Professional Responsibility

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Professional Responsibility

A Context and Practice Casebook

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Series Editor's Preface

Welcome to a new type of law text. Designed by leading experts in law school teaching and learning, Context and Practice casebooks assist law professors and their students to work together to learn, minimize stress, and prepare for the rigors and joys of practicing law. **Student learning and preparation for law practice are the guiding ethics of these books.**

Why would we depart from the tried and true? Why have we abandoned the legal education model by which we were trained? Because legal education can and must improve.

In Spring 2007, the Carnegie Foundation published *Educating Lawyers: Preparation for the Practice of Law* and the Clinical Legal Education Association published *Best Practices for Legal Education*. Both works reflect in-depth efforts to assess the effectiveness of modern legal education, and both conclude that legal education, as presently practiced, falls quite short of what it can and should be. Both works criticize law professors' rigid adherence to a single teaching technique, the inadequacies of law school assessment mechanisms, and the dearth of law school instruction aimed at teaching law practice skills and inculcating professional values. Finally, the authors of both books express concern that legal education may be harming law students. Recent studies show that law students, in comparison to all other graduate students, have the highest levels of depression, anxiety, and substance abuse.

The problems with traditional law school instruction begin with the textbooks law teachers use. Law professors cannot implement *Educating Lawyers* and *Best Practices* using texts designed for the traditional model of legal education. Moreover, even though our understanding of how people learn has grown exponentially in the past 100 years, no law school text to date even purports to have been designed with educational research in mind.

The Context and Practice Series is an effort to offer a genuine alternative. Grounded in learning theory and instructional design and written with *Educating Lawyers* and *Best Practices* in mind, Context and Practice casebooks make it easy for law professors to change.

I welcome reactions, criticisms, and suggestions; my e-mail address is michael.schwartz@washburn.edu. Knowing the authors of these books, I know they, too, would appreciate your input; we share a common commitment to student learning. In fact, students, if your professor cares enough about your learning to have adopted this book, I bet s/he would welcome your input, too!

Professor Michael Hunter Schwartz, Series Designer and Editor
Co-Director, Institute for Law Teaching and Learning
Associate Dean for Faculty and Academic Development
Washburn University School of Law

Preface

Dear Students:

My primary goal in writing this text and in teaching professional responsibility is that, by the end of the course, you will believe that issues of attorney ethics and regulation are very important to every attorney and that you will feel confident that you can identify and respond to any ethical issue that might arise in your practice.

Overall, the text has the following major learning outcomes that recur throughout the chapters.

First, you should know the law that regulates attorneys. You should be able to explain the relationship between bar-generated disciplinary codes and other sources of law, such as cases, statutes, and regulations. You should be able to identify the core issues and governing law in any troublesome situation and be able to analyze complex professional responsibility problems in the primary areas of concern for attorneys:

- The four C's of the attorney-client relationship: Competence, Communication, Confidentiality, and Conflict-free representation;
- The three C's of the attorney-court relationship: Candor, Compliance, and Civility;
- The FAIR rule for the attorney's relationship with everyone else in society: Fairness, Access, Integrity, and Responsibility.

You should be able to recognize the tensions and gaps among these concepts, which are inherent in the regulation of attorneys.

Second, you should be able to learn more. You should be able to read rules of professional conduct and extract their meaning. You should be able to research issues of professional responsibility and be aware of sources for additional help.

Third, you should have acquired a habit of thinking of the values underlying professional issues and how your own personal values relate to those values. You should recognize the value of personal reflection and collaborative work in addressing issues of professional responsibility.

Fourth, you should be able to avoid getting yourself, your fellow attorneys, and your clients into trouble, by having learned some practical strategies for avoiding common professional pitfalls.

The text provides opportunities for you to assess your own learning and to practice a range of skills important to effective professional lawyering: reflection, collaboration, research, risk assessment, effective written and oral communication with clients, and a range of office management practices.

A word about one of the learning goals you may have for this course. Many students take the Multistate Professional Responsibility Exam (MPRE) during law school and so presume that the primary goal of the Professional Responsibility course should be to prepare them for this exam. While there is a substantial overlap in subject matter between the professional responsibility course and the MPRE, the law school course is not designed as a "bar prep" course for the MPRE for three reasons.

First, the MPRE tests some materials that are easily mastered without a law school course. That is not to say that you need not prepare for the MPRE. You must read all the rules and comments of both the Model Rules of Professional Conduct and the Code of Judicial Conduct and take a practice exam (at a minimum) in order to pass the MPRE. The appendix to the text provides general advice on preparing for and taking the MPRE.

Second, the MPRE tests only a small portion of the knowledge required to practice law professionally and ethically. The MPRE necessarily cannot test doctrines for which there is substantial uncertainty or controversy regarding their meaning or application nor can it test notions of "best practices." Yet this is the very knowledge that attorneys must call upon in their day-to-day practice.

Third, you do a great disservice to yourself in preparing for practice if your approach to learning in a course of Professional Responsibility is to focus only on preparing for the MPRE. One of the easiest matters to test on a multiple-choice test is exactly where the lines between permitted and prohibited conduct lie. But attorneys who make a career out of walking on that line, rather than aiming for higher standards of practice, are at continual risk of losing their licenses, reputations, and careers. As Professor Kordesh observed, "lawyers do not practice in a multiple-choice world." Maureen Straub Kordesh, *Reinterpreting ABA Standard 302(f) in Light of the Multistate Performance Test*, 30 U. Mem. L. Rev. 299, 310 (2000).

