

CASES AND MATERIALS  
ON THE LAW GOVERNING  
LAWYERS

Fourth Edition

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# CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS

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*Fourth Edition*

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Library of Congress Cataloging-in-Publication Data

Moliterno, James E., 1953-

Cases and materials on the law governing lawyers / James E. Moliterno. — 4th ed.

p. cm.

ISBN 978-1-4224-9866-8 (hard cover)

1. Practice of law — United States — Cases. 2. Lawyers — United States — Cases. 3. Attorney and client — United States — Cases. 4. Legal ethics — United States — Cases. I. Title.

KF300.M65 2012

340.023 dc23

2011047641

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MATTHEW  BENDER

# Dedication

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To Timothy, Emily, and Greg —J.E.M.



# Preface to Fourth Edition

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This casebook is now in its 12th year and the time was right for a general refreshment. In this fourth edition, an effort was made to tighten every case edit and every law journal excerpt. Dated materials have been replaced with more contemporary ones. The result is a leaner, more efficient casebook that is easier to read and use.

Materials have been added to reflect issues that have emerged in the last five years. In general the move toward a global legal profession has been reflected in expanded International Notes.





# Preface to the Third Edition

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The lawyer's world is shrinking. More commercial transactions than ever have international implications. More clients move more comfortably in global environments. U.S. lawyers being educated today need to be aware of differences in the law governing lawyers in non-U.S. jurisdictions. Those differences will evolve over the new lawyer's career, but today's lawyers need an awareness that such differences exist and some sense of when and how to apply another jurisdiction's lawyer law.

Aside from the deletion of a few cases and the insertion of a couple of new ones, the main feature of this third edition is the addition of "International Notes." Each of these will provide a brief contrast between U.S. lawyer law and that of another jurisdiction, most often the EU or Japan or China, but others as well. This exposure is not sufficient to say that students using this book will learn the lawyer law of these other jurisdictions. To do that, a supplemental book would be needed. But these International Notes do provide a sense of the international treatment of several core lawyer law issues. With this sense, new lawyers will be better prepared to function in the shrinking, global environment.



# Preface to the Second Edition

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The primary motivation for producing a second edition has been the important work of the ABA's Ethics 2000 Commission. The Commission has worked long and hard to accomplish its mission of revising the Model Rules of Professional Conduct. The work was largely completed in February 2002, when the ABA House of Delegates approved the Commission's Report, thereby amending the Model Rules in a number of significant respects. Of course, these amendments have affected the law governing lawyers and will undoubtedly have greater effect in the future. The amendments will almost immediately affect the law governing lawyers in some federal courts and agencies because by local rule many federal courts look to the ABA Model Rules as either their governing rules of ethics or as important guidance. Until states adopt the amendments, of course, their greatest impact will be inchoate. And it remains to be seen whether the states will adopt these amendments quickly (as they adopted the Model Code in the 1970s), slowly-but-surely (as they adopted the Model Rules in the 1980s and 90s), or not at all (as some states have declined to adopt past amendments and some of the original provisions of the Model Rules). However they are accepted by the states, the Ethics 2000 Commission revision of the Model Rules is important material to consider in the study of the law governing lawyers both because of the enormous energy and thought that the Commission has given to the project and because the new Model Rules will become the centerpiece text for the Multistate Professional Responsibility Bar Exam.

Interspersed through this second edition are various entries titled, "Notes on the February 2002 Amendment to Model Rule X." Through this device, the materials present all of the significant changes wrought by the work of the Ethics 2000 Commission. As the next few years pass, these entries may become more significant as states adopt or reject the new ABA approach to the particular issues. Two critical topics facing the profession were left incompletely addressed by Ethics 2000: multidisciplinary practice and multijurisdictional practice. The latter is being thoroughly treated by the ABA Commission on Multijurisdictional Practice, having delivered its final report to the ABA for action at the 2002 annual meeting. Materials have been added to this edition that will allow classroom discussion of the main features of the multijurisdictional practice debate. Multidisciplinary practice presents perhaps the thorniest, weightiest, and most revealing issue currently facing the legal profession. Can the legal profession survive if it does not embrace multidisciplinary practice? Can it survive if it *does* embrace multidisciplinary practice? On no other question facing the profession are more divergent views held more strongly. Materials have been added to this edition to allow a classroom discussion of multidisciplinary practice issues. The international aspects of both issues loom large.

