Introduction

A. Ethics, morals, and professionalism

Why study the law governing lawyers?

It is important to study the law governing lawyers for two reasons. First, knowledge of this subject is important to your professional security. It will help you to stay out of trouble. Second, you need to know the boundaries imposed by law on the conduct of the other lawyers you encounter so that you will recognize improper conduct and not allow it to harm your clients.

This course is somewhat different from other courses in the curriculum because it has a very practical goal — to assist you in avoiding professional discipline, civil liability, and criminal charges. Some lawyers get into serious trouble, and others experience near-misses at some point during their careers. Many lawyers who have gotten into trouble made simple and avoidable mistakes. Some of the ethical and legal rules that govern lawyers are counterintuitive, so an educated guess about what a rule might say could be incorrect. An empirical study in New York concluded that "[v]ery few lawyers ever looked at the New York [ethics code] to resolve ethical issues they encountered in practice." In fact, many "had not consulted it since law school."[1]

Why study the history and structure of the legal profession?

One reason to study the profession as well as its ethical rules is to acquire useful background knowledge about the various organizations that make and enforce the rules for lawyers. For example, the American Bar Association writes many rules and opinions. A law student needs to know whether the ABA has some kind of governmental authority and what relationship the ABA has with the bars of the 50 states.

As a lawyer, you need to understand policy issues relating to the structure and regulation of the profession so that you can participate in the improvement of the profession and the justice system. You will have opportunities to affect the ever-changing law of the legal profession. If you clerk for a judge, you might be asked to draft an opinion on an appeal of a lawyer disciplinary matter or to advise your judge about proposed ethical rules. You could become a staff member to a state or federal legislator, or even an elected official. Many recent law graduates serve on committees of state and local bar associations that initiate or comment on changes in the rules that govern lawyers. Much of the impetus for law reform comes from the fresh perceptions of newcomers to a particular field of law who have not yet become accustomed to "business as usual."

What is the difference between "morals" and "ethics," on one hand, and "legal ethics," on the other?

The terms "morals" and "ethics" are sometimes used synonymously[2] and sometimes distinguished, but in varying ways. One authority defines "morals" as "values" attributable "to a system of beliefs" arising "from something outside the individual [such as a] higher being or higher authority (e.g., society)."[3] "Ethics"

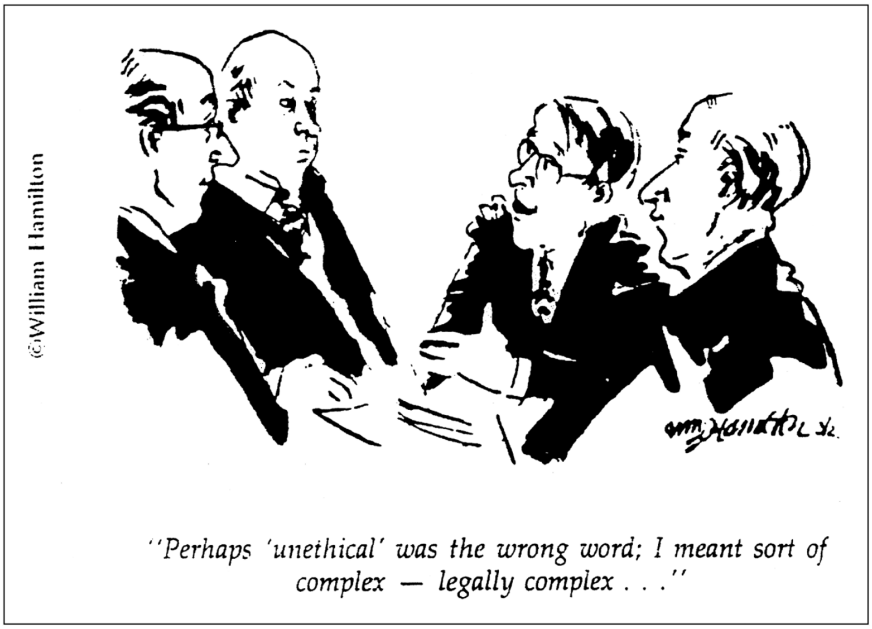
1. Leslie C. Levin, The Ethical World of Solo and Small Law Firm Practitioners, 41 Hous. L. Rev. 309, 368-369 (2004).

2. See, e.g., Merriam-Webster On-Line Dictionary, https://www.merriam-webster.com/dictionary/moral (last visited June 4, 2022), which lists "moral" and "ethical" as synonyms.

3. Frank J. Navran, Defining Values, Morals, and Ethics, Darke County News Online (2011), https://perma.cc/H9UD-M4XZ.

can be defined as a discipline concerned with what is good and bad, right and wrong.[4] Those concerned with *legal ethics* might ask "what ethical values [should lawyers] uphold in light of the profession's unique position in society?"[5]

In this book, we use the term "moral," as opposed to "ethical," to refer to broad questions of good and bad and right and wrong. We use the term "ethics" or "ethical" to refer not to moral philosophy but to "principles of conduct that members of the legal profession are expected to observe in their practice. They are an outgrowth of the development of the legal profession itself."[6] When we ask whether a particular act is "unethical," usually we are asking whether the act would violate the ethics codes that govern lawyers.



"Perhaps 'unethical' was the wrong word; I meant sort of complex — legally complex . . ."

The ethics codes reflect a fairly strong consensus within the legal profession about what lawyers should do when faced with certain kinds of pressures and dilemmas. Most lawyers would say that it is immoral as well as professionally improper to violate a state's code of legal ethics, but many lawyers could identify some rules whose mandates do not correspond with their individual moral judgments. For example, one rule bars litigating lawyers from helping indigent clients facing eviction to pay their rent if the lawyers expect to receive fees from those clients. While providing such assistance would violate the rule and could get a lawyer in trouble, few people would say that it would be immoral to do so.

4. "Ethics," Encyclopædia Britannica, https://www.britannica.com/topic/ethics-philosophy (last visited June 4, 2022).

5. David W. Wilkins, Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism, 58 Law & Contemp. Probs. 241, 243 (1995).

6. "Legal Ethics," Encyclopædia Britannica, http://www.britannica.com/topic/legal-ethics (last visited June 4, 2022).

In addressing how best to solve a client's problem, you should consider all the facts and circumstances, including strategic, practical, economic, and other factors. When contemplating any action that raises a question of legal ethics, you need to ask whether the conduct violates the ethics codes or violates other law, such as criminal law or regulatory law. You then should think about what you believe is "the right thing to do" and whether what is morally appropriate aligns with the guidance in the ethics code or other law.

What difference does it make that lawyers are "professionals"?

The words "profession" and "professional," like the words "ethics" and "ethical," have multiple meanings. Some fields, such as medicine, law, and architecture, are considered "professions," while others are not. Members of many professions are permitted to do work that is forbidden to nonmembers. They must be licensed before they are allowed to ply their trades. To obtain licenses, they must receive extensive technical training. Governing bodies of professional associations develop standards for licensing professionals — and for disciplining licensees who fail to meet the standards.

A critical aspect of what it means to be a professional is a commitment to serving others. The training and licensing of lawyers is intended to promote the delivery of high-quality services, to expand the opportunities for people to have access to justice, and to foster support throughout society for the rule of law. Because the profession is essential to protect democratic government, and because the licensing process gives attorneys a monopoly on the services they provide, lawyers should provide some service to clients who cannot afford to pay. They also should participate in the improvement of the legal system.

To be "professional" means to do an unusually careful job. This sense of the word does not require advanced training, but it does imply a high degree of skill and care. One can do a professional job in any work, not just the work required of members of the "professions." Most people who consider themselves "professionals" have internal standards of performance. They want to perform at a high level at all times, even when no one is watching. They derive internal satisfaction as well as external rewards for doing excellent work.

A person joining a profession adopts a defined role and agrees to comply with articulated standards of conduct. This may lead the individual to make moral choices about his conduct that are justified by reference to the defined role.[7] A criminal defense lawyer, for example, might urge that it is proper to seek to exclude from evidence an exhibit that shows his client's guilt because the

7. See Monroe H. Freedman & Abbe Smith, Understanding Lawyers' Ethics (5th ed. 2016); The Paradox of Professionalism: Lawyers and the Possibility of Justice (Scott L. Cummings ed., 2011); Mary Ann Glendon, A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society (1994); Anthony T. Kronman, The Lost Lawyer: Failing Ideals of the Legal Profession (1993).

police obtained the evidence improperly. Even if the court's ability to discern the true facts is compromised by the exclusion of the evidence, the criminal defense lawyer would argue that his request to exclude is consistent with his role. Some scholars question whether this "role differentiation" is used too easily to justify conduct that otherwise might be viewed as immoral.[8]

Most students are excited by the prospect of joining a profession. Membership offers the opportunity to develop skills and to evolve internal standards of performance, to engage in lifelong learning and improvement, and to serve others.

In law, after the first few years of training, no one but a lawyer knows the details of much of what she does. The external standards play an important role, but they often lie in the background. Lawyers must set most of their professional standards internally, especially those that relate to treatment of clients and the quality of work product.

Joining the legal profession[9] requires mastery of a large and complex body of externally imposed ethical and legal standards. Many decisions are left to the professional discretion of the lawyer who is handling a particular matter, but the lawyer is expected to know which standards are discretionary and which are not. In this course, you'll become acquainted with many external standards, and you'll have opportunities to cultivate and refine your own internal standards.

Lawyers and law students are members of an honorable profession, most of whose members devote themselves to client service and to our system of justice. However, public opinion polls show that most people view lawyers as dishonest and unethical. For example:

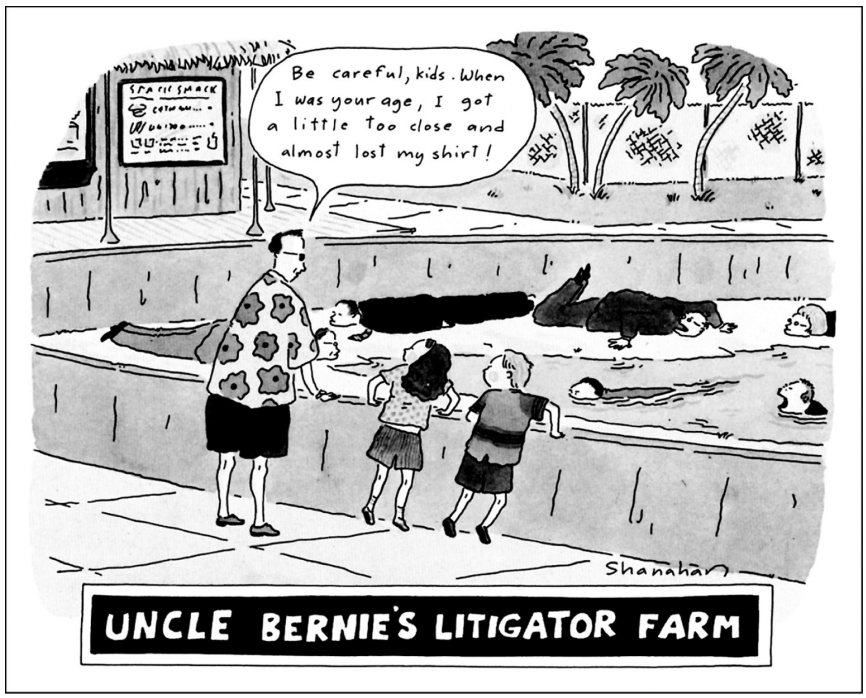
- A Harris poll found that only a quarter of the public would trust lawyers to tell the truth. This was far lower than the percentage who would trust ordinary people (66 percent) and was the lowest percentage for any profession except actors.[10]

8. Richard Wasserstrom, Lawyers as Professionals: Some Moral Issues, 5 Hum. Rts. 1, 7-8 (1975).

9. In this book, we use the phrase "the legal profession." But neither the fact that lawyers aspire to become "professionals" nor the fact that the United States has about 1.3 million lawyers (ABA, *Profile of the Legal Profession* (2021)) necessarily proves that lawyers are part of a profession. Indeed, Professor Thomas Morgan has cogently argued that law is merely a business like many others and that "American lawyers are not part of a profession." He suggests that lawyers are like many other people in business and that the idea of a "legal profession" is a clever fiction perpetuated by the American Bar Association to confer prestige on lawyers and to prevent competition from nonlawyers. Morgan suggests that "lawyers will be able to understand their problems and opportunities only by seeing the world clearly and without the distortion the label 'professional' introduces." Thomas D. Morgan, The Vanishing American Lawyer 19-69 (2010).

10. The Public Thinks Lawyers Lie, Justice Denied, Summer 2007, at 6, quoting Harris Interactive, Doctors and Teachers Most Trusted Among 22 Occupations and Professions, Harris Poll No. 61 (Aug. 8, 2006).

- A 2014 study found that the public rated lawyers highly for competence but ranked them at the bottom of the scale for "warmth."[11]
- In a 2021 Gallup poll, respondents were asked to rate lawyers and other professionals based on the respondents' view of their honesty and ethical standards. Only 19 percent of the public rated lawyers "high or very high" for honesty and ethics. Lawyers ranked far below nurses (81 percent ranked "high or very high" for honesty and ethics), doctors (67 percent), and grade school teachers (64 percent).[12] In 1981, the comparable rating for lawyers was 29 percent.[13]
- A 2013 Pew Research study reported that more than a third of Americans surveyed believed that lawyers contributed "not very much" or "nothing at all" to society.[14]



11. Susan T. Fiske & Cydney Hurston Dupree, Gaining Trust as Well as Respect in Communicating to Motivated Audiences About Science Topics, Proceedings of the National Academy of Sciences 111 (Supp. 4, Sept. 2014), https://perma.cc/9892-KDRF.

12. Gallup, Honesty/Ethics in Professions (2021), https://perma.cc/2K47-35ST.

13. Gallup, Honesty/Ethics in Professions (2018), https://perma.cc/3BE6-7L4J.

14. Pew Research Center, Public Esteem for Military Still High (July 11, 2013), https://perma.cc/WZC8-WLKC.

The public's perception of lawyers is also reflected in the many cartoons (like some of those reproduced in this book) depicting lawyers as avaricious and unethical, and in oft-told jokes such as this one:

> An ancient, nearly blind old woman retained the local lawyer to draft her last will and testament, for which he charged her $200. As she rose to leave, she took the money out of her purse and handed it over, enclosing a third $100 bill by mistake. Immediately, the attorney realized he was faced with a crushing ethical decision: Should he tell his partner?[15]

B. Some central themes in this book

Several themes come up repeatedly in this book. Perhaps they represent some fundamental questions about the practice of law.

1. Conflicts of interest

One common thread is that many ethical problems present conflicts of interest. One might define an ethical dilemma as a situation in which a person notices conflicting obligations to two or more people, one of whom may be herself. Chapters 6 through 10 deal with the body of law that lawyers usually refer to when they talk about "conflicts of interest." Many of the other topics covered in this course also involve conflicts between competing interests or obligations. Suppose a client informs you that he was arrested in the course of planning a terrorist attack. The other conspirators have not been apprehended. He tells you where they are hiding. You have a duty to protect the confidences your client shared with you, but you also may believe you have a duty to your community to help prevent the terrorist attack from taking place. Here's another example. Your firm will pay you a bonus of $66,000 if your annual billings exceed 2,400 hours.[16] You are working on one major memo, billing by the hour. You can achieve a very good result for the client in 30 hours, or you could do the "dissertation" version of the memo and bill 100 hours.

