secretary of state, some of those judges had yet to have their official commissions (documents of employment) delivered to them. President Jefferson ordered his secretary of state, James Madison (father of the Constitution), to refuse delivery of the seals, thereby keeping some of Adams's Federalist judges off the federal bench. William Marbury was one of those judges. He had been given a justice of the peace job in the District of Columbia, and, like any good American, he sued. But he took his lawsuit directly to the U.S. Supreme Court, rather than to a federal trial court.

The Supreme Court was led by a Federalist, Chief Justice John Marshall, whose opinion alone in *Marbury v. Madison* makes him, according to some, the most powerful chief justice ever. Justice Marshall decided the case in a most unusual way. He first declared Marbury right in his assertion that he had been wrongfully denied his federal job, but then declared him the loser under a line of reasoning that we know as "judicial review." Marshall declared that a federal statute passed in 1789 authorized Marbury to bring his suit originally to the Supreme Court, whereas the Constitution gives the Supreme Court authority over such a suit only in its appellate function. Setting up such a self-opposing premise allowed Marshall to debate the question of which is superior—the Constitution, or an act of Congress that contradicts the Constitution? Chief Justice Marshall argued that because America's new government was based on a written constitution, the Constitution must take precedence over a federal statute, whose existence flows from the Constitution. He viewed the Constitution as "superior . . . law, unchangeable by ordinary means." *Marbury*, at 177. Therefore, the statute in question must be invalid because it contradicts the Constitution.

Another question presented in *Marbury* was whether the Supreme Court had the power to declare a statute unconstitutional, because the Supreme Court was given authority in the Constitution over lower courts but not another branch of government such as Congress. Marshall resolved this question in favor of the Supreme Court by declaring, "[I]t is emphatically the province and duty of the judicial department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . *This is the very essence of judicial duty.*" *Marbury*, at 177, 178. (Emphasis added.) And that

is the doctrine of judicial review. The U.S. Supreme Court, in *Marbury v. Madison*, created a power for itself not granted to it in the Constitution, but not questioned since 1803, holding that it had ultimate authority over any law, whatever the source.

How does that apply to the regulation of the practice of law? First, judicial review is a doctrine whose scope extends to state supreme courts, giving them the power to declare state laws void. Second, because the practice of law is regulated on a state level, rather than a national level, state supreme courts grant their own lawyers—and perhaps paralegals some day—the right to practice law. Therefore, when a state legislature passes a law dealing with lawyers, the right to practice law, or the expansion of the rights of nonlawyers to engage in certain legal transactions, it is likely that the supreme court of that state will strike down the statute as an impermissible intrusion into the Supreme Court's business. Keep this in mind, and you will better understand how the regulation of the practice of law is unlike that of any other occupation or profession.

Poor old Marbury never did get his justice of the peace job, because after Jefferson served two terms as president, James Madison was elected, then reelected, to the presidency. Madison never granted to Marbury that which Jefferson had originally ordered to be denied. Those are the breaks, as they say, in the world of political patronage. And in the spirit of Paul Harvey, here is the twist to *Marbury v. Madison*: President Adams's secretary of state, the one who neglected to deliver the judicial commission to William Marbury, was none other than John Marshall, the chief justice. Perhaps that makes Marbury's decision to go directly to the Supreme Court more logical. Considering that Marbury brought his case to the Court in 1801, it might seem curious that the decision was not handed down until 1803. However, Chief Justice Marshall's infamous opinion in *Marbury* was not delayed due to court congestion but was actually delivered about a month after the conclusion of the case. So rancorous was the fighting between Marshall's Federalists and Jefferson's Anti-Federalists that the Supreme Court was actually closed for 14 months after Marbury filed suit, due to a law passed in 1801 that nearly stripped the Federalist Supreme Court of its official sessions. Politics has always been a contact sport.

Not Quite **Lincoln**

"May It Please the Court" Was Not Meant to Be Taken Literally

While watching a grandfather's emotional testimony in a murder case of his grandchild in 2003, jurors thought they heard a swhooshing sound, as if a blood pressure cuff was being pumped. So during a break in the trial, a police officer who also overheard the sound approached Oklahoma Judge Donald Thompson's bench, where he found a penis-enlargement pump behind the bench and then took a picture of it.

How can one conclude that it belonged to Judge Thompson? Well, it was his courtroom. Also, the judge's longtime court reporter, Lisa Foster, confirmed it was his. Foster, who wept during her testimony at Thompson's 2006 indecent exposure trial, said she had personally seen him use it on himself during court on many occasions, starting in 2000. Jurors from Judge Thompson's court testified that they saw and heard him using it on himself during trials. In addition, tape recordings of two trials in 2003 captured the pumping sounds. There was even testimony by witnesses that they had observed Judge Thompson conduct trials while taking his shoes off and shining them, clipping his toenails, and spitting tobacco.

What defense did this twenty-three-year judge and former state representative make to such bizarre and grotesque charges? His lawyer claimed the pump was a gag gift from the judge's best friend, and the judge just happened to keep the gift at his bench, but that he never used it during court. Furthermore, the defense claimed the former jurors, from their location in the jury box, could never have seen Judge Thompson using the pump. And of course, the defense claimed Judge Thompson was the victim of a political smear by Lisa Foster and the local police.

After five hours of deliberation, the jury, who were seen giggling and guffawing throughout the trial, found Judge Thompson guilty on all four counts of indecent exposure. He was sentenced to four years in prison. After being released in 2008 (and long since removed from the bench and disbarred), Mr. Thompson was rearrested in 2011 for stalking his ex-girlfriend. Later that year, he was arrested for driving under the influence.

Sources: http://www.smokinggun.com. http://www.tulsaworld.com/news/article.aspx?subjectid=14&articleid=20110803 _12 _A7_CUTLIN793355.

Not Quite **Lincoln**

For a Lawyer, Freedom of Speech Isn't Always Free

Does the First Amendment cover your right to criticize a judge? Not so fast. Think it through. Judges are government agents and so the First Amendment applies. And the freedom to criticize the government is part and parcel of freedom of speech. But lawyers must be careful about how that part of the Bill of Rights applies to them. Lawyers are officers of the court, not just public citizens, and the oath of admission to the bar (as well as the ethics codes) expressly or impliedly requires a level of decorum in speaking about judges, which restricts members' critiques.

Florida criminal defense lawyer Sean Conway was fed up with Miami trial judge Cheryl Aleman, who Conway thought never gave defense lawyers sufficient time to prepare for trial. So he blogged about it, referring to her as "an evil, unfair witch" with an "ugly, condescending attitude" who was "seemingly mentally ill." That got him sanctioned by the Florida Bar. While he agreed to a public reprimand in 2008, he chose to fight for his First Amendment rights and had the support of the American Civil Liberties Union (ACLU) of Florida, who supported his cause before the Florida Supreme Court. But Conway ended his First Amendment fight in 2009.

For her part, Judge Aleman was also publicly reprimanded. An investigation into her treatment of defense lawyers showed her to be, according to the Florida Supreme Court, "arrogant, discourteous and impatient." In one case, the judge gave an attorney fifteen minutes to draft a motion.

Sources: http://www.citmedialaw.org/threats/florida-bar-v-conway. http://www.abajournal.com/news/article/lawyer_agrees_to_reprimand_for_blog_tirade/. http://www.nytimes.com/2009/09/13/us/13lawyers.html?scp=3&sq=schwartz&st=cse. http://articles.sun-sentinel.com/2010-12-03/news/fl-broward-judge-aleman-obit -20101202_1_aggressive-cancer-law-degree-adult-education-classes. *Florida Bar v. Conway*, 996 So.2d 213 (Flor. 2008).

