

Imagine for a Moment That . . . (A Preface)

Imagine for a moment that you will spend many years living and working in a distant island nation. You've heard many good things about the place and are looking forward to your venture. But you are also a bit apprehensive. Much there will be like home, but some customs will be new. You don't want to embarrass yourself or, worse, get kicked off the island. So you buy a guidebook to tell you how to act in different professional and social settings.

This book is a guidebook of sorts. Its silent subtitle could be *How to Act in Lawyerland*—a place where most readers will spend decades of their working life.

How to Act. In *The Presentation of Self in Everyday Life* (1959), sociologist Erving Goffman “uses the term ‘performance’ to refer to all the activity of an individual in front of a particular set of observers, or audience. . . . These performances deliver impressions to others, which communicates information that confirms the identity of the actor in that situation.”* In *As You Like It*, Jacques (meaning Shakespeare) anticipated Goffman by centuries when he said: “All the world’s a stage/And all the men and women merely players/They have their exits and their entrances/And one man in his time plays many parts.”

Echoing Goffman and Jacques, the part of lawyer is performed through a professional self that the lawyer herself must create. There is no single way to perform being a lawyer. We learn from watching others, but we can't copy them. We must be true to ourselves as we settle into a professional identity that we find comfortable. Or I should say “identities” because the identity we choose may vary with the particular situation and over time.

Identity. The ABA committee that accredits law schools and makes rules for their programs of study recently instructed law schools to “provide substantial opportunities to students for . . . the development of a professional identity.” In a comment, the committee wrote:

Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of

* Ashley Crossman, “The Presentation of Self in Everyday Life,” ThoughtCo, Aug. 27, 2020, [thoughtco.com/the-presentation-of-self-in-everyday-life-3026754](https://www.thoughtco.com/the-presentation-of-self-in-everyday-life-3026754).

professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice.

Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.

I add only that the work of developing a professional identity continues throughout your career as you and the nature of your work change.

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Here are three things to know about this book and the class it serves.

First. This is your second most important class. A bold statement. Here's why it's true. Say you aim to be an antitrust lawyer. Your memory of the criminal procedure class you really loved will fade. For you, antitrust is not merely an academic or intellectual subject, as it might be for law or business school scholars. Antitrust is what you *do*—what you practice—not only what you know. In practice, you will give clients antitrust advice through skills all lawyers use: counseling, negotiating, drafting, researching, mediating, and litigating. What you learn here is *how* to practice antitrust or any other area of law. Legal ethics is always there whenever you go to work as a lawyer and whatever your work may be.

Second. The book contains many problems. Some are a paragraph, others a page or more. Many are based on or composites of real events. Many are dense and messy, like life. They arose yesterday or will arise tomorrow. As in practice, a problem may not have all the information you need to address it. You may have to identify what more you need to know. Even then, you may not be able to identify *the* answer because there may be more than one answer, each with different risks and advantages.

Third. This book has a personality, a voice: mine. Its voice is conversational, with asides from popular culture, literature, current events, and history. Sometimes, it takes a position. I encourage you to disagree. “I” appears with some frequency as the subject of my sentences.

As you approach the starting line of your legal career, most important are the rules that constrain your behavior. You will want to know—in such areas as competence, fees, advocacy, confidentiality, conflicts of interest, negotiation, and the client-lawyer relationship—what you may or must do or not do, with confidence that your conduct will not land you before a disciplinary committee, create civil or criminal liability, invite court sanction, forfeit your fee, or harm your reputation and the reputation of your law office.

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Ethics, a handy word, does not accurately describe all lessons learned here. The law business is heavily regulated. The regulations are growing

more complex. This has led to new terms—*the law governing lawyers* and *the law of lawyering*—lest anyone is fooled by the word “ethics” into believing that the subject is simply about how to be a good person and a good lawyer at the same time, although it’s certainly about that as well.

Avoid two errors.

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 you do not need to be told not to lie or steal. The rules here may be obscure, counterintuitive, or subtle in application. Application often calls for judgment. Good judgment comes with experience in practice. Legal education can make only a modest start.

Do not assume your employer will provide all the protection you need. Most law offices do have systems to detect and avoid mistakes and people to whom lawyers can turn for advice. But the best systems and resources are not perfect, and anyway, the professional responsibility of a lawyer cannot be delegated wholesale to others. Furthermore, you need to know enough to know when you need to seek advice or do research.

