Ethical Problems in the Practice of Law

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Ethical Problems in the Practice of Law

Concise Fourth Edition

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To Sam and Sarah, who continue to light up our lives

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Preface for Teachers and Students

This book is an introduction to the law that governs lawyers. It includes two chapters on some important aspects of the legal profession.

Our goals

Our principal goals in writing this book were to offer an overview of the law governing lawyers and to provide materials through which law students may explore some of the ethical problems that lawyers encounter in practice. Also, we sought to provide opportunities for law students to consider the various professional roles that lawyers occupy and the moral quandaries that students will struggle with when they begin to practice law. For example, in negotiating a settlement for a client, a lawyer might say that his client would refuse to accept less than $100,000, even though the client has told the lawyer that she would be delighted to receive $50,000. This is deceptive, but lawyers commonly use this tactic to obtain favorable outcomes for their clients. Does the pervasiveness of this type of deception make it acceptable? Is a lawyer's only duty to get the best result for his client, or does he also owe his opposing counsel a duty of honesty?

This book introduces students to many aspects of the law that governs lawyers. The book does not include an encyclopedic analysis of every ethical rule, much less the entire body of law governing the legal profession. We focus primarily on the subjects that are most likely to arise during the first years of an individual's law practice. For example, many new lawyers become associates in law firms, so this book explores what an associate should do when a more senior associate or a partner asks the associate to do something that seems improper. Also, most new lawyers in private practice make frequent decisions about how to record their time for billing purposes. This book includes many problems that arise from everyday practice issues. Most of the examples and problems in this book involve lawyers who represent individuals or businesses in matters involving contracts, torts, criminal prosecution and defense, civil litigation, real

"Ms. Burney, do we have anything on right and wrong?"

estate, and family law. We have sought to develop problems and to select cases in which a student can understand the facts and the ethical issues regardless of whether the student has taken advanced courses in law school.

The problem-based approach

This book offers opportunities to explore ethical dilemmas that have actually arisen in practice, some of which have resulted in published judicial decisions. While we have excerpted or summarized some important judicial opinions in the book, we have transformed a larger number of cases into problems for class discussion. Instead of reprinting the appellate opinions, we have presented the essential facts of these cases as one of the lawyers saw them, walking the cases backward in time to the moment at which the lawyer had to make a difficult choice based on both ethical and strategic considerations. Rather than building the book primarily around predigested legal analyses by appellate judges, we invite students to put themselves in the shoes of lawyers who face difficult

choices among possible actions. The dilemmas in most of our problems are based on tough situations that have confronted real lawyers.

Evaluating ethical dilemmas in class will help students to handle similar quandaries when they encounter them in practice. A student who has worked through the problems assigned in this course will know where in the law a particular issue might be addressed, how to begin to analyze the relevant rules, and what questions to ask. Grappling with these problems also will increase students' awareness of ethical issues that otherwise might have gone unnoticed.[1]

We set out to write an introduction to the law governing lawyers that students would enjoy reading. Studies show that by the third year of law school, the class attendance rate is only about 60 percent and that a majority of those students who do attend class read the assignments for half or fewer than half of the classes they attend.[2] Increasingly, law students use their computers to play solitaire or write e-mail during class.[3] Law schools seem to be failing in their efforts to retain the interest and attention of their students, particularly third-year law students. We have sought to write a book whose content and methodology capture and sustain the reader's interest. This aspiration is reflected in our choice of topics and materials, our concise summaries of the law, our challenging problems, and our use of graphic materials.

Defining features of this book

We built a number of unique features into this book based on our experience teaching professional responsibility classes:

- Almost every section of the book begins by summarizing the relevant doctrine that provides the legal background students need to analyze the problems that follow.
- Most summarized rules and doctrines appear in question-and-answer format. This structure provides an ongoing roadmap, anticipating readers' questions and forecasting the content of the next subtopic.
- Numerous concrete examples, set off from the text, further illustrate the general doctrinal principles.

1. See Steven Hartwell, Promoting Moral Development Through Experiential Teaching, 1 Clin. L. Rev. 505, 527 (1995) (reporting on his empirical research, which shows that professional responsibility students' moral reasoning skills made significant advances during a course in which students discussed simulated ethical dilemmas); and Lisa G. Lerman, Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals, 39 Wm. & Mary L. Rev. 457, 459 (1998) (explaining the reasons to use experiential methodology in professional responsibility classes).

2. Mitu Gulati, Richard Sander & Robert Sockloskie, The Happy Charade: An Empirical Examination of the Third Year of Law School, 51 J. Legal Educ. 235, 244-245 (2001).

3. Ian Ayres, Lectures vs. Laptops, N.Y. Times, Mar. 20, 2001, at A25; David Cole, Laptops vs. Learning, Wash. Post, Apr. 7, 2007, at A13.