How to Brief a Case

Few things annoy legal students more than being assigned cases to brief. That is an understandable reaction because briefing cases is tedious. It requires one to read case law very carefully, often more than once, and often using highlighters. Then it requires the reader to analyze the case, making judgment calls in choosing the portions that are relevant for the reader's needs. Finally, it requires the reader to turn those judgment calls into a coherent, summary form that expresses the essence of the judge's opinion. And that is exactly why case briefing is so important. In a **common law** country, such as America, case law will always be the ultimate answer to any legal question.

common law
This phrase has three related definitions. In this context, common law refers to judge-made law, or the process whereby appellate courts make precedent that lower courts must follow. Because of our colonial history with England, America is known as a common law country.

Therefore, appellate cases will always need to be read and understood. And at a pragmatic level, the better one gets at legal analysis, the more valuable one becomes, and nothing sharpens one's legal analysis skills more than briefing cases. As you read the cases in the chapters, understand that they are presented for two reasons: to help you understand how courts interpret the rules of professional responsibility and to help bring those dry rules to life. Be aware that even though a case in the text might have come from your jurisdiction, it does not mean that case is still followed in its original form or even followed at all.

Like making omelettes, everyone has their own method on how to brief cases. But every brief should have at least five elements: facts, issue, holding, reasoning, and decision. A sixth element could be the dissent, but not all cases have a dissenting opinion. As these elements are explained, bear in mind that your instructor might have a different view on the format of a case brief.

The Facts

Law does not occur in a vacuum. A good case brief starts with its facts section, but to be "brief," a facts section should include only the key facts. As a rule of thumb, key facts are those whose existence not only places the case in a context but also helps to

shape the case's outcome. How is that determined? It is done through careful reading. As you examine the facts from a case in order to brief it, ask yourself if the court could have reached its decision without that fact being in existence. If not, that usually indicates a key fact that should be in your brief.

The Issue

The issue is the brain center of a case brief and the hardest part of a brief to grasp. A good issue asks a legal question, not an "outcome" question. An issue is about what the court has to grapple with in the appeal, not about who wins or loses. A good issue also incorporates some of the key facts into its wording. You know you have written a good issue when it stands on its own—when it, by itself, would allow a reader who has not read the case to still get an understanding of it. Write your issue in the form of a question. Do not be alarmed if your issue reads differently from someone else's, because issues can convey the same legal question but be expressed in different ways.

The Holding

For a case brief, the holding should simply answer the question presented in the issue in as short a method as possible. On a formal level, however, a holding is the pronouncement of law issued by the court's majority opinion; it is the precedent. The holding in a case brief, however, should just answer the issue.

The Reasoning

The reasoning section is the heart of the brief. A good reasoning section tells the reader why the court did what it did or how it reached its conclusion. Because appellate courts most often reach their conclusions through relying on case law, then a question is often raised concerning whether a reasoning section should include case citations. It generally should not, because citations, by themselves, explain nothing. Instead of citations, a reasoning section should give the principles from the precedent cited in the case. Sometimes courts use prominent legal doctrines, commonly called **black letter law**, as the foundation on which their reasoning is built.

A court's reasoning is often in the latter part of the opinion and usually makes reference to the facts in the earlier part of the opinion. Likewise, your reasoning section should revisit integral facts in order to summarize the court's analysis.

The Decision

The decision section is procedural in nature. Appellate courts do one of four things with a case: **affirm**, **reverse**, **remand**, or **vacate**.

At times, however, courts do more than one of the preceding options in the same opinion. One can usually find the court's decision at either the beginning or the end of the case. If a disciplinary sanction against an attorney is stated or upheld, it is wise to include that sanction in your decision.

Please read the following case twice. Then, try briefing it along the left half of one or two pages of paper, leaving the right half of the paper open. This visual method will allow you to include on the right half of the same section of the brief any critical elements discussed in class that you may have missed, as well as any class notes associated with that case. When you are done briefing the case, look at the following page in the text. There you will find a sample brief of the case. The sample brief will be in italics, with some instructional comments placed in brackets. Compare your brief to the sample for similarities. On a final note, the more one briefs cases, the faster and better one gets at it, so hang in there.

black letter law
Legal principles that have become so accepted and unequivocal that they are cited as truisms.

affirm
The decision of an appellate court that maintains the status quo and keeps the lower court's decision in place.

reverse
The opposite of affirm.

remand
A remand occurs when an appellate court sends at least part of an appeal back to a lower court to reexamine the evidence or damages in light of the higher court's decision.

vacate
Similar to a remand, but sometimes a higher court vacates a lower court's decision to temporarily set a matter aside with instructions that the lower court rewrite its opinion in light of the higher court's opinion.

Case **Law** | In the Matter of Anonymous

689 N.E.2d 434 (Ind. 1997)

Per Curiam.

Lawyers who advertise that they are "specialists" in a particular area of the law must comply with the provisions of Ind. Admission and Discipline Rule 30. The respondent in this disciplinary action failed to comply with those provisions and for that misconduct will receive a private reprimand. Herein, we set forth the facts and circumstances of this case in order to educate the bar with respect to provisions regarding lawyer specialist certification, while preserving the private nature of the admonishment.

The Commission charged the respondent with violating Rule 7.4(a) of the *Rules of Professional Conduct for Attorneys at Law* by claiming, in an advertisement, that he was a specialist in personal injury law when in fact he was not so certified. Pursuant to Ind. Admission and Discipline Rule 23, Section 11, the respondent and the Commission have agreed that the respondent engaged in misconduct and that a private reprimand is an appropriate sanction. That agreement is now before us for approval.

The parties agree that in 1995, the respondent purchased advertising time on a radio station and provided text for an advertisement of his law office. The text he submitted for the ad was culled from "canned" advertisements the respondent purchased from a legal periodical several years before. The respondent allowed his office manager to send the material to the radio station without first reviewing its contents. On March 15, 1995, the radio station broadcast the advertisement, which stated that the respondent "specialize[d] in personal injury cases." At the time the advertisement aired, the respondent was not certified as a specialist in any area of the law under Ind. Admission and Discipline Rule 30.

Indiana Professional Conduct Rule 7.4(a) provides that lawyers may not express or imply any particular expertise except that authorized by Prof.Cond.R. 7.4(b), which in turn allows certification as a specialist only when authorized by the provisions of Admis.Disc.R. 30. Admission and Discipline Rule 30 provides, in relevant part:

Section 5. Qualification Standards for Certification. (a) To be recognized as certified in a field of law in the State of Indiana, the lawyer must be duly admitted to the bar of this state, in active status, and in good standing, throughout the period for which the certification is granted. (b) The lawyer must be certified by an ICO [independent certifying organization] approved by CLE [Commission for Continuing Legal Education], and must be in full compliance with the Indiana Bar Certification Review Plan, the rules and policies of the ICO and the rules and policies of CLE.

At the time the respondent's radio advertisement aired, he was not certified as a specialist in the area of personal injury law pursuant to Admis.Disc.R. 30. We therefore find that he violated Prof.Cond.R. 7.4(a) by expressing an expertise when he was not certified as a specialist pursuant to Admis.Disc.R. 30. We find that a private reprimand is appropriate in this case largely because the respondent's misconduct was unintentional. The offending content of the advertisement made its way on air due to the respondent's failure to review the material prior to submitting it to the radio station. We therefore view his misconduct as less culpable than if he had knowingly submitted a wrongful advertisement. It is, therefore, ordered that the tendered *Settlement of Circumstances and Conditional Agreement for Discipline* is approved, and accordingly, the respondent is to be given a private reprimand.

Sample **Brief** | In the Matter of Anonymous

Facts: The Disciplinary Commission charged an attorney with violating Rule 7.4 of the Indiana Rules Professional Conduct. In 1995, the attorney paid for a radio commercial to advertise his services. The text for his radio spot came from "canned" advertisements he had previously purchased from a legal periodical.

