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As with the eleven prior editions, this one is dedicated
with love and pride to my strolling-in-the-city companions,
Gillian Gillers and Heather Gillers,
les enfants du paradis.

Imagine that you are going to spend substantial time in a distant island nation. You're excited because you've heard a lot of good things about the place, but you're also a little anxious. Much will resemble home, but many customs will be new. You don't want to embarrass yourself or, worse, get kicked off the island. You buy a guidebook to tell you how to act in different business and social situations. What should you expect?

This book is a guidebook of sorts. Its silent subtitle could be *How to Perform in the Law.* It tells you how to act in a new place — Lawyerland — a place where most readers of this book will spend decades of their working life. You need to know the customs or, more accurately, the rules in order to thrive.

How to act. In *The Performance of Self in Everyday Life*, the sociologist Erving Goffman compared everyday face-to-face encounters to acting, to a series of performances. In chapter 7A, Robert Post draws on Goffman's study of performance and acting to help understand the popular perception of American lawyers. "All the world's a stage," Jacques declared in *As You Like It,* anticipating Goffman by centuries. Law practice is also a stage, on which, updating Jacques, a lawyer in her lifetime will play many parts.

* * *

Here are three things about this book and the class it serves.

First, this is your second most important class. A bold statement, but true. Say you become an antitrust lawyer. The criminal procedure class you loved will fade in your memory. Or if you become a criminal defense lawyer, you won't need to know much about copyright. But whatever work you do as a lawyer, you will practice what you learn here every day you go to work. Other courses teach lessons that bear on a client's problems. This book is about your work as a lawyer. You're the client.

Knowledge of these rules enables you to stay safe and to protect your clients from the misconduct of other lawyers. Also, representing lawyers and law firms in trouble (or needing advice to avoid trouble) is now an established practice area, one that might appeal to you.

Second, the book contains many problems. Some are one paragraph, others a page or more. Many are based on or composites of real events

that I've heard or read about. Many of the problems are dense and messy, like life. They arose yesterday or will tomorrow. A problem may not have all the information required to answer it. Just like practice. You may have to identify what more you need to know.

Lawyers know that finding solutions to problems that arise in practice benefits from conversation. So, too, here. Listening to others in class and articulating your own tentative responses will produce a better result than thinking alone.

Third, this book has a personality, a voice: mine. In that way, it is unlike some other casebooks. Its voice is conversational. Sometimes, it takes a position. I invite you to disagree. "I" appears with some frequency as the subject of a sentence.

As you approach the starting line of your legal career, most important are the rules that constrain your behavior. You will want to know—in such areas as competence, fees, advocacy, confidentiality, conflicts of interest, negotiation, and the client-lawyer relationship—what you may or must do or not do, with confidence that your conduct will not land you before a disciplinary committee, create civil or criminal liability, invite court sanction, forfeit your fee, or damage your reputation.

Ethics, a useful shorthand, does not accurately describe all lessons learned here. The law business is heavily regulated. The regulations are growing more complex. This has led to new terms—*the law governing lawyers* and *the law of lawyering*—lest anyone be fooled by the word "ethics" into believing that the subject is simply about how to be a good person and a lawyer at the same time (although it's about that, too). It sometimes seems that the public thinks both are not possible.

Avoid two errors.

Do not believe that the right way to act—toward clients, courts, adversaries, or colleagues—will be intuitively obvious. Sure, sometimes it will be. But no one needs to teach you not to lie or steal. The rules here may be obscure, some may be counterintuitive, and others are subtle in application. Application in turn calls for judgment, and judgment is mostly learned through experience. But it can start now.

Do not assume your employer will provide all the protection you need. Most law offices do have systems to detect and avoid mistakes and people to whom lawyers can turn for advice. But the best systems and resources are still not perfect, and anyway, the professional responsibility of a lawyer cannot be delegated wholesale to others. Furthermore, you need to know enough to know when you need to seek advice or do research.

* * *

A broader perspective from which to view the laws and rules that regulate lawyers looks at their effect on civil society and the administration of justice. These laws and rules help define the nature and work of the entire profession and therefore the behavior of our legal institutions

and the quality of our social justice. For example, a rule that prohibits, requires, or allows a lawyer to reveal a client's confidential information to protect others from harm will guide a lawyer's own behavior, but it can also affect what information clients are willing to share with their lawyers. Many rules reflect an effort to reconcile competing interests between clients and others.

As you enter law practice, you are likely more interested in such questions as "How must I behave?" and "How can I stay out of trouble?" than in asking, "What are the consequences to civil society and justice if one or another version of a particular rule is applied to the 1.3 million American lawyers?" Still, the last question is important and, if not as immediate, may arise in the course of your professional life. You may someday be in a position to resolve the broader questions—as a member of a bar committee, a legislator, a government lawyer, or a judge.

Asking about the consequences to justice and civil society if a rule is resolved one way rather than another—and saying which resolution is best—engenders different answers among both lawyers and the public. Why is that? In part, because the answers depend on political and moral values more fundamental than the "ethics" that inform various codes. And political and moral values of different people differ.

In addressing the questions here, we must be honest about the interests we mean to protect. Those of society generally? Those of a particular client population? The legal profession's? Your own? Law school and law practice, it is sometimes said, encourage more rather than less self-interest. In transition as you are, your answers may vary from what they would have been when you applied to law school, and they will likely be different five years after you graduate.

* * *

You will enter a profession in greater transition than at any other time in American history. Three forces are reshaping the U.S. law industry: technology, globalization, and competition from new sources. As it happens, while I was writing this preface the Wall St. Journal ran an article entitled "Would You Trust a Lawyer Bot With Your Legal Needs?" by Asa Fitch (August 10, 2020.) And the Utah Supreme Court adopted reforms that allow nonlawyers to own law firms, an idea that, until recently, would have been unthinkable. Lyle Moran, "Utah Embraces Nonlawyer Ownership of Law Firms as Part of Broad Reforms," (ABA Journal August 14, 2020). Arizona did, too. See chapter 14B.