15. Marc Galanter, The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse, 66 U. Cin. L. Rev. 805, 819 (1998).

16. Many law firms tie the amount they pay in bonuses to the number of hours worked and the number of years an associate has been with a firm. In 2020, at the law firm of Sheppard Mullin, a midlevel associate who billed fewer than 1,950 hours that year would have received no bonus, while one who worked at least that many hours received a bonus of $32,000. From there, bonuses increased with billed hours, so that those who billed at least 2,400 hours received bonuses of $78,000. Memo from Guy Halgren, Chairman, Sheppard Mullin, to U.S. Associates, Dec. 14, 2020, reproduced in Kathryn Rubino, No Special Bonuses at This Am Law 100 Biglaw Firm, and Associates Are PISSED, Above the Law, Dec. 15, 2020, https://perma.cc/5KY6-42FA.

Examine each of the topics covered in this course through this "conflict of interest" lens. Sometimes you can see the issues more clearly by articulating the nature of the conflict presented.

2. Truthfulness

Another central theme is the question of whether and to what extent a lawyer is obliged to be truthful. Rule 8.4 prohibits "dishonesty, fraud, deceit [and] misrepresentation." At first blush, this might seem like a very simple issue. In fact, however, many ethical dilemmas involve a conflict about truthfulness. Some of the issues about honesty and deception turn out to involve conflicts between a lawyer's personal interests and an obligation to a client, or a conflict between her duty to a client and to another person. Suppose you are conducting a direct examination of a client in court. Your client surprises you by making a statement that you know is false. You have a duty to advance your client's interests, or at least not to harm them, and a duty to be truthful in dealing with the tribunal. If you tell the judge that your client lied on the stand (or if you persuade your client to correct his testimony), you are being fully truthful. If you conceal the information, however, you might better advance your client's interests. Or consider this example: A prospective client is considering hiring you to handle a large (that is, lucrative) matter involving toxic waste disposal. You once did a very modest amount of work on a matter involving similar facts. The client asks, "Do you have a lot of experience in this area?" A truthful answer probably will result in the client seeking representation elsewhere.

Many problems raise questions about whether a lawyer can lie or mislead someone, withhold information, shade the truth, or sit quietly and watch a client mislead someone. In an ideal world, we might aspire to unvarnished truthfulness in dealings with others, but the obligations of an advocate present many situations in which withholding information seems justifiable.

3. Lawyers' duties to clients versus their duties to the justice system

Lawyers differ in their beliefs about the appropriate role of lawyers in society. Some lawyers see themselves as important cogs in the "adversary system" machine. By seeing their role almost exclusively as protecting and advancing their clients' interests, they place themselves at the "client-centered" end of the spectrum. The justification for this narrow view of lawyers' duties is strongest for criminal defense lawyers who represent indigent defendants. If substantial resources are available for the prosecution but few for the defense, lawyers might properly focus their energies on protecting their clients. Criminal defense lawyers in particular often urge that by focusing on the representation of their clients, they *are* contributing to the improvement of the justice system.

At the other end of the spectrum are lawyers who believe their primary responsibility is to protect our system of justice and to ensure that proceedings are fair, that participants play by the rules, and so on. Lawyers who become judges or who work for judges are in this group. To a lesser degree, so are lawyers who work for government agencies, including prosecutors. In addition, some lawyers in private practice and in nonprofit organizations have a broad view of their public responsibilities. Sometimes lawyers choose the fields in which they work based on ideas about their roles. Some, for example, spend their lives trying to improve access to justice for disadvantaged individuals or groups. Sometimes this sense of responsibility affects lawyers' choice of work. A "public interest" lawyer might become a public defender, might pursue class action litigation rather than individual cases, or might work on legislation rather than litigation to produce broader results.

Most lawyers probably see their responsibilities as falling somewhere between these two poles. Most lawyers take very seriously their duties to their clients. At the same time, they notice aspects of their work that might impact broader groups of people. Many ethical dilemmas involve some conflict between the interests of a client and the interests of a larger community. This theme of the public interest versus clients' individual interests pops up throughout the text.[17]

4. Lawyers' personal and professional interests versus their ethical and fiduciary obligations

It is in the nature of professional life that obligations to clients conflict with a lawyer's personal interests and desire for professional advancement. A lawyer who sought to "give her all" in service of a client might, at least for a time, sacrifice spending time with her family. A lawyer who has worked hard for many months might sorely need a vacation, but taking one would require setting aside client interests for that time. A lawyer might encounter a conflict between the duty to protect confidential information and a felt need to confide in his partner about the burdens of the work. A lawyer under pressure to generate enough fees to pay the staff or enough hours to earn a bonus might feel pressure not to represent an indigent client. Such conflicts between duty to clients and needs for income, work-life balance, and self-care are so commonplace in law practice that they often are not acknowledged as ethical dilemmas. Throughout the text,

17. Chapter 2, for example, describes a lawyer who did not fulfill his duty to report the misconduct of another lawyer because his client did not want him to make a report. In Chapters 4 and 11, we discuss some circumstances in which a lawyer might have confidential information that, if revealed, could prevent or mitigate harm to others or could help to ensure a just outcome in litigation. In Chapter 12, we ask whether a lawyer who represents a person injured by a dangerous product should agree to keep the discovery documents that he obtained from the defendant secret in exchange for a good award to his client, even though revelation of those documents might cause other people to avoid buying the product or might stimulate a government investigation.

we raise these questions because, like other conundrums, they benefit by conscious analysis.

5. Self-interest as a theme in regulation of lawyers

In the study of the rules that govern lawyers, especially the ethics codes, one often sees evidence of the drafters' concern for their own or other lawyers' interests. These concerns tend to predominate over attention to the interests of clients, adversaries, the public, or those who cannot afford to hire lawyers. For a vivid example, look at ABA Model Rule 1.5(b), which explains lawyers' duty to inform clients about the hourly rate basis of fees.

> The scope of the representation and the *basis or rate* of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably* in writing, before or *within a reasonable time* after commencing the representation, *except* when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

We italicize the various qualifiers in this rule. A client-centered rule might require disclosure of the amount to be charged before the client hires the lawyer. This rule requires only disclosure of the "basis or rate" of the fee and expenses. The rule does not specify what must be disclosed, although the comments offer some details on disclosure of what expenses will be separately billed. This rule usually is understood to require disclosure of how much a lawyer plans to charge for each hour worked. It does not require disclosure of whether the lawyer plans to bill only for high-quality research and advocacy time, or whether the lawyer also intends to bill at that rate or some other rate for time spent doing administrative work, "thinking" time, airplane time, or time spent chatting with the client about their children's sporting events. (There is wide variation in lawyer billing practices.) Nor need the lawyer disclose how many hours the lawyer thinks the new matter might require. So a lawyer might comply with the rule but leave the client knowing almost nothing about the fees to be charged.

But there are more hedges. Must the lawyer make this paltry disclosure before the client hires the lawyer? No. The rule requires a lawyer only to inform the client of his hourly rate "before or within a reasonable time after" the lawyer begins the work. Must the lawyer make the disclosure in writing so that the client has a record of what was said? The rule says no. Writing is preferred but not required. Does the lawyer have to make a fee rate disclosure at the beginning of each matter undertaken for a client? No. This disclosure is required only if the lawyer has not regularly represented the client on the same basis.

The rule also requires a lawyer to tell the client if the basis or rate of the fee changes. But the rule does not require the lawyer to consult with the client to

get permission to raise his rates. Nor does the rule even require advance notice of the increase. A more consumer-oriented rule would require client consent before an increase would take effect. But not so for lawyers.

Why is this rule so hedged? One part of the answer is that it was drafted mainly by lawyers and then, in the states that adopted it, approved through a process in which most or all of the participants were lawyers. Perhaps we should not be surprised that many lawyers want maximum latitude and minimum regulation of their financial relationships with their clients.

This rule provides a vivid example of how lawyers' self-interest is expressed in the law governing lawyers. When reading rules and opinions, watch for other examples of rules that give primary attention to the interests of lawyers rather than of clients.

6. Lawyers as employees: Institutional pressures on ethical judgments

One last theme that comes up often in the text involves lawyers as employees. Many ethical dilemmas are caused or exacerbated by conflicts between a lawyer's obligations under ethics rules or other law and the lawyer's felt duties to her employer. Lawyers often feel duty-bound to follow instructions from more senior lawyers, even if these instructions seem wrong. In addition, lawyers tend to absorb the ethical norms of the institutions that employ them, even if what is going on around them is inconsistent with published or generally accepted professional norms.

Professor Kimberly Kirkland did an empirical study in which she interviewed 22 large-firm lawyers about the structure of large firms and how these structures influence the ethical awareness of their associates. She concluded that as lawyers "climb case hierarchies and negotiate their firms' management bureaucracies . . . they look to the lawyers they are working for and with, and those who matter to them at the time, as the source of norms," including ethical norms. The individuals from whom the associates absorb professional norms are not the "elite partners" but the lawyers who directly supervise the associates or who manage the firm.[18]

Professor Kimberly Kirkland

Lawyer-employees may feel obliged *not* to share information about the misconduct of others in their firms or agencies, information that the rules may require to be reported. New lawyers are often well aware

18. Kimberly Kirkland, Ethics in Large Firms: The Principle of Pragmatism, 35 U. Mem. L. Rev. 631, 710-711 (2005).

of the ethics rules. They may know what the rules say and notice work that seems inconsistent with the rules' requirements. But new lawyers often have little authority within the institutions where they work, and they have strong incentives to be loyal and not to criticize the conduct of their superiors. If they do raise questions about ethical problems, they may face retaliation through loss of raises, bonuses, attractive assignments, or promotions. They may even get fired.

In evaluating many problems in this text, you will encounter ethical dilemmas that require action. In considering what to do, you will often find yourself caught between your duties as a member of the profession and your obligations to your employer. By exploring these problems, you will become more adept at distinguishing those that are serious enough to require action, even when that action might be considered disloyal. You also will develop a repertoire of methods by which you might fulfill your duties to the profession without placing yourself at risk of retaliation.

7. The changing legal profession

The legal profession is undergoing a period of profound change, brought about by globalization, changes in technology, and the economics of law practice. The first chapter and the last two chapters of this book provide a partial portrait of the legal profession: what it aspires to be, how it has evolved over time, and current trends that will profoundly affect the next generation of lawyers. Chapter 1 offers a short history of the American legal profession. Chapter 13 explores the changes that are currently rocking the private practice of law. Chapter 14 discusses the vast unmet need for legal services of poor and middle-class individuals, in contrast to the voluminous assistance being provided by the profession to wealthy individuals and corporations. It explores the aspirations of lawyers and bar organizations to serve public needs, and the institutions through which the profession tries to do so.

C. The structure of this book

Our primary focus in organizing this book is on the interests and needs of the law students who read it. We have ordered the topics based on what we believe law students need to learn first about the law governing lawyers. The book first addresses issues that are of pressing concern to law students or that may arise in the course of externships, clinics, or part-time work. We begin Chapter 1 with a brief history of the legal profession and of legal education. Then we take up admission to the bar, a topic of great urgency for many students. We end the chapter by examining the profession's record on diversity. We proceed in

Chapter 2 explains the sources of the law that governs lawyers and provides an overview on lawyer liability in which we look at the disciplinary system, at legal malpractice liability, and at legal protections for subordinate lawyers.

Chapter 3 begins with how lawyer-client relationships are formed and discusses the duties that lawyers owe their clients, including the duties of competence, diligence, honesty, and communication. This chapter also examines the allocation of decision-making authority between lawyers and clients. It concludes with a discussion of how lawyer-client relationships end.

In Chapters 4 and 5, we turn to the duty to protect confidences and the attorney-client privilege. Chapter 4 opens with a set of questions that confront many law students every day. "If I'm working on a client matter, can I talk about it outside the office? How much can I say? What if I'm in a public place?" Law students do not create autonomous lawyer-client relationships, but most law students do work on client matters, so these are some of the first ethical questions that students encounter.

Chapters 6 through 10 explore the law on conflicts of interest, which involves questions of confidentiality and of loyalty. The law of conflicts, which is probably the most complex material in the book, includes ethical rules, liability rules, and disqualification rules. Chapter 6 describes the different types of conflicts and introduces the subject of concurrent conflicts between the interests of two or more present clients. Chapter 7 examines conflicts between the interests of present or prospective clients and past clients. Chapter 8 discusses examples of concurrent conflicts in particular practice settings. For example, we examine issues for lawyers employed in general counsel's offices of corporations and those who defend persons accused of crimes.

Chapter 9 addresses conflicts between the interests of lawyers and their own clients, most of which involve money. It covers issues relating to fee arrangements and billing practices, the rules governing care of client money and property, and other issues that raise conflicts between the interests of lawyers and clients. Chapter 10 discusses conflicts issues for present and former government lawyers and the ethical responsibilities of judges, law clerks, arbitrators, and mediators.

Chapters 11 and 12 look at lawyers' duties to people who are not their clients. They explain the obligations of truthfulness to courts, adversaries, witnesses, and others. Chapter 11 is primarily concerned with the conflict between the duty of lawyers to advocate for their clients and their duty to be candid with adversaries, courts, and other tribunals. Chapter 12 deals with duties that lawyers owe to other people, such as opposing counsel, witnesses, and other "third parties." Chapter 12 includes a section on the special duties of prosecutors.

Chapter 13 discusses the business of private law practice, including the rules on advertising by lawyers, the limitations on interstate law practice, and the

prohibition of the practice of law by unlicensed people. This chapter also offers a glimpse at how law firms are changing in the twenty-first century as a result of technological innovation and globalization.

Chapter 14 reveals the bar's professed desire to serve the entire public, including those who cannot afford legal services, but shows that that goal is far from being met. It documents that while some lawyers do provide services to those in need, including through pro bono representation, governmental support is also necessary to meet public needs.

D. The rules quoted in this book: A note on sources

This book quotes the text of numerous "rules of professional conduct" and their "comments." The American Bar Association (ABA) drafts and issues Model Rules of Professional Conduct and recommends that state courts adopt them as law. Most state courts have adopted the ABA's Model Rules, often with several variations reflecting local policy. The state with the fewest departures from the Model Rules is Delaware, largely because E. Norman Veasey, the chief justice of Delaware when Delaware adopted its rules, chaired the ABA committee that drafted the most recent major rewrite of the rules in 2002.[19] Most law school courses in professional responsibility focus on the Model Rules, not a particular state's variations, because students at most law schools will practice in many different states. The Model Rules are taught as a proxy for the state rules. In addition, all the states or territories except for Wisconsin and Puerto Rico require bar admission applicants to take the Multistate Professional Responsibility Examination (MPRE), which tests students on the Model Rules, not on the state variations.[20] One goal of many professional responsibility courses is to prepare students for the MPRE.

19. In fact, with only a few exceptions (most notably Rules 1.5, 3.5, and 3.9), the text of the rules in this book is the text of the Delaware Rules of Professional Conduct, which happens to correspond to the text of the Model Rules. So if you happen to be studying at Widener University's Delaware campus, you are actually studying your own state's rules.

20. Nat'l Conference of Bar Examiners, Jurisdictions Requiring the MPRE, http://www.ncbex.org/exams/mpre/ (last visited June 4, 2022). "The MPRE is based on the law governing the conduct and discipline of lawyers and judges, including the disciplinary rules of professional conduct currently articulated in the American Bar Association (ABA) Model Rules of Professional Conduct, the ABA Model Code of Judicial Conduct, and controlling constitutional decisions and generally accepted principles established in leading federal and state cases and in procedural and evidentiary rules." Nat'l Conference of Bar Examiners, Preparing for the MPRE, http://www.ncbex.org/exams/mpre/preparing/ (last visited June 4, 2022).