The advertisement was given to the radio station by the attorney's paralegal before the attorney reviewed it. The ad stated that the attorney "specialized in personal injury cases." At the time the commercial aired, attorney was not certified as a specialist under Indiana law.

[Notice that the attorney's name is not listed in this case; this is an example of private discipline. Also, this case is not on appeal to the Indiana Supreme Court because the attorney and the disciplinary commission agreed to the facts and a sanction. The Supreme Court has this case in order to approve the sanction. Your facts should show that the lawyer placed an ad that implied he was a specialist when, at the time of the ad's publication, he was not certified, as required by Rule 7.4. The sample facts section includes the facts about the paralegal because it is of importance to know that the lawyer is responsible for the mistake of his employees. Moreover, maybe the paralegal would not have sent the ad at all if he or she had been more aware of the Indiana Rules of Professional Conduct.]

Issue: When an attorney uses an advertisement that states he "specializes" in some area of the law, is that equivalent under the rules of professional responsibility to stating he is a "specialist"?

[Because this is not a traditional appeal, there is no "legal conflict" as earlier described. That makes the issue a bit harder to find. So, instead, craft an issue that would come out of the case if the attorney here was disputing the findings of the disciplinary commission. What would that be? Namely, that he did not say he was a specialist, but that he was specialized, which might mean that he does a lot of a certain kind of cases. Do not forget to use key facts in your issue so that it can stand securely by itself.]

Holding: Yes.

[A reading of the case shows that the attorney did violate the advertising rules, so the answer to our issue is yes.]

Reasoning: Rule 7.4 states that one cannot even imply he is a specialist unless he is certified as a specialist, as allowed by Admission Rule 30. That rule says that in order to be certified as a specialist, an attorney must be certified by an independent certifying organization that has been approved by the Indiana Commission for Legal Education. Since the attorney's ad said he specialized in personal injury law, it implied he was a specialist. And, at the time of the ad's broadcast, he was not certified, as required.

[This is a case brief, so do not include all of the court's explanation, including copying all of the language from the two rules (MR 7.4, and A&D Rule 30(5)), but include enough to leave you with a definitive explanation. The key to this reasoning section is to close the loop, to show in your brief why the attorney violated the advertising and specialization rules, not to restate that he did violate them, failing to include any of the details.]

(continued)

Sample **Brief** | In the Matter of Anonymous

(continued)

Decision: The Court agreed that a private reprimand was sufficient here, since the attorney unintentionally violated the advertising and specialization rules.

[In attorney discipline cases, the decision will usually include a sanction, or approval of a sanction, unless the court finds that the rules were not violated. Here, your decision should state why a minimal sanction was given because that shows how intent to break the rules affects a court's sanctioning process.]

In the following case, the New Jersey Supreme Court disbarred a lawyer for misappropriating his clients' funds, which is an official way of saying he stole his clients' funds. While reading the case, notice that the court is perplexed about how the attorney's alcoholism affected the court's decision to disbar him.

Case **Law** | In the Matter of Hein

516 A.2d 1105 (N.J. 1986)

Per Curiam.

This matter arises from a report of the Disciplinary Review Board (DRB) recommending disbarment of respondent. The recommendation is based upon its finding of multiple instances of misconduct involving neglect of clients' matters, misrepresentation of the status of matters, and, most significantly, two instances of misappropriation of clients' funds. Based upon our independent review of the record, we are clearly convinced that respondent engaged in the described conduct and that the ethical infractions warrant the discipline recommended.

Respondent was admitted to the bar in 1976. He opened an office for the practice of law as a sole practitioner. He practiced without incident until 1979, when the first of these incidents involving neglect arose. The problem matters continued into 1980 and were concluded in August 1981, when respondent closed his office. Various complaints were filed against him, including certain matters that were resolved without a finding of disciplinary infraction. He was suspended on September 28, 1982, for failure to answer the complaints. Respondent made no answer to any of the disciplinary complaints until January 11, 1983, when he appeared at a hearing conducted by the District III Ethics Committee (Ocean/Burlington). At that time, he substantially conceded the matters set forth in the complaints and attributed his failings to very serious drinking problems.

The DRB made detailed findings with respect to the several incidents as to which it sustained the District Ethics Committee's presentment of unethical conduct. Those findings may be summarized as follows: three clients gave retainers to respondent to represent them in matrimonial matters. Despite receipt of the retainers, respondent failed to file the requested complaints or to prosecute the parties' claims. He misrepresented the status of the file to one client. Another client retained him to handle various tax and commercial matters, to collect rents, and to prepare and file an income tax return. Respondent failed to file the tax return, to respond to inquiries about

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Case **Law** | In the Matter of Hein

(continued)
the matters, and to turn over $174 in rent receipts. In another instance, respondent was found to have aided a non-lawyer in the practice of law by reviewing bankruptcy petitions that the non-lawyer was preparing for filing. The non-lawyer signed respondent's name to the petitions without his consent.

The matter of gravest consequence to us and the ethics panels is a matter in which respondent was given a power-of-attorney, by clients who were in the military service, to collect the proceeds of a second mortgage. The clients had to leave the state before the matter could be resolved. Respondent collected almost $1,400 due on the mortgage but never responded to the clients' inquiries about the status of the matter and never turned the proceeds over to the clients. When the clients learned from the mortgagor that she had paid the mortgage balance to respondent, this complaint ensued.

It is plain that respondent exhibited a pattern of neglect in his handling of legal matters generally, in violation of DR 6-101(A)(2); that he failed to carry out his clients' contracts of employment, in violation of DR 7-101(A)(2); and that he misrepresented the status of various matters to his clients, in violation of DR 1-102(A)(4). Standing alone, these incidents would probably not warrant disbarment since they occurred during a relatively brief period of respondent's career and were influenced, at least in part, by respondent's dependence upon alcohol during the period. . . . However, we remain gravely troubled by the misappropriation of clients' funds. Respondent acknowledges that he collected about $1,400 on behalf of the clients and that these funds were converted to his own use. This evidence clearly established that respondent unlawfully appropriated clients' funds. Although the amounts involved do not evidence a course of magnitude, there is no suggestion in the proofs that it was an unintentional misuse of clients' funds through neglect, *In re Hennessy*, 93 N.J. 358, 461 A.2d 156 (1983), or through misunderstanding, *In re Hollendonner*, 102 N.J. 21, 504 A.2d 1174 (1985).

Respondent, in a quite appealing sense of candor, admitted to the District Ethics Committee that, with certain exceptions not relative to our disposition, the allegations are essentially true. When asked if there was anything he would like to say by way of mitigation, he told the committee that he had "very serious drinking problems" and "that I didn't have enough sense to seek help when I should have. . . . I thought I was succeeding. But it did not succeed. It got progressively worse." His final comments were:

MR. HEIN: I would like to add for what it is worth, I am sorry for the other members of the Bar. I cast a bad look on lawyers for doing this. But it got out of my control.

MR. BEGLEY: That is a nice thing to say. But you have to try to think about yourself and straighten your own life out.

MR. HEIN: That is why I am here today. I just want to get this all resolved and I will never practice law again. But at least I will be able to live with myself again.

How far we should look behind such an uncounseled admission concerns us deeply. Unfortunately, respondent did not appear before the DRB. It acted on his matter on the record before it. Before us, respondent was represented by counsel who forcefully argued that his misconduct was causally related to his alcohol dependency and that his alcoholism should be a mitigating factor that would avoid the extreme sanction of *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979). . . .

To some extent a similar effect on perception, cognition and character may be caused by financial reverses, especially when that results in extreme hardship to respondent's family. It is not unusual in these cases to find such hardship, at least as
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Case **Law** | In the Matter of Hein

(continued)
perceived by most respondents. Yet we disbar invariably. It is difficult to rationalize a lesser discipline where alcohol is the cause—especially in view of the often related factors of financial reverses, failure in the profession, family hardship, and ultimately misappropriation.