Will artificial intelligence replace some lawyer tasks? Will it replace some lawyers? Will it reduce the cost of some legal services? Yes, yes, and yes. It has already happened.

These three forces are upsetting a lawyer regulatory system that has served the United States well for more than a century, a system based on geography. In that system, lawyers get licensed by a place and serve

clients from an office in that place. But technology has challenged the use of geography as the basis for regulation and licensure. The Internet does not recognize borders. Neither may a client's problems. An algorithm does not need a law license. Technology and globalization have encouraged competition from lawyers outside the U.S. and the ability of non-law businesses to offer legal services at lower cost. Chapters 12C and 14B address these trends.

* * *

This is the twelfth edition of the book. I started working on it in 1982 shortly before the birth of the first of two amazing daughters to whom all editions have been dedicated. I sent the manuscript to the publisher just after the birth of the second daughter in 1984. The daughters are now out in the world, but the book has never left home.

You think a lot about what a casebook is and can be when you live with one so long. The book's primary purpose is to provide information, but that's just the beginning. The minimum editorial task would allow me to pick good cases and other materials, edit them, order them logically, add interstitial notes and questions, and put the product between covers. Voila! A casebook. Of course, one must begin this way, but if nothing more were possible (even if not required), I wonder if I would have kept at it so long. Luckily, more is possible while still serving the book's goal—to teach the subject.

For starters, we can strive for humor, variety, clarity, and good writing. The enterprise will not likely support the wit and moral imagination of an Orwell essay or the originality of a Vonnegut novel—assuming counterfactually that I had the talent to write either (in which case I'd probably be in a different line of work)—but a casebook is a book, after all, and it should have an authorial presence in so far as possible. That's what makes the book mine.

And then there are the stories lawyers tell each other. The legal profession is a culture of storytellers and stories. Harrison Tweed (1885-1969), a president of the New York City Bar Association, once said: "I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with than most other varieties of mankind." These words are inscribed on a wall at the Association's headquarters. As a young lawyer, I thought Tweed was overly effusive, even sanctimonious. At the time, I was inclined to agree with the character in George Bernard Shaw's play *The Doctor's Dilemma* who said that "all professions are conspiracies against the laity." I still find Tweed a bit over the top and Shaw's observation spot-on. But now I think that Tweed was onto something. The profession and its members *are* fascinating to study. Its stories *are* fascinating to hear.

As with the study of any culture, understanding the bar requires density of information. We must know a thousand small details about the actual life within the society of lawyers, not merely a few doctrines and theories, if we are going to understand Lawyerland truly. I have tried to include some of those details here. I have tried to include stories lawyers tell each other and stories about lawyers from the popular and legal press.

I invite your views on the book. What was dull? What worked well? How can the book be improved? Have you encountered a quote or story somewhere (true or fictional) that you think nicely highlights an issue? This edition is indebted to past users who alerted me to interesting sources. All comments will be gratefully acknowledged.

Stephen Gillers
Stephen.Gillers@NYU.edu
September 2020

Beginning with the first edition of this book in 1985 and ever since, I have been fortunate to have help from generations of students at New York University School of Law. Among the students who assisted with the last edition was Lindsey E. Smith, class of 2018. When it came time for me to consider a twelfth edition, I reached out to Lindsey, now in practice, to see if I could persuade her to assist again. She said yes. Her hundreds of contributions, though invisible to readers, are quite visible to me and greatly improve the book. Her consummate skill as a close reader of text and thorough researcher are equaled only by the conscientiousness she brings to the tasks.

My former colleague Norman Dorsen, who died in 2017, was my co-author on the first two editions of this casebook and my mentor and friend for fifty years. Other demands on his time caused Professor Dorsen to trust succeeding editions to my sole care. Nevertheless, in countless ways this edition, like its predecessors, benefits from Professor Dorsen's early work and his good advice over the decades. Also, as he several times reminded me, he had the connection to Little, Brown, the original publisher. "I got the client," he'd joke.

I thank the D'Agostino/Greenberg Fund for financial assistance that aided this twelfth edition.

My understanding of the subject of legal ethics has been immeasurably enhanced by my conversations across forty years with one person whom I mention last but am grateful to most: Professor Barbara S. Gillers, whose decades of professional work on lawyer regulation—in a government law office, in private practice, and with bar associations local and national—has put her on the front lines of most of the developing issues recounted here. She has left private practice, but not the subject. For three years, until August 2020, she chaired (and was previously a member of) the American Bar Association's Standing Committee on Ethics and Professional Responsibility. She served as vice chair of the New York State Bar Association's Committee on Standards of Attorney Conduct. She was the chair and a member of the ethics committee of the New York City Bar Association. Now as an adjunct professor at New York University School of Law, she teaches a class in legal ethics and a seminar on legal ethics for public interest lawyers. Our ethics partnership has been invaluable to our work in the field.