Not insignificantly, discussion problems have been added as well, allowing treatment of the material through class discussions of these hypotheticals. Finally, the inevitable changes, re-editing of cases, and adding of notes and questions have occurred. I am grateful to those who have used the book and been kind enough to offer suggestions. I hope you will recognize your suggestions in the changes that have been made.



# Preface to the First Edition

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The Professional Responsibility course (by whatever name it is called at your school) is about the law and ethics that govern relationships lawyers have with clients, other lawyers, the profession, the justice system, and the public. It is the only substantive law course in the typical law school curriculum that is about what lawyers do. In Torts, Contracts, and so on, you study law that affects clients' relationships with others and that lawyers interact with as an expert a step removed from the actual effect of the law. In Professional Responsibility, by contrast, the law you study is directly about your future role as a lawyer. In other words, Professional Responsibility is the course in which the lawyer is the "client," the one on whom the law studied actually operates. Arguably, Professional Responsibility is the most important course in the law school curriculum. At least it is the course whose subject matter will affect you most frequently and most directly.

The law governing lawyers is a complicated mix of many different areas of substantive law from many different sources. Most obvious are the organized bar's self-regulations, enforced through the courts (as ethics codes adopted in the states), but other law fields have important applications to the various relationships of which lawyers are a part. Agency, contract, tort, procedure and evidence law, among others, have specific applications to lawyers. All of these are interwoven in this casebook.

In particular, the organized bar, through the American Bar Association, has promulgated model ethics codes. The ABA models have dominated the law of lawyering because these models, with some modification, have been adopted by the states as law. These models have also dominated law school courses in Professional Responsibility. They have dominated law school teaching of the subject because they are easily accessible and because they serve as simple proxies for what the law of lawyering is in the states.

Between the two models, the Model Code and the Model Rules, the Rules now dominate. The Code was originally adopted by the ABA in 1969 and was amended from time to time thereafter. When the Rules were adopted by the ABA in 1983, the ABA ceased its effort to amend and update the Model Code. The Code is now almost entirely out-of-date in some respects. States whose law reflects the Model Code as their basis have gone from a high point of nearly fifty to under three and falling. More than forty-five states now have adopted ethics codes based on the Model Rules. This casebook takes the approach with regard to the models that has come to be most prevalent in law school courses: The Model Rules are the basic document of study; the Model Code is used as contrast in particular areas.

All of this talk of ethics codes must not be read to mean that law other than the ethics codes is unimportant. On the contrary, the other significant trend in Professional Responsibility courses is toward the recognition that lawyers' conduct is governed largely by law outside the ethics codes and by control systems other than the bar disciplinary system. Malpractice liability, litigation sanctions, regulatory agency control, the evidentiary privilege, civil and criminal liability, among others, all serve to control lawyer conduct, most often with greater effect than the bar disciplinary process. That law, and those other systems, are a significant part of this casebook.



# TABLE OF CONTENTS

<b>Preface to the Fourth Edition</b> .....	<b>v</b>	
<b>Preface to the Third Edition</b> .....	<b>vii</b>	
<b>Preface to the Second Edition</b> .....	<b>ix</b>	
<b>Preface to the First Edition</b> .....	<b>xi</b>	
<b>Chapter I</b>	<b>INTRODUCTION TO THE ROLE OF LAWYER</b> .....	<b>1</b>
A.	MORAL PHILOSOPHY, RIGHT AND WRONG, AND THE LAW GOVERNING LAWYERS .....	1
B.	THE ROLE OF LAWYER .....	2
1.	Conceptions of the Lawyer’s Role .....	3
	William H. Simon, <i>The Ideology of Advocacy: Procedural Justice and Professional Ethics</i> .....	3
	David J. Luban, <i>Lawyers and Justice</i> .....	5
	International Notes .....	7
2.	Differences Between Lawyers’ Litigation and Planning Roles .....	8
	Problem 1-1 .....	8
	<i>Westlake v. Abrahams</i> .....	8
<b>Chapter II</b>	<b>REGULATION OF THE LEGAL PROFESSION AND CONTROLS ON LAWYER CONDUCT</b> .....	<b>15</b>
A.	INSTITUTIONAL FRAMEWORK .....	15
1.	Organization of the Legal Profession .....	15
a.	The American Bar Association .....	15
b.	Alternative National Bar Associations .....	16
c.	State Bar Associations .....	16
	Notes, Questions, and Examples .....	17
	International Notes .....	17
2.	Sources of the Law Governing Lawyers .....	18
a.	Ethics Codes .....	18
b.	Case Authority and Inherent Court Power .....	20
	<i>Chambers v. Nasco, Inc.</i> .....	20
	Notes, Questions, and Examples .....	25
c.	Ethics Opinions .....	25
d.	Constitutional Constraints .....	25
e.	“Other Law” .....	26