- A few judicial opinions appear in the book. They have been edited carefully to present only the most relevant sections. Some opinions are summarized rather than reprinted so that students can move quickly to the book's challenging application problems.
- The more than 40 problems that appear in the book are designed to focus class discussion and immediately engage students by describing real-life ethical dilemmas.
- The problems present facts from real cases in narrative form to allow students to analyze the issues as if they were the lawyers facing those dilemmas. This structure tends to produce livelier discussion than does the autopsy method traditionally used in law classes, in which teachers invite post hoc dissection of court opinions.
- Pertinent rules of professional conduct are included in the book so that students do not need to flip constantly back and forth between this text and a statutory supplement. When studying a particular rule, however, students should review the entire rule and comments. Every student should study with a printed version of the rules beside the textbook for ease of reference. With our co-author, Professor Anjum Gupta, we wrote a concise supplement as a companion to this textbook. It is Ethical Problems in the Practice of Law: Model Rules, State Variations, and Practice Questions (Wolters Kluwer). That supplement includes more than 120 practice questions, in the format used on the Multistate Professional Responsibility Examination, organized into 14 sections corresponding to the chapters of this textbook.
- The book's many bulleted lists and tables clarify legal doctrines and other conceptual material in easily reviewable sections.
- Photographs, diagrams, and cartoons break up the text. Some of these, like the photographs of some of the lawyers, parties, judges, and scholars, add important context. Others, like the cartoons, offer a change of pace from the textual narrative.

What's new in the concise fourth edition

Teachers who have used the concise third edition of this book will discover much that is familiar, along with some new material. The book reflects all changes made in the ethics codes and other lawyer law since the third edition was published. We have updated countless empirical statements. The book discusses recent cases, bar opinions, institutional changes, and scholarship. It includes discussions of such new developments as the revised versions of Model Rules 1.6, 1.18, and 8.4(d), regulatory issues relating to lawyers' use of social

media, and the challenges to confidentiality and attorney-client privilege resulting from computer hacking and governmental spying.

We hope that you enjoy this book. We welcome your reactions and suggestions, small or large, for the next edition. Please send any comments or questions to lerman@law.edu.

Lisa G. Lerman
Philip G. Schrag

Acknowledgments

Hundreds of law professors, practitioners, and judges have worked to regulate the practice of law, to study its regulation, and to publish their ideas. Decades of effort have gone into the drafting of successive model codes for lawyers, rules of state bars, and the Restatement. Academics have made countless contributions in the form of books and law review articles on the legal profession and papers delivered to conferences convened under the auspices of the American Bar Association, the Association of American Law Schools, the Keck Foundation, and other organizations. This book is in part a summary of many of those efforts.

We particularly want to acknowledge our intellectual debt to the authors of the Restatement and of the other treatises and textbooks that are used in courses on legal ethics and the American legal profession. We have consulted these books frequently in the course of writing this volume.

We have received invaluable encouragement and assistance from our editors at Aspen, especially Susan Boulanger, Melody Davies, John Devins, Richard Mixter, Barbara Roth, and Mei Wang, and from Tom Daughhetee, Joe Stern, Troy Froebe, and Kathy Langone at The Froebe Group. We are particularly grateful to Lisa Wehrle, who has copy-edited every edition of this book and significantly improved its readability. Several colleagues have reviewed various drafts of the book and have given us amazingly insightful and detailed comments and suggestions. These include Tom Andrews, Carrie Griffin Basas, Paul Chill, Russell Engler, Megan A. Fairlie, Susan Saab Fortney, William Freivogel, Philip Genty, Steve Goldman, Anjum Gupta, Mark Harrison, Peter Joy, Ann Juergens, Arlene Kanter, Jennifer LaVie, Donald Lundberg, Judith Maute, Ben Mintz, Jane Moriarty, Rob Rubinson, Ted Schneyer, and Brad Wendell. Many other people assisted us by answering questions and providing needed information. These include Frank Armani, Carl Bogus, Kathleen Clark, Nathan Crystal, Scott Cummings, Michael Davidson, Richard Dieter, Sarah Duggin, Susanna Fischer, Lawrence Fordham, David Frakt, Alex Garnick, Art Garwin, Stephen Gillers, John Gleason, Paul Gowder, Bruce Green, Denise Greskowiak, James Grogan, Robert Kuehn, Alexandra Lahav, Leslie Levin, David Luban, Deborah

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We need to acknowledge the profound contributions to this textbook of the countless students with whom we have had the opportunity to discuss questions about professional ethics and about the legal profession. (Between the two of us, we have more than seventy years of teaching experience.) A good number of the problems in the text are based on situations that our present or former students have encountered in law school clinical practice or working elsewhere in the legal profession during or after law school. By sharing their experience and consulting us, numerous students have provided the basis for many an interesting class discussion. Likewise, once these problems were published, our understanding of the issues has been much enriched by the ideas and analysis of the many students with whom we have explored them.

Special thanks go to our research assistant for the fourth edition, Benjamin Schiffelbein. Thanks also to Jason Parish, who, with amazing precision and care, cite-checked the entire manuscript of the first edition of this book. For contributions to the second edition, we would like to thank Erica Pencak, Ruth Harper, and Taylor Strickling. For the third edition, we are particularly grateful to Patrick Kane and Bria DiSalvo.

We note with sorrow the passing in 2010 of Leo Cullum, who drew most of the *New Yorker* cartoons in this book. Mr. Cullum was an extraordinary cartoonist and a perceptive and acerbic observer of the legal profession.

We appreciate the support given us (in the form of leaves of absence from teaching and summer writing grants) by our employers, The Catholic University of America and Georgetown University.

