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Professional Responsibility

A Context and Practice Casebook

Barbara Glesner Fines

UNIVERSITY OF MISSOURI-KANSAS CITY
SCHOOL OF LAW



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Contents

Table of Principal Cases	xvi
Series Editor's Preface	xvii
Preface	xix
Acknowledgments	xxi

UNIT ONE

LEARNING ABOUT PROFESSIONAL RESPONSIBILITY

Goals of Unit One	3
Pretest	3
Chapter One · What Is a Professional?	5
Learning Objectives	5
Rules to Study	5
Preliminary Problem	5
1.1 Who Are Lawyers and What Do They Do?	6
1.2 What Is a Professional?	12
Reflective Practice	14
To Learn More	15
Chapter Two · What Laws Govern Attorney Conduct?	17
Learning Objectives	17
Rules to Study	17
Preliminary Problems	17
2.1 What Sources of Law Regulate the Legal Profession?	18
Researching Professional Responsibility 2-A: Brainstorming Search Terms	20
2.2 What Are Rules of Professional Conduct?	21
2.3 Reading the Rules: Basic Guidelines for Reading a Rule of Professional Conduct	22
Test Your Understanding	24
Problems for Practice	25
2.4 What Is the Significance of Law as a Self-Regulated Profession?	27
<i>In re Riehlmann</i>	27
Researching Professional Responsibility 2-B: Finding Disciplinary Rules	34
2.5. The Disciplinary Process	35
<i>In the Matter of the Reinstatement of Whitworth</i>	36
2.6 Obligations under General Law	41
<i>Milavetz, Gallop & Milavetz, P.A. v. United States</i>	45

Researching Professional Responsibility 2-C: Professional Guidance in Your Practice Area	47
Test Your Understanding	48
To Learn More	49
Chapter Three • Who Should Be a Lawyer?	51
Learning Objectives	51
Rules to Study	51
Preliminary Problem	51
3.1 Who Admits You to Practice Law?	52
3.2 What Are the Qualifications Necessary for Admission to Practice Law?	54
3.2.1. Educational Requirements	55
3.2.2. Bar Examinations	56
3.2.3. Character and Fitness	57
<i>Lane v. Bar Commission of the Nebraska State Bar Association</i>	58
3.3 Reading the Rules: Connecting Rules to Procedures	66
Researching Professional Responsibility 3-A: Using Research Guides	68
Professional Responsibility Skill 3-A: Interviewing a Bar Applicant	69
Test Your Understanding	72
To Learn More	72
Chapter Four • The Legal Services Industry	73
Learning Objectives	73
Rules to Study	73
Preliminary Problem: The New World of Legal Practice	73
4.1. How Is the Practice of Law Changing?	74
4.2 Where Do You Practice Law?	75
4.3 Reading the Rules: Rule 5.5	77
<i>In the Matter of Trester</i>	80
4.4 What Are Some Alternative Business Forms for Legal Services Delivery?	84
Test Your Understanding	86
To Learn More	87
UNIT ONE REVIEW	
Reflective Practice	88
Multiple Choice Review Questions	88
UNIT TWO	
THE ATTORNEY-CLIENT RELATIONSHIP	
Goals of Unit Two	91
Pretest	91
Chapter Five • Selecting and Rejecting Clients	93
Learning Objectives	93
Rules to Study	93
Preliminary Problems	94
5.1 How Do You Form an Attorney-Client Relationship?	94
Professional Responsibility Skill 5-A: Drafting Non-Engagement Letters	97
Researching Professional Responsibility 5-A: Finding Forms	98