---

*TABLE OF CONTENTS*

	International Note . . . . .	26
3.	Admission to Practice . . . . .	28
a.	Territorial Restrictions . . . . .	28
	<i>Supreme Court of New Hampshire v. Piper</i> . . . . .	28
	Notes, Questions, and Examples . . . . .	28
b.	Education, Knowledge, and Good Character . . . . .	29
	Problem 2-1 . . . . .	29
	Problem 2-2 . . . . .	29
	<i>In Re Lammers</i> . . . . .	30
	<i>Clark v. Virginia Board of Bar Examiners</i> . . . . .	33
	<i>Law Students Civil Rights Research Council, Inc. v. Wadmond</i> . . . . .	40
	Notes, Questions, and Examples . . . . .	45
c.	Misconduct in the Application Process . . . . .	46
	Problem 2-3 . . . . .	46
	<i>In Re De Bartolo</i> . . . . .	46
	Notes, Questions, and Examples . . . . .	48
d.	Pro Hac Vice Admission . . . . .	49
	<i>Leis v. Flynt</i> . . . . .	49
4.	Unauthorized Practice . . . . .	53
	<i>Ranta v. McCarney</i> . . . . .	54
	Notes, Questions, and Examples . . . . .	57
5.	Multijurisdictional Practice . . . . .	58
	<i>Rittenhouse v. Delta Home Improvement, Inc. (In Re Desilets)</i> . . . . .	59
	<i>Report of the ABA Commission on Multijurisdictional Practice</i> . . . . .	64
6.	Self-Governance and the Duty to Report Misconduct . . . . .	70
	Problem 2-4 . . . . .	70
	Problem 2-5 . . . . .	70
	<i>In Re Himmel</i> . . . . .	71
	Notes, Questions, and Examples . . . . .	75
B.	CONTROL DEVICES INTRODUCED . . . . .	75
1.	Bar Discipline . . . . .	76
	<i>Florida Bar v. Neale</i> . . . . .	76
	<i>In Re Warhaftig</i> . . . . .	78
	Notes, Questions, and Examples . . . . .	81
a.	Acts Indicating Moral Turpitude . . . . .	81
b.	Criminal Conduct . . . . .	81
c.	Dishonesty, Fraud, and Deceit . . . . .	82
d.	Conduct Prejudicial to the Administration of Justice . . . . .	82
	<i>In Re Snyder</i> . . . . .	82
e.	Forms of Discipline and Procedural Issues . . . . .	88
	<i>In Re Ruffalo</i> . . . . .	88