We would like to thank our children, Samuel Schrag Lerman and Sarah Lerman Schrag (to whom the book is dedicated). Both of them are exquisitely sensitive to moral and ethical issues. Our understanding of ethical problems has been much advanced by our many conversations with them about the dilemmas that they have confronted, both as children and as adults.

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Introduction

1. Conflicts of interest
2. Truthfulness
3. Lawyers' duties to clients versus their duties to the justice system
4. Lawyers' personal and professional interests versus their fiduciary obligations
5. Self-interest as a theme in regulation of lawyers
6. Lawyers as employees: Institutional pressures on ethical judgments
7. The changing legal profession

Why study the law governing lawyers?

The law governing lawyers is worth studying for two reasons. First, knowledge of this subject is important to your professional security. (That is, it will help you to stay out of trouble.) Second, you need to know the boundaries imposed by law on the conduct of the other lawyers you encounter so that you will recognize improper conduct and not allow it to harm your clients.

This course is somewhat different from other courses in the curriculum because it has a very practical goal — to assist you in avoiding professional discipline, civil liability, and criminal charges. Some lawyers get into serious trouble, and others experience near-misses at some point during their careers. Many lawyers who have gotten into trouble made simple and avoidable mistakes. Some of the ethical and legal rules that govern lawyers are counterintuitive, so an educated guess about what a rule might say is sometimes incorrect. An empirical study in New York concluded that "[v]ery few lawyers ever looked at the New York [professional responsibility] Code to resolve ethical issues they encountered in practice" and, in fact, "had not consulted it since law school."[1]

> Suppose that you are representing a plaintiff and are in the middle of a civil lawsuit. The other side offers to pay a preposterously low settlement. You are tempted to turn it down on the spot to demonstrate your contempt for the offer and to increase the pressure on your adversary to come up with a better one. But if you reject this offer without consulting your client, you would inadvertently violate an ethical rule. You could be disciplined, or your client might sue you for malpractice.

Why study the legal profession?

One reason to study the profession as well as its ethical rules is to acquire useful background knowledge about the various organizations that make and enforce the rules for lawyers.

> The American Bar Association writes many rules and opinions. What is this entity? Does it have some kind of governmental authority? What is its relationship to the bars of the 50 states?

Also, as a lawyer you need to be familiar with the various policy issues relating to the structure and regulation of the profession so that, through your state or local bar association or otherwise, you can participate in the improvement of the profession and the justice system.

> Should paralegals be allowed to provide some services to clients without being supervised by lawyers? Should lawyers be required to offer some services to clients who cannot afford to pay them? If you believe the answer to either of these questions is yes, you could become involved in advocacy to license paralegals or to mandate pro bono work.

1. Leslie C. Levin, The Ethical World of Solo and Small Law Firm Practitioners, 41 Hous. L. Rev. 309, 368-369 (2004).

Even as a new lawyer, you will have opportunities to affect the ever-changing law of the legal profession. You may become a law clerk to a judge. You might be asked to draft an opinion on an appeal of a lawyer disciplinary matter or to advise your judge about proposed ethical rules. You could become involved in legislative policymaking as a staff member to a state or federal legislator, or even as an elected representative. Many recent law graduates serve on committees of state and local bar associations that initiate or comment on changes in the rules that govern lawyers. Much of the impetus for law reform comes from the fresh perceptions of newcomers who have not yet become fully accustomed to "business as usual" in their particular fields of law.

What is the difference between ethics and morals?

That depends on whom and in what context you ask. These two terms are sometimes used synonymously[2] and sometimes distinguished, but in varying ways. One scholar defines "morals" as

> values that we attribute to a system of beliefs that help the individual define right versus wrong, good versus bad. These typically get their authority from something outside the individual — a higher being or higher authority (e.g. government, society). Moral concepts, judgments and practices may vary from one society to another.[3]

We use the word "moral" to refer to the broad question of whether an act is right or wrong.

"Ethics" as a general concept is "also called moral philosophy, the discipline concerned with what is morally good and bad, right and wrong. The term is also applied to any system or theory of moral values or principles."[4] We use the term "ethics" or "ethical," however, to refer not to the field of moral philosophy, but to the field of legal ethics. The term "legal ethics" is defined as "principles of conduct that members of the profession are expected to observe in the practice of law. These principles are an outgrowth of the development of the legal profession itself."[5] When we ask whether a particular act is "unethical," usually we are asking whether the act would violate the ethics codes that govern lawyers. We also invite readers to consider whether a particular response to a problem is moral or immoral. Often, but not always, "the right thing to do" in a particular situation also complies with the ethical rules. Even so, it is important to ask

2. See, e.g., Merriam-Webster On-Line Dictionary, https://www.merriam-webster.com/dictionary/moral (last visited Aug. 21, 2017), which lists "moral" and "ethical" as synonyms.

3. Frank Navran, What Is the Difference Between Ethics, Morals and Values? Ethics and Compliance Initiative, Ethics and Compliance Glossary, http://www.ethics.org/resources/freetoolkit/toolkit-glossary (last visited Oct. 7, 2017).