5.2 Reading the Rules: Withdrawing from Representation	99
Professional Responsibility Skill 5-B: Choosing Clients	101
Reflective Practice: Saying Yes, Saying No	103
Test Your Understanding	103
To Learn More	103
Chapter Six • Providing Competent Lawyering	105
Learning Objectives	105
Rules to Study	105
Preliminary Problem	105
6.1 Why Do Lawyers Make Mistakes and How Should They Respond?	107
Reflective Practice: Thinking about Mistakes	110
6.2 Reading the Rules: Rule 1.1 — Disciplinary Regulation of Competence	110
6.3 Regulation of Attorney Competence through Civil Liability	113
Researching Professional Responsibility 6-A: Using Secondary Sources	116
6.4 Other Regulation of Attorney Conduct	117
6.5 Reading the Rules: Rules 5.1 and 5.2—Responsibilities to Other Attorneys	119
Professional Responsibility Skill 6-A: Difficult Conversations	123
Review Problem	124
Researching Professional Responsibility 6-B: Getting Advice on Your Professional Duty	125
6.6 Beyond Mistake Management and Risk Avoidance	127
Reflective Practice: Self-Evaluation and Planning for Professional Development	128
Test Your Understanding	129
To Learn More	129
Chapter Seven • Fees, Files, and Property	131
Learning Objectives	131
Rules to Study	131
Preliminary Problem	131
7.1 Setting Fees	132
7.2 Reading the Rules: Rule 1.5	134
Reflective Practice: Your Relationship with Money	138
7.3 How Do I Bill Clients?	138
Professional Responsibility Skill 7-A: Timekeeping	140
Reflective Practice: Your Relationship with Time	142
7.4 Collecting Fees	142
7.5 Client Funds and Property	144
<i>Swift, Currie, McGhee & Hiers v. Henry</i>	146
7.6 Communicating About Fees and Property	148
Professional Responsibility Skill 7-B: Documentation	149
Researching Professional Responsibility 7-A: Fees, Files, and Property	150
Test Your Understanding	150
To Learn More	151
Chapter Eight • Communication and Authority	153
Learning Objectives	153
Rules to Study	153
Preliminary Problem	153

8.1 The Scope of Representation	154
8.2 How Are Decisions Allocated Between an Attorney and a Client?	157
Researching Professional Responsibility 8-A: Using the Restatement as a Research Tool	160
8.3 Reading the Rules: Rule 1.4 — Communication with Clients	160
Professional Responsibility Skills 8-A: Explaining the Attorney-Client Relationship	164
8.4 What are Some Models of the Attorney-Client Relationship?	164
8.5 Reading the Rules — When Is a Rule Not a Rule?	166
Reflective Practice: Your Model of the Attorney-Client Relationship	168
Test Your Understanding	168
To Learn More	169
UNIT TWO REVIEW	
Practice Context Review	171
1. The engagement contract	171
2. The Closing Letter	173
Multiple Choice Review	174
UNIT THREE	
CONFIDENTIALITY — A DEFINING DUTY	
Goals of Unit Three	179
Pre-Test	180
Chapter Nine • Confidentiality, Privilege, and Related Doctrines	183
Learning Objectives	183
Rules to Study	183
Preliminary Problem	183
9.1 Reading the Rules: Rule 1.6 and the Duty of Confidentiality	184
<i>In the Matter of Anonymous</i>	187
9.2 When Must Attorneys or Clients Provide Information in Litigation?	192
9.2.1. The Attorney-Client Privilege	192
<i>Terrence Teadrop v. Teamist Distributors Inc.</i>	193
9.2.2. The Work-Product Doctrine	199
Researching Professional Responsibility 9-A: Rules of Evidence and Procedure	202
9.3 Comparing and Contrasting Doctrines	202
Test Your Understanding	205
To Learn More	206
Chapter Ten • Exceptions to Confidentiality and Privilege Based on Consent and Waiver	207
Learning Objectives	207
Rules to Study	207
Preliminary Problems	208
10.1 Disclosing Confidential Information to Further the Representation	210
Reflective Practice: Exercising Judgment	212
10.2 Confidentiality, Privilege, and Shared Representations	212
Problems for Discussion	213

Professional Responsibility Skill 10-A: Drafting a Waiver of Confidentiality	214
10.3 Waiver by Inadvertent Disclosure	214
<i>Peterson v. Bernardi</i>	215
10.4 Waiver by Placing a Matter in Evidence	222
<i>In re Seagate Technology, LLC</i>	223
10.5 Attorney Self-Defense Exceptions	225
Researching Professional Responsibility 10-A: Finding Case Law on Professional Responsibility Issues	227
Test Your Understanding	228
To Learn More	229
 Chapter Eleven · Exceptions to Confidentiality Designed to Protect Third Persons	 231
Learning Objectives	231
Rules to Study	231
Preliminary Problem	231
11.1 Variations on Exceptions to Confidentiality to Protect Third Persons	232
11.2 Exceptions to Confidentiality for Death or Substantial Bodily Injury	233
<i>McClure v. Thompson</i>	234
11.3 Reading the Rules: Disclosure of Client Frauds	239
11.4 The Crime-Fraud Exception to Privilege	241
<i>State v. Gonzalez</i>	242
Reflective Practice: Disclosing Client Wrongdoing	250
11.5 Required by Law	250
Researching Professional Responsibility 11-A: Finding Disclosure Requirements	251
Test Your Understanding	252
To Learn More	253
 UNIT THREE REVIEW	
Outline Review	254
Multiple Choice Review	255
 UNIT FOUR	
CANDOR, CONFIDENTIALITY, AND COMPLIANCE	
Goals of Unit Four	259
Pre-Test	260
 Chapter Twelve · Confidentiality and the Duty of Candor to the Court	 261
Learning Objectives	261
Rules to Study	261
Preliminary Problem	261
12.1 Reading the Rules: Rule 3.3 Candor to the Tribunal	262
12.2 Refusing to Offer False Evidence	267
<i>Nix v. Whiteside</i>	267
<i>United States v. Long</i>	275
12.3 Interviewing to Establish Trust and Encourage Candor	279
Jean R. Sternlight & Jennifer Robbennolt, <i>Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients</i>	280