We recognize, as respondent argues, that alcoholism is indeed not a defect in character. The public policy of the State of New Jersey recognizes alcoholism as a disease and an alcoholic as a sick person. See, e.g., N.J.S.A. 26:2B-7 (alcoholics "should be afforded a continuum of treatment" rather than subjected to criminal prosecution). The course that we have pursued in disciplinary matters is premised on the proposition that in our discipline of attorneys our goal is not punishment but protection of the public. *In re Goldstein*, 97 N.J. 545, 547–48, 482 A.2d 942 (1984); *In re Jacob*, 95 N.J. 132, 138, 469 A.2d 498 (1984). There may be circumstances in which an attorney's loss of competency, comprehension, or will may be of such magnitude that it would excuse or mitigate conduct that was otherwise knowing and purposeful. *See In re Jacob, supra*, 95 N.J. at 137, 469 A.2d at 498.

We have carefully tested against the Jacob standard the proofs submitted by the respondent consisting of evidence of his seeking treatment at a rehabilitation center, expert analysis and expert opinion with respect to his condition, and personal **affidavits** from himself, his wife, and an employee. These documents do demonstrate an alcohol dependency, but they do not demonstrate to us the kind of loss of competency, comprehension, or will that can excuse the misconduct. Respondent's expert described the normal progression of alcohol dependency to the point where "there is a disruption eventually of the normal critical thinking and in concern and judgment in his perception of daily living and in the accomplishment of skills in his particular profession." He concluded that respondent "has gone through all the expected stages of drug abuse. . . . There is no question, in my opinion, that there is a direct causal relationship between the progressive disease of alcoholism and the loss of critical care and judgment affecting [respondent's] practice of law."

In this case the evidence falls short, however, of suggesting that at the time the mortgage proceeds were converted to respondent's use, he was unable to comprehend the nature of his act or lacked the capacity to form the requisite intent. In addition, it does not appear that he was continually in a dependent state, since he was able to attend to his practice. We must, however, accept, as respondent's expert points out, that the alcoholic becomes skilled at concealing the impairment. Respondent's secretary candidly stated that she was surprised that he could function as he did. These psychological states are extremely difficult for us to resolve. We do not purport here to determine definitively the effect alcohol dependency can have upon the volitional state of an individual. We have only the legal standard to guide us. We wish that we knew more.

Until we know more, perhaps until science and society know more, we shall continue to disbar in these cases. We believe that to do less will inevitably erode the Wilson rule and the confidence of the public in the Bar and in this Court. We believe that public attitudes toward alcoholics and addicts have changed, that they are much more compassionate, and almost totally nonpunitive, and that the members of the public have recognized more and more that they are dealing more with a disease than with a crime. Nevertheless we do not believe that that sympathy extends to the point of lowering the barriers to the protection we have attempted to give to that portion of the public who are clients, especially clients who entrust their money to lawyers.
(continued)

affidavits
A written statement of declaration made under oath and very often in the course of litigation.

Case **Law** | In the Matter of Hein

(continued)

The circumstance of the rehabilitated alcoholic or addict is deeply troubling to us. He has presumably recovered from the condition that contributed to cause his clients harm, and he will probably never again do any harm. But many of the lawyers, nonalcoholic, nonaddicted, disbarred by us for misappropriation would probably never again misappropriate. Indeed the probabilities may be even greater. Yet we disbar. That individual harshness—and so it is in most cases—is justified only if we are right about the devastating effect misappropriation—unless so treated—has on the public's confidence in the Bar and in this Court. Our primary concern must remain protection of the public interest and maintenance of the confidence of the public and the integrity of the Bar.

There may come a time when knowledge of the effect of drugs or alcohol, or other dependency upon the ability of individuals to conform their conduct to a norm, may lead us to alter our current view. Programs may be developed in conjunction with the Bar and the involved professionals that will promise the avoidance of public injury with the concurrent rehabilitation of dependent attorneys. We have seen, as they attest, that dependent attorneys become skilled at deception, not only of others, but of themselves. The best help is self-help, but others may be able to detect the need and help attorneys to take the first step to recovery. Under such programs an attorney could demonstrate commitment to a firm plan of recovery from the disease or condition. That in turn could assure the Court, and therefore the public, of the individual's ability to practice under circumstances or conditions that will assure public confidence until the disease or defect was arrested. For now, we find it difficult to exonerate the conduct influenced by the compulsion of alcohol dependency as contrasted with the compulsion to preserve one's family or assist another in a time of extreme need. . . .

Upon consideration of all the circumstances, we conclude that the appropriate discipline is disbarment. We direct further that respondent reimburse the Ethics Financial Committee for appropriate administrative costs.

Case Questions

1. Explain the attorney's misconduct in this case. Identify the acts that most concerned the court.
2. Assess whether there are any mitigating factors in this case. Support your answer.
3. Determine the court's sanction against the attorney and explain the court's reasoning for issuing this sanction.

Case **Law** | In the Matter of Malone

In re Malone, 105 A.D.2d 455 (1984)

Petitioner moves to confirm a referee's report which sustained, in part, a charge of professional misconduct against respondent. Respondent, an attorney admitted in the Second Department on March 16, 1966, cross-moves to disaffirm the report.

The single charge against respondent arises out of his conduct of an investigation, as Inspector General of the New York State Department of Correctional Services, into the alleged brutal beating of an inmate by several correction officers. Specifically, in order to protect the identity of a correction officer who stated he witnessed the incident, and thus protect him from retaliation for having broken the "code of silence" among correction officers, respondent instructed the officer to testify falsely under oath at one point during the investigation.

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Case **Law** | In the Matter of Malone

(continued)

In December, 1980, Correction Officer Robert Lewis confidentially informed his superiors that he had witnessed an unprovoked assault upon inmate Robert Jackson by several correction officers which occurred on December 13, 1980 at [***2] the Downstate Correctional Facility in Dutchess County. Testimony before the referee, including that of the Commissioner of the Department of Correctional Services, indicated that it is highly unusual for a correction officer to voluntarily inform upon his fellow officers for fear of retaliation for breaking the "code of silence" which exists among correction officers.

Respondent began an investigation into Lewis' allegations. Preliminary interviews of Lewis by respondent and his investigators to ascertain Lewis' version of events and his credibility [*456] were conducted at the Dutchess County Airport. The interviews were conducted at the airport as part of a policy decision by respondent, condoned by the commissioner and Lewis, to keep Lewis' identity as an informer secret as long as possible. Some additional information [**605] gathered during this period, such as inmate Jackson's statement and his medical records, appear to support Lewis' version of the events surrounding the assault.

Thereafter, on October 21, 1981, at the Downstate Correctional Facility, as part of the ongoing investigation, respondent interviewed under oath the correction officers who had been [***3] identified as possibly involved in the alleged beating of inmate Jackson. Six correction officers, including Lewis, were interviewed. The purpose of the interviews was to gather, evidence and to have the officers make sworn statements regarding the incident. None of the officers admitted participating in or observing an assault upon the inmate.

Lewis also denied having witnessed the use of undue force. This false testimony was given at respondent's direction. By having Lewis give false testimony exonerating his fellow officers, respondent hoped to avert suspicion away from Lewis as an informer. The ruse was successful.

The day before the interviews, on October 20, 1981, at the Quality Inn in the City of Albany, respondent had taken Lewis' true testimony under oath as to the incident in the presence of a stenographer and investigator. At that time, respondent stated on the record the plan of taking two contradictory statements from Lewis "in order to preserve the confidentiality of his information and his identity". The transcript of Lewis' October 20, 1981 testimony does not reveal Lewis' identity and is entitled "Interview with 'Witness' Correction Officer". After the fact, [***4] respondent informed the commissioner and the department's chief legal counsel of Lewis' contradictory statements; both approved of the procedure.