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I

The What, Who, How, When, and Why of "Legal Ethics"

The Preface explained why, especially today, law students really need to know the rules and laws that will govern their careers as lawyers. These rules and laws have a long history, at least 1,500 years, according to Professor Carol Andrews. "By the end of the Roman Empire," she writes,

> the advocate's oath was remarkably similar to modern oaths. An oath reportedly used in the era of Justinian (sixth century A.D.) required advocates to swear that:
>
> > [T]hey will undertake with all their power and strength, to carry out for their clients what they consider to be true and just, doing everything with it is possible for them to do. However, they, with their knowledge and skill, shall not prosecute a lawsuit with a bad conscience when they know [beforehand] that the case entrusted to them is dishonest or utterly hopeless or composed of false allegations. But even if, while the suit is proceeding, it were to become known [to them] that it is of that sort [i.e., dishonest], let them withdraw from the case, utterly separating themselves from any such common cause.
>
> . . .
>
> Parliament also regulated the early English lawyers known as attorneys (the predecessor of modern solicitors). In 1402, Parliament formally required that attorneys take an oath. The 1402 Act did not specify any form of the attorney's oath, but the oath probably was some form of the following pledge to "do no falsehood:"
>
> > You shall doe noe Falsehood nor consent to anie to be done in the Office of Pleas of this Courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lord Chiefe Baron or other his Brethren that it may be reformed; you shall Delay noe Man for Lucre Gaine or Malice; you shall increase noe Fee but you shall be contented with the old Fee accustomed. And

> further you shall use yourselfe in the Office of Attorney in the said office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God.*

As the Preface also explained, "legal ethics" inadequately describes the subject of this book and the courses that may use it. The term is fine as a shorthand, but our subject is broader. Rules that govern how lawyers and judges may, must, or must not behave have many sources. I will list them here, but first we need to ask two big questions.

A colleague once told me that "the problem with legal ethics" was that it lacked a theory. He meant to be helpful. He taught legal history, so I wondered, but did not ask, "Does legal history have a theory?" Why is the lack of a theory a "problem"?

Then I got to thinking. Do the various rules and laws subsumed under the title Regulation of Lawyers derive from an overarching Theory of Everything, or at least a Theory of Pretty Much Everything—one (nearly) grand design that explains (most of) it? Academics (me, your teacher) favor theories. They are part of the academic toolkit, if not all of it. We cannot choose the right rule until we know our goals. We cannot identify our goals until we know the norms and values we wish to advance. And why? So we need a theory.

In truth, we may never find that theory, or we may disagree about what it is, or we may see our theory temporarily ascendant, then repudiated by the next generation of scholars. More distant generations may resurrect our theory when we're no longer around to enjoy the recognition. And so it goes. None of this does, or should, stop us from the search for a theory. In asking the questions, we learn a lot.†

Outside the academy, people must subordinate theory to pragmatism. To what works. Michael Ignatieff was a Harvard political science professor before returning to his native Canada, getting elected to Parliament, and briefly serving as a Liberal Party leader. So he was in a good position to understand how ideas (a synonym for theory) worked differently in different environments. On August 5, 2007, he published a New York Times

* Carol Rice Andrews, The Lawyer's Oath: Both Ancient and Modern, 22 Geo. J. Legal Ethics 3 (Winter 2009).

† To borrow from Rainer Maria Rilke's *Letters to a Young Poet* (1903): "And the point is to live everything. Live the questions now. Perhaps then, someday far in the future, you will gradually, without even noticing it, live your way into the answer."

Magazine article, "Getting Iraq Wrong," in which he tried to understand his own mistake in initially supporting the war in Iraq:

> The philosopher Isaiah Berlin once said that the trouble with academics and commentators is that they care more about whether ideas are interesting than whether they are true. Politicians live by ideas just as much as professional thinkers do, but they can't afford the luxury of entertaining ideas that are merely interesting. They have to work with the small number of ideas that happen to be true and the even smaller number that happen to be applicable to real life. In academic life, false ideas are merely false and useless ones can be fun to play with. In political life, false ideas can ruin the lives of millions and useless ones can waste precious resources. An intellectual's responsibility for his ideas is to follow their consequences wherever they may lead. A politician's responsibility is to master those consequences and prevent them from doing harm.*

What does this mean for legal ethics? All legal rules must be pragmatic ("applicable to real life") because they tell people how to behave. And legal ethics rules must be pragmatic because they tell lawyers how to behave when advising other people how to behave. As Ignatieff wrote, we "can't afford the luxury of entertaining ideas that are merely interesting." Or more precisely, we can, but it's not enough. Our ideas must also lead to rules that make sense to those who must obey them. Lawyers and judges know this instinctively.

Legal theories need stories and vice versa. Lawyers are storytellers, and not only trial lawyers. Stories help lawyers make sense of their work, which combines the abstract and the particular. Every client matter is a story. A client wants an estate plan or to start a business or tax advice because of events in the client's life, which tell a story. Lawsuits tell conflicting stories. So although we can and will talk theoretically about the scope of a lawyer's duty of loyalty or confidentiality, we test and come to understand these concepts through stories. This book seeks to do that with many problems, some based on real events, in addition to cases and case notes.

* The same thought appears elsewhere in Berlin's work:

> In one of his most famous essays, Isaiah Berlin quotes a fragment from the Greek poet Archilochus: "The fox knows many things, but the hedgehog knows one big thing" ("The Hedgehog and the Fox"). The contrast is a metaphor for the crucial distinction at the heart of Berlin's thought between monist and pluralist accounts of moral value. According to monism, a single value or narrow set of values overrides all others, while on the pluralist view human goods are multiple, conflicting and incommensurable. Monism, Berlin believes, harbors political dangers that pluralism avoids. While the great authoritarian visions of politics have all rested on monist foundations, pluralism is naturally aligned with toleration, moderation and liberalism. George Crowder, Hedgehog and Fox, 38 Australian J. Pol. Sci. 333 (July 2003).

Another philosopher, former New York Yankees shortstop Yogi Berra, is reputed to have expressed the same idea more concisely: "In theory there is no difference between theory and practice, in practice there is."

Lawyers and judges are foxes in the work they do, and this book is mostly a fox book.