I am interested in any comments or suggestions you have about the text. My email address is glesnerb@umkc.edu.

Peace,

Barbara Glesner Fines

Acknowledgments

Over 2000 of my students have learned professional responsibility in my classes using some portion of this textbook. To the extent it is a useful learning tool, it is because of their insights, contributions, questions, and confusions. I am especially grateful to my research assistants who proofread and indexed the text: Kristin Jacobs (Class of 2011); Ashley Williams (Class of 2012); and Bree Berner (Class of 2014).

This text surely would not have been possible without the support of my colleague, co-teacher, and Dean Ellen Suni. It was she who first developed her own teaching materials for the course and, over the past fifteen years, we have shared those materials back and forth so much that there is very little in this text that does not have origins in those discussions. In particular, her influence is evident in the chapter on current client conflicts and the selection of the Dresser case (still a great learning tool after all these years); the chapter on advertising and the approach to teaching that material through a constitutional history approach; and the many problems set in the context of criminal representations. Finally, in her role as Dean, she encouraged this work with support for travel and research stipends. I owe her an enormous debt of gratitude.

Other colleagues here at UMKC have played an important role in the text as well. Our immediate past Dean, Burnele Powell, also a professional responsibility scholar and teacher, was equally supportive in my development of expertise in the field. My newest colleague, Professor Marcia Narine, co-taught the course with me, tested the materials through her own course, contributed her expertise from a well-established career in corporate compliance, and shared her perspectives as a new faculty member teaching the course for the first time. The chapter on counseling compliance was especially influenced by her contributions. Thanks as well to my librarian colleagues: Professor Paul Callister, Michael Robak, and Larry MacLachlan for their insights and assistance in the research instruction lessons throughout the text. Exercises and narrative discussions of ethical issues in the context of family representation were enriched by my ongoing collaborations with my family law colleagues: Professors Mary Kay Kisthardt, Mary Kay O'Malley, and June Carbone. My former colleague Dean Irma Russell inspired me to pay more careful attention to the ways in which practice area context shapes ethics issues and their resolution. My colleagues in the legal writing program, Professors Wanda Temm, Barbara Wilson, Judy Popper, Daniel Weddle, and Aaron House all instruct me regularly on the nuances of teaching drafting and thereby informed the skills exercises throughout the text. Finally, one of my earliest colleagues, Professor Judith Maute, introduced me to the value of reflective journal writing over twenty years ago and my clinical colleagues from around the country have informed my continuing efforts to incorporate this important clinical pedagogy into my teaching.

My teaching is constantly informed by the many colleagues who have lent countless hours of conversation and collaboration over the years. In particular, many of the materials in

the text were informed by my work with the Center for Computer-Assisted Legal Instruction. I am exceedingly grateful for the time and passion the John Mayer and Deb Quentel have brought to supporting my work in developing these unique learning materials. I have learned more about structured learning through the opportunities to author lessons and work with other faculty members in CALI projects than in nearly any other collaboration.

So many of my colleagues in the field have enriched my understanding and influenced my teaching, including the many I have quoted or cited many in the text. I am especially grateful for permission from the authors of the following articles, which I have included in more sizeable excerpts in the text:

John Leubsdorf, *Legal Ethics Falls Apart*, 57 Buffalo L. Rev. 959, 959-62 (2009).

Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 Ohio St. J. on Disp. Resol. 437, 487-491, 499-504 (2008).

Andrew Perlman, *Civil Procedure and the Legal Profession: The Parallel Law of Lawyering in Civil Litigation*, 79 Fordham L. Rev. 1965, 1971-1973 (2011).

I have been especially intellectually enriched and inspired by my many colleagues and friends from the American Association of Law Schools Professional Responsibility and Teaching Methods Sections and the National Institute for Teaching Ethics and Professionalism. I will commit the sin of omission to them collectively so as to avoid the insult of inadvertently omitting any one individually.

Finally, I am exceedingly honored and grateful to have been invited to join the Context and Practice series by Professor Michael Hunter Schwartz. Both he and Professor Gerry Hess have been spirited cheerleaders, gentle cajolers, tactful editors, and inspiring role models. My editors at Carolina Academic Press as well have been a delight: endlessly patient and supportive. I am especially grateful to Tim Colton for his inspired work in translating my amateur efforts at capturing critical ideas in graphics into professional and effective images.

The problems that remain are my own alone.

A word on editing. All cases are edited. Citations have been removed or shortened, however, I have indicated with ellipses only those omissions of significant substantive text. I have chosen to include state rules of professional conduct rather than ABA Model Rules, to reinforce the message that the governing disciplinary standards are not from a bar association but from the state. However, I have deliberately chosen state versions that closely track the ABA Model Rules and have highlighted any significant variations. In this way, I hope to reinforce the centrality of the rules of professional regulation. I look forward to suggestions and comments.

Last, but most importantly, like any book author, my family has paid most dearly for this project with my missed dinners, reams of paper strewn throughout the house, distracted listening and endless claims of "almost done." Thank you Dave and Dan. Your love and support mean more to me than words on paper can ever capture.

Peace,
Barbara Glesner Fines