On December 11, 1981, disciplinary charges were brought against three of the correction officers interviewed by respondent on October 21, 1981, alleging the use of undue force and giving false testimony. Negotiations ensued between the department and the officers' union in an effort to settle the charges. During these negotiations, respondent provided the department negotiators with Lewis' October 20, 1981 true statement to use as leverage or a bargaining chip. The negotiations proved unsuccessful, the accused correction officers filed grievances and arbitration was initiated.

On the first day of arbitration, October 4, 1982, Lewis was called as a witness, testified to the use of undue force, and [*457] revealed the contradictory nature of his two prior statements and respondent's role with respect thereto. Had the matter never gone to arbitration, Lewis' identity would have remained secret.

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Case **Law** | In the Matter of Malone

(continued)

On September 22, 1983, petitioner Committee on Professional Standards charged respondent with professional misconduct in violation of DR [***5] 1-102 (subd [A], pars [3], [4], [6]) of the Code of Professional Responsibility and section 487 of the Judiciary Law in that "he counseled and instructed a witness to give contradictory, misleading and inconsistent testimony and attempted to mislead and deceive a party or parties". The charge detailed two specifications, the facts of which were admitted by respondent, which essentially described his role in the taking of Lewis' statements on October 20 and 21, 1981. After a hearing on January 20, 1984 before a referee assigned by this court, the referee found respondent had violated DR 1-102 (subd [A], par [4]) by engaging in conduct involving deceit and misrepresentation and found respondent's proffered justifications for his action relevant only to the degree of discipline to be imposed.

In support of his cross motion for disaffirmance of the referee's report, respondent first argues that this court is without jurisdiction in this matter because he was not admitted in, does not reside in, and has never practiced law in this Department. We reject his contention. This court's disciplinary jurisdiction extends to New York attorneys who have offices in or are employed [***6] or transact business in this Department (see Judiciary Law, § 90, subd 2; 22 NYCRR 806.1; *Matter of Smith*, 68 AD2d 52, 53); as Inspector General of the State Department of [**606] Correctional Services, respondent has one of his main offices in Albany. Also, the fact that some of the alleged misconduct, such as respondent's direction to Lewis at the Quality Inn in Albany to testify falsely, took place in this Department is an additional valid jurisdictional ground (see *Matter of Klein*, 23 AD2d 356, 360, affd 18 NY2d 598, cert den *sub nom. Klein v Klein*, 385 U.S. 973).

Next, we reject respondent's argument that since he was acting in his role as Inspector General and not as an attorney when he advised Lewis to lie under oath, this court may not discipline him for such misconduct. *HN1* It is clear that this court's power to discipline an attorney "extends to misconduct other than professional malfeasance when such conduct reflects adversely upon the legal profession and is not in accordance with the high standards imposed upon members of the Bar" (*Matter of Nixon*, 53 AD2d 178, 181-182; see Judiciary Law, § 90, subd 2; 22 NYCRR 806.2; *Matter of Dolphin*, 240 NY 89, [***7] 93). Directing a person to give false testimony would normally constitute such [*458] misconduct (see *Matter of Popper*, 193 App Div 505, 512; see, also, *Imbler v Pachtman*, 424 U.S. 409, 429; Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney, Ann., 10 ALR4th 605). *HN2* Holding a public office, such as Inspector General, is not a shield behind which breaches of professional **ethics**, otherwise warranting disciplinary action, are permitted. Rather, a lawyer who holds public office must not only fulfill the duties and responsibilities of that office, but must also comply with the Bar's ethical standards.

Respondent argues that, under the circumstances of this case, his direction to Lewis to falsely testify was not a breach of ethical principles because it was in accordance with certain ethical canons, that there is precedent for the proper use of false testimony in the investigative and prosecutorial context, that the motive of protecting Lewis from danger justified the breach, if any, that respondent was under a duty to protect Lewis, that respondent's actions are justifiable under section 35.05 of the Penal Law, [***8] and that respondent should enjoy immunity for a good-faith discretionary act.

First, we conclude that *HN3* the ethical canons cited by respondent in support of his conduct, requiring competent and **zealous representation** of clients, cannot in and of themselves overcome the proscription against directing another to give false testimony. Second, *HN4* while there is precedent for the proposition that the creation and use

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Case **Law** | In the Matter of Malone

(continued)

of false documents and testimony in the investigative and prosecutorial context may not be so violative of due process and a defendant's fundamental rights as to warrant dismissal of a criminal indictment (see *People v Archer*, 68 AD2d 441, affd 49 NY2d 978, cert den 449 U.S. 839), such conduct may, nevertheless, be unethical (cf. *United States v Archer*, 486 F2d 670; *People v Rao*, 73 AD2d 88).

Respondent's argument that his conduct was not unethical because it was motivated by a desire to protect Lewis and prompted by his responsibilities as Inspector General is essentially a contention that the end justifies the means. This argument was properly rejected by the referee who relied upon *Matter of Friedman* (76 Ill 2d 392, 392 NE2d 1333) an *Olmstead v United States* [***9] (277 U.S. 438, 485 [Brandeis, J., dissenting]; see, also, *Matter of Zanger*, 266 NY 165; Disciplinary Action Against Attorney for Misconduct Related to Performance of Official Duties as Prosecuting Attorney, Ann., 10 ALR4th 605). We also note that it is not entirely clear the "means" chosen by respondent to protect Lewis' identity was the only alternative available. The department legal counsel testified before the referee [*459] [**607] that possible alternatives might have included the taking of statements from the correction officers in a manner which would not have revealed what any of the guards testified to, or the use of some sort of witness protection program.

Next, we reject respondent's contention that his conduct was justified pursuant to subdivision 1 of section 35.05 of the Penal Law because it was "performed by a public servant in the reasonable exercise of his official powers, duties, or functions". While the defense of justification may relieve respondent of criminal liability (cf. *People v Archer*, 68 AD2d 441, 448, *supra*; see, generally, *People v Mattison*, 75 AD2d 959) or civil liability (cf. *Sindle v New York City Tr. Auth.*, 33 NY2d [***10] 293), the defense does not necessarily render his actions ethical or even in accord with due process strictures (see *Matter of Friedman, supra* [Underwood, J., concurring]).

Lastly, we also reject respondent's argument that as a public official exercising prosecutorial and investigative discretion he should be immune from disciplinary action. In one of the cases cited by respondent, which deals with the immunity of public officials from being held liable in damages for their actions, the Supreme Court noted: "Moreover, *HN5* a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime" (*Imbler v Pachtman*, 424 U.S. 409, 429, *supra*).

In view of the above, we confirm the referee's report insofar as it found respondent violated DR 1-102 (subd [A], par [4]), "A lawyer shall not: * * * Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." It [***11] is not clear whether the referee, by solely mentioning DR 1-102 (subd [A], par [4]) intended to exonerate respondent of violations of other ethical rules. However, we find respondent did not violate DR 1-102 (subd [A], par [3]), "illegal conduct involving moral turpitude", or DR 1-102 (subd [A], par [6]), "any other conduct that adversely reflects on his fitness to practice law". Nor has respondent violated section 487 of the Judiciary Law which states, in pertinent part, that: "An attorney or counselor who: 1. Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party * * * Is guilty of a misdemeanor, and in addition to the punishment prescribed therefor by the penal law, he forfeits to the party injured treble damages, to be recovered in a civil action."