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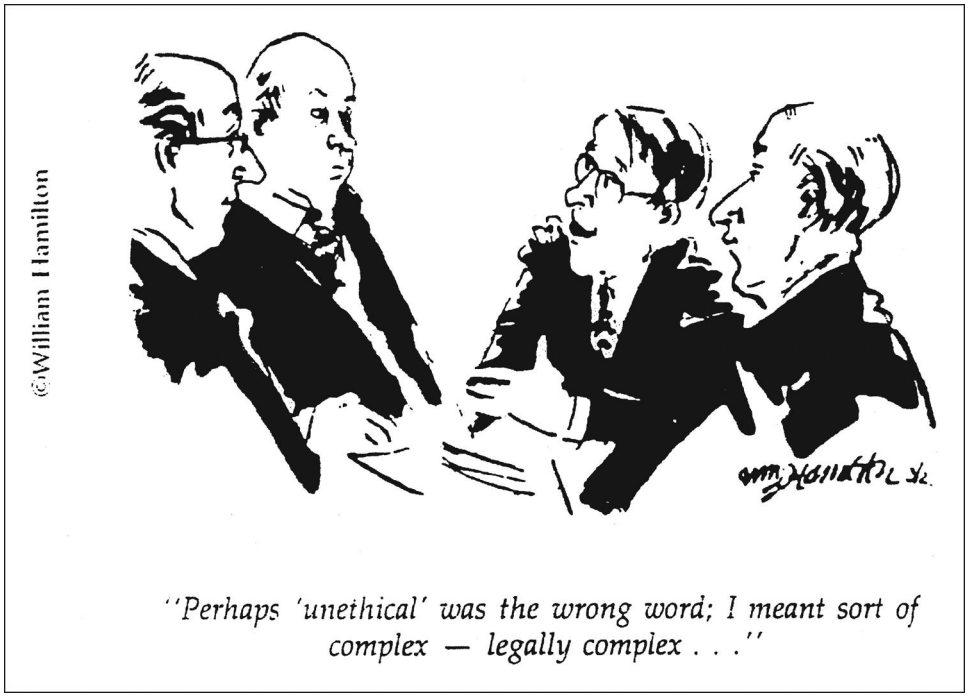

"Perhaps 'unethical' was the wrong word; I meant sort of complex — legally complex . . ."

both questions. Of course, lawyers often disagree both about what is the best interpretation of an ethical rule and about what is "the right thing to do."

The ethics codes reflect a fairly strong consensus within the legal profession about what lawyers should do when faced with certain kinds of pressures and dilemmas. Most lawyers would say that it is immoral as well as professionally improper to violate a state's code of ethics for lawyers. But many lawyers could identify some rules whose mandates do not correspond with their individual moral judgment.

> One rule bars litigating lawyers from helping indigent clients to pay their rent. While providing such assistance would violate the rule and could get a lawyer in trouble, few people would say that it would be immoral to do so.

The critical point here is that in evaluating any question in legal ethics, you must ask whether the conduct in question violates the ethics codes. (For the protection of both the lawyer and the client, you also must ask whether the conduct violates other law, such as criminal law or regulatory law.) Quite apart from the question of compliance with law, you should add a final question: "What is the right thing to do?"

What difference does it make that lawyers are "professionals"?

The words "profession" and "professional," like the words "ethics" and "ethical," have multiple meanings. Some fields, such as medicine, law, and architecture, are considered "professions," while others are not. Members of many professions are permitted to do work that is forbidden to nonmembers. They must be licensed before they are allowed to ply their trades. To obtain licenses, they must receive extensive technical training. Governing bodies of professional associations develop standards for licensing professionals and for disciplining licensees who fail to meet the standards.

Second, a critical aspect of what it means to be a professional is a commitment to serving others. The training and licensing of lawyers is intended to promote the delivery of high-quality services, to expand the opportunities for people to have access to justice, and to foster support throughout society for the rule of law. Because the profession is essential to the protection of democratic government, and because the licensing process gives attorneys a monopoly on the services they provide, lawyers are expected to provide some service to clients who cannot afford to pay. They are also expected to participate in the improvement of the legal system.

Third, to be "professional," or do something in a professional way, means to do an unusually careful job. This sense of the word does not require advanced training, but it does imply a high degree of skill and care. One can do a professional job of any work, not just the work required of members of the "professions." Most people who consider themselves "professionals" have their own internal standards of performance. They want to perform at a high level at all times, even when no one is watching. They derive internal satisfaction as well as external rewards for doing excellent work.

A fourth aspect of becoming a professional is that a person joining a profession adopts a defined role and agrees to comply with articulated standards of conduct. This may lead the individual to make moral choices about his conduct that are justified by reference to the defined role.[6]

A criminal defense lawyer might urge that it is proper to seek to exclude from evidence an exhibit that shows his client's guilt

6. For some of the many fine books and articles discussing professionalism among lawyers, see ABA Commission on Professionalism, In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism (1986); ABA Section of Legal Educ. & Admissions to the Bar, Teaching and Learning Professionalism 6 (1996); Scott L. Cummings, ed., The Paradox of Professionalism: Lawyers and the Possibility of Justice (2011); Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society (1994); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993); David Barnhizer, Profession Deleted, Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit, 17 Geo. J. Legal Ethics 203 (2004); Melissa L. Breger, Gina M. Calabrese & Theresa A. Hughes, Teaching Professionalism in Context, Insights from Students, Clients, Adversaries and Judges, 55 S.C. L. Rev. 303 (2003); Richard A. Posner, Professionalisms, 40 Ariz. L. Rev. 1 (1998); Deborah L. Rhode, The Professionalism Problem, 39 Wm. & Mary L. Rev. 283 (1998).