E. Stylistic decisions

We use the following stylistic conventions:

- The use of pronouns in English is changing rapidly because of the increasing recognition that gender is not binary but is on a spectrum. In previous editions we alternated references to lawyers, judges, and clients as either "him" or "her," but in this edition we also from time to time include "they" and "their" when referring to a single person.
- We indicate in the text which problems are based on real cases. In those problems, we change the names of the lawyers, clients, and other actors.
- In excerpts from court opinions and articles, we eliminate citations and footnotes without inserting ellipses. We use ellipses where we omit text.
- In evaluating each problem, assume that the relevant jurisdictions have adopted the Model Rules. We do not repeat this point before each problem.
- When we refer to the "Restatement" without specifying a different Restatement (such as the *Restatement of Contracts*), we mean the American Law Institute's *Restatement of the Law Governing Lawyers (Third)* (2000).
- When we cite sources that are found easily by searching online (e.g., legal and nonlegal periodicals, ethics opinions, and ABA publications), we usually cite only the author, title, source, and date rather than providing the URL. For other online sources, we use permalinks where possible to prevent the problems that result when websites are taken down or moved to different addresses. These practices allow us to reduce the length of the footnotes. Note that print versions of articles found online often appeared one day earlier or later and sometimes with slightly different headlines.
- In tables that provide the language and brief explanations of ethical rules, the explanations are our own, not those of any official source.

CHAPTER 1

The Legal Profession: Bar Admission, History, and Diversity

A. Admission to the bar

1. Changes in bar admission requirements over time
2. Contemporary bar admission requirements
3. The bar examination
4. The character and fitness inquiry

B. History and development of the U.S. legal profession

1. Pre-revolutionary America
2. The nineteenth and twentieth centuries
3. History of American legal education

C. Diversity and discrimination in the legal profession

1. Women lawyers
2. Lawyers of color
3. Lesbian, gay, bisexual, transgender, and queer lawyers
4. Lawyers with disabilities
5. Lawyers from low-income families
6. Other bases of discrimination in the legal profession

The history of admission to the American legal profession is partly one of exclusion. American lawyers and their newly organized bar associations initially regulated who could practice law as a way to establish and maintain high professional standards. Prominent lawyers and bar organizations sought to protect clients from unscrupulous lawyers and to ensure that admitted lawyers were qualified. But the history of these early regulatory efforts is replete with evidence of bias against women, people of color, immigrants, Catholics, Jews, and others who were not White Protestant men. The regulators also sought to protect their turf and to limit competition.

In this chapter, we begin with a look at contemporary standards for admission to the bar. This has practical importance for current law students, who will soon encounter the licensing process.

The second part of the chapter summarizes the history of the American legal profession and of legal education. The third part of the chapter focuses on the initial exclusion of various groups from law practice. We look at the process by which members of these groups challenged and overcame barriers to entry. We also report on the growing diversity of the profession and on persistent problems of employment discrimination within it.

A. Admission to the bar

1. Changes in bar admission requirements over time

Starting in the nineteenth century, the state bars gradually increased the educational requirements for those seeking licenses to practice law.[1] In the colonial era, law schools didn't exist. A person who wished to become a lawyer first had to apprentice with another lawyer. In the middle of the nineteenth century, many law schools were established, and legal education began to take root in American legal culture.[2] By 1860, all but two states had established bar examinations, but the questions were administered orally and the process was fairly informal.[3] Only nine states required a defined period of apprenticeship as a precondition of admission to the bar.[4]

In the late nineteenth and early twentieth centuries, one could practice law without law school training. During this period, many states began to require applicants to take written bar examinations.[5] As of 1900, 80 to 90 percent of

1. See generally Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s (1983).
2. Id. at 20-22.
3. Id. at 25.
4. Id.
5. Id.

lawyers had never attended college or law school.[6] Neither was college a prerequisite to law school. Some law students never even finished high school.[7] The majority of lawyers qualified for bar admission simply by completing a three-year apprenticeship.[8]

Between 1870 and 1920, the legal education curriculum expanded in many universities from one year to three years. Only later did law become a course of graduate study.[9] From 1890 to 1930, the number of law schools tripled.[10] The ABA urged that a law school degree should be mandatory for bar admission.[11] By 1941, graduation from an ABA-accredited law school was a prerequisite to sitting for the bar exam in all but a few states.[12]

Over time, some things have changed. More than 20 states still require that all applicants for admission to the bar have graduated from an ABA-accredited law school.[13] There are more than 30 non-ABA accredited law schools.[14] Most states make the path to bar admission easier for those who have graduated from accredited law schools, but they allow a person who attended an unaccredited law school to sit for the bar if the person has been admitted in another state and has completed a specified number of years of practice. Seven states still allow people who have completed a course of law office study (instead of law school) and who satisfy various other requirements to sit for the bar. Six states permit applicants to take the bar exam after they complete a course of study in a correspondence or online law school.[15]

Proponents of law school accreditation urge that the accreditation process helps to protect the public from being represented by lawyers whose training is inadequate. There have been concerns about the quality of education offered by some of the unaccredited schools, especially those that report low bar pass rates.

6. Robert Stevens, Democracy and the Legal Profession: Cautionary Notes, Learning & L., Fall 1976, at 15.

7. Id. at 38.

8. Lawrence M. Friedman, A History of American Law 238 (3d ed. 2005).

9. Stevens, supra n. 1, at 36-37.

10. Herb D. Vest, Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America, 50 J. Legal Educ. 494, 497 (2000).

11. The ABA pushed the states to require attendance at law school as a prerequisite to bar membership. Records of ABA meetings show that the organization's goals were (1) to raise standards; (2) to restrict the numbers of lawyers; and (3) to keep out Blacks, Jews, and other immigrants. Stevens, supra n. 1, at 16.

12. See Vest, supra n. 10, at 497.

13. Nat'l Conference of Bar Exam'rs et al., Comprehensive Guide to Bar Admission Requirements 2020, https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf (last visited May 11, 2022). "ABA-accredited" is a shorthand. The accrediting body for law schools recognized by the U.S. Department of Education is the 24-person Council of the ABA Section of Legal Education and Admissions to the Bar. The Council is independent of the ABA. Legally, then, the accreditation is not done by the ABA itself. ABA, Section of Legal Education and Admissions to the Bar, https://www.americanbar.org/groups/legal_education/ (last visited May 12, 2022).

14. Law School Admission Council, Non-ABA Approved Law Schools, https://www.lsac.org/choosing-law-school/find-law-school/non-aba-approved-law-schools (last visited May 11, 2022).

15. Id.

On the other hand, compliance with the accreditation requirements imposes significant costs on law schools, which leads to higher tuitions. The system advantages institutions that have adequate resources to implement the often-costly requirements for accreditation and makes it difficult for lower-cost law schools to obtain approval.[16] This imposes a barrier to entry to students who can't afford the high cost of attending accredited schools.[17]

2. Contemporary bar admission requirements

In most states, the rules for admission to the bar are established by the state's highest court. The licensing process is organized by state, so that a lawyer who wishes to practice law in New York and New Jersey must seek two separate bar admissions. In most states, the basic requirements for bar admission are

- graduation from an accredited undergraduate college (usually required for admission to law school);
- graduation from a law school that meets the state's educational standards;
- submission of an application for admission to the bar;
- a finding that the applicant is of good moral character and is fit for the practice of law; and
- a passing score on the bar examination administered by the state.[18]

In addition, New York State requires applicants for admission to the bar (other than those admitted in other states) to have performed at least 50 hours of pro bono legal service.[19]

In most states, a bar applicant must be a U.S. citizen or lawful permanent resident. In recent years, however, at least eight states — California, Colorado, Florida, Illinois, Nebraska, New Jersey, New York, and Wyoming — have changed their rules to allow some immigrants who are not fully documented to be admitted to the bar.[20]

16. See Editorial Article, What Is Going on with Western State and the ABA? An Examination of Western State University's Bid to Obtain American Bar Association Approval, 31 W. St. U. L. Rev. 265 (2004) (reviewing the ABA law school accreditation process and examining how it is applied).

17. See generally John S. Elson, The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to Our Democratic Ideology, 15 St. John's J. Legal Comment. 269 (2001).

18. See ABA, Section of Legal Educ. & Admissions to the Bar, Overview of Bar Admissions Information (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview/.

19. N.Y. Ct. App. R. 520.16.

20. Nat'l Conference of State Legislatures, Professional and Occupational Licenses for Immigrants, Jan. 17, 2017, https://www.ncsl.org/research/immigration/professional-and-occupational-licenses-for-immigrants.aspx (contains a chart detailing the changes in each state); Iris Hentze, States Move to Reduce Licensing Barriers for Immigrants, Nat'l Conference of State Legislatures (July 21, 2021), https://www.ncsl.org/research/labor-and-employment/states-move-to-reduce-licensing-barriers-for-immigrants-magazine2021.aspx (listing Colorado, New Jersey, and New Mexico; however, New Mexico's law does not apply to attorneys).

Once admitted to a state bar, a lawyer must fulfill various requirements to maintain his admission. These may include a certain number of hours of continuing legal education every year, payment of annual dues, membership in a state bar association, and keeping or submitting records relating to the operation of a law office. A few states still require each member of the bar to maintain an office in the state, but most no longer require this.[21]

If a lawyer has been admitted to practice in one state, the lawyer may gain admission in some other states without taking their bar examinations, sometimes only after a specified number of years of practice. A lawyer who seeks admission to litigate only one case may be admitted *pro hac vice* by association with a lawyer admitted in the state. Most federal courts admit any licensed lawyers who apply for admission to appear before them.[22]

3. The bar examination

Each state administers a bar examination to applicants for admission, though some states allow candidates to "waive in" to the bar if they pay a fee, have practiced for a specified number of years in another state, and satisfy character and fitness requirements.[23]

Two-thirds of the state bars require the Uniform Bar Examination (UBE), a set of multistate tests produced by the National Conference of Bar Examiners. The UBE is a two-day exam that includes the Multistate Bar Examination (MBE), six Multistate Essay Examination (MEE) questions, and two Multistate Performance Test (MPT) tasks.[24] Every jurisdiction except Wisconsin and Puerto Rico also requires passing the separately administered Multistate Professional Responsibility Examination (MPRE), and many states also require a "jurisdiction-specific" component of the exam.[25] The MBE and the MPRE consist of multiple-choice questions. As of 2020, the MBE is required in all states and territories except Louisiana and Puerto Rico. Connecticut and New Jersey do not require the MPRE for applicants who have completed a law school course in professional responsibility.[26]

21. Lisa Needham, States That Require a Bona Fide Office, Lawyerist.com, Aug. 26, 2015, http://web.archive.org/web/20190325140516/https://lawyerist.com/states-require-bona-fide-office/.

22. Restatement § 2, comment b.

23. Nat'l Conference of Bar Exam'rs & ABA Section of Legal Educ. & Admissions to the Bar, Comprehensive Guide to Bar Admission Requirements 42-47 (2020), https://www.ncbex.org/assets/BarAdmissionGuide/CompGuide2020_021820_Online_Final.pdf [hereinafter NCBE & ABA]. In addition, graduates of Marquette University Law School and the University of Wisconsin Law School are granted a "diploma privilege" and are admitted to the Wisconsin bar without examination. Wis. Sup. Ct. R. 40.03.

24. NCBE & ABA, supra n. 23, at 18.

25. Id., NCBE, Multistate Professional Responsibility Examination, https://www.ncbex.org/exams/mpre/ (last visited June 11, 2022).

26. NCBE & ABA, supra n. 23, at 26.

Most candidates prepare for the bar exam by taking a multiweek cram course from one of a few dozen private companies.[27]

"Attention, please. At 8:45 A.M. on Tuesday, July 29, 2008, you are all scheduled to take the New York State Bar Exam."

Critics charge that the bar examination favors those who can afford the time and money for a bar review course, tests nothing that has not already been tested by the law schools, and discriminates against minorities and disabled persons.[28] Professor Deborah Jones Merritt observes:

> The bar exam is broken: it tests too much and too little. . . . [T]he exam forces applicants to memorize hundreds of black-letter rules that they will never use in practice. . . [but] licenses lawyers who don't know how to interview a client, compose an engagement letter, or negotiate with an adversary. . . . We haven't shown that the exam measures the quality (minimal competence to practice law) that we want to measure.[29]

27. See Findlaw, How to Pick a Bar Review Course, https://lawstudents.findlaw.com/the-bar-exam/how-to-pick-a-bar-review-course.html (last updated May 30, 2019).

28. See, e.g., The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification, 29 Law & Soc. Inquiry 547 (2004); see Bartlett v. N.Y. Bd. of Law Exam'rs, 156 F.3d 321 (2d Cir. 1998) (New York bar exam administered without accommodations to reading-disabled applicant violated Americans with Disabilities Act).

29. Deborah Jones Merritt, Validity, Competence and the Bar Exam, AALS News, Spring 2017.

States continue to require the exam. Each state devotes substantial resources to administering the bar examinations and reviewing applicants for admission.

The ABA looks at bar pass rates in considering whether to accredit each law school. In 2019, the Council of the ABA Section of Legal Education and Admission to the Bar raised the required bar passage rate to maintain accreditation. Standard 316 requires that 75 percent of the graduates of each law school pass the bar exam within two years after graduation. Schools whose graduates' pass rate is lower have at least two years to come into compliance.

During the 2019 amendment process, some critics urged that this rule would adversely impact law schools that enroll large numbers of students of color.[30] In response to these concerns, the ABA promised to collect and publish data analyzing bar passage rates by race and ethnicity to assess the impact created by the new requirement. The first few years of those data are now available.[31] They show a significant difference in pass rate between White and non-White bar applicants. For example, 88 percent of White graduates of the class of 2021 passed the bar exam on their first try, compared to 66 percent of Black graduates.[32]

The data for 2020 and 2021 include only bar exams that were administered online due to the COVID-19 pandemic. The online bar required that software continually scan to ensure the applicant was seated before the computer or else it would stop the user's test. However, this technology does not detect black or brown faces as easily as white ones.[33] The use of this software may have disproportionately impacted non-White test takers.

4. The character and fitness inquiry

How does a bar admissions authority evaluate the character and fitness of an applicant for admission to the bar? The point, obviously, is to assess whether the applicant will practice law in an honest and competent manner. This is a difficult exercise in prediction. If someone did something dishonest last year, will she do something dishonest next year? What should be the scope of the inquiry? What is relevant to the assessment of the "moral character" of a lawyer? Suppose the person has radical political views, an unusual lifestyle, or peculiar personal habits? What if the applicant has had trouble repaying debts, plagiarized an article while in college, was arrested in a political protest,

30. ABA, Council Enacts New Bar Passage Standard for Law Schools, https://perma.cc/GUQ6-SSZU.

31. ABA, Section of Legal Educ. & Admissions to the Bar, Summary Bar Pass Data: Race, Ethnicity, and Gender: 2020 and 2021 Bar Passage Questionnaire, https://perma.cc/STX3-CDSA.

32. Id. at 1, "2021 BPQ Aggregate Data."

33. See Khari Johnson, ExamSoft's Remote Bar Exam Sparks Privacy and Facial Recognition Concerns, Venture Beat (Sept. 29, 2020), https://perma.cc/Q3X2-RRQ6; Sam Skolnik, Civil Rights Group Threatens Suit Over Bar Exam Facial Scans, Bloomberg Law (Feb. 10, 2021), https://perma.cc/E8PP-H8CR; Joe Patrice, Online Bar Exams Rely on Facial Recognition Tech and Guess What? It's Still Racist!, Above the Law (Sept. 18, 2020), https://perma.cc/9UV2-C7BB.

pled guilty to shoplifting, or has a history of mental illness? The evaluation is inevitably subjective, so the political or moral biases of those evaluating candidates could be reflected in admissions decisions. Some character and fitness questionnaires ask broad questions that require disclosure of sensitive personal information that should not be relevant to the individual's qualifications for admission to the bar.

a. Criteria for evaluation

Most states require bar applicants to fill out an application. Applicants may need to assemble and submit a wide range of information, including residence and employment history, criminal records, traffic records, credit history, records of any litigation in which they have been parties, and other information. The National Conference of Bar Examiners' standard application form, which is used in many states and which runs 36 pages, asks for the following information, among many other things.

> Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, or allowed to resign in lieu of discipline, otherwise subjected to discipline or requested to discontinue your studies by any law school? . . .
>
> List every permanent and temporary physical address where you have resided for a period of one month or longer for the last ten years or since age 18, whichever period of time is shorter. . . .
>
> List your employment and unemployment information for the last ten years. . . . In addition, list all law-related employment you have ever had. . . . [E]mployment encompasses all part-time and full-time employment, including self-employment, externships, internships (paid and unpaid), clerkships, military service, volunteer work, and temporary employment. . . . Provide a brief, but specific, description of your activities while unemployed. . . .
>
> Have you ever been a named party to any civil action? . . . Note: Family law matters (including divorce actions and continuing orders for child support) should be included here. **If Yes**, include a copy of the associated pleadings, judgments, final orders and/or docket report.
>
> Have you ever been cited for, charged with, or convicted of any violation of law other than a case that was resolved in juvenile court? **Note:** Include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside. . . .
>
> Have you ever been cited for, arrested for, charged with, or convicted of any moving traffic violation during the past ten years? . . . Include matters that have been dismissed, expunged, subject to a diversion or deferred prosecution program, or otherwise set aside. . . .

> Have you had any debt that has been more than 120 days past due within the past three years that was not resolved in bankruptcy?. . .[34]

Most states ask some questions about abuse of drugs or alcohol and/or treatment for substance abuse.[35] All states ask questions about past criminal conduct. Some states ask not only about criminal convictions but also about arrests or citations.[36] Some states include broad requests to reveal any moral indiscretions. The South Carolina questionnaire, for example, asks:

> Are there any other facts not disclosed . . . concerning your background, history, experience, or activities which in your opinion may have a bearing on your character, moral fitness, or eligibility to practice law in South Carolina and which should be placed at the disposal or brought to the attention of the examining authorities? If yes, explain fully.[37]

Some states ask applicants to have lawyers write them letters of recommendation for admission. Most states require that the dean of the law school attest to the moral character of each graduate who seeks admission. Some state bars conduct personal interviews with all applicants, while others interview only those whose responses raise questions. An application that is believed to raise significant problems of moral character may trigger a bar investigation and a formal hearing on the applicant's qualifications for admission.

Is the current system for evaluating character and fitness fair, or does it work to exclude certain groups from bar admission?

Some have criticized the moral character inquiry as an overly broad fishing expedition into the background of applicants. Historically, the process was used to restrict admission of immigrants, people of color, and other "undesirable" applicants, such as those with radical political views. Some states have made efforts to make the inquiry more fair.[38] Even so, most state bars do not disclose

34. Nat'l Conference of Bar Exam'rs, Sample NCBE Character and Fitness Application, https://perma.cc/Z3E3-AS85.

35. Stephanie Denzel, Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories, 43 Conn. L. Rev. 889, 908 & n. 27 (2011) ("thirty-nine states ask specifically about a diagnosis of or treatment for substance abuse," but many of those limit the inquiry about substance abuse currently affecting the applicant).

36. The Florida bar, for example, asks applicants for "information about arrests, charges or accusations of violation of a law or ordinance (including traffic violations), reporting dates, law enforcement agency, explanation of event, and final disposition. If your arrest records are sealed, you must petition the appropriate court to unseal those records." Fla. Bd. of Bar Exam'rs, Checklist to File a Bar Application, https://www.floridabarexam.org/__85257bfe0055eb2c.nsf/52286ae9ad5d845185257c07005c3fe1/0c7a2e6a8a1cc31285257c0c006fcf0e (last visited June 6, 2022).

37. S.C. Judicial Dep't, Bar Application, question 18, https://barapplication.sccourts.org/Documents/SamplePartB.pdf (last visited June 6, 2022).

38. Leslie C. Levin, Christine Zozula & Peter Seligman, The Questionable Character of the Bar's Character and Fitness Inquiry, 40 Law & Soc. Inquiry 51 (2015).

which types of conduct give rise to inquiries. The nature of the inquiry gives unfettered discretion to the biases of the examiners. The bar admissions authorities are asked to assess applicants' mental health even though few, if any, members of the admissions committees are trained in the mental health professions. The questionnaires tend to ask numerous questions that may be burdensome to answer but that usually do not lead to investigation.

The character and fitness inquiry is predicated on a mostly untested assumption that the bar can protect the public from dishonest or otherwise untrustworthy lawyers by examining the past behavior of applicants. It used to be thought that people had stable moral traits that could predict their future conduct. In the last 50 years, however, many studies have concluded that situational factors have a greater impact than character traits in determining how people respond to a particular situation. One study of students at Princeton's Theological Seminary, for example, showed that when people walked by a person slumped over in a doorway, two-thirds of those *not* in a hurry would try to help. But 90 percent of subjects who *were* in a hurry walked by the distressed person without trying to help. Being in a rush was apparently more important than any preexisting character trait in determining conduct. These days, most experts see behavior as a product of both character traits and the particular situation.[39] But the character and fitness bar inquiry remains focused on the elusive notion of stable character traits.

A study by Professor Leslie Levin and others examined the character and fitness questionnaires of more than 1,300 applicants to the Connecticut bar and then studied their subsequent disciplinary records. The authors noted that the overall risk of discipline was very low (only 2.5 percent) but found a "slight" increase in the risk of later discipline of lawyers who had reported "having delinquent credit accounts, having been a party to civil litigation (excluding divorce), higher student loan debt, more traffic violations, and a history of a diagnosis or treatment for psychological disorders." They found a lesser risk of discipline among lawyers who had higher law school grades, had attended prestigious law schools, or were female.[40]

Much scholarship criticizes the character and fitness process as subjective, sometimes discriminatory, and very unpredictable.[41] The absence of clear

39. Deborah L. Rhode, Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings, 43 Law & Soc. Inquiry 1027, 1030 (2018) (also referencing the famous experiments by Stanley Milgram in which subjects directed to administer electric shocks to another person tended to follow orders).

40. Levin et al., supra n. 38, at 54. Disciplinary action generally occurs only if someone files a complaint, so conduct that could be a basis for discipline may never come to the attention of the disciplinary authorities. Many disciplinary agencies pursue only a small percentage of the complaints filed because of staffing and funding limitations.

41. See, e.g., Jon Bauer, The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act, 49 UCLA L. Rev. 93, 95 (2001); Alyssa Dragnich, Have You Ever . . . ? How State Bar Association Inquiries into Mental Health Violate the Americans with

Professor Deborah L. Rhode

standards for fitness to practice results in a strikingly idiosyncratic body of case law. For example, five states prohibit all felons from being admitted to the bar, while others have no such rule. No greater consistency is evident in how past misdemeanor offenses are treated. In this era of mass incarceration, when 700,000 people are released from prison each year, rules restricting admission of people with criminal records disqualify a large segment of the population and impact people of color disproportionately.[42] Professor Deborah Rhode points out that the character screening process is both too early (before candidates have encountered the pressures of practice) and too late (after they have borrowed and spent hundreds of thousands of dollars on legal education).[43]

The following table gives examples of bar admission decisions that involved questions about moral character. Some of the facts most relevant to the court's decision appear in italics, and judgments are shown in boldface. The table provides a sample of the issues that come up in moral character inquiries. This is not a random or a representative sample but a selection of interesting cases.[44]

While several of the cases summarized resulted in denial of admission, denial of admission is, in fact, uncommon. The vast majority of bar admission cases, even those in which the application presents some issue — a criminal conviction, a poor credit history, a law school discipline incident — conclude with the admission of the applicant to the bar. In Connecticut, for example, David Stamm, former Executive Director of the Connecticut Bar Examining Committee, estimated that admission was usually denied to only one or two applicants per year.

Consider that the bar admissions authorities, members of the bar, and the applicants all devote a substantial amount of time and energy to a process that screens out almost no one. Bar committees sometimes delay decisions on applications that raise such issues for months or longer. They may require applicants to submit additional documentation to prove good character or rehabilitation. Perhaps the process has other benefits, such as deterring some "unsuitable persons" (whatever that means) from applying or causing some applicants to curb behaviors that could cause problems. Even so, one might wonder whether all this time and energy might better be directed elsewhere — ethics education, law firm management training, or other risk reduction efforts.[45]

Disabilities Act, 80 Brook. L. Rev. 677 (2015); Carol M. Langford, Barbarians at the Bar: Regulation of the Legal Profession through the Admissions Process, 36 Hofstra L. Rev. 1193 (2008).

42. Rhode, supra n. 39, at 1033, 1037.

43. Id. at 1039.

44. Even a random sample of litigated cases would be unrepresentative: Most cases in which an application raises issues are unreported because the applicant is eventually admitted or gives up on her effort to be admitted.

45. Levin et al., supra n. 38, at 54, n. 3.

Bar admission issue and citation	Synopsis
Manslaughter: In re Manville, 538 A.2d 1128 (D.C. 1988)	While in college, Dan Manville "*agreed to assist another student in recovering drugs and money believed to have been stolen* by [another student named Edgar. They entered Edgar's apartment and] threatened him with a gun and a knife. When two visitors arrived unexpectedly, Manville *used chloroform to render Edgar and the visitors unconscious. One of the visitors died* from an unusual reaction to the chloroform." Manville evaded arrest for four months. Charged with murder, *he pled to manslaughter and served over three years in prison*. "He became a 'jailhouse lawyer,' completed his college education, and helped other inmates as [a tutor]. After his release on parole [he] . . . went to Antioch Law School [and later was] . . . employed by the American Civil Liberties Union's National Prison Project." He also published a prisoner's litigation manual. The court **granted admission to the bar**, finding that he had sufficiently rehabilitated himself.
Sexual relations with minors: In re Pilie, Supreme Court of Louisiana, No. 12-OB-1846 (2012)[46]	Philip Pilie graduated from law school in Georgia in 2007. During the month before he was to take the bar, he *made contact on the Internet with a person he believed to be a 15-year-old girl*. *He told her that "he wanted to meet her at home and have sex."* His contact was actually a police officer posing as a juvenile. When he got to their agreed meeting place, *Pilie was arrested and charged with two felonies: "computer-aided solicitation of a minor and attempted indecent behavior with a juvenile."* He amended his application to disclose the arrest and was precluded from sitting for the bar. During the next year, *he completed a pretrial diversion program in Jefferson Parish, Louisiana, after which the criminal charges were dropped.* He was allowed to sit for the bar exam in 2009, but the court **denied bar admission** and imposed a lifetime bar against his seeking admission. It cited the gravity of the charges of attempted sexual exploitation of a minor.

46. https://perma.cc/YD68-J69E.

Bar admission issue and citation	Synopsis
Shoplifting and misrepresentation of debt: In re Tobiga, 791 P.2d 830 (Or. 1990)	Somtim Tobiga, a graduate of the law school at Lewis and Clark College, was arrested for shoplifting after leaving a store with a *package of meat in his coat pocket*. The charge was dismissed upon his agreement to pay $100. Tobiga also *had failed to disclose unpaid loans on his bar application*; he claimed confusion. There were many positive character witnesses. **He was admitted**, found to have proven his moral character. Tobiga said he didn't know how much he owed. Several debts were owed to the bar itself for educational loans. The court wrote, "[T]he Bar's records are unclear; the collection agency's are worse."
Declaration of bankruptcy: Fla. Bd. of B. Examiners re S.M.D., 609 So. 2d 1309 (Fla. 1992)	S.M.D. lived on student loans and charged a wedding, a move, and other expenses to credit cards during law school. She filed for bankruptcy during her last semester of law school because of *$109,000 of accumulated debt, most of which was nondischargeable student loans*. The state supreme court overturned a board recommendation to deny admission; **she was admitted**. The court stated, "The Board is rightly concerned over the morality of a person who continues to incur large debts with little or no prospect of repayment." But "we cannot agree that the evidence sufficiently demonstrates financial irresponsibility. . . ."
Cheating on law school exam: Friedman v. Conn. B. Examining Comm., 77 Conn. App. 526 (2003)	Two students at Quinnipiac University reported that David Friedman had *concealed a one-page outline on his desk during a closed-book exam*. Before a student disciplinary committee, Friedman denied he cheated and claimed he wrote the outline during the exam. The students testified that they had seen Friedman retain a written page on his desk under a blank sheet before the exam was distributed. The committee proposed to reduce Friedman's grade and to reprimand him. The law dean reversed the committee's reprimand because of delays in adjudicating the charge. **The court denied admission**, noting that in a dispute of fact, the bar examining committee could decide that the student who reported the applicant's conduct was more credible than the applicant, and that cheating on a law school exam was sufficient evidence that the applicant lacked good moral character.

Bar admission issue and citation	Synopsis
Criticism of the bar: Lawrence v. Welch, 531 F.3d 364 (6th Cir. 2008) (denying review of Mich. Supreme Court decision)	Frank Lawrence, who attended an accredited law school in Michigan, had *unsuccessfully sued the Board of Law Examiners and the state bar, alleging that some state bar rules were unconstitutional.* He also operated a website called StateBarWatch criticizing those bodies for alleged dishonesty in the lawyer licensing system. He reaffirmed his opinions in his interview with the character committee, which concluded that "[w]e are concerned about providing a law license to someone who, even before he has handled his first case as a member of the bar, has effectively written off such a huge component of the justice system." **Admission was denied.**

b. Filling out the character questionnaire

Bar admissions committees, courts, and the Model Rules take the position that, in filling out the questionnaire, you should be scrupulously honest in writing your answers, even if your disclosures could delay or prevent your admission to the bar.[47] Bar examiners particularly dislike having applicants lie to them or conceal information.

You would be surprised how many law students have small skeletons in their closets — minor brushes with the criminal justice system, academic or disciplinary problems during college, or other mishaps that could raise the eyebrow of a character and fitness official. Such facts must be disclosed if the questionnaire or bar officials ask questions that call for the information at issue. Most of these disclosures do not lead to character and fitness inquiries. If you are worried about something, review the character questionnaire from the state where you will apply for admission and read the questions carefully to see whether a straightforward reading of the questionnaire requires you to disclose the past event. Make a list of information and documents you need to collect. Draft possible answers to help you think about what you may need to disclose. If you think that your issue might be serious, start thinking this through early, perhaps in your second year of law school. Consider whether you need legal advice. If you are not sure, you could ask your professional responsibility teacher whether you may ask for informal advice in confidence.

47. Rule 8.1 requires that applicants for bar admission be honest and forthright with bar admissions authorities.

Many law students get very worried about fairly trivial potential problems. Use your common sense. Bar examiners tend to be more concerned about problems that are serious, recent, or recurrent.

- **Serious:** A minor misdemeanor charge during college or earlier is unlikely to raise eyebrows, but if you have a felony conviction on your record, you should seek legal advice from a lawyer who represents clients seeking bar admission.
- **Recent:** Admissions officials look more closely at events that took place in the last several years and are less concerned about events that took place longer ago.[48]
- **Recurrent:** The character committees care more about patterns of misconduct than about single instances. A speeding ticket will not hold up your bar admission, but a series of DUIs or a portfolio of unpaid parking tickets might.

"I shot a man in Reno, just to watch him die. After that, law school was pretty much a given.

Might bar admission officials look at your social media pages?

