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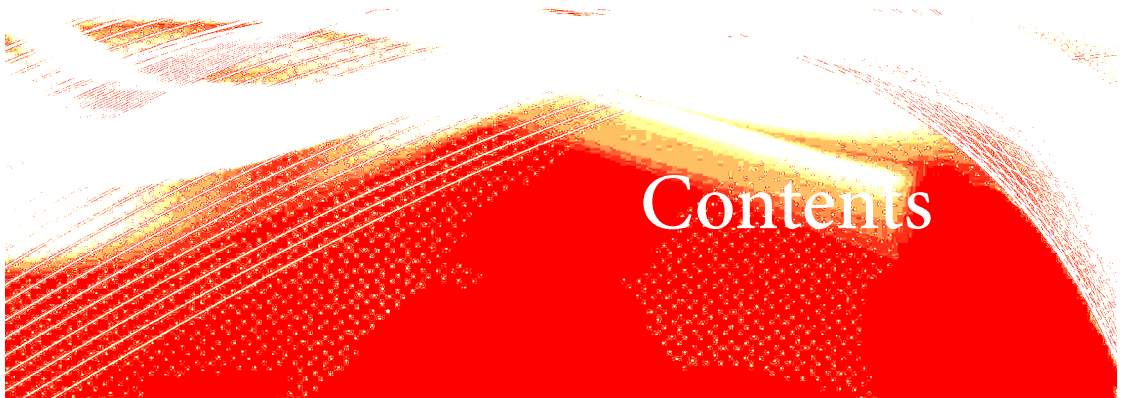
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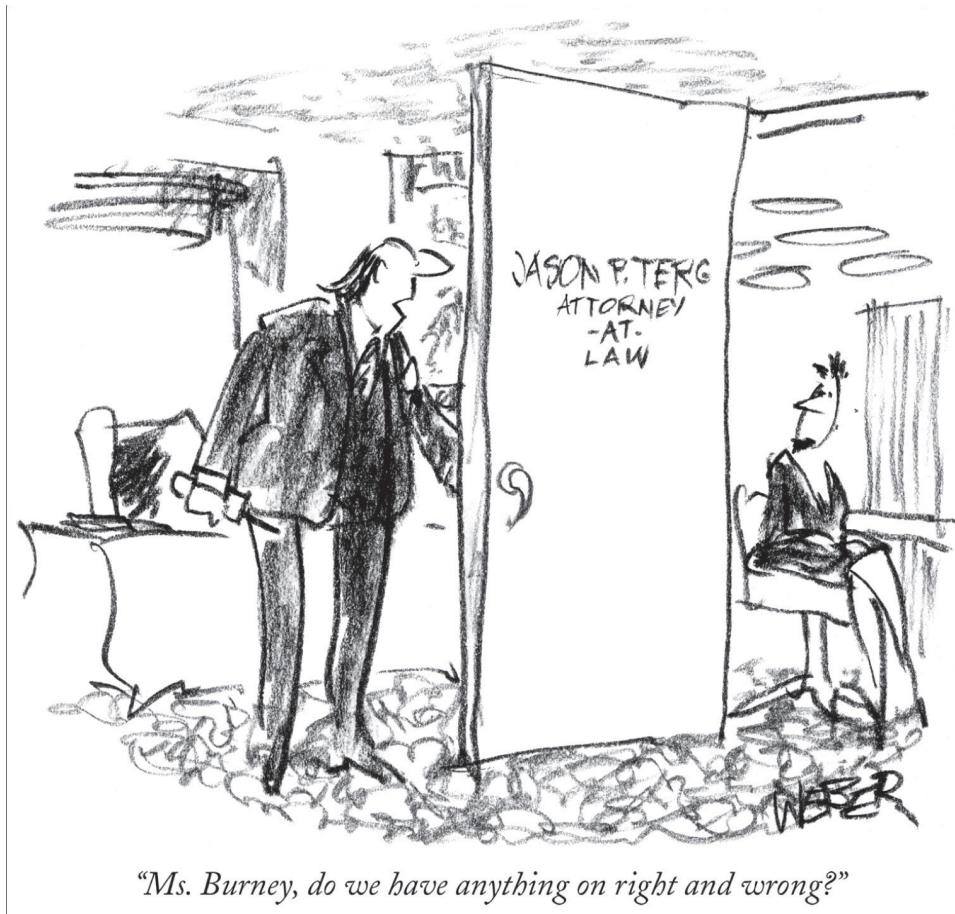


Preface to the Fifth Edition for Teachers and Students

This book is an introduction to the law that governs lawyers. It includes two chapters on the history, structure, and future of the legal profession.