With all this in mind, let us identify perspectives (even if not fully formed theories) that might help explain the law and rules governing lawyers. Each finds some support (or criticism) in primary or secondary authority.

"The Client Is the Center of the Universe, if Not the Whole Universe." The dominant, rarely questioned ideology of the American bar is that the laws and rules governing lawyers must permit and often require lawyers to protect the rights and autonomy of clients in a complex legal world. Lawyers must be free to act for a client in any lawful manner that achieves the client's goal. Protecting a client's autonomy requires an environment in which the client is encouraged to be candid. The rules must therefore assure clients that lawyers cannot and will not betray a client's trust, reveal her secrets, or cause her harm. In addition, lawyers must diligently pursue a client's goals. So long as the means and ends are lawful, a lawyer should be free to push forward even if the whole world would consider her ends or means unjust to others. If a lawyer cannot do that for a particular matter, she must decline the representation.

"Lawyers and the Legal Profession Also Deserve Autonomy." Lawyers are not technicians robotically obligated to ignore the wrongfulness of a client's instructions or to do whatever works, however distasteful. They are moral agents entitled to decline to be the instruments of injury and injustice to others even when lawful. The lawyer's autonomy is not limited to declining to accept a matter she finds repugnant. It includes the right, even after accepting a matter, to refuse to use means or to pursue ends the lawyer finds offensive. The rules must allow for a lawyer's autonomy. But how much?

"The Bad Client Problem." Some clients are willing to use lawyers to commit frauds or crimes that harm others or the administration of justice. Of course, lawyers cannot knowingly assist them. Rule 1.2(d). But a lawyer may later learn that her labors assisted a client's criminal or fraudulent scheme. These bad clients deserve no concern. The rules governing lawyers must permit, perhaps even require, lawyers to protect the victims of a client's past, ongoing, or prospective illegal conduct, at least where the lawyer has been the unwitting facilitator of the client's scheme, and even if doing so harms the client.

"The Tempted Lawyer Problem." Faced with conflicting interests, lawyers may be tempted to abuse a client's trust for their own benefit or the benefit of other clients or third parties. Alas, some lawyers will succumb to the temptation. Although most will not, the mere existence of a conflict can be a problem because clients who view their lawyers as facing conflicting interests may hesitate fully to trust them. Because client trust is crucial to enabling lawyers to advise and protect a client, the rules governing lawyers should forbid lawyers (absent client consent) ever to occupy positions in which the risk of betrayal is too high. But what is too high?

"The Poor Lawyer Problem." Not all lawyers are above average all of the time. Even those who are usually above average may perform below average on occasion, and below average lawyers may work especially hard and perform above average. When a lawyer seriously messes up, the law should afford a remedy to clients who suffer. Just as important, the rules should adopt prophylactic measures that promote competence in the first place, so that the amount of messing up is small.

"The Justice and Fairness Model." Lawyers are the intermediaries between the law on paper and its application to the real problems of actual clients. We cannot have the rule of law without lawyers, at least not in a modern society. No matter how beautiful a legal theory may be, it is only a theory until lawyers implement it. Legal theories have many goals. *Justice* and *fairness* are two. We may disagree on what justice or fairness requires, abstractly or in a particular situation, but we seem to accept that the law should aspire toward both. Consequently, so should rules for lawyers, who are the bridge between theory and practice.

"The Professional Conspiracy Theory." Why do we need legal ethics rules at all? Lawyers are just one kind of agent. Why aren't the legal rules that govern other agents sufficient? This theory posits that the ethics rules exist mainly to protect the interests of lawyers and to impede what, in their absence, would be legislative (rather than judicial) control of the bar. Judges, lawyers in robes, are more likely than lawmakers to favor the bar. True, the bar can no longer be so obvious about protecting its economic self-interest as in the days of minimum fee schedules. But that only means it has better learned how to showcase its devotion to the public interest and the clients' interest. Look closer and it turns out that the interests the rules mostly protect are those of the bar.

"The 'In Service of Other Theories' Theory." Legal ethics does not need a theory. We have quite enough theories and theory makers already, thank you very much. Instead, the proper content of any ethical rule should respond to theories developed in other areas of legal and jurisprudential studies. The ethics rules can then adapt themselves as appropriate to serve contract theory, feminist legal theory, adversary justice theory, criminal law theory, constitutional theory, law and economics theory, and so on. Let scholars in those fields do the heavy theory lifting. The ethics rules will tag along, implementing the insights and values they propound.

Do the rules, or does a particular rule, favor one political, economic, or social ideology over others? Is there a clear political left, right, and center in the world of legal ethics? I don't think so. Alignments get scrambled

when we move from the political realm to the world of lawyer regulation. In debates about a rule, a political adversary may support you and a political ally may oppose you. Lawyers favor rules that are best for their clients, their practices, or both. Lawyers who, for example, represent class action plaintiffs and those who represent class action defendants may support different rules, making class actions easier or harder to bring, but it will be because the rule helps or hurts their clients, and not (or not only) because the lawyers are politically conservative or progressive. The same is true for criminal defense lawyers and prosecutors. I may be naïve about this, so you should ask this question again as you work through the book.

One exception here are rules and laws that prevent or impede a person's access to the courts because of ideological opposition to the rights she is trying to protect. Two examples are the Virginia laws that prevented the NAACP from using the courts to implement Brown v. Board of Education and South Carolina's effort to discipline a public interest lawyer after she wrote to a potential client whose government benefits were conditioned on her agreement to be sterilized, offering to represent her. See chapter 14A.

Of particular concern are rules or laws that at one time impeded or still impede access to legal advice and representation. These rules and laws appear throughout the book. Examples include the minimum fee schedules once set by bar associations (now forbidden, see chapter 4D), laws prohibiting unauthorized law practice (chapter 12C), and a rule that prevents a lawyer from assisting a needy client with living expenses while her case moves slowly through the courts (chapter 5A3).