The Florida bar has an announced policy of examining the social media posts of candidates whose applications disclose conduct of concern such as substance abuse or an inclination to overthrow the government. Other character and

48. The character and fitness committees will want to know about any conduct that led to discipline during law school. See, e.g., In re Mustafa, 631 A.2d 45 (D.C. 1993).

fitness officials may well do likewise, joining the rest of the world in perusing social media to learn about other people.[49]

> **FOR EXAMPLE:** Otion Gjini was denied admission to the bar by the Maryland Court of Appeals in 2016. The decision was based primarily on his failure to disclose a state enforcement action alleging that he had failed to complete an alcohol treatment program following a DUI charge. However, the court opined at length about Gjini's unsavory comments on the Internet. These comments included: "The both fight like hoes [sic]. . . . That girl is hot as f* * *. . . . Who is the faggot that made this video?" While the court did not deny admission based on these and other comments, the opinion noted that these postings "continued a hideous practice of relegating certain persons within our community — in this instance, women and homosexuals — to second-class status and subjecting them to derision and exclusion."[50]

Don't post offensive comments or potentially embarrassing material on social media pages, even in jest. It is an important step in your professional development to behave in a manner that will engender the trust and respect of colleagues and clients. This kind of mindfulness has its own rewards, but it also may avoid problems with bar officials or prospective employers.

What if an issue that might trouble the bar examiners is something that you should have disclosed on your law school application?

The information you disclose on your bar application must be consistent with the information you disclosed on your law school application. The law school dean's office is asked to fill out a questionnaire on each applicant for admission to the bar. The questionnaire asks various questions, such as whether the student has a criminal record, so an omission on your law school application could lead the dean's office to provide information that does not match the account that you provide.

If you need to disclose some adverse information on your character questionnaire, review your law school application to see whether the law school asked a question that should have elicited the information at issue. Examine your answer. (If you don't have a copy of your law school application, ask your

49. See Jessica Belle, Social Media Policies for Character and Fitness Evaluations, 8 Wash. J.L. Tech. & Arts 107 (2012); Dina Epstein, Have I Been Googled? Character and Fitness in the Age of Google, Facebook, and YouTube, 21 Geo. J. Legal Ethics 715 (2008); Jan Pudlow, On Facebook? FBBE May Be Planning a Visit, Fla. B. News, Sept. 1, 2009.

50. While acknowledging First Amendment concerns, the court noted that comments such as Gjini's would "breed disrespect for the courts and for the legal profession" whether or not they were "uttered in a professional setting." In re Gjini, 448 Md. 524, 545 (2016).

law school registrar for a copy.) If your earlier answer was incomplete, consider making a belated disclosure to the law school of the same information. You can write a letter to the relevant administrator explaining that in preparing your application for bar admission, you realized that you had omitted a piece of information on your law school application. If the information is so serious that it might have led to your being denied admission to law school (such as a homicide conviction), it would be prudent to seek legal advice before writing a letter. If, as is more common, the disclosure is of something minor (such as a citation for a college dorm party), the late disclosure probably won't lead to disciplinary action. Even if a late disclosure to the law school seems risky, it is probably less professionally hazardous to correct the record than not to do so.

PROBLEM 1-1

ADDERALL

This problem is based on a real question from the application form for admission to the Iowa state bar.[51]

You are a third-year law student. In a few months, you plan to apply for admission to the Iowa bar. You have just received a copy of the application form, which begins with this statement:

OFFICE OF PROFESSIONAL REGULATION, APPLICATION FOR THE IOWA BAR EXAMINATION

The contents of this application will be public information subject to the limitations of Iowa Code section 602.10141 [which provides that a member of the five-person Board of Law Examiners shall not disclose information relating to the criminal history or prior misconduct of the applicant].
[Question 40 reads as follows:]

40. **Illegal drugs** Are you currently, or have you been in the last three years, engaged in the illegal use of drugs? If yes, give complete details below (or on an attached sheet).

"Illegal Use of Drugs" means the use of controlled substances obtained illegally as well as the use of controlled substances which are not obtained pursuant to a valid prescription or taken in the

51. The application form is linked from Office of Prof'l Regulation of the Sup. Ct., Application for the Iowa Bar Examination, https://www.iowacourts.gov/static/media/cms/Bar_Application_11_7F8A8AA8C7F30.pdf (last visited Sept. 23, 2021).

accordance [sic] with the directions of a licensed health care practitioner. "Currently" does not mean on the day of, or even the weeks or months preceding the completion of this application. Rather, it means recently enough so that the condition or impairment may have an ongoing impact.

You have a right to elect not to answer those portions of the above questions which inquire as to the illegal use of controlled substances or activity if you have reasonable cause to believe that answering may expose you to the possibility of criminal prosecution. In that event, you may assert the Fifth Amendment privilege against self-incrimination. . . . If you choose to assert the Fifth Amendment privilege, you must do so in writing. . . . Your application for licensure will be processed if you claim the Fifth Amendment privilege against self incrimination. . . .

Release

. . . I also authorize and request every person, firm, company, corporation, governmental agency, court, bar association, law enforcement agency, medical facility, or other institution having control of any documents, records, and other information pertaining to me, to furnish to the Iowa Board of Law Examiners or their agents or representatives, any such information. . . .

I, _____, being first duly sworn, deposes and states: . . . [m]y answers to the foregoing questions are full, true, and correct to the best of my knowledge and belief. [Applicant's signature must be notarized.]

During your three years of law school, you have taken Adderall, a stimulant drug used to treat attention-deficit/hyperactivity disorder (ADHD). You don't have ADHD, but you took Adderall to help you to stay awake and focus when you were studying for finals or finishing a paper. You did not have a prescription; instead, like lots of your friends, you purchased Adderall from your classmates. The last time you did this was three weeks ago. You checked to see whether Adderall is a controlled substance and found that the Drug Enforcement Administration does classify it that way.[52] In your state, possession of Adderall without a prescription is a

52. Adderall is listed under Schedule II, which includes "drugs, substances, or chemicals . . . with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous." U.S. Drug Enforcement Admin., Drug Scheduling, https://www.dea.gov/drug-scheduling (last visited June 5, 2022).

misdemeanor punishable by a fine of up to $1,800, imprisonment for up to one year, or both. Now that you have learned this, you certainly won't take any more Adderall, at least not before you are admitted to the bar.

Last year, a rumor circulated on campus that a member of the bar admissions committee was asked what would happen to applicants who answered question 40 affirmatively, and he reportedly said that they would be denied admission to the bar. How will you answer the question?

c. Mental health questions about applicants

Should bar admissions authorities ask questions about the mental health of applicants?

It used to be thought that only a small percentage of the population suffered from mental health problems. More recently, we have learned that these issues are commonplace. The American Psychiatric Association reports that one in six people experience depression at some point in their lives.[53] Anxiety disorders are increasingly common also. A smaller segment of the population suffers from mental illnesses such as bipolar disorder and paranoid schizophrenia. Concerns about the impact of mental illness on client service have led bar examiners to ask a variety of mental health–related questions of applicants. Until the 1980s and 1990s, many states asked very detailed and intrusive questions. Most states have now narrowed their inquiries, but some still ask questions that are ambiguous, intrusive, or inappropriate. In 2014, the Department of Justice found that assessing fitness to practice based on mental health questions may violate the Americans with Disabilities Act. In 2015, the ABA adopted a resolution urging that fitness to practice should be based on assessment of an applicant's past conduct rather than based on diagnoses.[54]

The National Conference of Bar Examiners (NCBE) conducts the character and fitness evaluation for about half the U.S. states and territories.[55] Applicants for admission to the bar of those states fill out an NCBE questionnaire to initiate this process. NCBE publishes a model character and fitness questionnaire that

53. Am. Psychiatric Ass'n, What Is Depression?, https://www.psychiatry.org/patients-families/depression/what-is-depression (last visited June 5, 2022).

54. Margaret Hannon, Why the Character and Fitness Requirement Shouldn't Prevent Law Students from Seeking Mental Health Treatment, Before the Bar Blog (July 9, 2018), https://abaforlawstudents.com/2018/07/09/character-fitness-requirement-and-seeking-mental-health-treatment/.

55. Nat'l Conference of Bar Exam'rs, 2021 Year in Review, at 10 (2022), https://www.ncbex.org/pdfviewer/?file=%2Fdmsdocument%2F302.

may be used in states that do not use NCBE to conduct their character and fitness evaluations. The mental health questions on this form are reprinted below.

> **29.** Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner? ☐ Yes ☐ **No**
>
> **Explanation**
>
> _____
>
> _____
>
> **30.** *The purpose of this inquiry is to allow jurisdictions to determine the current fitness of an applicant to practice law. The mere fact of treatment, monitoring, or participation in a support group is not, in itself, a basis on which admission is denied; jurisdictions' bar admission agencies routinely certify for admission individuals who demonstrate personal responsibility and maturity in dealing with fitness issues. The National Conference of Bar Examiners encourages applicants who may benefit from assistance to seek it.*
>
> Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner?
>
> **Note:** In this context, "currently" means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer. ☐ Yes ☐ **No**
>
> Are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program? ☐ Yes ☐ **No**
>
> [The form then asks for dates of service provided, for a description of the condition or impairment, for a description of "any treatment, or any program that includes monitoring or support," and, if applicable, for the name and contact information for an "attending physician or counselor" and for a hospital or institution.[56]]

Notes and Questions about the NCBE's mental health questions

1. A significant proportion of applicants would be required to disclose highly personal information in response to this questionnaire. Serious mental

56. Nat'l Conference of Bar Exam'rs, Character and Fitness Resources, Sample Application, http://www.ncbex.org/dmsdocument/134 (last visited June 6, 2022).

health problems burden a surprisingly high percentage of law students. In 2016, results were published from a 2014 Survey of Law Student Well-Being. The survey was sent to the 11,000 J.D. students at 15 law schools across the country; 30 percent responded. The researchers found that 37 percent of law students reported mild, moderate, or severe anxiety, with 14 percent reporting severe anxiety; 17 percent suffering from depression; and 27 percent having an eating disorder. Six percent had seriously considered suicide in the past year. Forty-three percent had engaged in binge-drinking at least once in the past two weeks.[57]

2. Are the NCBE mental health questions sufficiently clear? Suppose you have been diagnosed with mild depression, are taking prescribed medication, and are passing your law school courses but think you would perform better if you were not depressed. Would you know how to answer the questions?
3. If the purpose of the questions is to assess *present* ability to practice, is it fair to ask, in Question 29, for disclosure of problematic conduct or behavior up to five years in the past?
4. Should the bar examiners be asking applicants any mental health questions? If so, what should they ask?

At last count, 26 states and territories have created systems through which applicants with histories of emotional trouble or substance abuse can be admitted to the bar conditionally for a probationary period. During this time, they must comply with specified conditions, such as participating in mental health care, mentoring, or random drug tests.[58] The purpose of these rules is to encourage law students who have such problems to seek counseling without fear that doing so would create an obstacle to bar admission. In 2009, the ABA adopted a Model Rule on Conditional Admission to Practice Law, which could provide a model for states that have not yet established a conditional admission procedure.[59] One author criticizes conditional admission, urging that this structure violates the Americans with Disabilities Act and that it may stigmatize applicants with disabilities.[60]

57. Jerome M. Organ, David B. Jaffe & Katherine M. Bender, Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns, 66 J. Legal Educ. 116, 129-139 (2016).

58. Nat'l Conference of Bar Exam'rs, ABA Section of Legal Education & Admissions to the Bar, 2021 Comprehensive Guide to Bar Admission Requirements, chart 2, https://reports.ncbex.org/comp-guide/charts/chart-2/#1610732529972-082634f8-a9d3 (last visited June 6, 2022).

59. ABA, Model Rule on Conditional Admission to Practice Law (2009).

60. Denzel, supra n. 35.

d. Law school discipline: A preliminary screening process

Most law schools have established internal disciplinary processes to evaluate student misconduct allegations and to impose sanctions. Sanctions range from asking the offending student to write a letter of apology to suspension or expulsion from law school. Sometimes the law school's sanctions include a transcript notation that bar examiners are certain to see. In other cases, the sanction is noted only in the student's confidential record, which the law school may report to the bar. The bar examiners often ask applicants to disclose any sanctions imposed by a law school, whether or not the law school considered them "confidential."

Some law school disciplinary boards are staffed entirely by students, others by students and faculty, and still others by faculty only. Likewise, some schools ask student or faculty volunteers to prosecute these cases, while a few have professional staff handle the prosecution of students. Student respondents are permitted to have counsel in these proceedings but generally must pay the legal fees themselves. Some schools allow nonlawyer advocates to assist respondents, and some allow or require faculty to represent the respondents.[61] The law school disciplinary systems tend to be structured like microcosms of the lawyer disciplinary system. The law schools perform a prescreening process for the bar examiners with respect to students who engage in misconduct while in law school.

PROBLEM 1-2

THE DOCTORED RESUME

The following problem is based on a true story, though some facts have been changed to protect the identity of the individual involved.

You are a member of your law school Honor Board, a judicial body that does fact-finding and recommends disposition of allegations of misconduct by law students. The Board has the authority to recommend reprimand, suspension from law school, expulsion from law school, community service, or other sanctions. The law school administration generally adopts the Honor Board's recommendations. Any finding of violation of the law school Honor Code is

61. See generally Caroline P. Jacobson, Academic Misconduct and Bar Admissions: A Proposal for a Revised Standard, 20 Geo. J. Legal Ethics 739, 747-750 (2007) ("while law schools play an integral role in determining and reporting academic misconduct, the results lack basic uniformity and similarly-situated students are likely to face different character and fitness evaluations depending on the schools they attend and the information they report").

reported to the bar to which a respondent applies for admission. The following matter has been presented to the Board for review.

Jan Kass, a third-year law student, is charged with violating the Honor Code by including false information on a resume and then submitting the resume to law firms recruiting through the law school placement office. The law school Honor Code specifically prohibits students from "providing false or misleading information about their academic credentials, employment history, or other matters, to the law school, to prospective employers, or to anyone else."

Jan came to the United States from Estonia a year before beginning law school. Her father is a diplomat and was sent to the United States. Jan's undergraduate degree is from Tartu University. She listed the undergraduate degree as having been awarded "magna cum laude." Upon investigation, the Honor Board learned that Tartu University has never conferred Latin honors upon graduation — to Jan or to anyone else. Jan is in the bottom quarter of her law school class, but she listed class rank as "top third." Jan used computer software to make some corresponding changes to her grades on her copy of her law school transcript. In addition, during the year before enrolling in law school, Jan worked at the Estonian Embassy in Washington. On the resume, she listed her position as cultural attaché. Jan's former employer informed an Honor Board investigator that Jan had worked as a file clerk at the embassy.

A hearing was held, at which Jan admitted that all three of the alleged falsehoods on the resume were false and that she put them on her resume in the hope of obtaining a good job in a law firm.

"I was new to the U.S., so even though I studied very hard, I didn't do well on my exams. It seemed unfair to me that my grades were not good even though I worked harder than most of the other students. My normal English was pretty good by the time I started law school, but the technical language was difficult for me.

"I have very high student loans — by the time I finish, it will be above $200,000. My family is not wealthy — they cannot help me pay for this. Also, the family is watching me to see whether I will succeed in the U.S. — I felt I must get a good position or else they would be ashamed of me.

"I tried applying for jobs but I wasn't getting any interviews. I talked with one of my American friends. He's another law student, I'd rather not say his name. He looked at my resume for me, and said I just needed to fix it up a little bit. He made some suggestions — I think the changes were all his ideas.

"At first I thought he was crazy — he was telling me to lie. He said they were just little white lies, and that if I wanted to succeed in America, I had to stop being such a goody-two-shoes. He said at his college, students never wrote their own papers — they just copied over someone else's paper from the year before or downloaded one from the Internet. It's a free country, he said. I knew it wasn't right, but also I knew I needed to get a job, so I decided to take his advice. Obviously, it was a mistake."