---

**TABLE OF CONTENTS**

2.	Malpractice . . . . .	91
	<i>Togstad v. Vesely, Otto, Miller &amp; Keefe</i> . . . . .	92
	Notes, Questions, and Examples . . . . .	96
3.	Liability for Complicity in Client Conduct . . . . .	96
4.	Contempt of Court . . . . .	97
	<i>Taylor v. Hayes</i> . . . . .	97
5.	Disqualification Motions and Other Litigation-Driven Controls . . . . .	102
a.	Disqualification for Conflict of Interest . . . . .	102
b.	FRCP 11 and Its State Law Counterparts . . . . .	103
<b>Chapter III</b>	<b>FORMAL ASPECTS OF THE LAWYER-CLIENT RELATIONSHIP . . . . .</b>	<b>107</b>
<hr/>		
A.	UNDERTAKING REPRESENTATION . . . . .	107
1.	Duty to Undertake Representation . . . . .	107
	<i>Brown v. Board of County Commissioners of Washoe County</i> . . . . .	108
	<i>Mallard v. United States District Court for the Southern         District of Iowa</i> . . . . .	110
	Notes, Questions, and Examples . . . . .	115
	International Notes . . . . .	115
2.	Duty to Reject Representation . . . . .	116
3.	Lawyer-Client Contracts and the Beginning of the Lawyer-Client Relationship . . . . .	116
B.	FEES . . . . .	116
1.	The Reasonableness Standard . . . . .	117
	<i>Fees Rule 1.5 ABA Model Rules of Professional Conduct</i> . . . . .	117
	<i>In Re Kutner</i> . . . . .	118
	<i>Pfeifer v. Sentry Insurance</i> . . . . .	121
	<i>Wong v. Michael Kennedy, P.C.</i> . . . . .	131
	Notes, Questions, and Examples . . . . .	136
	International Note . . . . .	136
2.	Contingent Fees . . . . .	137
	Reginald Heber Smith, <i>Justice and the Poor</i> . . . . .	138
	<i>Contingent Fees</i> . . . . .	139
3.	Fee Splitting . . . . .	140
	<i>Moran v. Harris</i> . . . . .	140
4.	Minimum Fee Schedules . . . . .	144
	<i>Goldfarb v. Virginia State Bar</i> . . . . .	144
	International Notes . . . . .	145
5.	Fee Forfeiture . . . . .	145
	<i>Caplin &amp; Drysdale, Chartered v. United States</i> . . . . .	145
C.	FIDUCIARY DUTIES . . . . .	154

---

**TABLE OF CONTENTS**

	<i>In Re Rosellini</i> . . . . .	154
	Notes, Questions, and Examples . . . . .	158
D.	COMPETENCE AND DILIGENCE . . . . .	159
	<i>Committee on Professional Ethics and Conduct of the Iowa State</i>	
	<i>Bar Association v. Nadler</i> . . . . .	159
	Notes, Questions, and Examples . . . . .	162
E.	COMMUNICATION AND SHARED DECISION-MAKING . . . . .	163
	<i>Jones v. Barnes</i> . . . . .	163
	Notes, Questions, and Examples . . . . .	166
	William H. Simon, <i>Should Lawyers Obey the Law?</i> . . . . .	167
F.	TERMINATING REPRESENTATION . . . . .	171
1.	Mandatory Withdrawal . . . . .	171
	<i>Maricopa County Public Defender’s Office v. Superior Court</i> . . . . .	171
2.	Permissive Withdrawal . . . . .	174
	International Notes . . . . .	175
3.	Duties upon Termination of the Lawyer-Client Relationship . . . . .	175
	<i>Rosenberg v. Levin</i> . . . . .	175
	Notes, Questions, and Examples . . . . .	178
<b>Chapter IV</b>	<b>CONFIDENTIALITY</b> . . . . .	<b>179</b>
A.	THE DUTY OF CONFIDENTIALITY AND THE ATTORNEY-CLIENT	
	EVIDENTIARY PRIVILEGE . . . . .	180
	Problem 4-1 . . . . .	180
	Problem 4-2 . . . . .	180
1.	Generally . . . . .	181
	<i>People v. Fentress</i> . . . . .	181
	<i>Rules of Evidence for United States Courts and Magistrates,</i>	
	<i>Article V. Privileges</i> . . . . .	191
	International Notes . . . . .	192
2.	The Privilege Applies to What? . . . . .	193
	Problem 4-3 . . . . .	193
	<i>People v. Meredith</i> . . . . .	194
	<i>Buntrock v. Buntrock</i> . . . . .	197
3.	Exceptions . . . . .	198
	Problem 4-4 . . . . .	198
	<i>United States v. Jacobs</i> . . . . .	198
	Notes, Questions, and Examples . . . . .	205
B.	TO WHOM IS THE DUTY OWED? . . . . .	206
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i>	
	<i>Model Rules</i> . . . . .	206
	<i>Swidler &amp; Berlin v. United States</i> . . . . .	206