Here, as elsewhere, a rule can be defended or criticized from two perspectives. One is normative. We can say, for example, that confidentiality rules are morally right because they respect a client's dignity and humanity by giving her a protected space in which to confide in a legal advisor who is on her side. That maximizes the client's autonomy within the law, which is complex and which she cannot navigate alone.

A behavioral prediction also operates here. It is that clients will in fact be more candid the greater the assurance of confidentiality. We may or may not intuitively accept its accuracy. It is only a prediction, not proof. Some predictions are so intuitively likely that the lack of proof may not matter. Others may be questionable (and questioned), and yet the inquiry goes no further, perhaps because proof would be expensive and difficult to get. This is true about the never-ending debate over whether exceptions to the duty of confidentiality will discourage client candor. See chapter 2B2. Even if confidentiality rules are not needed to encourage client candor, the normative justification for them remains.

Judges promulgate most professional conduct rules for lawyers. What gives them the right?

Courts claim that their inherent authority to regulate the bar inheres in their judicial power under state and federal constitutions. They may also cite specific or general constitutional language. Persels & Assocs. v. Banking Comm'r, 122 A.3d 592 (Conn. 2015) ("[T]he judiciary wields the sole authority to license and regulate the general practice of law in Connecticut.") (citing state constitution). A court may invalidate legislation that purports to regulate lawyers even when it does not contradict the court's own rules. This has been called *negative* inherent power. Not only do we get to make the rules for lawyers, the courts insist, lawmakers cannot make any regardless of what we do or don't do. One effect of the inherent power doctrine is to prevent popular regulation (via legislation) to control the conduct of lawyers. Although that may sound undemocratic, the doctrine insulates the bar (and the administration of justice) from political interference.

Here are some examples.

State ex rel. Fiedler v. Wisconsin Senate, 454 N.W.2d 770 (Wis. 1990), invalidated a law that imposed a continuing legal education requirement on attorneys who wished to be appointed as guardians ad litem. The court held that "once an attorney has been determined to have met the legislative and judicial threshold requirements and is admitted to practice law, he or she is subject to the judiciary's inherent and exclusive authority to regulate the practice of law."

Irwin v. Surdyk's Liquor, 599 N.W.2d 132 (Minn. 1999), held that statutorily imposed limitations on attorney's fee awards violated separation of powers. Even where the legislature's only goal is to protect clients as consumers, courts may say no. See also Preston v. Stoops, 285 S.W.3d 606 (Ark. 2008) (refusing to apply deceptive trade practices law to out-of-state lawyers because "any action by the General Assembly to control the practice of law would be a violation of the separation-of-powers doctrine").

Some courts are more tolerant of legislative activity. The Kansas Supreme Court allowed the legislature to include lawyers in the Kansas Consumer Protection Act (KCPA):

> A statutory regulation governing the practice of law is effective only when it accords with the inherent power of the judiciary, because licensed attorneys are officers of the court. This court has nevertheless recognized the legitimate authority of the legislature to enact statutes that have direct or indirect effects on the practice of law when those statutes reinforce the objective of the judiciary. . . .
>
> The purpose of the consumer protection laws in Kansas is protection of the public. This intent is consistent with the Kansas Rules of Professional Conduct. The KCPA harmonizes with the goals of this court when it regulates the practice of law, and the statute provides a private cause of action that supplements the regulatory power of this court.

Hays v. Ruther, 313 P.3d 782 (Kan. 2013). In Colorado, Crowe v. Tull, 126 P.3d 196 (Colo. 2006), held that the state's consumer protection law could be used to sue lawyers for false advertising. While emphasizing its "inherent and plenary powers . . . to regulate . . . the practice of law," the court wrote that "some overlap between judicial rulemaking and legislative policy is constitutionally permissible as long as the overlap does not create a substantial conflict."

Unauthorized practice of law is a controversial area in which judges and lawmakers may clash. Lawmakers may authorize "nonlawyers" to provide a particular service that lawyers also offer. That can reduce its cost by increasing the number of (less expensive) people who offer the service. If the provision is challenged, a court may invalidate it on the ground that the specified service constitutes "the practice of law" (a broad and fluid term), for which the court alone may license practitioners. See chapters 12C and 14B.

The federal government has broad power to regulate lawyers notwithstanding the tradition of state regulation. See the discussion of the Sarbanes-Oxley and Dodd-Frank legislation in chapter 10C. See also Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) (regulation of bankruptcy lawyers). Congress can make rules for lawyers who work for the federal government. 28 U.S.C. §530B, called the McDade Amendment after its sponsor, Rep. Joseph McDade, does just that. See chapter 3A2.

The dominant influence here is the American Bar Association's Model Rules of Professional Conduct (RPC or Rules). Some may question the wisdom of allowing the regulated to write even the first draft of the regulations. This skepticism has occasionally proved justified, but less so in recent years.

Proponents argue that self-regulation is the hallmark of a profession. (For the profession's affirmation of this view, see the Rules' Preamble.) This loops us into a debate about professions: What makes an occupation a profession? Whatever the answer, why should professionals get to regulate themselves? Asked less charitably, the question might be whether the claim to self-regulation is simply a way to maintain power over rules governing the sale of a product—legal help—and its cost.

But how much power do lawyers really have? The ABA is a private organization with no right to impose its rules on anyone. That is why its Rules of Professional Conduct are preceded by the word "Model." Before any rule can actually govern any lawyer's behavior, a court must adopt it. Courts once accepted the ABA's (or a state bar's) recommendations with little change.