Our principal goals in writing this book are 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 seek to provide opportunities for law students to consider the various professional roles that lawyers occupy and some of the moral quandaries that they may 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 of the entire body of law governing the legal profession. What the book does address are many problems that arise in everyday practice, including those that lawyers are most likely to encounter during their first years in the legal profession. For example, the book explores what you should do when a more senior lawyer asks you to pad your time sheets. Or what if your supervisor asks you to appear in court for a hearing on a matter that involves complex issues of law that you know nothing about? With these and many other issues, we have sought to present problems and examples with respect to which a student can understand the facts and the ethical issues regardless of whether the student has taken advanced courses in law school.



This book offers opportunities to explore ethical dilemmas that have arisen in practice. Some of them have resulted in published judicial decisions. While we excerpt or summarize some judicial opinions in the book, we transform a larger number of cases into problems for class discussion. We present 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 ethical and strategic considerations. Rather than building the book around predigested legal analyses by appellate judges, we invite students to put themselves in the shoes of lawyers who faced difficult choices.

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 how to find the law that addresses the particular issue, how 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 provide an overview of 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, some law students who use computers during class are only half present; they chat with friends, do other work, play games, and so on.³ Law schools have a hard time retaining students' interest and attention after their first year. This is a book whose content and methodology will 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.

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 to provide the legal background that students need to analyze the problems that follow.

Most of the text is presented in question-and-answer format. This structure provides an ongoing roadmap, anticipating readers' questions and forecasting the content of the next subtopic.

Concrete examples, set off from the text, illustrate the general doctrinal principles.

This book has very few judicial opinions. Law students read so many opinions in other courses. Professional responsibility is best taught using a problem-based approach. The few opinions in the text are edited carefully to present only the most relevant sections. Some are summarized rather than reprinted so that students can move quickly to the problems.

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.

The book's many rich problems focus class discussion and 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 though they were the lawyers facing those dilemmas. This structure produces livelier discussion than does the autopsy method used in many 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. You may wish to consult *Ethical Problems in the Practice of Law: Model Rules, State Variations, and Practice Questions* (Aspen Publishing) (Lerman, Schrag, and Gupta), which includes the ABA's Model Rules of Professional Conduct, some interesting changes that certain states made when they adopted their own versions of the Model Rules, and more than 125 practice questions that students can use to prepare for the Multistate Professional Responsibility Examination.

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 context. Others, like the cartoons, offer a change of pace from the textual narrative.

The book has an associated website on which we provide updates. If the Model Rules of Professional Conduct are amended, important cases decided, or other major developments occur, information will be posted to the website. The URL for the website is <https://www.AspenPublishing.com/lerman-ethicalproblems5>.

Teachers who have used the fourth edition of this book will discover much that is familiar, along with numerous additions:

The book reflects changes made in the ethics codes and other lawyer law since the fourth edition was published. We have added many new examples and several new problems. We have updated countless empirical statements in the book about the law and the legal profession. 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 8.4, the amended rules governing advertising and

solicitation by lawyers, 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 examine novel trends in the way that legal services are delivered, including the increased use of companies that contract with firms to deliver many critical pieces of the work and the changes in lawyer regulation to allow outside funding of lawsuits. We describe many other current problems such as sexual harassment in the profession and the judiciary, and ethical issues faced by lawyers who act as arbitrators or mediators.

In this new edition, we have reorganized the material on some topics. We moved the content of former Chapter 14 to other chapters. Former Chapter 5, on lawyer-client relationships, is now Chapter 3, coming before the chapters dealing with confidentiality and the attorney-client privilege. We have changed the order of former Chapters 7 and 8. The material on applying the conflicts rules to specific contexts now follows the chapter on conflicts involving former clients. Chapter 13 discusses the changing landscape of law practice in the twenty-first century, bringing together some issues addressed in the previous edition and adding some new material.

We do not include URL citations for legal journal, newspaper, and magazine articles that are easily searchable online using the title of the article.⁴ To reduce the number of online citations that may disappear from the web, we have created permalinks for many of them.

The book now has 43 *New Yorker* cartoons. We continue to believe that there is much to learn about lawyers and the legal profession from the jokes made about both.

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

Lisa G. Lerman
Philip G. Schrag
Robert Robinson

4. In some cases, the date cited is the date of the online version of an article, which may have appeared in the printed publication on the previous or subsequent day.

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.