---

**TABLE OF CONTENTS**

	<i>Upjohn Co. v. United States</i> . . . . .	212
	Notes, Questions, and Examples . . . . .	216
	International Notes . . . . .	216
	<i>In Re Grand Jury Subpoena Duces Tecum</i> . . . . .	217
	Notes, Questions, and Examples . . . . .	224
C.	TO WHAT DOES THE DUTY APPLY? . . . . .	225
	Notes, Questions, and Examples . . . . .	225
D.	EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY . . . . .	225
1.	Consent . . . . .	225
2.	Self-Defense and Fees . . . . .	226
	<i>Squire, Sanders &amp; Dempsey, L.L.P. v. Givaudan Flavors</i> <i>Corporation</i> . . . . .	226
	Notes, Questions, and Examples . . . . .	232
3.	Future Crimes, Frauds, and Harms . . . . .	232
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i> <i>Model Rules</i> . . . . .	232
	<i>Texas Disciplinary Rules of Professional Conduct Rule</i> . . . . .	233
	<i>Michigan Rules of Professional Conduct Client-Lawyer</i> <i>Relationship</i> . . . . .	234
	<i>Illinois Rules of Professional Conduct</i> . . . . .	235
	<i>Rules Regulating the Florida Bar</i> . . . . .	235
	<i>Minnesota Rules of Professional Conduct Client-Lawyer</i> <i>Relationship</i> . . . . .	236
	<i>People v. Belge</i> . . . . .	236
	<i>People v. Belge</i> . . . . .	239
4.	“Other Law” or Orders of Court . . . . .	239
	Notes, Questions, and Examples . . . . .	240
E.	USE OF CONFIDENTIAL INFORMATION FOR THE LAWYER’S BENEFIT . . . . .	240
	RESTATEMENT (THIRD) OF AGENCY . . . . .	240
<b>Chapter V CONFLICTS OF INTEREST . . . . .</b>		<b>243</b>
A.	LOYALTY AND OTHER GENERAL PRINCIPLES . . . . .	244
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i> <i>Model Rules</i> . . . . .	244
	International Notes . . . . .	245
B.	WAIVER OF CONFLICTS . . . . .	245
	RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, <i>Rules and Principles</i> . . . . .	246
	<i>Greene v. Greene</i> . . . . .	252
	International Note . . . . .	254

---

*TABLE OF CONTENTS*

C.	SOURCES OF CONFLICTS . . . . .	254
1.	Third-Party Interference . . . . .	254
	Problem 5-1 . . . . .	254
	<i>Parsons v. Continental National American Group</i> . . . . .	255
	Notes, Questions, and Examples . . . . .	258
	International Note . . . . .	258
	<i>Pfeifer v. Sentry Insurance</i> . . . . .	259
2.	Lawyer-Client Conflicts . . . . .	261
a.	Business Transactions with Clients . . . . .	261
	<i>Goldman v. Kane</i> . . . . .	261
	Notes, Questions, and Examples . . . . .	264
b.	Literary Rights . . . . .	264
	<i>United States v. Hearst</i> . . . . .	264
	Notes, Questions, and Examples . . . . .	269
c.	Drafting Instruments That Benefit the Lawyer . . . . .	269
d.	Sexual or Amorous Relations with Clients . . . . .	270
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i>	
	<i>Model Rules</i> . . . . .	270
	<i>In Re Heard</i> . . . . .	270
	<i>In Re Hawkins</i> . . . . .	276
	Notes, Questions and Examples . . . . .	277
e.	Lawyer-Client Conflicts and Champerty, Barratry, and	
	Maintenance . . . . .	277
	<i>Iowa State Bar Association v. Bitter</i> . . . . .	278
	Notes, Questions, and Examples . . . . .	280
3.	Multiple Client Conflicts . . . . .	280
a.	Concurrent Clients . . . . .	281
	<i>JPMorgan Chase Bank v. Liberty Mutual Insurance Company</i> . . . . .	281
b.	Positional Conflicts of Interest . . . . .	284
	John S. Dzienkowski, <i>Positional Conflicts of Interest</i> . . . . .	285
c.	Same-Side Multiple Client Representation . . . . .	290
	Problem 5-2 . . . . .	290
	<i>State Farm Mutual Automobile Insurance Co. v. K.A.W.</i> . . . . .	291
	<i>Cuylar v. Sullivan</i> . . . . .	294
d.	Aggregate Settlements . . . . .	300
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i>	
	<i>Model Rules</i> . . . . .	300
	<i>Quintero v. Jim Walter Homes, Inc.</i> . . . . .	301
	<i>In Re Mal De Mer Fisheries, Inc.</i> . . . . .	303
e.	Prospective and Current Clients . . . . .	306
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i>	