Some still do, but fewer lately. The Model Rules, adopted in 1983, generated substantial professional and even popular debate, as have their periodic amendments. Some courts have shown less deference to the bar's wishes, including courts in California, Florida, New York, Massachusetts, and New Jersey. Still, even if lawyers do not have the final say, we must not discount their influence.

The Canons and the Code. The ABA's first effort to codify ethical rules was the 1908 Canons of Professional Ethics, which (with amendments) remained in effect—if of diminishing relevance—for 62 years.* Effective in 1970, the ABA (and soon thereafter all states, in some form) adopted the Code of Professional Responsibility (the Code or Model Code). The Code is divided into nine Canons, numerous Ethical Considerations (ECs), which are said to be "aspirational," and many Disciplinary Rules (DRs). The courts in some states, like New York, did not adopt the ECs but would cite them.

The Kutak Commission and Watergate. The Code's inadequacy became quickly apparent. In 1977, the ABA formed a new commission, chaired by Robert J. Kutak, an energetic and visionary Nebraska lawyer. Meanwhile, perhaps because so many lawyers were implicated in the burglary of the Democratic National Committee's office during the 1972 presidential campaign (referred to today simply as "Watergate," the venue of the burglary) and in the attempted cover-up, and because of the rapid growth of the bar, professional and popular interest in legal ethics increased.

Watergate also explains why in the 1970s the ABA first required law schools to teach legal ethics as a condition of ABA approval, which is needed nearly everywhere in the United States for admission to the bar. Blame John Dean, Richard Nixon's White House Counsel. In a 2000 interview, Dean said that the Senate Watergate committee had asked him for a list of "everybody that I thought had been involved in Watergate. Then I put an asterisk beside the names of all the lawyers. They asked me, 'What are all those asterisks?' and they really did jump out. I said to myself, 'How did all those lawyers get involved?'" (There were 21 lawyers on the list.) Dean answered his own question: Some, like Nixon and G. Gordon Liddy, who was part of Nixon's reelection

* Was there a U.S. legal ethics code in the nineteenth century? See Norman Spaulding, The Myth of Civic Republicanism: Interrogating the Ideology of Antebellum Legal Ethics, 171 Fordham L. Rev. 1397 (2003) (arguing that "the morally activist concept of lawyering so often said to prevail among nineteenth-century civic republican legal elites is more mythical than real"); Russell Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 Geo. J. Legal Ethics 241 (1992).

campaign, did not believe the law applied to them. Some did not understand the law. And others "simply remained loyal to Richard Nixon."*

Dean's testimony was a watershed moment for the bar. Were law schools turning out ethically challenged graduates? Was there something about law school or law practice that turned good law students into bad people? Whatever the right answers, there emerged the requirement of mandatory legal ethics instruction as a condition of ABA approval, which may explain why you are taking the course that assigned this book.

The work of the Kutak Commission prompted extensive debate within and outside the bar. After six years and several drafts, the ABA House of Delegates adopted the Model Rules of Professional Conduct on August 2, 1983. The Rules use a "Restatement" format, with black letter rules followed by comments. Each comment, according to the Scope section as it reads today, "explains and illustrates the meaning and purpose of the Rule." They are "intended as guides to interpretation, but the text of each Rule is authoritative." Elsewhere, the Scope tells us that comments "do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules."

Whereas state adoption of the 1970 Model Code was swift, adoption of the Rules was glacial. New Jersey was first in 1984. But not until 2009 did two of the three remaining holdouts, New York and Maine, go along. That left California. In 2019, after many years of study and false starts, the state Supreme Court approved a new set of rules that more closely tracks the ABA text than did its predecessor. No state has adopted the Rules unchanged and the changes are not nationally uniform.

The Ethics 2000 Commission. In 1997, the ABA appointed a new commission to study the Model Rules and recommend amendments. Although its official name was the Commission on Evaluation of the Rules of Professional Conduct, it soon became known as the Ethics 2000 (or E2K) Commission because it was charged to report in the year 2000. It did issue a report in November 2000, but then made significant changes. The ABA House of Delegates began debating the report at its August 2001 meeting and continued through 2002. The House adopted nearly all of the recommendations.

The Task Force on Corporate Responsibility. In July 2002, as part of the Sarbanes-Oxley Act, which responded to a wave of corporate scandals (e.g., Enron, Tyco, WorldCom) that alarmed many, Congress

* Interview with John Dean by Michael Taylor, SFGate.com, Feb. 4, 2000. By 1980 or thereabouts, Dean was no longer famous. Then came investigations of the Trump administration, which turned Dean into a frequent commentator on CNN as an expert on White House shenanigans. Who says there are no second acts in American life?

passed and President Bush signed legislation that, among other things, required the Securities and Exchange Commission (SEC) to adopt specific rules governing lawyers appearing and practicing before the SEC and authorized the agency to adopt additional rules as it might choose. This was a controversial event in the history of the regulation of the bar because it gave explicit authority to (and in part required) a federal agency to make rules governing an important and lucrative area of legal work. Whatever the SEC did would affect many lawyers and clients. More threatening, other federal agencies might seek statutory authority to regulate lawyers who practice before them.

Before the ink was dry on the legislation, the ABA charged a Task Force to propose rules and policies responsive to the corporate scandals. That was meant to show that the profession could react appropriately and thereby to discourage the SEC from adopting rules broader than the legislation required. The effort did not entirely succeed, although it did lead to significant agency deference. The federal threat also led the ABA to accept two confidentiality exceptions that the Ethics 2000 Commission had proposed but that the ABA had rejected just a year earlier. See Rule 1.6(b)(2) and (b)(3), discussed in chapter 2B2. The ABA was also moved to amend Rule 1.13, which describes the duties of lawyers for organizations, to permit those lawyers to disclose confidential information to outsiders when the unlawful conduct of officials poses a likely threat of serious harm to the company. See chapter 10C.