Professional Responsibility Skills 12-A: Counseling a Client for Candor	283
12.4 False or Frivolous?	284
Researching Professional Responsibility 12-A: Researching	
Pleading Sanctions	288
Test Your Understanding	288
To Learn More	291
Chapter Thirteen · Confidentiality and Misrepresentations in Negotiations	293
Learning Objectives	293
Rules to Study	293
Introductory Problem	293
Practice Context Review	294
13.1 Reading the Rules: Rule 4.1 and the Role of Comments to the Rules	295
Test Your Understanding	300
13.2 Consequences of Misrepresentations	300
<i>Roth v. La Societe Anonyme Turbomeca France</i>	301
Professional Responsibility Skills 13-A: Protecting Your Client from Misrepresentations	306
13.3 Exploiting an Opponent's Error and Hardball Negotiation	307
Reflective Practice: Fair Game?	312
Test Your Understanding	313
To Learn More	315
Chapter Fourteen · Confidentiality and Counseling Compliance	317
Learning Objectives	317
Rules to Study	317
Introductory Problem	317
14.1 The Lawyer as Gatekeeper	318
<i>Milavetz, Gallop & Milavetz, P.A. v. United States</i>	322
Researching Professional Responsibility 14-A: Finding Federal Regulations	329
14.2 Reading the Rules: Counseling the Entity Client	330
Reflective Practice: Thinking about the Attorney's Public Role	333
Test Your Understanding	336
To Learn More	336
UNIT FOUR REVIEW	
Practice Review: Communicating about Confidentiality	340
Multiple Choice Review	341
UNIT FIVE	
CONFLICTS OF INTEREST	
Goals of Unit Five	345
Pre-Test	345
Chapter Fifteen · Overview of Conflicts of Interest	347
Learning Objectives	347
Rules to Study	347
15.1 Interests and Risks	347

15.2 Reading the Rules: The General Principles of Conflicts	351
15.3 Imputed Conflicts	354
15.4 Common Misconceptions About Conflicts of Interest	356
Review Problems	358
To Learn More	358
Chapter Sixteen · An Attorney's Own Interests in Conflict with the Client's	361
Learning Objectives	361
Rules to Study	361
Preliminary Problem	361
16.1 Reading the Rules: Attorney-Client Conflicts	362
16.2 Prohibited Transactions	365
Researching Professional Responsibility 15-A: Finding Policies and Purpose	367
16.3 Discouraged Transactions	368
Professional Responsibility Skills 16-A: Documenting Transactions with Clients	370
16.4 Professional and Personal Interests	371
<i>Mendoza Toro v. Gil</i>	373
Reflective Practice: Personal and Professional Identity Conflicts	377
Problems for Review	378
To Learn More	379
Chapter Seventeen · Conflicts of Interest and the Problem of Client Identity	381
Learning Objectives	381
Rules to Study	381
Preliminary Problems	381
17.1 Reading the Rules—Rule 1.18: Prospective Clients	384
Practice Problem	386
Professional Responsibility Skill 17-A: Disclaimers and Electronic Communication	387
17.2 The Entity Person	388
<i>GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C.</i>	390
17.3 Third-Party Payors	393
<i>Brown v. Kelton</i>	394
Researching Professional Responsibility 17-A: Research Problem	401
Test Your Understanding	401
To Learn More	402
Chapter Eighteen · Conflicts Among Current Clients	403
Learning Objectives	403
Rules to Study	403
Preliminary Problem	403
18.1 An Overview of Concurrent Conflicts	404
18.2 Representing Opposing Parties	405
<i>In re Dresser Industries, Inc.</i>	406
Reflective Practice: Loyalty to a Client	413
18.3 Representing Co-Parties in Litigation	413
18.4 Representing Multiple Parties in Transactions	416