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A broader perspective from which to view the laws and rules that regulate lawyers looks at their effect on civil society and the administration of justice. These laws and rules help define the nature and work of the entire profession and therefore the behavior of our legal institutions and the quality of our justice. A rule that prohibits, requires, or allows a lawyer to reveal a client’s confidential or privileged information (see chapter 2B2) will guide a lawyer’s own behavior, but it can also affect what information clients are willing to share and their inclination to trust their lawyers. The same goes for the conflict-of-interest rules. These and other rules reflect an effort to reconcile competing interests between clients and others or among clients.

As you enter law practice, you are likely more interested in such questions as “How must I behave?” and “How can I avoid 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 the 1.3 million American lawyers?” Still, the second question is important and, if not as immediate for you right now, may arise in the course of your professional life. You may someday be in a position to help resolve the policy questions—as a member of a bar committee, a legislator, a government lawyer, or a judge.

Asking about the consequences to justice and civil society if a rule is resolved one way rather than another—and saying which resolution is best—engenders different answers among lawyers and between lawyers and the public. Why is that? In part, because the answers depend on political and moral values more fundamental than the “ethics” that inform various codes. And political and moral values of different people differ.

In addressing the questions here, you must be honest about the interests you mean to protect. Those of society generally? Those of a particular client

population? The legal profession's? Your own? Your answers may vary from what they might have been when you applied to law school, and they will likely be different five years after you graduate.

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You will enter a profession in greater transition than at any other time in American history. Three forces are reshaping the U.S. law industry: technology, globalization, and competition from new sources. A few years ago, the Wall St. Journal ran an article entitled “Would You Trust a Lawyer Bot with Your Legal Needs?” by Asa Fitch (Aug. 10, 2020). Will artificial intelligence replace some lawyer tasks? Will it replace some lawyers? Will it reduce the cost of some legal services? Yes, yes, and yes. A paralegal trained in AI may be more productive than a new associate—and cheaper, too.

The Utah Supreme Court has adopted reforms that allow nonlawyers to own law firms, an idea that, until recently, would have been unthinkable. Lyle Moran, “Utah Embraces Nonlawyer Ownership of Law Firms as Part of Broad Reforms,” A.B.A. J., Aug. 14, 2020. Arizona has done so, too. See chapter 14B. Both states will license nonlawyers to practice in designated areas of law.

These three forces are confronting a lawyer regulatory system that has served the United States well for more than a century, a system based on geography. In that system, lawyers get licensed by a place and serve clients from an office in that place. It worked tolerably well for a long time. But technology has challenged the use of geography (place) as the basis for regulation and licensure. The internet does not recognize borders. Neither may a client's problems. An algorithm does not need a law license. Technology and globalization have encouraged competition from lawyers outside the United States and have enabled non-law businesses to offer legal services at lower cost. Chapters 12C and 14B address these trends.

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I started work on the first edition of this book in 1982. You think a lot about what a casebook is and can be when you live with one so long. The book's primary purpose is to provide information and it contains a great deal. 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. A casebook is born. I begin this way, but if nothing more were possible (even if not required), I wonder if I would have kept at it so long. Luckily, more is possible while still serving the book's goal—to teach the subject.

For starters, we can strive for humor, variety, clarity, and good writing. The enterprise will not likely support the wit and moral imagination of a George Orwell essay or the originality of a Kurt Vonnegut novel—assuming counterfactually that I had the talent for 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 sensibility or voice in so far as possible.

And then there are the stories lawyers tell each other. The legal profession is comprised 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 overly effusive, even sanctimonious. At the time, 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.” I still find Tweed overly effusive and Shaw’s observation apt. But Tweed was onto something. The profession and its members *are* fascinating to study. Its stories *are* fascinating to hear. Luckily, we don’t have to choose. Both can be right.

As with the study of any society, understanding the legal profession requires a great deal of information. We must know a thousand small things about life within Lawyerland, not merely a few doctrines and theories, if we are going to understand it truly. I have tried to include some of those details here. You’ll encounter many more in practice.

I invite your views on the book. What was dull? What worked well? How can it be improved? Have you encountered a quote or story somewhere (true or fictional) that you think nicely highlights an issue? This edition benefits from the suggestions of past users, to whom I’m grateful.

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