---

**TABLE OF CONTENTS**

	<i>Model Rules</i> . . . . .	307
f.	Former and Current Clients, the Substantial Relationship Test . . . . .	307
	<i>In Re John J. Carey</i> . . . . .	308
	<i>Haagen-Dazs Co. v. Perche No! Gelato, Inc.</i> . . . . .	317
	<i>Mickens v. Taylor</i> . . . . .	320
	<i>Maricopa County Public Defender’s Office v. Superior Court</i> . . . . .	332
g.	Lawyer for an Organization . . . . .	333
	Milton C. Regan, Jr., <i>Professional Responsibility and the</i>	
	<i>Corporate Lawyer</i> . . . . .	334
D.	IMPUTED DISQUALIFICATION . . . . .	337
	Problem 5-3 . . . . .	337
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i>	
	<i>Model Rules</i> . . . . .	338
	Ethics 2000 Commission, <i>February 2002 ABA Amendment to</i>	
	<i>Model Rules</i> . . . . .	340
	<i>Haagen-Dazs Co. v. Perche No! Gelato, Inc.</i> . . . . .	340
	<i>SWS Financial Fund v. Salomon Brothers</i> . . . . .	342
	Notes, Questions, and Examples . . . . .	350
E.	SPECIAL ROLE-RELATED CONFLICTS RULES . . . . .	350
1.	Former Judge . . . . .	350
	International Note . . . . .	351
2.	Former Government Lawyer . . . . .	351
	<i>Armstrong v. McAlpin</i> . . . . .	352
3.	Lawyer as Witness . . . . .	357
<b>Chapter VI                  DUTIES TO THIRD PARTIES . . . . .</b>		<b>359</b>
A.	TRUTH-TELLING OUTSIDE THE COURT CONTEXT . . . . .	359
1.	False Statements of Material Law or Fact . . . . .	359
2.	The Negotiation Setting . . . . .	360
	James J. White, <i>Machiavelli and the Bar: Ethical Limitations on</i>	
	<i>Lying in Negotiation</i> . . . . .	360
3.	Reducing Agreements to Writing . . . . .	365
	Problem 6-1 . . . . .	365
	Notes, Questions, and Examples . . . . .	366
B.	HARASSMENT AND OTHER ABUSIVE CONDUCT . . . . .	366
	Problem 6-2 . . . . .	366
	<i>In Re Knight</i> . . . . .	367
	Notes, Questions, and Examples . . . . .	368
	<i>In Re Hansen</i> . . . . .	369
	Notes, Questions, and Examples . . . . .	371
C.	COMMUNICATING WITH REPRESENTED PERSONS . . . . .	371

---

**TABLE OF CONTENTS**

	<i>Niesig v. Team I</i> . . . . .	371
	Notes, Questions, and Examples . . . . .	375
	<i>United States v. Lopez</i> . . . . .	376
	Notes, Questions, and Examples . . . . .	383
	International Note . . . . .	384
D.	COMMUNICATING WITH UNREPRESENTED PERSONS . . . . .	385
	<i>Monsanto Co. v. Aetna Casualty and Surety Co.</i> . . . . .	385
	International Notes . . . . .	391
E.	CIVIL LIABILITY TO THIRD PERSONS . . . . .	391
	RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS	
	Copyright . . . . .	392