> because the police obtained the evidence improperly. Even if the court's ability to discern the true facts is compromised by the exclusion of the evidence, the criminal defense lawyer would argue that his request to exclude it is consistent with his role.

Some scholars have questioned whether this "role differentiation" is too easily used to justify conduct that otherwise might be viewed as immoral.[7]

You, like most students, are probably very excited by the prospect of joining a profession. Membership offers the opportunity to develop your skills and to evolve internal standards of performance, to challenge yourself to lifelong learning and improvement, and to serve others. And at least in law, after the first few years of training, no one but you will know the details of much of what you do. The external standards play an important role, but they often lie in the background. You must set most of your professional standards internally, especially those that relate to your treatment of clients and the quality of your work product.

Joining the legal profession[8] requires mastery of a large and complex body of externally imposed ethical and legal standards. Many decisions are left to the professional discretion of the lawyer who is handling a particular matter, but the lawyer is expected to know which standards are discretionary and which are not. In this course, you will become acquainted with many external standards, and you will have opportunities to cultivate and refine your own internal standards.

Lawyers and law students usually think of themselves as belonging to an honorable and prestigious profession whose members devote themselves to client service and to our system of justice. However, public opinion polls show that most people view lawyers as dishonest and unethical. For example:

> The prestige of lawyers fell dramatically over a 30-year period, with the percentage of people who thought they had very great prestige falling from 36 percent in 1977 to 26 percent in 2009. No other profession experienced such a dramatic drop in prestige during the period surveyed by Harris.[9]
> A 2006 Harris poll found that only a quarter of the public would trust lawyers to tell the truth, far lower than the percentage who would trust

7. Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 7-8 (1975).

8. In this book, we use the phrase "the legal profession." But neither the fact that lawyers aspire to become "professionals" nor the fact that the United States has about 1.3 million lawyers necessarily proves that lawyers are part of a profession. Indeed, Professor Thomas Morgan has cogently argued that law is merely a business like many others and that "American lawyers are not part of a profession." He suggests that lawyers are like many other people in business and that the idea of a "legal profession" is a clever fiction perpetuated by the American Bar Association to confer prestige on lawyers and to prevent competition from nonlawyers. Morgan suggests that "lawyers will be able to understand their problems and opportunities only by seeing the world clearly and without the distortion the label 'professional' introduces." Thomas D. Morgan, The Vanishing American Lawyer 19-69 (2010). We return to this question in Chapter 14.

9. Harris Interactive, Firefighters, Scientists and Doctors Seen as Most Prestigious Occupations (Aug. 4, 2009), http://media.theharrispoll.com/documents/Harris-Interactive-Poll-Research-Pres-Occupations-2009-08.pdf.

ordinary people (66 percent), and the lowest percentage for any profession except actors.[10]

A 2011 Harris poll found that leaders of law firms inspired a great deal of confidence in only 11 percent of Americans. Only leaders of Congress and Wall Street scored lower.[11]

In a 2014 Gallup poll, respondents were asked to rate lawyers and other professionals based on the respondents' view of their honesty and ethical standards. Only 21 percent of the public rated lawyers "high or very high" for honesty and ethics. Lawyers ranked far below nurses (80 percent ranked "high or very high" for honesty and ethics), doctors (65 percent), pharmacists (65 percent), and police officers (48 percent).[12]

10. The Public Thinks Lawyers Lie, Justice Denied, Summer 2007, at 6, quoting Harris Interactive, Doctors and Teachers Most Trusted Among 22 Occupations and Professions, Harris Poll No. 61 (Aug. 8, 2006).

11. Harris Interactive, Confidence in Congress and Supreme Court Drops to Lowest Level in Many Years (May 18, 2011), http://www.theharrispoll.com/politics/Confidence_in_Congress_and_Supreme_Court_Drops_to_Lowest_Level_in_Many_Years.html.

12. Gallup, Honesty/Ethics in Professions 2014, http://www.gallup.com/poll/1654/Honesty-Ethics-Professions.aspx?utm_source=ETHICS&utm_medium=topic&utm_campaign=tiles.

The public's perception of lawyers is also reflected in the many cartoons (like some of those reproduced in this book) depicting lawyers as avaricious and unethical, and in oft-told jokes such as this one:

> An ancient, nearly blind old woman retained the local lawyer to draft her last will and testament, for which he charged her $200. As she rose to leave, she took the money out of her purse and handed it over, enclosing a third $100 bill by mistake. Immediately, the attorney realized he was faced with a crushing ethical decision: Should he tell his partner?[13]

Several themes come up repeatedly in this book. Perhaps they represent some fundamental questions about the practice of law.

One common thread is that many ethical problems present conflicts of interest. One might define an ethical dilemma as a situation in which a person notices conflicting obligations to two or more people, one of whom may be herself. Chapters 6 through 10 deal with the body of law that lawyers usually refer to when they are talking about "conflicts of interest," but many of the other topics could also involve conflicts between competing interests or obligations.