What sanction, if any, should the law school impose on Jan? Options include expulsion, suspension, reprimand with notice to the bar, or a private reprimand. Should the alleged conduct preclude her admission to the bar?

B. History and development of the U.S. legal profession[62]

1. Pre-revolutionary America

There were very few lawyers in the colonies. Colonial America was an "era of law without lawyers, a time when law was shaped by theologians, politicians, farmers, fishermen, and merchants."[63] In fact, the colonial public didn't trust lawyers and saw no need for them except for courtroom advocacy. The Massachusetts Bay Colony passed a law prohibiting the collection of money for legal services. At around the same time, both Virginia and Connecticut passed laws barring lawyers from appearing in courtrooms. The Fundamental Constitutions of the Carolinas declared that it was "a base and vile thing to plead for money or reward."[64] In Pennsylvania, it was said, "They have no lawyers. Everyone is to tell his own case. . . . 'Tis a happy country."[65]

62. The material in this section is drawn from numerous sources, some of which are cited below. Others include Jerold S. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America 63 (1976); James W. Hurst, The Growth of American Law: The Law Makers 9-11, 285-287 (1950); Thomas D. Morgan & Ronald D. Rotunda, Professional Responsibility: Problems and Materials 3-6 (13th ed. 2018); Deborah L. Rhode, David Luban, Scott L. Cummings & Nora Freeman Engstrom, Legal Ethics 15-20 (8th ed. 2020); Deborah A. Ballam, The Evolution of the Government-Business Relationship in the United States: Colonial Time to Present, 31 Am. Bus. L.J. 553, 580-582 (1994); Deborah L. Rhode, Keynote: Law, Lawyers, and the Pursuit of Justice, 70 Fordham L. Rev. 1543, 1557 (2002).

63. Richard B. Morris, The Legal Profession in America on the Eve of the Revolution, in ABA, Political Separation and Legal Continuity 5 (Harry W. Jones ed., 1976).

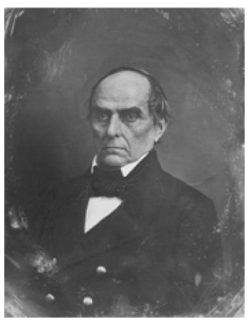
64. Lawrence M. Friedman, A History of American Law 63 (4th ed. 2019).

65. Id. at 65.

2. The nineteenth and twentieth centuries

Between 1800 and 1830, manufacturing and transportation grew dramatically. By 1860, there was a tenfold increase in miles of railroad tracks in only 20 years and soon thereafter the telegraph revolutionized communications. These advances transformed American society and its economy.

As industry developed, so did the law. The development of railroads, for example, led state legislatures and courts to address issues involving rights of way and railway accidents. One historian notes that the revolution in American technology "could not have occurred had there not been equally revolutionary changes in American business law."[66] Major upheavals occurred in contracts, corporations, property, and government regulation of business.[67] As commerce grew, lawyers became more necessary.



Daniel Webster

Eventually, lawyers were accepted grudgingly as "a necessary evil."[68] Before the Civil War, a typical lawyer was a courtroom lawyer and a showman. The most famous lawyers of the time delivered dramatic performances at trial or appellate arguments. For example, judges expected and allowed a level of oratorical flamboyance that is rarely seen today. Attorneys arguing before the U.S. Supreme Court in 1824 were often "heard in silence for hours, without being stopped or interrupted."[69] For example, in *Dartmouth College v. Woodward*,[70] lawyer Daniel Webster delivered an emotionally charged four-hour-long argument before the Supreme Court, after which Chief Justice John Marshall's eyes were filled with tears.[71]

The rapid growth of enormous railroad projects, large financial trusts, and industrial corporations in the latter half of the nineteenth century led to the birth of the "Wall Street" transactional lawyer who never appeared in a courtroom and yet "made more money and had more prestige than any courtroom lawyer could."[72] These lawyers' work was not mainly to try lawsuits but to prevent them altogether.

The new corporate lawyers formed partnerships with other lawyers to handle the greater volume of business. By 1914 in New York City, 85 law firms had

66. Ballam, supra n. 62, at 582.
67. Friedman, supra n. 64, at 513-517 (contracts), 495-511 (corporations), 391-416 (property), and 417-441 (government regulation of business).
68. Friedman, supra n. 8, at 54
69. Id. at 233.
70. 4 Wheat. 518 (1819).
71. Friedman, supra n. 64, at 298-299.
72. Id. at 617.

four or more lawyers, an increase from only 10 such firms in 1872. These partnerships allowed lawyers to share the growing overhead expenses now associated with legal practice: paid staff, new technology such as typewriters and telephones, and expanding libraries, to name just a few.[73]

During the latter years of the nineteenth century, many cities established bar associations, partly as a response by White Protestant lawyers to growing numbers of immigrants and others seeking to enter the profession. These associations "were not open to everybody . . . [they] sent out feelers to a select group, the 'decent part' of the bar."[74]

By the 1920s, the bar had begun to stratify, with a small number of law firms that were "large by standards of the day" serving Wall Street corporations having a "significance and influence beyond their mere numbers."[75] These firms consisted of lawyers who were "solid Republican, conservative in outlook, standard Protestant in faith, old English in heritage."[76]

Along with the growth of law firms and bar associations, the structure for employing lawyers changed. In 1948, 82 percent of lawyers practiced alone or in law firms; of this group, the majority were solo practitioners. By 1980, the percentage of lawyers in private practice dropped to 68 percent. Corporations began to hire salaried full-time lawyers, and as local, state, and federal governments expanded, a growing number of lawyers worked for governmental agencies.[77]

Between 1850 and 1900, the population of lawyers in the United States grew by more than 500 percent, significantly outpacing general population growth. During the twentieth century, the profession continued to grow rapidly. By 1970, 355,242 lawyers were practicing in the United States.[78] By 2018, that number had risen to more than 1.3 million.[79] Large law firms have flourished since the 1970s. In 1975, only four U.S. law firms had more than 200 lawyers. At first, "they were viewed with great skepticism."[80] As of 2017, there were more than 200 law firms that employed at least 200 lawyers, many with offices across the globe. Twenty-three of those firms employed more than 1,000 lawyers.[81]

73. Thomas Paul Pinansky, The Emergence of Law Firms in the American Legal Profession, 9 U. Ark. Little Rock L. Rev. 593, 596, 616-617 (1987).

74. Id at 635.

75. Id at 626.

76. Id. at 622.

77. Friedman, supra n. 64, at 495.

78. Clara N. Carson, The Lawyer Statistical Report (1999); Geoffrey C. Hazard, The Future of Legal Ethics, 100 Yale L.J. 1239 (1991).

79. ABA, National Lawyer Population by State (2018), https://www.americanbar.org/content/dam/aba/administrative/market_research/National_Lawyer_Population_by_State_2018.pdf.

80. Arlin M. Adams, The Legal Profession: A Critical Evaluation, 74 Judicature 77, 79 (1990).

81. Internet Legal Research Grp., America's Largest 350 Law Firms, https://www.ilrg.com/nlj250? (last updated July 2019).

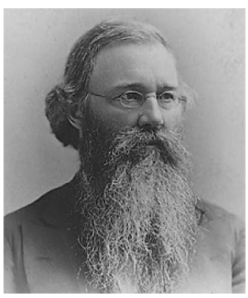
3. History of American legal education[82]

As noted earlier, until the twentieth century, most American lawyers entered the profession by paying to apprentice with a practicing lawyer. In theory, the apprentice learned the law on the job while receiving guidance from a more experienced practitioner. In fact, however, apprenticeships often proved grueling and unrewarding. Apprentices frequently performed countless hours of thankless grunt work (such as copying documents by hand) and had little time to study legal skills or substantive law.

Slowly, the apprenticeship system gave way to formal legal education. The first American law schools were freestanding institutions. Many of them eventually affiliated with universities. Many law schools opened and then closed during the first half of the nineteenth century, but they gained a more stable foothold during the latter part of the century. By 1860, the nation had 21 law schools or university law departments.[83] During the latter part of the nineteenth century, law was taught by the Dwight method, a combination of lecture, recitation, and drill named after a professor at Columbia. Students prepared for class by reading "treatises," dense textbooks that interpreted the law and summarized the best thinking in the various fields. They were then tested, orally and in front of their peers.[84] Students were asked to recite what they had read and memorized. They learned legal practice skills later, during apprenticeships or actual practice.

When did law schools begin to use the Socratic method?

During the second half of the nineteenth century, academic law schools became more respected due in no small part to Dean Christopher Columbus Langdell of Harvard Law School. Langdell revolutionized legal education, and many of his reforms have survived into the twenty-first century. Langdell expanded the then-standard one-year curriculum into a three-year law school program. He required that students pass final exams before they advanced to the next level of courses. He pioneered the use of "casebooks" in place of the treatises. Finally, he replaced the then-pervasive use of lectures in class with an early version of the Socratic method.



Christopher Columbus Langdell

82. We drew from the following sources (in addition to those cited below) in drafting this section: Friedman, supra n. 8; George B. Shepherd & William G. Shepherd, Scholarly Restraints? ABA Accreditation and Legal Education, 19 Cardozo L. Rev. 2091, 2111 (1998); Stevens, supra n. 1; Stevens, supra n. 6, at 18; Vest, supra n. 10, at 496-497.

83. Stevens, supra n. 6, at 21.

84. David A. Garvin, Making the Case, Harv. Mag., Sept.-Oct. 2003, 55, 58.

Langdell advocated a number of views that have since gone out of fashion. He believed that common law possessed elegance and wisdom that resulted from hundreds of years of slow, careful sculpting at the hands of skilled and sagacious judges. Statutory and other lesser forms of law, he urged, were the hurried work of easily swayed politicians and were therefore unworthy of study in a law classroom. Langdell opposed the teaching of constitutional law because he felt it had more in common with the vulgarity of statutes than with the beauty of common law. He insisted that "the law" (meaning, of course, common law) was a science. He believed that legal education should focus on the internal logic of the law, not on the relationship between law and society. Social, economic, and political issues were excluded from the classroom.[85]

Initially students and professors reacted negatively to Langdell's reforms. Students cut Langdell's classes in unprecedented numbers. When word of Langdell's wacky new teaching style got out, the enrollment at Harvard significantly declined. Boston University Law School was founded in 1872 partly "as an alternative to Harvard's insanity."[86]

In the end, Langdell's philosophy and approach won out. Some of his better students were hired as instructors at other schools. They brought Langdell's "insanity" with them. Eventually, however, law professors evolved Langdell's methods to teach critical analysis of law. For example, they began to assign cases with inconsistent outcomes to allow students to examine conflicting values in society and to question whether law is objective or scientific.

A modified version of Langdell's case method of teaching remains the dominant mode of legal education more than a century later. Not until the 1970s, when clinical legal education was introduced into the curricula of most law schools, did any other approach to law teaching become a significant part of most law schools' curricula. Clinical education started when the Ford Foundation offered American law schools $11 million to experiment with student representation of live clients. Ford's principal purpose was to improve legal education by connecting students' learning with reality, but an additional benefit was to provide more legal assistance for poor people.[87]

When did law schools introduce a required course in professional responsibility, and why?

In 1974, the ABA adopted a requirement that students take courses in professional responsibility.[88] This move was a reaction to the Watergate scandal, in

85. In fact, the field of political science originated from the generally unsuccessful attempts of early law professors to introduce lessons in politics, government, and society into law classrooms. Friedman, supra n. 64, at 596.

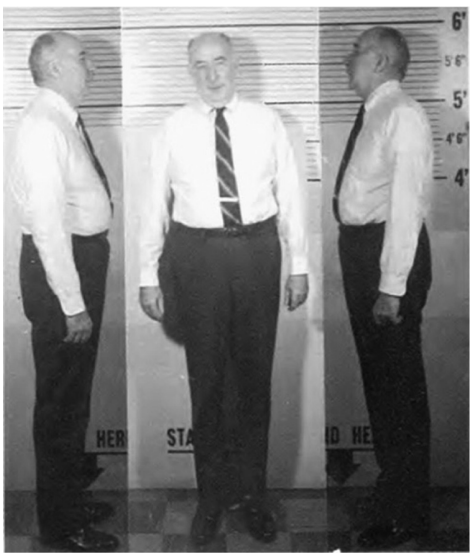
86. Id. at 599.

87. See Philip G. Schrag & Michael Meltsner, Reflections on Clinical Legal Education 3-10 (1998).

88. Warren E. Burger, The Role of Law Schools in the Teaching of Legal Ethics and Professional Responsibility, 29 Clev. St. L. Rev 377, 390 (1980).

which some of the most powerful lawyers in the federal government, including President Richard Nixon, engaged in a complex criminal conspiracy. During the Nixon administration, a large number of federal officials participated in an astonishing array of clandestine and often illegal activities designed to help Nixon's reelection campaign and to investigate people whom Nixon viewed as enemies. These activities came to light in 1972 after a group of burglars were caught breaking into the headquarters of the Democratic National Committee at the Watergate complex to obtain documents for Nixon's Committee to Re-Elect the President (CREEP). One of them was carrying the business card of a White House official to whom the burglars were reporting.[89]

What followed was an elaborate cover-up to conceal the administration's role in the illegal activities. Congress began to investigate and learned that White House meetings had been tape-recorded. A special prosecutor, Archibald Cox, was also appointed to investigate. Cox subpoenaed the Oval Office tapes. In 1973, in an episode that came to be known as the "Saturday Night Massacre," the President tried to block the investigation by ordering the U.S. Attorney General, Elliot Richardson, to fire Cox. Richardson said no and resigned. Then Nixon directed Deputy Attorney General William Ruckelshaus to fire Cox. He also resigned. Robert Bork was the third in line at the Department of Justice. He fired Cox as directed,[90] but the resulting outcry led to the appointment of a new special prosecutor. Eventually, Congress initiated an impeachment proceeding. In August 1974, Nixon resigned.[91]



John Mitchell, President Nixon's Attorney General

The investigation of the Watergate scandal led to the indictment of dozens of government officials, including many lawyers. Most were convicted or pleaded guilty. The charges included perjury, fraud, obstruction of justice, campaign law violations, and conspiracy.[92] Among the 29 lawyers who were convicted

89. President Nixon had used the same burglars to break into the office of the psychiatrist of Daniel Ellsberg, a former government analyst who had leaked Vietnam War documents to the press. Michael Ray, Daniel Ellsberg, American Military Analyst and Researcher, Encyclopedia Britannica, https://www.britannica.com/biography/Daniel-Ellsberg (last visited June 6, 2022).

90. Carroll Kilpatrick, Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit, Wash. Post, Oct. 21, 1973, at A1.

91. See United States v. Nixon, 418 U.S. 683 (1974); Carl Bernstein & Bob Woodward, All the President's Men (2d ed. 1994).

92. Kathleen Clark, Legacy of Watergate for Legal Ethics Instruction, 51 Hastings L.J. 673 (2000).

of crimes were Attorneys General of the United States, John Mitchell and Richard Kleindienst; the White House Counsel, John Dean; Nixon's Assistant for Domestic Affairs, John Ehrlichman; and the General Counsel for CREEP, G. Gordon Liddy. Nixon himself was eventually named as an unindicted co-conspirator.[93] President Gerald Ford pardoned Nixon after taking office. The nation was horrified to find that so many elite lawyers had facilitated massive corruption in government. In an effort to prevent another such shameful episode, law schools introduced a required course in professional responsibility.