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We need to acknowledge the profound contributions to this textbook of the countless students (in addition to our research assistants, who are acknowledged below) with whom we have had the opportunity to discuss questions about professional ethics and about the legal profession. (Between the three of us, we have more than 100 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 raised our awareness of so many ethical issues and 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 fifth edition, Rachael Connelly; to Taylor Deer, who also provided important research assistance; and to law student Julia Whitney for helping us spot errata in the fourth edition. 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. For the fourth edition, we benefited greatly from the work of Benjamin Schiffelbein.

We acknowledge the late 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.

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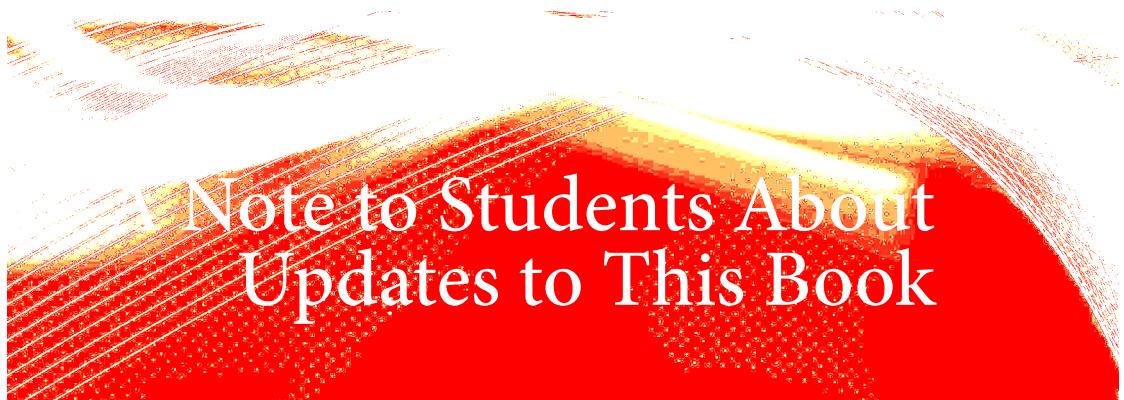
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A Note to Students About Updates to This Book

This book will be updated on the book's companion website to reflect any important changes in the rules or any other very significant developments.

The URL for the companion website is <http://www.AspenPublishing.com/Lerman-EthicalProblems5>.



Introduction

A. Ethics, morals, and professionalism

B. Some central themes in this book

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 ethical and 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?

It is important to study the law governing lawyers for two reasons. First, knowledge of this subject is important to your professional security. 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 could be incorrect. An empirical study in New York concluded that “[v]ery few lawyers ever looked at the New York [ethics code] to resolve ethical issues they encountered in practice” and, in fact, “had not consulted it since law school.”¹

Why study the history and structure of 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. For example, the American Bar Association writes many rules and opinions. A law student needs to know whether the ABA has some kind of governmental authority, and what is the relationship between the ABA and the bars of the 50 states.

As a lawyer, you need to understand policy issues relating to the structure and regulation of the profession so that you can participate in the improvement of the profession and the justice system. You will have opportunities to affect the ever-changing law of the legal profession. If you clerk for 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 a staff member to a state or federal legislator, or even an elected official. 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 to a particular field of law who have not yet become accustomed to “business as usual.”

What is the difference between “ethics” and “morals,” on one hand, and “legal ethics,” on the other?

The terms “ethics” and “morals” are sometimes used synonymously² and sometimes distinguished, but in varying ways. One authority defines “morals” as “values” attributable “to a system of beliefs” arising “from something outside the individual [such as a] higher being or higher authority (e.g. society).”³ “Ethics”