---

**Chapter VII DUTIES TO THE LEGAL SYSTEM AND SOCIETY . . . 395**

A.	TRUTH-TELLING INSIDE THE COURT CONTEXT . . . . .	395
	Problem 7-1 . . . . .	395
	Problem 7-2 . . . . .	396
1.	Fact Statements to the Court . . . . .	396
	<i>State v. Casby</i> . . . . .	397
	<i>Virzi v. Grand Trunk Warehouse and Cold Storage Co.</i> . . . . .	400
	<i>In Re Morrissey</i> . . . . .	403
	International Notes . . . . .	407
2.	Ex Parte Proceedings . . . . .	408
3.	Perjury . . . . .	408
	Monroe H. Freedman, <i>Professional Responsibility of the Criminal</i>	
	<i>Defense Lawyer: The Three Hardest Questions</i> . . . . .	408
	<i>Nix v. Whiteside</i> . . . . .	413
4.	Law Statements to the Court . . . . .	421
	<i>Jorgenson v. County of Volusia</i> . . . . .	422
B.	WITNESS PAYMENT . . . . .	423
C.	LIMITATIONS ON PRESENTATIONS TO A COURT . . . . .	423
1.	Frivolous Claims and Litigation Positions . . . . .	424
	<i>Lawyer Disciplinary Board v. Neely and Hunter</i> . . . . .	424
	Notes, Questions, and Examples . . . . .	430
2.	Personal Opinion and Alluding to Matters Outside the Record . . . . .	430
	<i>Darden v. Wainwright</i> . . . . .	431
	International Note . . . . .	436
3.	ObeY Court Orders . . . . .	437
	<i>Kleiner v. First National Bank of Atlanta</i> . . . . .	437
4.	Intemperate Remarks . . . . .	443
	<i>In Re Vincenti</i> . . . . .	443
	<i>Grievance Administrator v. Geoffrey N. Fieger</i> . . . . .	449

---

**TABLE OF CONTENTS**

	Notes, Questions, and Examples . . . . .	460
D.	LIMITATIONS ON LITIGATION PUBLICITY . . . . .	460
	<i>Gentile v. State Bar of Nevada</i> . . . . .	460
	International Note . . . . .	475
E.	EX PARTE CONTACT WITH JUDGES AND JURORS . . . . .	475
1.	Judges . . . . .	476
2.	Jurors . . . . .	476
	<i>Florida Bar v. Peterson</i> . . . . .	476
	Notes, Questions, and Examples . . . . .	477
F.	PRO BONO PUBLICO . . . . .	478
1.	Organized Legal Services for the Poor . . . . .	478
	Roger C. Cramton, <i>Crisis in Legal Services for the Poor</i> . . . . .	479
	Notes, Questions, and Examples . . . . .	486
2.	Individual Lawyer’s Duty . . . . .	487
	Notes, Questions, and Examples . . . . .	487
 <b>Chapter VIII      SPECIAL ROLE-RELATED DUTIES . . . . .</b>		<b>489</b>
<hr/>		
A.	SPECIAL DUTIES OF PROSECUTORS . . . . .	489
	Problem 8-1 . . . . .	489
1.	Avoid Conflicts with Private Interests . . . . .	490
	<i>In Re Morrissey</i> . . . . .	490
2.	Dismissal of Charges Not Supported by Probable Cause . . . . .	494
3.	Disclosure of Exculpatory Evidence . . . . .	494
	<i>Brady v. Maryland</i> . . . . .	494
	<i>Read v. Virginia State Bar</i> . . . . .	496
	Notes, Questions, and Examples . . . . .	499
4.	Investigative Limits . . . . .	499
	<i>Colorado v. Reichman</i> . . . . .	499
	Notes, Questions, and Examples . . . . .	503
B.	SPECIAL DUTIES OF SUPERVISING AND SUBORDINATE LAWYERS . . . . .	505
1.	Lawyers Subordinate to Other Lawyers . . . . .	505
	<i>Daniels v. Alander</i> . . . . .	505
2.	Providing Supervision . . . . .	510
	<i>In Re Yacavino</i> . . . . .	510
3.	Responsibility for Lawyer or Non-Lawyer Subordinates’ Misconduct . . . . .	512
C.	LAWYERS AS EMPLOYEES . . . . .	512
1.	Wrongful Discharge . . . . .	512
	<i>Balla v. Gambro, Inc.</i> . . . . .	512
	<i>Crews v. Buckman Laboratories International, Inc.</i> . . . . .	520
	Notes, Examples, and Questions . . . . .	526