C. Diversity and discrimination in the legal profession

Until the second half of the twentieth century, most American lawyers were Caucasian Protestant men from prosperous families. Immigrants, Jews, Catholics, people of color, or women often faced tremendous opposition to their becoming lawyers.[94]

When you look around your law school classrooms, you may see people of many races, nationalities, sexual orientations, and gender identities; older and younger individuals; people of various religious beliefs; and people with disabilities. It has not always been so.

Why did the legal profession initially exclude women, Catholics, Jews, and members of minority groups?

The exclusion of so many people from the legal profession may have been rooted in economic self-interest, social elitism, and bias against women, people of color, and immigrants. Competition from more lawyers would produce lower fees for everyone. In addition, many of the Christian White males who dominated the profession until after World War II believed that only people like themselves had the proper "character" to be lawyers.

As a practical matter, most people could be excluded from the legal profession in its early years because admission to the bar depended on personal connections. When apprenticeship was the primary method of becoming a lawyer,

93. The Lawyers of Watergate, ABA J., http://www.abajournal.com/gallery/Watergate/589 (last visited June 6, 2022); N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-Nine Lawyers, 62 ABA J. 1337 (1976).

94. In the first third of the twentieth century, corporate and patent law were "the exclusive domains of white Christian males. Lawyers who were Jewish essentially were confined to practicing real estate and negligence law." The entry of Jews into the legal profession was "strewn with obstacles of exclusion and discrimination set by law schools and law firms." Jerome Hornblass, The Jewish Lawyer, 14 Cardozo L. Rev. 1639, 1641 (1993).

it was nearly impossible for people from disfavored groups to find established lawyers willing to apprentice them. As law schools and other advances opened the bar to a greater number of people, other barriers were imposed. Some laws prohibited admission of members of certain groups.[95]

> **FOR EXAMPLE:** California in the 1800s barred noncitizen immigrants from becoming lawyers. In 1890, the California Supreme Court denied admission to Hong Yen Chang, a Columbia Law graduate. Chang had already been admitted in New York and was the first Chinese American lawyer in the United States. California refused his admission because he was not a U.S. citizen, and, as a member of the "Mongolian race," he was not legally eligible to become a citizen.[96]

Even after the overtly exclusionary laws were repealed, bar associations in the late nineteenth and early twentieth centuries took steps that they claimed would raise the standards of the profession. Bar associations sought to protect the public from unscrupulous or incompetent practitioners by requiring graduation from law school as a condition of bar admission, by requiring some college study as a condition of law school admission, or by imposing character and fitness requirements.[97] These measures often resulted in exclusion of applicants from marginalized groups.

Some law schools imposed further barriers to entry. Thomas Swan, dean of Yale Law School in the 1920s, believed that law schools should not base admissions on college grades because that practice could result in the admission of students who had "foreign" rather than "old American" lineage and result in an "inferior student body ethically and socially."[98] As Professor Richard Abel explains,

> At the beginning of [the twentieth] century, the professional elite were quite open about their desire to exclude Jewish and Catholic Eastern and Southern European immigrants and their sons, whose entry into the profession had been greatly facilitated by the shift from apprenticeship to academic training. The introduction of prelegal educational requirements, the attack on unapproved and part-time law schools, the requirement of citizenship, and the introduction of "character" tests were all directed toward this end, in whole or part.[99]

95. See Carol M. Langford, Barbarians at the Bar: Regulation of the Legal Profession through the Admissions Process, 36 Hofstra L. Rev. 1193 (2008).

96. In re Hong Yen Chang, 24 P. 156 (Cal. 1890). Chang was posthumously admitted to the California bar in 2015. Gabriel Chin, Hong Yen Chang, Lawyer and Symbol, 21 UCLA Asian Pac. Am. L.J. 1 (2016).

97. See Leslie C. Levin, The Folly of Expecting Evil: Reconsidering the Bar's Character and Fitness Requirement, 2014 BYU L. Rev. 775, 782.

98. Stevens, supra n. 6, at 101.

99. Richard L. Abel, American Lawyers 85, 109 (1989).

1. Women lawyers[100]

The first woman lawyer in America was Margaret Brent, who practiced law in the 1630s and 1640s. Born in England to a wealthy and powerful family, she arrived in America in 1638 and set up what became a thriving litigation practice. Brent was involved in more than 100 court cases between 1638 and 1646, including many jury trials, and she reportedly never lost a single one. Governor Leonard Calvert of Maryland appointed her to be his legal counsel. After the governor died, Brent served as executor of his estate. Her skillful handling of the estate earned her a public commendation from the Maryland Assembly. Many judges at the time apparently could not fathom the concept of a female attorney. Many addressed her as "Gentleman" Margaret Brent. However, there is little evidence that Brent suffered much discrimination as a result of her sex. She was regarded as an anomaly. After Brent, not a single woman was permitted to practice law in America for more than 200 years.[101]

Myra Bradwell

When did more than a few women begin seeking entry to the bar?

During the last half of the nineteenth century, a growing number of women tried to enter the profession. During this period, judges, law school administrators, and others saw female lawyers as a threat to the patriarchal social order. In 1875, the chief justice of the Wisconsin Supreme Court wrote that any woman who attempted to become a lawyer was committing "treason" against "the order of nature."[102] The courts refused admission to women who sought entry at this time.

FOR EXAMPLE: Myra Bradwell, a pioneer in seeking a place for women in the legal profession, applied for a license to practice law. She met all the requirements, but the Illinois court denied her application. Although state law did not explicitly bar women from becoming lawyers, the court concluded that legislators could not have contemplated their admission to the

100. We drew from the following sources (and those cited below) in writing the historical material in this section: Clara N. Carson, The Lawyer Statistical Report (1999); Deborah L. Rhode, ABA Commission on Women in the Profession, The Unfinished Agenda: Women and the Legal Profession (2001); Rhode et al., supra n. 62, at 22-24; Charles W. Wolfram, Toward a History of the Legalization of American Legal Ethics — II The Modern Era, 15 Geo. J. Legal Ethics 205 n. 62 (2002).

101. This paragraph is primarily based on the account of Margaret Brent's life in Dawn B. Berry, The 50 Most Influential Women in American Law (1996); see also Karen B. Morello, The Invisible Bar: The Woman Lawyer in America: 1638 to the Present 3-9 (1986).

102. In re Goodell, 39 Wis. 232, 245 (1875).

> bar. The court said: "that God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded [when the statutes were passed] as an almost axiomatic truth."[103]

In 1872, the Supreme Court affirmed the denial on the ground that the Privileges and Immunities Clause of the Constitution did not give Bradwell the right to practice. Three concurring justices added:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.[104]

Three women applied to Columbia University Law School in 1868. Trustee and law school founder George Templeton Strong wrote in his diary, "No woman shall degrade herself by practicing law, in N.Y. especially, if I can save her."[105] All three were denied entry.[106]

Some of those who supported admission of women to law school offered peculiar justifications. In 1872, attorney George C. Sill wrote a letter to Yale Law School recommending that it admit women, but with this curious endorsement: "Are you far advanced enough to admit young women to your school?. . . I am in favor of their studying & practicing law, provided they are ugly."[107] Perhaps he thought that the presence of "attractive" women would distract male students from their study. Yale, apparently, was not as "far advanced" as the progressive Mr. Sill and continued to refuse law school admission to women until 1918.[108]

Many nineteenth-century experts opposed all professional activity and even higher education for women. In 1873, for example, Harvard University

103. Application of Bradwell, 55 Ill. 535, 539 (1869).

104. Bradwell v. Illinois, 83 U.S. 130, 141-142 (1872).

105. Virginia G. Drachman, Sisters in Law: Women Lawyers in Modern American History 41 (1998), quoting The Diary of George Templeton Strong: Post-War Years, 1865-1875, at 256 (Allan Nevins & Milton H. Thomas eds., 1952).

106. One of the three women denied entry was Lemma Barkeloo, who later became the first American woman to formally study at a law school when admitted to Washington University in 1869. She completed one year of legal education at the top of her class and then passed the state's bar exam. After she died, a biographical publication reported that the cause of her death was "overmental exertion." (She actually died of typhoid only a few months after beginning her legal career, but not before she became "the first female attorney of official record to try a case in court.") Berry, supra n. 101, at 53-54.

107. Drachman, supra n. 105, at 43, quoting from Frederick C. Hicks, Yale Law School: 1869-1894, Including the County Court House Period 72 (1937).

108. Id.

physician Dr. Edward H. Clarke published a book warning that women who pursued higher education might experience health problems as a result. He wrote that female reproductive physiology made it dangerous for women to engage in strenuous intellectual activity. He urged that such activity would divert energy from female reproductive organs to the brain, harming the health of women and their children. This, he warned ominously, could cause irreparable harm to the future of America.[109]

Despite the controversy, some law schools opened their doors to women. The University of Iowa and Washington University admitted women in the late 1860s. Most other schools continued to deny admission to women. In the late 1800s, New York University, Cornell, and Boston University began to admit women. By the end of the 1920s, Yale and Columbia also admitted a few. Larger numbers of women attended part-time law programs for women only. During World War II, some schools increased the number of women admitted because of a wartime decline in enrollment. But until the 1970s, the number of female enrollees in any given law school class remained very small, sometimes because of explicit quotas. During the 1970s, women began to agitate, and sometimes to file lawsuits, to demand an end to discrimination against them in the legal profession.[110] This caused a major change. In 1964, only 4 percent of law students were female. By the late 1970s, many law schools enrolled 40 percent women students. By 2016, the majority of law students were women.[111]

Are women and men treated equally in the contemporary legal profession?

Yes and no. While the status of women in the profession has been improving for decades, problems remain. The representation of women in positions of authority in the legal profession has grown, but men still predominate. In 2021, the ABA Commission on Women in the Profession published a report[112] on why women leave the law profession. Authors Joyce Sterling and Linda Chanow report that:

109. Dr. Clarke's writings were very influential at the time and spawned criticism of women's colleges, even from within the colleges. One president of a women's college wondered when the college opened "whether woman's health could stand the strain of education." Id. at 39, quoting M. Carey Thomas, Present Tendencies in Women's Colleges and University Education, 25 Educ. Rev. 68 (1908).

110. Cynthia Grant Bowman, Women in the Legal Profession from the 1920s to the 1970s: What Can We Learn from Their Experience About Law and Social Change? (Cornell Law Faculty Publ'ns, Paper 12, 2009).

111. ABA, Enrollment and Degrees Awarded 1963-2012, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf (last visited June 6, 2022); Elizabeth Olson, Women Make Up Majority of U.S. Law Students for First Time, N.Y. Times, Dec. 16, 2016.

112. Joyce Sterling & Linda Chanow, In Their Own Words: Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession, ABA Comm'n on Women in the Profession

> According to the recent National Association for Law Placement (NALP) report, women are approximately 36 percent of lawyers, 47 percent of associates, and 24 percent of partners.[113] The representation of women as partners has shown slow upward movement since 2006. Women are now 24 percent of partners, as compared to 15 percent in 1999. After seven years of law practice, men are two to five times more likely to become partners. That partnership disparity exists even for women who never took time out for family.
>
> Even with considerable efforts to recruit and promote more women, the statistics on women equity partners have barely inched up in the past two decades. Partnership rates of women equity partners continue to hover between 19 percent and 21 percent. Even after 12 years of practice, a substantial proportion of [female] lawyers remain as nonequity partners.[114]

Women now hold 33 percent of general counsel positions at Fortune 500 legal departments.[115] As of Fall 2021, at least 38 percent of law school deans were women,[116] and 14 percent of ABA-accredited law schools were led by Black female deans.[117] In 2021, 36 percent of all federal and state judges were women.[118] While women are a growing presence in leadership positions in the legal profession, a significant pay gap remains. In 2020, the median weekly earnings of women lawyers was $1,665, while the median weekly wage for male lawyers was $2,324.[119]

Are many women lawyers subjected to sexual harassment and bullying in the workplace?

Yes. Sexual harassment of women in law practice is unfortunately commonplace, despite decades of federal and state legislation and public education aimed at prevention. The "me too" movement has brought needed attention to

(2021), https://www.americanbar.org/content/dam/aba/administrative/women/intheirownwords-f-4-19-21-final.pdf.

113. Id. at 3 (citing Nat'l Ass'n for Law Placement, 2019 Report on Diversity in U.S. Law Firms 10–11 (2019), https://www.nalp.org/uploads/2019_DiversityReport.pdf).

114. Id.

115. Brian Baxter, Women Led a Third of Fortune 500 Legal Departments in 2019, Bloomberg Law (Jan. 22, 2020), https://news.bloomberglaw.com/esg/women-led-a-third-of-fortune-500-legal-departments-in-2019.

116. Karen Sloan, Ahead of the Curve: Tracking Law Deans, Law.com (Aug. 27, 2019) (available on Lexis).

117. Karen Sloan, "It's the Moment for This": An Unprecedented Number of Black Women Are Leading Law Schools, Law.com (May 13, 2021) (available on Lexis).

118. Nat'l Ass'n of Women Judges, Forster-Long's Gender Diversity Survey: 2021 vs. 2020, https://perma.cc/8D7G-JZDA (listing a total of 20,270 American judges, of whom 7,296—36 percent—are women).

119. U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey: Household Data Annual Averages, https://www.bls.gov/cps/cpsaat39.htm (last visited June 6, 2022).

a longstanding pattern of misconduct. A 2018 survey of more than 5,800 people in several industries found that 26 percent of the women lawyers surveyed reported being subjected to sexual harassment at work in the last five years.[120] Another study in Florida found that one in seven of the women surveyed had experienced harassment or bullying related to gender during the past three years, and most of those who complained did not get a satisfactory response.[121]

A women's bar study of all Utah lawyers admitted between 1985 and 2005 found that 37 percent of female lawyers in firms experienced verbal or physical behavior that created an unpleasant or offensive environment.[122] Almost a third of those felt that the level of that behavior amounted to harassment. In contrast, approximately 1 in 100 men in firms described experiencing harassing behavior.[123]

Is it common for more senior lawyers in law firms to engage in bullying of less experienced lawyers?

Unfortunately, bullying in law firms is also common. Like sexual harassment, bullying involves an abuse of power, usually by a supervisor and directed at a subordinate. Both men and women get bullied. One survey listed the following bullying behaviors, among others:

> Shouting and swearing or otherwise verbally abusing someone more junior; one person being singled out for unjustified criticism or blame; an employee being excluded from company activities or having his or her work or contributions purposefully ignored; language or actions that embarrass or humiliate; practical jokes, especially if they happen repeatedly to the same person.[124]

A survey of 124 managing partners found that 93 percent of respondents reported bullying at their firms. The bullies generally are senior lawyers who are high earners. Because of this, 40 percent of the managers surveyed said that they are unable or unwilling to stop the bad behavior. Many firms don't have good procedures to discipline partners who engage in abusive behavior.[125]

120. Kathryn Rubino, #MeToo in the Legal Industry: Over a Third of Senior Women in the Law Say They've Been Sexually Harassed, Above the Law (Oct. 19, 2018), https://perma.cc/JW68-L2VD.

121. Report of the Florida Bar Special Committee on Gender Bias (May 26, 2017), https://perma.cc/M63S-TS78.

122. Women Lawyers of Utah, The Utah Report: The Initiative on the Advancement and Retention of Women in Law Firms (Oct. 2010). There were 2,668 responses, and the response rate exceeded 50 percent. The margin of error of the survey was 1.3 percent. Id at 14.

123. Id. at 10.

124. Merrilyn Astin Tarlton, Are You Being Bullied?, Attorney at Work (Aug. 30, 2012), https://www.attorneyatwork.com/are-you-being-bullied/.