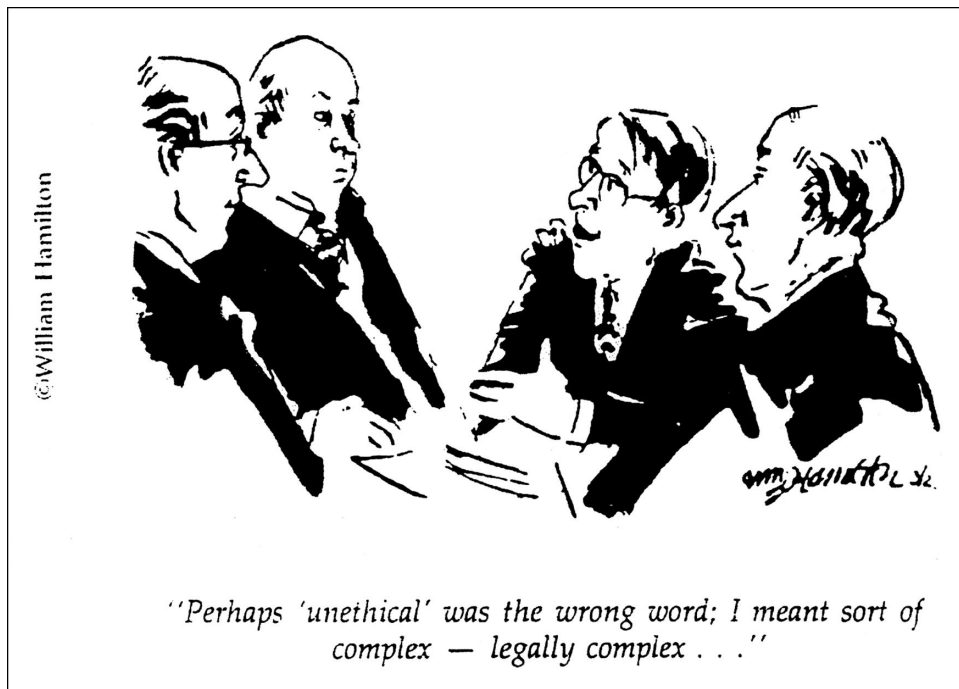
1. Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 Hous. L. Rev. 309, 368-369 (2004).

2. See, e.g., Merriam-Webster On-Line Dictionary, <https://www.merriam-webster.com/dictionary/moral> (last visited Aug. 22, 2019), which lists “moral” and “ethical” as synonyms.

3. Frank J. Navron, *Defining Values, Morals, and Ethics*, Drake County News Online (2011), <https://perma.cc/H9UD-M4XZ>.

can be defined as a discipline concerned with what is good and bad, right and wrong.⁴ Those concerned with *legal ethics* might ask “what ethical values lawyers should uphold in light of the profession’s unique position in society?”⁵

For purposes of this book, we use the term “moral,” as opposed to “ethical,” to refer to broad questions of good and bad and right and wrong. We use the term “ethics” or “ethical” to refer not to moral philosophy, but to “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.”⁶ When we ask whether a particular act is “unethical,” usually we are asking whether the act would violate the ethics codes that govern lawyers.



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 legal ethics, but many lawyers could identify some rules whose mandates do not correspond with their individual moral judgment. For example, one rule bars litigating lawyers from helping indigent clients facing eviction to pay their rent. While providing such assistance would

4. “Ethics,” Encyclopædia Britannica, <http://www.britannica.com/eb/article-9106054/ethics> (last visited Aug. 22, 2019).

5. David W. Wilkins, Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism, 58 Law & Contemp. Probs. 241, 243 (1995).

6. “Legal Ethics,” Encyclopædia Britannica, <http://www.britannica.com/topic/legal-ethics> (last visited Aug. 22, 2019).

violate the rule and could get a lawyer in trouble, few people would say that it would be immoral to do so.

In addressing how best to solve a client's problem, you should consider all the facts and circumstances, including strategic, practical, economic, and other factors. If the contemplated action raises a question of legal ethics, you need to ask whether the conduct in question violates the ethics codes or whether it would violate other law, such as criminal law or regulatory law. You then should think about what you believe to be "the right thing to do" and whether what is morally appropriate aligns with the guidance in the ethics code or other law.

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.

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 protect democratic government, and because the licensing process gives attorneys a monopoly on the services they provide, lawyers should provide some service to clients who cannot afford to pay. They also should participate in the improvement of the legal system.

To be "professional" 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 in any work, not just the work required of members of the "professions." Most people who consider themselves "professionals" have 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 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.⁷ A criminal defense lawyer, for example, might urge that it is proper to

7. See Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics* (5th ed. 2016); *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Scott L. Cummings ed., 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).

seek to exclude from evidence an exhibit that shows his client's guilt 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 used too easily to justify conduct that otherwise might be viewed as immoral.⁸

Most students are excited by the prospect of joining a profession. Membership offers the opportunity to develop skills and to evolve internal standards of performance, to engage in lifelong learning and improvement, and to serve others.

In law, after the first few years of training, no one but a lawyer knows the details of much of what she does. The external standards play an important role, but they often lie in the background. Lawyers must set most of their professional standards internally, especially those that relate to treatment of clients and the quality of work product.

Joining the legal profession⁹ 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'll become acquainted with many external standards, and you'll have opportunities to cultivate and refine your own internal standards.

Lawyers and law students are members of an honorable profession, most of 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:

A Harris poll found that only a quarter of the public would trust lawyers to tell the truth. This was far lower than the percentage who would trust ordinary people (66 percent), and was the lowest percentage for any profession except actors.¹⁰

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

9. 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 13.

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).