---

**TABLE OF CONTENTS**

	<i>Wieder v. Skala</i> . . . . .	526
2.	The Partnership Decision as an Employment Action . . . . .	530
	<i>Hishon v. King &amp; Spalding</i> . . . . .	530
3.	And Partners, Too? . . . . .	535
	<i>Equal Employment Opportunity Commission v. Sidley Austin</i> <i>Brown &amp; Wood</i> . . . . .	535
	Note . . . . .	540
4.	Employee or Lawyer? . . . . .	540
	<i>Hull v. Celanese Corp.</i> . . . . .	540
	<i>Hull v. Celanese Corp.</i> . . . . .	542
	Notes, Questions, and Examples . . . . .	545
D.	LAWYERS AS INTERMEDIARIES AND THIRD-PARTY NEUTRALS . . . . .	545
E.	ANCILLARY BUSINESSES AND MULTIDISCIPLINARY PRACTICE ISSUES . . . . .	547
	<i>Pennsylvania Bar Association Committee on Legal Ethics and</i> <i>Professional Responsibility</i> . . . . .	547
	Notes, Questions, and Examples . . . . .	550
	Laurel S. Terry, <i>Redefining Lawyers' Work: Multidisciplinary Practice:</i> <i>A Primer on MDPs: Should the "No" Rule Become a New Rule?</i> . . . .	551
	<i>[Excerpts from the] Report and Recommendation of the District of</i> <i>Columbia Bar Special Committee on Multidisciplinary Practice</i> . . . . .	555
	<i>Wouters v. Algemene Raad De Nederlandse Orde van Advocaten</i> . . . .	558
	Bryant G. Garth, <i>"From the Trenches and Towers": MDPs after</i> <i>Enron/Andersen</i> . . . . .	568
<b>Chapter IX ADVERTISING AND SOLICITATION . . . . .</b>		<b>573</b>
A.	INTRODUCTION . . . . .	574
	<i>Barton v. State Bar of California</i> . . . . .	574
	<i>In Re Sizer and Gardner</i> . . . . .	575
	International Notes . . . . .	581
B.	THE BLANKET BAN ON ADVERTISING BREAKS DOWN . . . . .	582
	<i>Bates v. State Bar of Arizona</i> . . . . .	582
	Notes, Questions, and Examples . . . . .	589
C.	WHAT IS FALSE OR MISLEADING? OR, <i>DE GUSTIBUS NON</i> <i>DISPUTANDUM EST</i> (THERE IS NO ACCOUNTING FOR MATTERS OF TASTE) . . . . .	589
	<i>Arguments Before the Court: Attorneys Misleading Advertising —</i> <i>Testimonials — Presumptions — First Amendment</i> . . . . .	590
D.	IN-PERSON SOLICITATION . . . . .	593
	Problem 9-1 . . . . .	593
	<i>Ohralik v. Ohio State Bar Association</i> . . . . .	593



---

**TABLE OF CONTENTS**

	<i>In Re Primus</i> . . . . .	601
	Notes, Questions, and Examples . . . . .	610
E.	IS TARGETED DIRECT MAIL ADVERTISING, SOLICITATION, OR SOMETHING ELSE? . . . . .	611
	<i>Shapiro v. Kentucky Bar Association</i> . . . . .	611
	<i>Florida Rule 4-7.4 Direct Contact with Prospective Clients</i> . . . . .	616
	<i>Florida Bar v. Went For It, Inc.</i> . . . . .	618
F.	THE SPECIAL CASE OF SPECIALIZATION . . . . .	627
	<i>Peel v. Attorney Registration and Disciplinary Commission of Illinois</i> . . . . .	628
	Notes, Questions, and Examples . . . . .	635
<b>Chapter X</b>	<b>JUDICIAL CONDUCT</b> . . . . .	<b>637</b>
A.	SOURCES OF JUDICIAL CONDUCT LAW . . . . .	637
	International Note . . . . .	638
B.	GENERAL JUDICIAL ATTRIBUTES: INDEPENDENCE, INTEGRITY, AND IMPARTIALITY . . . . .	639
	International Note . . . . .	639
C.	PERSONAL CONDUCT AND ACTIVITY OUTSIDE THE JUDICIAL ROLE . . . . .	639
	International Note . . . . .	641
D.	JUDICIAL DUTIES . . . . .	642
E.	POLITICAL ACTIVITIES . . . . .	647
F.	JUDICIAL IMMUNITY . . . . .	647
	<b>Table of Cases</b> . . . . .	<b>TC-1</b>
	<b>Index</b> . . . . .	<b>I-1</b>

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