[*460] This statute is inapplicable herein because no one is attempting to hold respondent criminally liable or to collect treble damages. This is not to say this court does not have

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Case **Law** | In the Matter of Malone

(continued)
the power to discipline an attorney for acts which may constitute a crime before trial and conviction for such crime (see *Matter of Kammerlohr*, 171 App Div 781, [***12] 785; see, also, *Matter of Wall*, 107 U.S. 265; *Matter of Popper*, 193 App Div 505, 511, *supra*).

The purpose of a sanction in a disciplinary proceeding is not to punish but to protect the public, to deter similar conduct, and to preserve the reputation of the Bar (see *Matter of Levy*, 37 NY2d 279, 282; *Matter of Kahn*, 38 AD2d 115, affd 31 NY2d 752; *Matter of Rotwein*, 20 AD2d 428, 429-430; *Matter of Ropiecki*, 246 App Div 80). In view of these purposes, and noting that this is a case of first impression in this State, that respondent appears to have acted out of a laudable motive, namely, to protect a witness willing to [**608] risk retaliation for breaking the correction officers' "code of silence", that respondent has had no prior disciplinary problems, and that respondent admitted the facts underlying the charge against him, we find censure to be an appropriate sanction.

Respondent censured.

Case Questions

1) Assess the facts of this case. Identify the attorney's unethical actions. Determine whether the attorney's unethical actions occurred while representing a client or outside of his professional role, according to the court's decision.
2) Explain the court's decision in this case. Explain the aspects of the court's decision that address the difference between zealous representation and unethical actions.

Not Quite **Lincoln**

WWJD?

William White III represented the Atlantic Beach Christian Methodist Episcopal Church in Atlantic Beach, South Carolina, in a zoning ordinance dispute with Atlantic Beach town officials. It was a disagreement that originally flared in 2004 and one where White represented the church back then. That suit settled in 2007, with the town of Atlantic Beach paying damages to the church. So, when Kenneth McIver, the Atlantic Beach town manager, wrote the church a letter in 2009 about its lack of zoning compliance, White was filled with the kind of indignation that calls for one to channel Charlton Heston in a beard, holding a shepherd's staff. White tossed off a letter to his client (the church and its landlord) and wrote in part: "You have been sent a letter by purported Town Manager Kenneth McIver. The letter is false. You notice McIver has no Order. He also has no brains and it is questionable if he has a soul. Christ was crucified some 2000 years ago. The church is His body on earth. The pagans at Atlantic Beach want to crucify His body here on earth yet again." He also ridiculed the damages the Atlantic Beach officials "pigheadedly cause[d] the church."

Going a bridge too far, he sent courtesy copies of the letter to the government officials he excoriated, which was the ultimate purpose of the letter. Just because someone may lack a soul doesn't mean he or she lacks a backbone, and three of the recipients filed a complaint with the South Carolina Bar. As penitence for White's fire and brimstone letter, the South Carolina Supreme Court suspended him for 90 days, for what it called his "blatant incivility and lack of decorum." In so doing, the court found that White violated South Carolina Ethics Rule 4.4, which concerned respect for the rights of third persons. It approved White's argument that the First Amendment protected his actions, concluding that members of the bar must temper their criticisms in accordance with professional standards of conduct. White also argued, to no avail, that he wasn't responsible for calling others pagans and soulless because he was requested to use those words. Blaming someone else didn't work for Eve or Adam either.

Sources: http://www.thesunnews.com/2011/03/07/2023897/columbia-attorney-suspended-over.html.
In re White, 707 S.E.2d 411 (S.C. 2011).

Final Thoughts on the ABA's Role in Regulating Lawyers

The ABA, like state and local bar associations, issues its own ethics opinions. These ethics opinions are meant to interpret the ABA Model Code of Professional Responsibility or the ABA Model Rules of Professional Conduct, depending on the date of the ethics opinion. Because the ABA is a private association and does not license lawyers, these ethics opinions are advisory only and do not have the force of law. In fact, in a 1998 case (discussing "inadvertent disclosure" is an important topic covered in detail in Chapter 4), the Texas Supreme Court stated that ABA ethics opinions are just that, advisory opinions that have no direct bearing on the behavior of Texas attorneys. *In re Meador*, 969 S.W.2d 346, 350 (Tex. 1998).

Although ethics opinions are advisory in nature, because of the ABA's significance, its ethics opinions are important, and very often other bar associations make references to ABA opinions. ABA ethics opinions come with two possible labels: Formal and Informal. And according to the Rules of Procedure of the ABA's Model Rules of Professional Conduct, the distinction between the two is that, "[f]ormal Opinions are those upon subjects the [Rules of Procedure] Committee determines to be of widespread interest or unusual importance." For example, the ABA issued a Formal Ethics Opinion in August 2010 on the subject of lawyer websites. But the ABA refused to make it available for review without paying a fee and prohibited ethics organizations or lawyers from posting it on their websites, asserting copyright in the opinion. Certain ABA ethics opinions are cited throughout the chapters of this book.

The ABA has also issued a document called "The ABA Standards for Imposing Lawyer Sanctions," which was revised in 1992 and establishes a blueprint upon which regulating courts can and do rely when considering imposing sanctions of lawyers. Included in the ABA's document are reasons for disciplining lawyers and categories of ethical duties violated by malfeasant lawyers, of which the most serious duty to be violated is one owed to a client. The ABA standards also specifically address four factors that should be considered when determining what level of sanction should be administered, which are the following: (1) the duty violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's misconduct, and (4) the existence of aggravating or mitigating factors. ABA Standards 3.0. Included

Not Quite **Lincoln**

Do You Mail a Snake C.O.D.?

Bob Castleman of Pocahontas, Arkansas, surrendered his law license to the Arkansas Supreme Court in July 2004 for what one could safely infer was in lieu of disbarment. It seems that Bob and his son Robert were not getting along so well with a Mr. Albert Staton, who was unhappy with an ATV purchase he had made from the younger Castleman.

Rather than egging Mr. Staton's house or car as a signal of their conflict with him, Bob and Robert decided to send a message to Albert—literally. But there were two problems with what they mailed Mr. Staton. The first problem, but not the least, was that inside the package sent to Staton was a live, three-foot-long copperhead snake. The second problem was that Mrs. Staton got the mail that day. Imagine her surprise. Fortunately for Mrs. Staton, the snake did not bite her after popping out of the box. (Unfortunately for the snake, a sheriff's deputy dispatched it.) After being charged with the accurately titled crime of sending a threatening communication through the mail, Bob Castleman pled guilty in January 2004. However, his sentence was delayed after he tested positive for marijuana. Eventually, Castleman was sentenced to two years in prison, and at his sentencing he said, "I am an educated idiot." In giving Castleman the minimum required sentence, U.S. District Judge George Howard Jr. said, "Once a sinner, not always a sinner." There is no word on whether PETA offered a Victim Impact Statement on behalf of the dead snake.

Sources: http://www.freerepublic.com/focus/f-news/1068993/posts. http://thecabin.net/stories/042404/loc_0424040008.shtml.

in the aggravating circumstances are selfish or dishonest motives, multiple offenses, a refusal to acknowledge wrongfulness, and substantial experience in the practice of law. ABA Standards 9.22. Included in the mitigating circumstances are the lawyer's reputation for having a good character, recovery from a chemical dependency that caused the misconduct, and a lack of a prior disciplinary record. ABA Standards 9.32. Some regulating courts look to the ABA Standards for guidance when disciplining their lawyers, and others direct their disciplinary panels to follow the ABA Standards in their proceedings. See *In re Conduct of Wittemyer*, 980 P.2d 148 (Or. 1999); *Grievance Administrator v. Lopatin*, 612 N.W.2d 120 (Mich. 2000).