> Suppose a client informs you that he was arrested in the course of planning a terrorist attack. The other conspirators have not been apprehended. He tells you where they are hiding. You have a duty to protect the confidences that your client shared with you, but you also may feel that you have a duty to your community to help prevent the terrorist attack from taking place.

> Your firm will pay you a bonus of $100,000 if your annual billings exceed 2,500 hours.[14] You are working on one major memo, billing by the hour. You can achieve a very good result for the client in 30 hours, or you could do the "dissertation" version of the memo and bill 100 hours.

13. Marc Galanter, The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse, 66 U. Cin. L. Rev. 805, 819 (1998).

14. Many law firms tie the amount they pay in bonuses to the number of hours worked and the number of years an associate has been with a firm. One associate at Kirkland & Ellis, for example, reported a bonus of $100,000 for a year in which that individual billed more than 2,500 hours. David Lat, Associate Bonus Watch: Kirkland & Ellis Returns to Shattering the Bonus Market Ceiling, Above the Law (Dec. 19, 2014), http://abovethelaw.com/2014/12/associate-bonus-watch-kirkland-ellis-returns-to-shattering-the-bonus-market-ceiling/.

Examine each of the topics covered in this course through this "conflict of interest" lens. Sometimes you can see the issues more clearly by articulating the nature of the conflict presented.

Another central theme is the question of whether and to what extent a lawyer is obliged to be truthful. Rule 8.4 prohibits "dishonesty, fraud, deceit [and] misrepresentation." At first blush, this might seem like a very simple issue. In fact, however, very many ethical dilemmas involve a conflict about truthfulness. Some of the issues about honesty and deception turn out to involve conflicts between a lawyer's personal interests and an obligation to a client, or a conflict between her duty to a client and to another person. These are two of the other recurrent themes.

> Suppose you are conducting a direct examination of a client in court. Your client surprises you by making a statement that you know is false. You have a duty to advance your client's interests, or at least not to harm them, and a duty to be truthful in dealing with the tribunal. If you tell the judge that your client lied on the stand (or if you persuade your client to correct his testimony), you are being fully truthful. If you conceal the information, however, you might better advance your client's interests.

> A prospective client is considering hiring you to handle a large (that is, lucrative) matter involving toxic waste disposal. You once did a very modest amount of work on a matter involving similar facts. The client asks, "Do you have a lot of experience in this area?" A truthful answer probably will result in the client seeking representation elsewhere.

Many problems raise questions about whether a lawyer can lie or mislead someone, withhold information, shade the truth, or sit quietly and watch a client mislead someone. In an ideal world, we might aspire to unvarnished truthfulness in dealings with others, but the obligations of an advocate present many situations in which withholding information seems justifiable.

Lawyers differ in their perceptions of their role in society. Some lawyers see themselves as important cogs in the "adversary system" machine. These lawyers see their role almost exclusively to be the protection and advancement of client interests.

As we discuss later in the text, the justification for this narrow view of lawyers' duties is strongest for criminal defense lawyers who represent indigent defendants. If there are substantial resources available for prosecution and few for defense, lawyers might properly focus their energies on the protection of their clients. Criminal defense lawyers in particular often urge that by focusing on the representation of their clients, they *are* contributing to the improvement of the justice system.

At the other end of the spectrum are lawyers who believe their primary responsibility is to protect our system of justice and to ensure that proceedings are fair, that participants play by the rules, and so on. Lawyers who become judges or who work for judges are in this group. To a lesser degree, so are lawyers who work for government agencies, including prosecutors. In addition, some lawyers in private practice and in nonprofit organizations have a broad view of their public responsibilities. Sometimes lawyers choose the fields in which they work based on ideas about their roles. Some spend their lives, for example, trying to improve access to justice for disadvantaged groups. Sometimes this sense of responsibility affects lawyers' choice of work. A "public interest" lawyer might pursue class action litigation rather than individual cases or might work on legislation rather than litigation to produce broader results.

Although some lawyers define their roles in a way that places them closer to one end of the "client-centered" than the "public-centered" spectrum, most lawyers reside somewhere between those poles. Most lawyers take very seriously their duties to their clients, and simultaneously notice aspects of their work that might impact broader groups of people. Very many ethical dilemmas involve some conflict between the interests of a client and the interests of a larger community.

> Suppose you are representing a client in a products liability suit involving a child's car seat that failed to restrain a child during a car accident because the straps came loose. You know that the defect that your client discovered in the car seat could endanger many other children. If you take the matter to trial, you will have the opportunity to publicize the problem and possibly to obtain an injunction requiring the manufacturer to correct the defect. However, the manufacturer has offered your client an attractive settlement under which your client would have to agree to keep the matter confidential, and your client prefers to accept the offer and put the episode behind her.

In this situation, a lawyer might advise the client of the other interests and considerations that point toward turning down the settlement. But the lawyer should defer to the client's wishes if she wants to accept the settlement. Even if the client wants to settle, the lawyer may think of other advocacy work unrelated to his client's matter that would assist others who have purchased the same car seat. The perennial problem for many lawyers is that other clients' work awaits, and the possible law reform work is unlikely to generate fees.

