

Why It's Important: A Preface for Students

I imagine you're pretty busy and that reading a preface is not at the top of your to-do list. But this one is different. It is written with you very much in mind. And it's short. So give me five minutes.

I want to say four things right off. First, as may already be apparent, this casebook has a personality, a recognizable voice: namely, mine. In that way, it may be unlike other casebooks. Its voice is conversational. And here and there, it takes a position directly, not solely through the words and views of others. Second, this book contains many problems. Some are a paragraph long, others are a page or two. Many are based on real situations that I've heard or read about. Mostly, the problems are dense and messy, like life. They are not stick-figure problems. They are real-people problems. They arose yesterday or will arise tomorrow, in one form or another. Third, the book contains many short essays (i.e., notes). The legal ethics world is best learned not only as a set of abstract doctrines, but also through stories taken from many cases and elsewhere. Detail illuminates nuance and variation and thereby provides a context in which to test the doctrines. I further explain this approach in chapter 1.

Fourth, this is your second most important law school class. *Yeah, right*, you think. It's a bold statement, I know. Here's why I think it's true. Say you become an antitrust lawyer. Your criminal procedure class will fade into a remote corner of memory. Or if you become a criminal defense lawyer, you're unlikely to need to know much antitrust. But whatever work you do as a lawyer, you will practice what you learn in this book and in the class that assigns it whenever you advise a client, argue in court, draft a document, write a brief, or negotiate with an opponent. So antitrust or criminal law or whatever may be your most important legal subject, depending on the direction of your professional life, but this subject is a close second. Here you learn the rules you must live by and the consequences if you don't. Other courses teach lessons that directly bear on your clients' legal problems. This course is for you. One exception: Knowledge of these rules enables you to protect your clients against misconduct of other lawyers—conduct that may violate conflict rules, for example, or rules against communicating with another lawyer's clients.

As you approach the starting line of your legal career, perhaps most important to you are rules that constrain your professional behavior. You will want to know—in such areas as competence, fees, marketing, confidentiality, conflicts of interest, negotiation, and the client-lawyer relationship—what may I do and how may I behave to be confident that my conduct will not land me before a

disciplinary committee, create civil liability, invite court sanction, forfeit my fee, or damage my reputation? Even reading this question should alert you that the “ethics” in legal ethics is not merely about being a morally good person. It is about being a professionally safe lawyer. For the fact is that the law business is heavily regulated, and its regulations have grown more complex in recent decades. 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 about how to be a good person.

You make two errors at your peril. First, 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 in professional life, and certainly not using hundreds of pages of text to do it. The rules here are often obscure; they may even be counterintuitive, and they can be subtle in application. Application in turn calls for judgment, and judgment is mostly learned through life experience. Indeed, much of what lawyers do for clients is make judgments—about where the law is headed, what a particular judge or court will do, how great may be the risk of a contemplated course of conduct. You develop that judgment across years of practice, but the process begins now. Second, you don’t want to make the mistake of assuming that your employer will provide all the protection you need against missteps. Good law offices do have systems to detect and avoid improper conduct and they have 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 to a boss. Furthermore, you need to know enough about this material to be aware when you have a problem that requires you to seek advice.

Another perspective from which to view the laws and rules that regulate lawyers considers their effect on civil society and the administration of justice. The obligations that lawyers impose on themselves through self-regulation or that are imposed on them by courts and legislatures, taken together, 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 allows lawyers to advertise will influence the conduct of individual members of the bar. But it can also affect consumer demand and (through greater competition) the size of legal fees. A rule that prohibits or requires a lawyer to reveal certain kinds of information about a client in order to protect others from harm will control that lawyer’s own behavior, but it may also affect which client populations use lawyers and what information clients are willing to give those lawyers. In short, many rules have social and political consequences (sometimes profound ones) beyond any single representation or practice.

As you enter law practice, you may be more interested in such questions as “How do 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 America’s more than 800,000 practicing lawyers?” Still, the last question is important and, if not as immediate, will surely arise in the course of your professional life. Many readers of this book will someday be in positions that require them to address the broader question—as heads of law offices, members of bar committees, legislators, government lawyers, and judges.

Asking about the consequences to justice and civil society if a rule is resolved one way rather than another — asking which resolution is best — engenders different, sometimes vehement, responses from practicing lawyers and the public. Why is that? In part, it is because the answers depend on political and moral values more fundamental than the “ethics” that inform various codes. And, of course, the political and moral values of different people differ. In addressing these questions, we should also try to be honest about the interests we mean to protect. Those of society generally? Those of a particular client population? The legal profession’s? Our own? Law school and law practice, it is sometimes said, encourage more rather than less self-interest in answering the questions raised here. In transition as you are, your answers may vary from what they would have been before you entered law school, and they will likely be different still five years on.

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This is the eighth edition of the book. I started on the first edition in 1982 shortly before the birth of the two amazing young women to whom all editions have been dedicated. Between editions, I spend an hour or two each week planning the next one. You get to thinking a lot about what a casebook is and can be when you live with one for so long. The book’s primary function 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 for so long. Luckily, more is possible while still serving the book’s objective — to teach the subject.

For starters, we can strive for humor, variety, clarity, and engaging writing. The enterprise will not likely support the extended charm of a Hazlitt essay or the quirkiness of a Vonnegut novel — assuming I had the talent to achieve 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.

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 over the top, if not downright sanctimonious, in making so grandiose a claim. At that time in my life, I was inclined to agree with the character in George Bernard Shaw’s play *The Doctor’s Dilemma* who said “all professions are conspiracies against the laity.” Amen! To some extent, I still find Tweed a bit excessive and Shaw apt, even if hyperbolic. But I now think Tweed had a point. The profession and its members *are* fascinating to study, and 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 things

about life within the society of lawyers, not merely a dozen big things, if we are going to understand it truly.

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 fictitious) that you think nicely highlights an issue? This edition is indebted to past users who alerted me to interesting sources. Send e-mail to stephen.gillers@nyu.edu. All comments will be gratefully acknowledged.

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