The MJP and 20/20 Commissions. In 2002, the Multijurisdictional Practice (MJP) Commission proposed, and the ABA adopted, dramatic amendments to Rule 5.5 (which forbids lawyers to engage in the unauthorized practice of law or to aid others in doing so). The amendments recognize that lawyers increasingly need to cross state and national borders, physically or virtually, to represent clients in jurisdictions in which they are not admitted. They created "safe harbors" whereby a lawyer in one state could render legal services in another state without risking an unauthorized practice charge. In 2009, the ABA created the 20/20 Commission (so named to encourage foresight) and charged it to study advances in technology and the rise of cross-border practice, globally and nationally, and to recommend how lawyer conduct rules should respond. All of its recommendations were accepted, among them a requirement that lawyers "keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." Rule 1.1 cmt. [8]. Rule 5.5 was amended to create safe harbors for foreign lawyers practicing in the United States.

One Size Fits (Almost) All. A jurisdiction's ethics rules apply to all lawyers admitted in it, mostly without regard to their practice settings or the identity of their clients. A lawyer in a solo practice in suburban San Diego whose practice focuses on real estate, wills, and similar work for individual clients is governed by nearly all of the same rules

as the San Francisco lawyer whose field is international banking, is a partner in a 1,500-lawyer Montgomery Street firm, and whose clients are among the Fortune 500. The Rules do make some distinctions, however. There are rules for trial lawyers, a rule for prosecutors, and a rule aimed at lawyers for corporations and other organizations. Mostly, though, the Rules do not recognize differences in practice settings, client identity, or the size of a law office. That may have made sense a century ago, but does it make sense today? On the other hand, is there any way to avoid it? Is it feasible to write entirely different sets of rules depending on the nature of a lawyer's practice or the identity of her clients?

The Model Rules are only that. A model. States deviate, sometimes in significant ways, including from each other. So we must interrupt this story to recognize a remarkable fact. There is greater dissimilarity in state ethics rules today than during the era of the Model Code (the 1970s), before the growth of our current national and international legal economy. As far as I can tell, no two states have identical rules. State courts want it *their* way. Yet even as these discrepancies have emerged, the American legal profession has become more mobile. Lawyers freely practice across state and national borders, both physically and virtually—via email, fax, satellite, and audio and video conferencing. The laws of each state are immediately available to lawyers anywhere. Those laws are often much alike. Federal and international law is identical everywhere. A Florida construction lawyer will be better able to represent a builder in New York than a New York lawyer whose practice is limited to criminal defense. How can we reconcile disparities among state ethics rules with the fact that lawyers (and not just large-firm lawyers) increasingly view the entire nation, and for some the world, as the relevant market for their area of practice?

We can't. The incongruity of having an expanding national and international legal economy, on one hand, and discrepant local rules, on the other, has created "cracks" in the regulatory machinery. One consequence has been a (perhaps) unavoidably vague choice-of-rule rule for when a lawyer's work crosses borders. See Rule 8.5. But this rule also differs among U.S. jurisdictions.

Jurisdictions give the professional conduct rules varying degrees of respect. The New York Court of Appeals said the (former) Code "is essentially the

legal profession's document of self-governance, embodying principles of ethical conduct for attorneys as well as rules for professional discipline. While unquestionably important, and respected by the courts, the code does not have the force of law." Niesig v. Team I, 558 N.E.2d 1030 (N.Y. 1990). Rather, the court will look to the rules "as guidelines to be applied with due regard for the broad range of interests at stake." People v. Herr, 658 N.E.2d 1032 (N.Y. 1995). This view is hard to reconcile with the fact that it is the courts (not "the legal profession") that adopt the rules, enforce them through discipline, cite them to resolve legal issues, and admit evidence of a rule's requirements to prove the violation of a legal duty. See chapter 13B1. Other jurisdictions reject this view. See, e.g., Post v. Bregman, 707 A.2d 806 (Md. 1998) (the rules "constitute[] a statement of public policy by the only entity in this State having the Constitutional authority to make such a statement, and [they have] the force of law").

Beyond the Rules are interpretations of them by bar committees in all states and at the ABA. A lawyer may write (or sometimes telephone) for advice about prospective conduct. Compliance with the advice demonstrates a lawyer's good faith, although the opinions are ordinarily not binding on a disciplinary committee or court. Opinions are published as guidelines for other lawyers and for whatever persuasive force (ranging from none to considerable) they may have with judges. Published opinions omit identifying information.

Many bar groups, including the ABA, do not await a lawyer's query before choosing to write on important new issues. As such, their work takes on the character of advisory opinions on broad questions meant to guide lawyers and courts. The ABA's opinions are particularly influential because its ethics committee is interpreting the organization's own widely copied document. Opinions are available on the ABA's website (americanbar.org/cpr), state and local bar websites, and Lexis, Westlaw, and Bloomberg Law.

Other secondary sources include:

The Georgetown Journal of Legal Ethics, inspired by Father Robert Drinan, which has become essential reading for anyone working in this field.

The multivolume Lawyers' Manual on Professional Conduct, published electronically. Not only does the Manual monitor court decisions and other developments; it also provides summaries of important ethics opinions (and for ABA opinions, the full text).

The two-volume Restatement of the Law Governing Lawyers, a 14-year project that aimed to restate the rules governing the U.S. legal profession.

This book is about rules lawyers must obey. Their oath of office requires that they do so. When a lawyer violates a rule, he may be aware of his misconduct but hope to gain a perceived advantage without detection; in other words, a "bad apple." But it may also be that he missed the ethical issue entirely—just didn't recognize it—or that he saw it but "reasoned" his way out of it so he could do what he wanted.