This theme of the public interest versus a client's individual interest pops up throughout the text. Chapter 2, for example, describes a lawyer who did not fulfill his duty to report the misconduct of another lawyer because his client did not want him to make a report. In Chapter 11, we discuss some circumstances in which a lawyer might have confidential information that, if revealed, could prevent or mitigate harm to others or could help to ensure a just outcome in litigation.

Throughout the book are examples of situations in which a lawyer's own interests conflict in some way with her duties to a client. Chapter 9 addresses such conflicts directly, but they arise elsewhere also. In Chapter 3, for example, we discuss the tension between the duty to protect confidences and a lawyer's felt need to share aspects of her working life with her friends. In Chapter 13, we discuss the duty to provide services to clients who cannot afford to pay fees, which is in the public interest but may not be in the lawyer's financial self-interest.

In the study of the rules that govern lawyers, especially the ethics codes, one often sees evidence of the drafters' concern for their own or other lawyers' interests. These concerns tend to predominate over attention to the interests of clients, adversaries, the public, or those who cannot afford to hire lawyers. For example, look at ABA Model Rule 1.5(b), which explains lawyers' duty to inform clients about the basis of fees based on time spent.

> The scope of the representation and the *basis or rate* of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably* in writing, before or *within a reasonable time* after commencing the representation, *except* when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

We italicize the various qualifiers in this rule. A client-centered rule might require disclosure of the amount to be charged before the client hires the lawyer. But this rule requires only disclosure of the "basis or rate" of the fee and expenses. The rule does not specify what must be disclosed, although the comments offer some details on disclosure of what expenses will be separately billed. This rule usually is understood to require disclosure of how much a lawyer

plans to charge for each hour worked. It does not require disclosure of whether the lawyer plans to bill only for high-quality research and advocacy time, or whether the lawyer also intends to bill at that rate or some other rate for time spent doing administrative work, "thinking" time, airplane time, or time spent chatting with the client about their children's sporting events. Nor need the lawyer disclose how many hours the lawyer thinks the new matter might require. So a lawyer might comply with the rule but leave the client knowing almost nothing about the fees to be charged.

But there are more hedges. Must the lawyer make this paltry disclosure before the client hires the lawyer? No. The rule requires a lawyer only to inform the client of his hourly rate "before or within a reasonable time after" the lawyer begins the work. Must the lawyer make the disclosure in writing, so that the client has a record of what was said? The rule says no. Writing is preferred, but not required. Does the lawyer have to make a fee rate disclosure at the beginning of each matter undertaken for a client? No, this disclosure is required only if the lawyer has not regularly represented the client on the same basis.

The rule also requires a lawyer to tell the client if the basis or rate of the fee changes. But notice that the rule does not require the lawyer to consult with the client to get permission to raise his rates. Nor does the rule even require notice of an increase in the rate in advance of beginning to bill at a higher rate. A more consumer-oriented rule would disallow changes in the price of the service without the consent of the person charged. But not so for lawyers.

Why is this rule so hedged? One part of the answer is that it was drafted mainly by lawyers and then, in the states that adopted it, approved through a process in which most or all of the participants were lawyers. Perhaps we should not be surprised that many lawyers want maximum latitude and minimum regulation of their financial relationships with their clients.

This rule provides a vivid example of how lawyers' self-interest is expressed in the law governing lawyers. When reading rules and opinions, watch for other examples of rules that give primary attention to the interests of lawyers rather than of clients.

One last theme that comes up often in the text involves lawyers as employees. Many ethical dilemmas are caused or exacerbated by conflicts between a lawyer's obligations under ethics rules or other law and the lawyer's felt duties to her employer. Lawyers often feel duty-bound to follow instructions from more senior lawyers, even if what they are asked to do seems wrong. In addition, lawyers tend to absorb the ethical norms of the institutions that employ them, even if what is going on around them is inconsistent with published or official professional norms.

Professor Kimberly Kirkland

Professor Kimberly Kirkland did an empirical study in which she interviewed 22 large-firm lawyers about the structure of large firms and the influence of these structures on the ethical awareness of their associates. She concluded that as lawyers "climb case hierarchies and negotiate their firms' management bureaucracies . . . they look to the lawyers they are working for and with, and those who matter to them at the time, as the source of norms," including ethical norms. The individuals from whom the associates absorb professional norms are not the "elite partners" but those who really matter, such as their immediate supervisors and the firms' managers.[15]

Lawyers who are employees may feel obliged *not* to share information about the misconduct of others in their firms or agencies, information that the rules require to be reported. New lawyers often have good familiarity with the ethics rules. They may know what the rules say and may notice aspects of the work that seem to be inconsistent with what the rules require. But new lawyers often have little authority within the institutions where they work, and they have strong incentives to be diligent and loyal and not to criticize the conduct of their superiors. If they do raise questions about ethical problems, they may face retaliation through loss of raises, bonuses, attractive assignments, or promotions. They may even get fired.

In evaluating many problems in this text, you will encounter ethical dilemmas that require action. In considering what to do, you will often find yourself caught between your duties as a member of the profession and your obligations to your employer institution. By exploring a large number of these problems, you will become more adept at distinguishing those that are serious enough to require action, even when that action might be considered disloyal. You will also develop a repertoire of methods by which you might fulfill your duties to the profession without placing yourself at risk of retaliation.