Summary

Lawyers are licensed to practice law on a jurisdiction-specific basis by the highest courts in their jurisdictions. Those courts set the prerequisites for those who want to practice law in their jurisdictions, one of which is the requirement that once admitted to the bar, an attorney is obligated to follow the rules of professional conduct that have been adopted. Such rules of conduct originate from the American Bar Association, which created the Model Code of Professional Responsibility, and then replaced it with the Model Rules of Professional Conduct in 1983. The Ethics 2000 Commission of the ABA then proposed revisions to the ABA Model Rules, and the ABA House of Delegates accepted many of the proposals. The ABA's latest effort to review and revise the Model Rules is called Ethics 20/20, and its focus is primarily on technology and global legal practice developments. Every state but California uses lawyer ethics rules that are based on the ABA Model Rules.

An attorney who violates the rules of conduct in his or her jurisdiction is subject to discipline by the court that granted that attorney's law license, following an investigation by a disciplinary commission and a hearing. Sanctions can range from a reprimand to disbarment. All findings of misconduct can be appealed to that jurisdiction's highest court. Rules of professional responsibility are given fuller meaning in two primary ways. First, each rule is accompanied by its official commentary. Second, case law interprets the rules by applying them to specific situations. Finally, state bar associations and the American Bar Association issue ethics opinions that answer questions regarding the interpretation of the rules of ethics. Although these ethics opinions do not have the effect of law (as do rules and appellate court opinions), they offer valuable insight to lawyers and are occasionally cited by courts.

Paralegals and legal assistants also must abide by their jurisdictions' rules of lawyer ethics. Because nonlawyer employees engage in substantive legal work, they face many of the same types of dilemmas lawyers face, and that requires nonlawyer employees to have a sufficient understanding of what is appropriate, professional conduct. While not directly responsible to a court for violations of professional ethics rules, paralegals are indirectly responsible, because attorneys are accountable for the misconduct of their paralegals and legal assistants.

As the new challenges arise in the world, the ABA's Formal Ethics Opinions address the changing nature of legal practice. For example, when the world quickly shifted daily life to curb the spread of COVID-19 in early 2020, the legal profession needed to respond quickly. In a record-setting shift of professional practice, nearly all law firm leaders promptly redirected their respective law firms to work remotely. This immediate shift was unprecedented and led to considerable challenges as firm leaders had to navigate uncharted ethical dilemmas posed by remote work. At the legal field's realization that remote work may be a new normal for many practices, extending well beyond the pandemic, the ABA issued a formal ethics opinion on December 16, 2020 to guide the profession in best practices.

Ethics in Action

Formal Opinion 495 **December 16, 2020**

Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.[1]

Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the

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[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

Ethics in Action

(continued)
lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[3] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website, letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of

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[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).

[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

Ethics in Action

(continued)

> his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction, while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized."

Case Questions

1) Assess the parameters and guidance provided by the ABA concerning remote work. Explain the ABA's position on remote work and the ethical consideration discussed in this formal opinion.
2) Decide whether you agree with ABA Formal Opinion 495. Explain whether you believe law firms should be permitted to engage in remote work. Support your answer.

Chapter Review Questions

1. Marcella wants to become an attorney in your state. Using your jurisdiction, explain the following:
   - The prior education Marcella must complete before applying for the bar
   - The application fee, deadline, and requirements
   - The date of the next bar administration
2. Marcello wants to become a paralegal in your state. Using your jurisdiction, explain the following:
   - The education preferred or required for paralegals in the state
   - Any state-specific rules governing the use of the professional term "paralegal"
3. Miley is an attorney and arbitrator at a law firm focused on alternative dispute resolution. As an arbitrator, Miley occasionally experiences inappropriate behavior from the parties to arbitration from time to time. Recently, Miley was called as a witness in a case involving a traffic accident she witnessed. The accident was very upsetting to Miley, because Miley witnessed her colleague hit and injured by a construction vehicle. During her testimony as a witness in the case, Miley became unruly and irritated and refused to answer the attorney's questions.
   a. Determine whether Miley's actions as a witness constitute contempt of court.
   b. Determine whether Miley can be sanctioned for unethical legal actions even if Miley was not acting as an attorney at the time of the infraction.
4. Benjamin and Li are two attorneys who share ownership of a small law firm focused on medical malpractice. The attorneys employ one other attorney, an administrative assistant, and a receptionist. At a recent lunch meeting, the attorneys discussed whether or not they should hire paralegals for their firm. Assess the attorneys' citation and explain how hiring paralegals can expand the firm's reach and clients' access to justice.
5. Pio, Patrick, and Mary are supervising attorneys of World Law Firm. As supervising attorneys, they often field ethical questions from employees. Isla, an attorney at the firm, asked the supervising attorneys how to handle a recent incident. While supervising her paralegal's work, Isla found that the paralegal made numerous errors on a complaint. Since she was running low on time and had many other cases to handle, Isla did not amend the complaint, and instead she signed it and approved it for filing with the court. Isla asks the supervising attorneys whether she will be held responsible or if the responsibility for the errors will rest with the paralegal. Applying the ABA Model Rules, determine whether Isla or the paralegal will be held responsible for the errors in the complaint.
6. Ava, Sebastian, and Roma are physicians who own a medical practice in your jurisdiction. The physicians hired a lawyer, Jeb, to represent them in a claim for misappropriation of commercial rights against a pharmaceutical company. According to the physicians, the pharmaceutical company used their likeness (in the form of photographs shared on social media) in conjunction with an advertising campaign for a new medication. The physicians have never reviewed the effectiveness for the medication, do not wish to promote the new medication, and have not provided the pharmaceutical company

with permission to use their images for commercial purposes. The physicians met with their attorney, Jeb, and agreed to move forward with a lawsuit. Last week, however, the physicians learned that Jeb failed to file the complaint on time and that they will not be able to pursue their legal claim because the statute of limitations has passed.

a. Applying the legal ethics rules for your jurisdiction, determine whether Jeb may be subject to legal sanctions.
b. Assess the physicians' predicament. Determine how the physicians can file an ethics claim against their attorney in your jurisdiction.

Points to Ponder

1. Analyze the ABA Model Rules.
   a. Determine whether the Model Rules are binding or nonbinding.
   b. Determine whether the Model Rules address attorney supervision of their paralegal's substantive legal work and provide the rule that applies.
   c. Determine whether the Model Rules address certification of paralegals.
2. Using a legal database, search and locate a legal ethics case in your jurisdiction concerning attorney supervision of paralegals. Using the template provided in the appendix, draft a case brief.
3. Using the U.S. Bureau of Labor Statistics as a source of information, assess how many attorneys are employed in your state. Compare this finding to that of other states.
4. Rank the following possible sanctions for legal ethics violation in order from least serious to most serious:
   a. Reprimand
   b. Disbarment
   c. Short suspension
   d. Extended or long suspension
5. Explain why a paralegal or attorney may need to brief a case. Assess how briefing a case can assist a legal professional in better understanding the case.
6. Determine the circumstances upon which a person can get immunity when filing a legal ethics violation and explain why this protection can be beneficial.
7. Consider the roles of the Multistate Exam, Uniform Bar Exam, and each state's Jurisdiction-specific bar exam. Determine which test(s) are administered in each of the following states:
   a. Florida
   b. Texas
   c. Vermont
   d. New Mexico
   e. Hawaii

Key Concepts

ABA House of Delegates
ABA Model Code of Professional Responsibility
ABA Model Rules of Professional Conduct
American Bar Association (ABA)
Case brief
Disbarment
Disciplinary commission
Ethics opinions
Ethics 2000 Commission
Judicial review
Jurisdiction
Rules of court

Key Terms

adjudication
affirm
annotated
Anti-Federalists
black letter law
comments
common law
contempt
deposition
disciplinary commission
Federalists
grievance
immunity
judicial review
jurisdiction
multistate bar exam
pro hac vice
remand
reverse
rules of court
unified bar association (integrated bar association)
Uniform Bar Exam (UBE)
vacate