Research in behavioral and cognitive psychology explains how such things happen—why good people stray. Recent scholarship applies this research to lawyers. It is called *behavioral legal ethics*. (For one dramatic example of a court's use of behavioral legal ethics, see United States v. Kentucky Bar in chapter 5B1.) Understanding the lessons of behavioral legal ethics can provide self-awareness that helps avoid misconduct. A good source is Jennifer Robbennolt & Jean Sternlight, Behavioral Legal Ethics, 45 Ariz. St. L.J. 1107 (2013).

Are we forgetting something? Colloquially, the subject is called legal *ethics*. Does it have anything to do with real ethics—the kind moral philosophers study in the tradition of Plato, Kant, and Mill? Yes and no. The title of the model ABA document has moved further and further away from ethics, as such, and toward descriptions that are rather law-like. Indeed, the documents that courts adopt *are* law, if by law we mean rules that carry state penalties if violated. Whereas the 1908 Canons had "Professional Ethics" in its title, the 1970 Code substituted "Professional Responsibility," and the 1983 Rules opted for "Professional Conduct."

But "ethics" lives on. Appeals to ethics let the bar proclaim its allegiance to ancient ideals, although the profession has made little or no effort to seek the views of moral philosophers. Real ethicists and academics who study the professions have nonetheless measured the "ethics" of lawyers against the standards of their disciplines. Richard Wasserstrom's prominent article, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1 (1975), was one of the first to do so. (Some day I will attend a legal ethics conference wearing a button reading WWAD: What Would Aristotle Do?)

In the mid-1980s, the word "professionalism" appeared with some frequency in bar publications and was heard increasingly at bar meetings. The ABA and some local bar groups formed committees on professionalism (or committees on the profession) to study the topic and write reports. Many meetings

were held. Many reports were written, most saying the same things. Their definitions of a "profession" share a theme: A professional subordinates self-interest and private gain to the interests of clients or to the public good generally. But the professionalism committees also recognized the financial needs of lawyers. Some forthrightly acknowledged that law practice shares many of the attributes of a business. It most certainly does. The search seems to be for the proper balance between professionalism and business. Some trends are said to take the profession too far in the wrong direction. We are warned against "over-commercialization." Mostly, the reports' conclusions are vague and aspirational.

No one can say for sure how it came about that so many lawyers in so many bar associations decided, seemingly simultaneously, to spend so many hours at bar dinners debating what it means to be a profession and drafting codes of professionalism for others to put on their shelves. I offer two possibilities:

> The advent of lawyer advertising following the *Bates* decision in 1977 (see chapter 16A) led to some offensive marketing schemes, which, coupled with pervasive, if tamer, efforts at self-promotion, conveyed the impression that lawyers were fixated on making money. An emphasis on professionalism might then be seen as an antidote or at least the public appearance of one.
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> As the number of lawyers in the nation dramatically increased relative to its nonlawyer population (from 1 in every 625 persons in 1960 to 1 in every 245 persons by 2020 according to the Census Bureau and the ABA), a need arose to remind lawyers that they were members of an elite club, or if (alas) the club was no longer quite so elite, it behooved lawyers to behave otherwise (at least in public).

Professionalism now has a permanent, if less prominent, home in the legal world. You may hear talk of it wherever lawyers congregate. Even lawyers too young to remember whether the particular Camelot ever existed will invoke the kinder, gentler time when courtesy was king, no one fought dirty, and lawyers treated each other like, well, professionals. Bar chatter is spiced with anecdotes of other lawyers' (usually an adversary's) monstrous behavior, often accompanied by a shake of the head, lips pressed together. Tsk tsk. What's this world coming to? Meanwhile, some lawyers seek to turn the perceived decline to their advantage by proudly (and loudly) proclaiming their readiness to "go right up to the line" for their clients. This presumes, of course, that there is a line, like the one down the center of a highway, and that its location is obvious. Much of this book is meant to tell you that if that was ever so, it is no longer. Proceed with caution.

PART ONE

THE ATTORNEY-CLIENT RELATIONSHIP

II

Defining the Attorney-Client Relationship

In the beginning is the client. But also before the beginning and after the end. Which is another way of saying that some rules apply even before a person formally becomes a client (if she ever does) and continue long after the work is done.

Lawyers love to quote Henry Brougham, the great British barrister and Lord Chancellor of the nineteenth century, who said that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."* How professionally liberating. *One person. In all the world.* But like many grand pronouncements, it is not entirely true. Lawyers also have obligations to courts, adversaries, partners, and associates. Still, duties to clients are the main concern of ethical and legal rules governing lawyers and will be ours. Whether these duties, in addition to being more numerous, should always be viewed as more important than preventing harm to others, the demands of "justice," or the "public interest"—and if so, when—are questions for debate. Indeed, debate is inevitable.

Debate is more likely in law schools and bar committees than in law offices. In the tumult of daily practice, lawyers have brief time to ponder *The Big Questions.* Many lawyers would agree with a prominent Connecticut lawyer's response to me when, recently admitted to the bar, I asked if he did public interest cases. It probably sounded like a challenge. It probably was. "I serve the public interest by fighting for the private interests of each of my clients, one at a time," he instructed, slowly emphasizing each word. Is he right? Lord Brougham would say yes. Rejecting any qualifiers, Brougham went on to say that the "hazards and costs to other persons" are of no concern to the lawyer, who "must not regard the alarm, the torments, the destruction which he may bring upon others. . . . [H]e must go on reckless of the consequences, though it should be his unhappy fate to involve his

* Trial of Queen Caroline 8 (J. Nightingale ed., 1821).