Professional Responsibility Skill 18-A: Agreements Concerning Joint Representation	417
Test Your Understanding	418
To Learn More	419
Chapter Nineteen · The Current Client and a Former Client	421
Learning Objectives	421
Rules to Study	421
Preliminary Problem	421
19.1 Reading the Rules: Former Client Conflicts	423
19.2 When Is a Client a “Former Client”?	426
Professional Responsibility Skill 19-A: Disengagement Letters	428
19.2 Substantial Relationships and Confidential Information	428
<i>In re Carey</i>	428
Researching Professional Responsibility: Working the Problem	442
19.3 Consents and Waivers of Conflicts	443
19.4 Reading the Rules: Conflicts and the Former Government Employee	444
Professional Responsibility Skills 19-B: Assessing a Career Path	447
Test Your Understanding	447
To Learn More	448
Chapter Twenty · Conflicts of Interest and Imputed Disqualification	449
Learning Objectives	449
Rules to Study	449
Preliminary Problem	449
20.1 Imputed Conflicts and Traveling Attorneys	450
20.2 Ethical Screens	452
Professional Responsibility Skill 20-A: Designing a Screen	453
20.3 Identifying Conflicts	453
Test Your Understanding	455
To Learn More	455
UNIT FIVE REVIEW	
Multiple Choice Review	458
Practice Context Review	460
UNIT SIX	
FAIRNESS AND THE BOUNDARIES OF ADVERSARIAL ZEAL	
Goals of Unit	463
Pretest	463
Chapter Twenty-One · Ethics in Litigation Practice	465
Learning Objectives	465
Rules to Study	465
Preliminary Problem	465
21.1 Reading the Rules: Tensions in the Role of the Advocate	466
Reflective Practice: Your Attitudes Toward Conflict	470
21.2 Gathering and Preserving Evidence	471
A. Legal Limits on Gathering Evidence	471

B. Destroying or Tampering with Evidence	475
21.3 Cooperation in Discovery	477
<i>Mancia v. Mayflower Textile Servs. Co.</i>	479
Professional Responsibility Skill 21-A: Cooperating in Planning Discovery	487
21.4 Deposition Practice	487
<i>In re Anonymous Member of South Carolina Bar</i>	489
Researching Professional Responsibility: Deposition Practice	493
21.5 Protecting Your Clients from Discovery Abuses	494
1. Prepare for the worst and make boundaries clear.	494
2. Stay formal and make a record.	494
3. Don't threaten unless you are ready to act.	495
4. Don't respond in kind.	495
5. Warn and prepare your client.	495
5. Seek the protection of the court if necessary.	496
21.6 Trial Publicity	496
<i>Gentile v. State Bar of Nevada</i>	496
21.7 Representing Clients in Mediation	506
Test Your Understanding	508
To Learn More	509
Chapter Twenty-Two · Communicating with Litigants, Witnesses, and Jurors	511
Learning Objectives	511
Rules to Study	511
Preliminary Problem	511
22.1 Reading the Rules: Communication with Represented Persons	512
<i>Palmer v. Pioneer Inn Associates, Ltd.</i>	516
Researching Professional Responsibility: Who Is a "Represented Person" in an Entity?	523
22.2 Unrepresented Persons	523
Problem for Practice	528
22.3 Communication with Jurors and Judges	528
Test Your Understanding	530
To Learn More	531
Chapter Twenty-Three · Judges and the Adversary System	533
Learning Objectives	533
Rules to Study	533
Preliminary Problem	533
23.1 The Core Duties of Judges	534
Researching Professional Responsibility: Using a Table of Contents to Guide Research	535
23.2 <i>Ex Parte</i> Communications — Interactions of Attorney Ethics and Judicial Ethics	537
<i>In Re Wilder</i>	539
23.3 Ethical Duties of Judicial Clerks	541
23.4 Dealing with Unethical Judges	543
Researching Professional Responsibility: Judicial Discipline	546
To Learn More	547

UNIT SIX REVIEW

Practice Context Review	548
Multiple Choice Review	549

UNIT SEVEN
ACCESS TO JUSTICE

Goals of Unit	553
Pre-Test	553

Chapter Twenty-Four · Making Law Affordable and Accessible	555
Learning Objectives	555
Rules to Study	555
Preliminary Problem	555
24.1 The Need for Legal Services	556
24.2 The Right to Counsel	558
<i>Turner v. Rogers</i>	560
24.3 Reading the Rules: Pro Bono and Appointed Representation	566
Researching Professional Responsibility 24-A: Local Court Rules	569
Professional Responsibility Skill 24-A: Motion to Withdraw from Appointed Representation	570
24.4 <i>Pro Se</i> Assistance and Limited Scope Representation	573
<i>Padilla v. Kentucky</i>	575
Problems for Review	580
24.5 Relaxing the Regulations to Insure Access	581
Test Your Understanding	583
To Learn More	584