2 Paralegals and Their Profession

Chapter Learning Outcomes

After reading this chapter, students will:

describe the history and emerging role of paralegals within the legal field

analyze and apply model codes of ethics to their professional responsibilities

explain the role of national associations representing the interests of paralegals

distinguish between the professional designations of paralegal certificate, certified paralegal, and licensure

identify the roles within a law firm and explain how the paralegal's work expands firm capabilities and access to justice

Chapter Highlights

- Paralegals provide essential legal services under the direction of an attorney. Paralegal duties and responsibilities will vary based on the firm's size, structure, and area of practice.
- Legal professionals have supported the work of attorneys throughout the history of law firms, but it was not until the 1960s that the profession began to formally recognize the role of the paralegal. As paralegals gained formal recognition, professional organizations developed model ethics codes to define the best practices for paralegal work. While paralegals were once limited to only a few employment settings, today paralegals work in every area of law with a broad range of responsibilities and professional titles.
- The principles of legal ethics apply to lawyers, and by extension the paralegals and legal staff under within their supervision. Paralegal associations, and some state bars, also specifically address paralegal ethics. Ethics codes designed for paralegals closely mirror ethics codes designed for attorneys and place significant emphasis on client protection and effective representation of clients.
- Paralegal associations provide professional and ethical guidance while promoting the important role of paralegals within the greater legal landscape. Paralegal associations also have a critical role in further developing support for paralegal licensure and certification programs.
- Many paralegal associations and state bars offer optional certification credentials, which may be designated upon successful application or completion of a correlating test. The concept of a certified paralegal differs from a professional who has earned an academic credential known as a certificate.
- Recognizing the many professional responsibilities that are included in paralegal work, many associations and legal experts support the movement toward licensure for paralegals. Some jurisdictions currently offer optional paralegal licensure, or similar programs, designed to designate the paralegal's training, education, and experience.

Introduction

"All professions are a conspiracy against the laity," wrote George Bernard Shaw in the play *The Doctor's Dilemma*. That sentiment is felt by clients and patients every day when they get a bill from their doctors or lawyers or accountants. But what makes an occupation a *profession*? A professional athlete is one who gets paid to play, but does that make the sport a profession? The clergy, doctors, and lawyers work in what are classically referred to as professions, yet all of those professions involve many aspects that arguably make them businesses. Whatever makes something a profession today, one of the historical, distinguishing features of a profession is that entry into it requires successful completion of two prerequisites: high levels of education and licensure.

Some would say that paralegals are professionals because they engage in substantive legal work on behalf of attorneys, who are professionals. Others would say that even if paralegals are to be distinguished from other support staff, such as secretaries and receptionists, they cannot be considered professionals unless they are licensed. Still others would say that paralegal certification, rather than licensure, is a sufficient benchmark. This chapter will examine the history of paralegalism, paralegal associations, the debate concerning licensure versus certification, the dynamics of lawyer supervision and paralegal discipline, overtime pay for paralegals, and disbarred lawyers working as paralegals.

A Short History of Legal Support Work

Plenty of people were doing paralegal-type work long before the terms *legal assistant* or *paralegal* were coined. Probably the first paralegal most Americans ever heard of was Della Street, who worked alongside Perry Mason on the first famous television show *Perry Mason*, about a fictional attorney. Although she may have been thought of as Perry Mason's secretary, she did a lot more than answer the phone: she managed case files and worked with clients; she engaged in investigations; and on occasion, she went to court with Perry. As peculiar as that comparison may seem, the fact remains that her depiction on a television show from the 1950s is evidence that the growing opportunities for paralegals since the days of Della Street, including formally recognizing nonlawyer employees as paralegals, are a result of an evolution whose beginnings may have gone unnoticed.

Paralegals are legal professionals who make important contributions to the firm's legal work. The distinguishing feature between a secretary and a paralegal is not the level of their education but the level of their participation in the services rendered for the client. As the last half of the twentieth century progressed, the reality was that there were a growing number of nonlawyer employees in law offices (as well as in the legal departments of corporations and government agencies) who engaged in substantive legal work for their supervising attorneys. A significant reason for this shift was that legal services could be delivered in a more cost-efficient manner if nonlawyers were trained to do the work of lawyers. The client's bill would then be smaller, because a nonlawyer's billing rate is less than that of an **associate**. Associates report to their supervising partner, or partnership mentor, or a **partner**. Likewise, the firm could increase its productivity by deploying its lawyers to other billable endeavors while its skilled, nonlawyer employees were used in their expanded roles. Increased productivity leads to increased profitability, while at the same time clients get smaller bills due to the expanded role of the lower-billing, nonlawyer employees. This is known as a classic win-win outcome.

As industry leaders recognize the value of paralegals, the prevalence of this role grows. Law firms can accomplish more, increase organizational effectiveness, and expand access to justice for clients by employing paralegals. As a result, paralegal salary and job opening surpass that of many other positions requiring similar job training

associate
A lawyer in a law firm who has not reached partnership status but may be on a partnership track.

partner
A lawyer who has been granted ownership status in a firm, having been voted in as a partner by the other partners. Partners generally share in the firm's profits.

clarity
communication that is straight forward and easy to understand.

professional
an individual who holds a role of significant responsibility.

and education. According to the U.S. Bureau of Labor Statistics, the average pay for paralegals in 2020 was over $59,000. Per the organization's latest assessment, 337, 800 paralegals were employed in the United States in 2019. Overall, the role of the paralegal is projected to expand, with the Bureau of Labor Statistics estimating that there will be a 10 percent increase in demand for paralegals between 2019 and 2029.

Communication Is Key

Professional Email in the Legal Setting

According to ONet, the nation's paralegals report a variety of professional responsibilities and duties within numerous legal employment settings. Upon review of a survey of paralegals working in the United States, ONet reports that a significant majority (99 percent) of paralegals hold positions wherein email is a daily required professional task. As legal professionals, paralegals must be mindful that email is considered legal correspondence. For this reason, all firm emails are subject to the jurisdiction's legal ethics rules and should reflect best practices in communication.

Consider these pointers for effective email communication:

- Timeliness is required by the model codes and state bar rules. If a paralegal is out of the office, their email should be monitored regularly or automatically forwarded to a colleague.
- **Clarity** is essential. Emails should include clear, concise explanations and instructions. For example, if a paralegal emails a court date confirmation to a client, the email should include the name and address of the courthouse along with parking information.
- Every email should be respectful and **professional**. While some clients may require more attention and patience than others, every email to a client should have a professional tone. If a client emails too frequently, the paralegal can suggest that the client schedule a phone call or meeting with their attorney to discuss legal matters.

Access to **Justice**

The Role of the Paralegal

Paralegals have a critical role in the modern legal workplace. Among many other responsibilities is the paralegal's role in increasing access to justice. Attorneys cannot complete important legal work alone, and paralegal contributions to law firms, legal aid organizations, and government entities allow these organizations to work at greater scales. When legal organizations can accept more cases, then these organizations are able to reach more clients in need of important legal services. Paralegals enable law firms to increase compliance, expand access to clients, and to better focus resources toward improved outcomes for clients. In later chapters, we will explore the many ways that paralegals and other legal professionals are working to expand access to justice in a variety of applications.

Question:

Select a news article addressing a current or ongoing legal case. Evaluate how a paralegal's work on this case may expand the scope and efficacy of the law firm's work on this case. Provide specific examples, including tasks and responsibilities within the scope of the paralegal's responsibilities.

American Bar Associations Standing Committee on Paralegals

Recognizing this evolution, in 1968 the American Bar Association created a committee known as the Special Committee on Lay Assistants for Lawyers. It was organized to encourage the use of nonlawyer employees in legal employment and to develop initiatives