The legal profession appears to be undergoing a period of profound change, brought about by globalization, changes in technology, and the recession that began in 2008. The last chapters of this book provide a partial portrait of the legal profession: what it aspires to be, how it has evolved over time, and current trends that will profoundly affect the next generation of lawyers.

15. Kimberly Kirkland, Ethics in Large Firms: The Principle of Pragmatism, 35 U. Mem. L. Rev. 631, 710-711 (2005).

Our primary focus in organizing this book is on the interests and needs of the law students who read it.[16] We have ordered the topics based on what we believe law students need to learn first about the law governing lawyers. We put early in the book issues that are of pressing concern to law students or that may arise in the course of externships, clinics, or part-time work. We begin Chapter 1 by discussing the basic structure of the legal profession and the law that governs lawyers because absent that background, the rest of the book might not make sense. Then we take up admission to the bar, a topic of great urgency for many students. We proceed in Chapter 2 through an overview on lawyer liability, looking at the disciplinary system, at legal malpractice liability, and at legal protections for subordinate lawyers. These topics appear early so that as students proceed to study the ethics codes, they will understand the consequences of violating these rules.

In Chapters 3 and 4, we turn to the duty to protect confidences and the attorney-client privilege. Chapter 3 opens with a set of questions that confront many law students every day. "If I'm working on a client matter, can I talk about it outside the office? How much can I say? What if I'm in a public place?" Law students do not create autonomous lawyer-client relationships, but most law students do work on client matters, so these are some of the first ethical questions that students encounter.

Chapter 5 explains the law of lawyer-client relationships. It covers the rules on how lawyers and clients begin and end their work together and lawyers' duties to clients, including the duties of competence, candor, and diligence. This chapter also examines the allocation of decision-making authority between lawyers and clients.

Chapters 6 through 10 explore the law on conflicts of interest, which involves questions of confidentiality and of loyalty. The law of conflicts, which is probably the most complex material in the book, includes ethical rules, liability rules, and disqualification rules. Chapter 6 describes the different types of

16. One could organize a textbook on legal ethics with a discussion of the formation of a lawyer-client relationship and then take up issues chronologically, according to when they arise in the course of the relationship. One could organize a text (following the structure of the Model Rules) according to who are the parties to a particular set of issues — lawyers dealing with clients, former clients, courts, adversaries, and so on. We have used the "who are the actors" question as one organizing principle, but not the only one.

Another organizing principle for this book is pedagogical. Professional responsibility is not an easy course to teach; establishing open communication and ongoing student engagement can be an uphill battle. We offer an organized and logical outline of the law governing lawyers, but some choices about topic order are affected by judgments about the needs of our student readers and about what will make for a good course. For example, it's important at the beginning to get some basic information across, but it's even more important to offer an interesting problem for discussion on the first day of class. Also, it is desirable to cover the chapters on conflicts of interest before the point in the semester at which many students take the MPRE. But because the conflicts material is difficult, it should not be taught too early in the semester. These and other pedagogical ideas guided our decisions.

conflicts and introduces the subject of concurrent conflicts between the interests of two or more present clients. Chapter 7 discusses examples of concurrent conflicts in particular practice settings. Chapter 8 examines conflicts between the interests of present clients and past clients. Chapter 9 addresses conflicts between the interests of lawyers and their own clients, most of which involve money. It covers issues relating to fee arrangements and billing practices, the rules governing care of client money and property, and other issues that raise conflicts between the interests of lawyers and clients. Chapter 10 discusses conflicts issues for present and former government lawyers and the ethical responsibilities of judges.

Chapters 11 and 12 look at lawyers' duties to people who are not their clients. They explain the obligations of truthfulness to courts, adversaries, witnesses, and others. They consider the conflicts that arise between (a) protecting confidences and advocating for a client's interests, and (b) dealing honestly and fairly with everyone else.

Chapter 13 reveals the bar's professed desire to serve the entire public, including those who cannot afford legal services, but shows that that goal is far from being met. It also documents that while some lawyers do provide services to those in need, including through pro bono representation, governmental support is also necessary to meet public needs. Chapter 14 offers a glimpse of the economic and technological changes that are rapidly transforming the U.S. legal profession and the delivery of legal services. It also addresses some important aspects of regulation of the business of practicing law, including advertising by lawyers and limitations on interstate legal practice.

This book quotes the text of numerous "rules of professional conduct" and their "comments." The American Bar Association (ABA) drafts and issues Model Rules of Professional Conduct and recommends that state courts adopt them as law. Most state courts have adopted the ABA's Model Rules, often with several variations reflecting local policy. The state with the fewest departures from the Model Rules is Delaware, largely because E. Norman Veasey, the chief justice of Delaware when Delaware adopted its rules, had been the chair of the ABA Committee that had drafted the most recent major rewrite of the rules in 2002.[17] Most law students study the Model Rules, not a par-

17. In fact, with only a few exceptions (most notably Rules 1.5, 3.5, and 3.9), the text of the rules in this book is the text of the Delaware Rules of Professional Conduct, which happens to correspond to the text of the Model Rules. So if you happen to be studying at Widener University's Delaware campus, you are actually studying your own state's rules.