Chapter Twenty-Five · The Professional Monopoly	585
Learning Objectives	585
Rules to Study	585
Preliminary Problem: The Delivery of Legal Services	585
25.1 Who Are the Gatekeepers to the Profession?	586
<i>In re Creasy</i>	588
25.2 What Is the Definition of the Practice of Law?	595
Researching Professional Responsibility Exercise 25-A: State Definitions of the Practice of Law	596
Test Your Understanding	596
To Learn More	598

Chapter Twenty-Six · Commercial Speech: Advertising and Solicitation	599
Learning Objectives	599
Rules to Study	599
Preliminary Problem	599
26.1 The Controversy over Attorney Advertising	599
26.2 Getting Clients — Personal Referrals	601
26.3 Advertising Regulation	604
<i>Hayes v. New York Attorney Grievance Comm. of the Eighth Judicial District</i>	611
26.4 Regulating Solicitation	617

26.5 Dignity and the Image of the Profession as a Governmental Interest	624
Researching Professional Responsibility: Constitutionality of Advertising	
Restrictions	626
Test Your Understanding	627
To Learn More	627
REVIEW OF UNIT SEVEN	
Practice Context Review	628
Multiple Choice Review	629
Appendix · Advice on Preparing for the MPRE	633
Index	641

Table of Principal Cases

Brown v. Kelton, 2011 Ark. 93 (Ark. 2011)	394
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991)	496
GSI Commerce Solutions, Inc. v. BabyCenter, L.L.C., 618 F.3d 204 (2d Cir. N.Y. 2010)	390
Hayes v. New York Attorney Grievance Comm. of the Eighth Judicial District, No. 10-1587-cv, 2012 U.S. App. LEXIS 4526 (2d Cir. March 5, 2012)	611
In the Matter of Anonymous, 932 N.E.2d 671 (Ind. 2010)	187
In the Matter of the Reinstatement of Whitworth, 2011 Okla. 79, 261 P.3d 1173 (Okla. 2011)	36
In the Matter of Trester, 285 Kan. 404; 172 P.3d 31 (2007)	80
In re Anonymous Member of South Carolina Bar, 552 S.E.2d 10 (S.C. 2001)	489
In re Carey, 89 S.W.3d 477 (Mo. banc 2002)	428
In re Creasy, 12 P.3d 214 (Ariz. 2000)	588
In re Dresser Industries, Inc., 972 F.2d 540 (5th Cir. 1992)	406
In re Riehlmann, 891 So. 2d 1239 (La. 2005)	27
In re Seagate Technology, LLC, 497 F.3d 1360 (Fed. Cir. 2007), <i>cert. denied</i> , Convolve, Inc. v. Seagate Tech., LLC, 552 U.S. 1230 (2008)	223
In Re Wilder, 764 N.E.2d 617 (Ind. 2002)	539
Lane v. Bar Commission of the Nebraska State Bar Association, 544 N.W.2d 367 (Neb. 1996)	58
Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354 (D. Md. 2008)	479
McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003)	234
Mendoza Toro v. Gil, 110 F. Supp. 2d 28 (D.P.R. 2000)	373
Milavetz, Gallop & Milavetz, P.A. v. United States, 130 S.Ct. 1324 (2010)	45, 322
Nix v. Whiteside, 475 U.S. 157 (1986)	267
Padilla v. Kentucky, 130 S. Ct. 1473 (2010)	575
Palmer v. Pioneer Inn Associates, Ltd., 59 P.3d 1237 (Nev. 2002)	516
Peterson v. Bernardi, District of New Jersey (July 24, 2009)	215
Roth v. La Societe Anonyme Turbomeca France, 120 S.W.3d 764 (Mo. App. W.D. 2003)	301
State v. Gonzalez, 290 Kan. 747, 234 P.3d 1 (Kan. 2010)	242
Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37 (Ga. 2003)	146
Turner v. Rogers, 564 U.S. ___, 131 S. Ct. 2507 (2011)	560
United States v. Long, 857 F.2d 436, 444-47 (8th Cir. 1988), <i>cert. denied</i> , 502 U.S. 828 (1991)	275

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).

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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

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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).

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

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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