

PREFACE TO THE SECOND EDITION FOR TEACHERS AND STUDENTS

Lawyers make, interpret, and apply law, but the legal profession is also governed by law. This book is an introduction to the law that governs lawyers and to the legal profession.

Our goals

Our principal goals in writing this book were to offer an overview of the law governing lawyers and to provide materials through which law students may explore some of the ethical problems that lawyers encounter in practice. Also we sought to provide opportunities for law students to consider the various professional roles that lawyers occupy and the moral quandaries that students will struggle with when they begin to practice law. For example, in negotiating a settlement for a client, a lawyer might say that his client would refuse to accept less than \$100,000, even though the client has told the lawyer that he 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 provides an overview of the law that governs lawyers. The book does not include an encyclopedic analysis of every ethical rule, much less the entire body of law governing the legal profession. We focus primarily on the subjects that are most likely to arise during the first years of an individual's law practice. For example, many new lawyers become associates in law firms, so this book explores what an associate should do when a more senior associate or a partner asks the associate to do something that seems improper. Also, most new lawyers in private practice make

frequent decisions about how to record their time for billing purposes. This book includes many problems that arise from everyday practice issues. Most of the examples and problems in this book involve lawyers who represent individuals or businesses in matters involving contracts, torts, criminal prosecution and defense, civil litigation, real estate, and family law. We have sought to develop problems and to select cases in which a student can understand the facts and the ethical issues regardless of whether the student has taken advanced courses in law school.

The problem-based approach

This book offers opportunities to explore ethical dilemmas that have actually arisen in practice, some of which have resulted in published judicial decisions. While we have excerpted numerous important judicial opinions in the book, we have transformed a larger number of cases into problems for class discussion. Instead of reprinting the appellate opinions, we have presented the essential facts of these cases as one of those lawyers saw them, walking them backward in time to the moment at which that lawyer had to make a difficult choice based on both ethical and strategic considerations. Rather than reviewing the predigested legal analysis of a judicial opinion, we invite students to put themselves in the shoes of a lawyer who faces a difficult choice among possible actions. The dilemmas in most of our problems are based on tough situations that have confronted real lawyers.

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

We set out to write an introduction to the law governing lawyers that students will 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 the

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).

half or fewer than half of the classes they attend.² Increasingly, law students use their computers to play solitaire or write e-mail during class.³ This data suggests that law schools are failing in their efforts to retain the interest and attention of their students, particularly third-year law students. We have sought to write a book whose content and methodology 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.

Defining features of this book

These are some defining features that we built into this book:

- Compared to several other professional responsibility texts, this book is relatively short, so the reading assignments need not be burdensome.
- We have begun almost every section of the book with a summary of the relevant doctrine, which provides the legal background students need to analyze the problems that follow.
- Most of the summary of various aspects of the rules and doctrine is in question-and-answer format. This structure provides an ongoing roadmap, anticipating readers' questions, forecasting the content of the next subtopic, and explaining why one might want to understand it. In addition, numerous concrete examples, set off from the text, illustrate the general doctrinal principles.
- We have included several judicial opinions, most of which will be familiar to teachers of professional responsibility. We have edited those opinions carefully and have provided brief summaries of others. The book, however, is not built primarily around appellate decisions. Our main focus is on clear explanation of rules and doctrines, followed by challenging application problems.
- Many of the cases that are widely taught in professional responsibility classes are presented as problems rather than as judicial opinions. We recount the facts of the cases in narrative form to allow students to analyze the issues as if they were the lawyers facing those dilemmas. We believe that this structure produces livelier discussion than does the autopsy method traditionally used in law classes, in which teachers invite post hoc dissection of court opinions.

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

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

- We have included nearly 70 problems in this book. These may become the primary focus of class discussion.
- We have included the text of pertinent rules of professional conduct in the book so that students will not need to flip constantly back and forth between this text and a statutory supplement. When studying a particular rule, students will find it worthwhile to review the entire rule and comments in another published source or on the Internet.⁴ However, this text is structured so that it can be read without constant reference to a supplement.
- When we reproduce court opinions, we have inserted headings into them to help orient students to the logic of the opinions.
- We have included many bulleted lists and tables to clarify legal doctrines and other conceptual material.
- We have included photographs, diagrams, and cartoons. Some of these, like the photographs of some of the lawyers, parties, judges, and scholars, add important context. Others, like the cartoons, offer a change of pace from the textual narrative.

What's new in the second edition

Teachers who have used the first edition of this book will discover much that is familiar as well as several new elements:

- We have reorganized the 10 chapters of the first edition into 15 shorter chapters in this edition, making each unit easier for students to digest.
- We have added new material on client protection funds, the Sarbanes-Oxley law, the controversy over the federal government's requests for corporate waivers of the attorney-client privilege, lawyers as counselors, aggregate settlements, the special responsibilities of prosecutors, advertising by lawyers, the ethical responsibilities of judges, and law firms' use of temporary and contract lawyers and of lawyers who work in India and other countries.
- We have added several new problems that are sure to stimulate lively class discussion.
- We have expanded the contextual material on the "buried bodies" case in Chapter 3.
- We have updated material throughout the book to take account of recent cases, bar opinions, institutional developments, scandals, and scholarship.

4. For example, students will find the full text of the Model Rules of Professional Conduct and the explanatory comments interpreting each rule at http://www.abanet.org/cpr/mrpc/mrpc_toc.html (last visited Feb. 11, 2008).

- We have increased the font size to make this book easy on the eyes of both students and teachers.
- We have increased the number of New Yorker cartoons from 9 to 22.

We hope that you will have a lot of fun with this book, and we welcome your reactions and suggestions, small or large, for the next edition. Please send any comments or questions to lerman@law.edu.

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