125. Kathryn Rubino, The Bullying in Biglaw Is Off the Charts — And Managing Partners Are Too Scared to Stop It, Above the Law (Oct. 26, 2016), https://perma.cc/RR92-L5AQ.

2. Lawyers of color[126]

African Americans and members of other minority groups were largely excluded from the practice of law for a long time. When lawyers were trained through apprenticeship, few Black people could find established lawyers willing to train them, and few could afford the fees even if a lawyer was willing. Until the late nineteenth century, law school doors were largely closed to Black people as well. Because Black students could not enroll in "White" law schools, about a dozen law schools were set up before 1900 to serve students of color. Of those, only Howard University's law school raised enough funds to stay open. Many Howard law graduates became prominent in private practice, government, and public interest law.

One of them was Thurgood Marshall, who grew up in Baltimore and wanted to attend the University of Maryland Law School but was barred from admission there because of racial segregation. He went instead to Howard University Law School, graduated first in his class, and then sued the University of Maryland. In 1936, in his first significant court victory, Marshall forced the desegregation of the school.[127] He went on to become one of the lawyers who argued *Brown v. Board of Education* before the U.S. Supreme Court.[128] Marshall was appointed by President Lyndon Johnson to the Supreme Court as its first Black Justice.

Efforts to "raise standards" for admission to the practice of law in the first third of the twentieth century made it more difficult for African Americans to enter the profession. Because Black Americans experienced disproportionately high levels of poverty and lack of access to quality education, they often could not satisfy requirements for entry to the bar or to law school. From 1937 to 1947, Alexander Pierre Tureaud was the only Black lawyer practicing in Louisiana.[129] Even in 1960, only three Black lawyers (out of more than 2,500 lawyers) practiced in Mississippi, even though the population of the state was 42 percent Black.[130]

126. We relied on the following historical sources, in addition to those cited below, in writing this section: ABA Task Force Report on Minorities in the Legal Profession (Jan. 1986); Auerbach, supra n. 62; Berry, supra n. 101, at 55-58; Rhode et al., supra n. 62, at 24-26; Geraldine R. Segal, Blacks in the Law: Philadelphia and the Nation 1-17 (1983).

127. The case was *Pearson v. Murray* (before correction in 1961, reported as *University of Maryland v. Murray*), 182 A. 590 (Md. 1936). The story is told in Randall Kennedy, Schoolings in Equality, New Republic, July 5, 2004.

128. 347 U.S. 483 (1954).

129. Library of Congress, American Folklife Center, A.P. Tureaud Collection, http://www.loc.gov/folklife/civilrights/survey/view_collection.php?coll_id=784 (last visited June 6, 2022).

130. Abel, supra n. 99, at 100.

What was the attitude of the ABA, the state courts, and the law schools toward admission of African Americans before the civil rights movement?

Bar associations often were hostile to aspiring Black lawyers. In 1912, three Black lawyers were accidentally given memberships in the ABA. After much controversy, the three were allowed to retain their memberships, but the ABA amended its application form to ask applicants to state their race and sex. Only in 1943 did the ABA declare that membership did not depend on these factors.[131]

George B. Vashon

During the second half of the nineteenth century, some state courts admitted Black lawyers, but others did not. In 1847 and again in 1868, the Pennsylvania Supreme Court rejected the bar application of George B. Vashon because he was Black. The court was apparently unmoved by the fact that Vashon had both a bachelor's degree and a master's degree from Oberlin College; had studied Greek, Latin, and Sanskrit; and had clerked for a Pennsylvania judge. Though Pennsylvania denied admission to Vashon, he was admitted to the bars of New York, Mississippi, and the U.S. Supreme Court. In 2010, Pennsylvania admitted him posthumously.[132]

Starting in 1896, some law schools relied on the Supreme Court's "separate but equal" ruling in *Plessy v. Ferguson* to justify discrimination.[133] For example, an African American applied for admission to the University of Texas Law School in the 1940s. Rather than admit the student, the state of Texas added law classes at a nearby "impoverished black institution," which offered college credit for "mattress and broom-making" and other vocational training for menial jobs.[134] Two of the three law classrooms "lacked chairs and desks."[135] In 1948, an appellate court in Texas held that this hastily created "law school" was "substantially equal" to the University of Texas Law School.[136] The case was appealed to the U.S. Supreme Court. Thurgood Marshall argued on behalf of the Black students who were seeking admission. The Court reversed the appellate decision in 1950.[137]

When and how did law schools end policies of discrimination against applicants for admission?

After the Supreme Court declared "separate" education to be "inherently unequal" in *Brown v. Board of Education* in 1954,[138] most schools ended their

131. Segal, supra n. 126, at 17-18.
132. Margaret Littman, A Long Time Coming, ABA J., Sept. 1, 2010, at 10.
133. 163 U.S. 537 (1896).
134. Rhode et al., supra n. 62, at 1016.
135. Id.
136. Sweatt v. Painter, 210 S.W.2d 442 (Tex. Civ. App. 1948).
137. Sweatt v. Painter, 339 U.S. 629 (1950).
138. 347 U.S. 483, 495 (1954).

exclusion policies, but many were slow to admit more than a token number of Black students.[139] By 1970, however, many law schools had established programs to recruit and retain minority students. But the legal struggle over admission policies did not end then. Organizations opposed to affirmative action supported lawsuits challenging affirmative action policies, particularly by public law schools. In 2003, the U.S. Supreme Court sustained the affirmative action plan of University of Michigan Law School, holding that the creation of a diverse educational community was a compelling state interest.[140] In 2019, a federal court found that Harvard University had not discriminated against Asian American students compared to other students of color, but at the time of this writing, the issue was before the U.S. Supreme Court.[141]

African Americans and other people of color surmounted a major hurdle in gaining admission to law school, but many non-White law students experience various forms of discrimination during law school. For example, some professors and students make remarks in or out of class that reflect race bias. Students of color are sometimes excluded from study groups and journals. While there has been progress over the years, these and other problems of race discrimination in law schools persist.[142]

Are people of color still underrepresented in the legal profession?

Yes. In 2015, Professor Deborah Rhode deemed law "one of the least racially diverse professions in the nation."[143] White people are overrepresented in the legal profession compared to the percentage of White people in the United States, but every other racial and ethnic group is underrepresented among lawyers compared with the overall U.S. population. This chart offers a somewhat simplified snapshot that reveals growing diversity in the U.S. population but very little increase in the diversity of the legal profession between 2010 and 2020.

139. William C. Kidder, The Struggle for Access from *Sweatt* to *Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000, 19 Harv. Blackletter L.J. 1, 9 (2003).

140. Grutter v. Bollinger, 539 U.S. 306 (2003).

141. Grace Huang Lynch, Harvard Affirmative Action Case Far from Over as Plans for Appeal Begin, The World, Oct. 2, 2019; Adam Liptak and Anemoma Hartocollis, Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C., N.Y. Times, Jan. 24, 2022.

142. See, e.g., Thomas Pfeiffer, "Racism Lives Here": What's Happening at Stanford Law, Stanford Politics, Feb. 20, 2018.

143. Deborah L. Rhode, Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That, Wash. Post, May 27, 2015.

Race/ethnicity	Percent of U.S. population 2010	Percent of U.S. population 2020[144]	Percent of U.S. lawyers 2011	Percent of U.S. lawyers 2021[145]
Asian	4.8	6	2	2
Black	12.6	12.4	5	5
Hawaiian/Pacific Islander	0.2	0.2	0	0
Hispanic or Latino[146]	16.3	18.7	4	5
Multiracial	2.9	10.2	N/A	2
Native American	0.9	1.1	1	0
White/Caucasian	72.4	61.6	88	85
Number of states reporting data to the ABA on lawyers			17	25

Is there still racial discrimination in law firms and corporate general counsels' offices?

Black and Latino lawyers are well represented in the summer law clerk and first-year associate ranks of large firms, but they are seriously underrepresented at the partnership level. In multi-tiered firms, the vast majority of partners are White men. Eight percent of equity partners and 11 percent of nonequity partners are people of color. In contrast, 25 percent of lawyers employed as staff attorneys or in nontraditional tracks are people of color.[147] Members of minority groups and women tend to leave large firms sooner than other lawyers do.[148]

144. Nicholas Jones, Rachel Marks, Roberto Ramirez & Merarys Ríos-Vargas, 2020 Census Illuminates Racial and Ethnic Composition of the Country (Aug. 12, 2021), https://perma.cc/3FJB-ATML.

145. ABA, ABA National Lawyer Population Survey: 10-Year Trend in Lawyer Demographics (2021), https://www.americanbar.org/content/dam/aba/administrative/market_research/2021-national-lawyer-population-survey.pdf. Many states did not report demographic data to the ABA.

146. In 2010 and 2020, the census bureau's ethnicity questionnaire included the category of "some other race" as one approach to measuring multi-ethnicity. "Nearly all of those who reported themselves to be of 'some other race alone' were of Hispanic or Latino origin." Jones et al., supra n. 144. This table therefore includes them in the category of "Hispanic or Latino."

147. Nat'l Ass'n for Law Placement, 2020 Report on Diversity in U.S. Law Firms 5-6 (Feb. 2021), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf.

148. NALP Found. for Research & Educ., Keeping the Keepers: Strategies for Associate Retention in Times of Attrition 54-55 (1998). The gender differential held true in a later study. NALP, Beyond the Bidding Wars: A Survey of Associate Attrition, Departure Destinations, and Workplace Incentives 23-24 (2000). The Foundation apparently did not include ethnicity data when it published its updated study.

In some cases, their departures are unrelated to the firms' treatment of them, but Professor Richard Sander notes that "their opportunities to learn and perform once inside the firm are, in some ways, distinctly inferior," and, as a result, their "attrition at corporate firms is devastatingly high," and that Black lawyers from their first year onwards depart from law firms at two or three times the rate of White lawyers. "By the time partnership decisions roll around, [the numbers of Black and Hispanic lawyers] at corporate firms are tiny."[149] According to Sander, the "most influential theory" accounting for the attrition is stereotyping:

> [F]ew minorities are classified as potential "stars" — young lawyers who should be cultivated as future firm leaders — in the firm, and therefore few minorities get the careful mentorship, challenging assignments, and other opportunities that allow them to prove their value to the firm. Minority associates therefore tend to be stuck with routine work leading nowhere, and most leave the firm long before being formally passed over for partnerships.

Professor Sander found that Black associates at firms of more than 100 lawyers are "one-fourth as likely as comparable Whites in the same cohort of associates to become partners at large firms."[150]

Implicit or explicit bias may account for some of the problems faced by African American lawyers.

> **FOR EXAMPLE:** One study by lawyer and sociologist Arin Reeves found that law firm partners gave a more negative evaluation of the written work product of an African American associate than a White associate. Sixty partners at 22 law firms were asked to review a research memo written by a third-year associate. Of the partners, 23 were women and 21 were people of color. Half the partners were told that the associate was African American; the others were told that the author was White. The memo contained 22 deliberate grammatical, factual, and legal errors. The partners were asked to rate the memo on a scale of 1 to 5. Partners who were told the author was White gave an average rating of 4.1. Those who were told the author was African American assigned an average score of 3.2.[151]

149. Richard H. Sander, What Do We Know About Lawyers' Lives? The Racial Paradox of the Corporate Law Firm, 84 N.C. L. Rev. 1755, 1758-1759 (2006).

150. Id. at 1766, 1806.

151. Arin N. Reeves, Written in Black & White: Exploring Confirmation Bias in Racialized Perceptions of Writing Skills, Nextions (Apr. 2014), https://perma.cc/Q69R-VNE8.

Do women of color face extra challenges in private law practice?

They do. The most "studied" sector of the profession is large law firms. There, the data show that although overt discrimination is far less than some decades ago, subtle discrimination persists at most large firms. Eighty-five percent of minority women lawyers at big firms quit within seven years. A major study in 2007 found that

> minority women were the most likely group to anticipate leaving their law firms and, more than others, to report feeling "shut out" of the mechanisms for obtaining good assignments and promotions. Specifically, minority women were more negative than any other group about their firms' dedication to diversity and the fairness of the distribution of work assignments.[152]

The *ABA Journal* reports that women of color exit from firms "not because they want to leave, or because they 'can't cut it.' It's because they feel they have no choice." One fifth-year associate explained:

> When you find ways to exclude and make people feel invisible in their environment, it's hostile. . . . It's very silent, very subtle, and you, as a woman of color — people will say you're too sensitive. So you learn not to say anything because you know that could be a complete career killer. You make it as well as you can until you decide to leave.[153]

3. Lesbian, gay, bisexual, transgender, and queer lawyers

American society has made huge progress in accepting lesbian, gay, bisexual, transgender, and queer (LGBTQ) people. The sweeping changes in recent years to recognize gay marriages and to allow many, but not all, LGBTQ people to serve openly in the armed forces are both cause and effect of growing acceptance of LGBTQ people in American society. As with other civil rights movements, much work remains in addressing problems of discrimination, even after significant progress has occurred.

LGBTQ lawyers are increasingly visible in the legal profession.[154] A 2020 NALP report found that 3.3 percent of lawyers self-identify as LGBTQ — three times as many as those who self-identified as LGBTQ two decades ago.[155]

In a 2020 survey of over 3,500 lawyers, 17 percent of the respondents identified as lesbian, gay, or bisexual. Of those, 47 percent reported that they had

152. Gita Z. Wilder, Are Minority Women Leaving Their Jobs?, (NALP, 2008), https://perma.cc/7TTG-Z7QM.

153. Liane Jackson, Minority Women Are Disappearing from BigLaw— and Here's Why, ABA J., Mar. 1, 2016.

154. LGBT Rights Milestones: Fast Facts, CNN, https://www.cnn.com/2015/06/19/us/lgbt-rights-milestones-fast-facts/index.html (last updated Oct. 31, 2021).

155. Nat'l Ass'n for Law Placement, supra n. 147, at 10.

experienced "subtle but unintentional bias" at work, compared with, for example, 38 percent of women lawyers.[156] That said, some LGBTQ lawyers report that discrimination has gotten significantly better in the last 30 years.[157] However, discrimination remains a problem, especially for transgender and nonbinary members of the LGBTQ community.[158]

4. Lawyers with disabilities

Lawyers, like other humans, suffer from a wide range of conditions that limit their abilities in various ways. Some have physical problems that impair mobility, coordination, sight, or hearing. Some have chronic illnesses, mental or emotional problems, or learning issues. In times past, many people with disabilities were excluded from becoming lawyers, but in recent decades, the law has offered some protection from discrimination for people with disabilities. Countless individuals have surmounted a wide range of challenges to join the legal profession.[159]

In 1990, Congress passed the Americans with Disabilities Act (ADA), thereby making a commitment to combat discrimination against people who have physical or mental disabilities. According to the U.S. Equal Opportunity Employment Commission, the ADA applies to

> persons who have impairments [that] substantially limit major life activities such as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working. An individual with epilepsy, paralysis, HIV infection, AIDS, a substantial hearing or visual impairment, mental retardation, or a specific learning disability is covered. . . .[160]

The law requires employers with 15 or more employees to make reasonable accommodations for those who have covered disabilities unless doing so would impose unreasonable hardship on the employer.[161]

156. Peter Blanck et al., Diversity and Inclusion in the American Legal Profession: First Phase Findings from a National Study of Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+, 23 UDC/DCSL L. Rev. 23, 25 (2020). A smaller percentage had experienced more blatant discrimination, harassment, or bullying.

157. Stephanie Russell-Kraft, It's Gotten Better to Be LGBTQ in Big Law, but Struggles Remain (July 29, 2020), Bloomberg Law, https://news.bloomberglaw.com/us-law-week/its-gotten-better-to-be-lgbtq-in-big-law-but-struggles-remain.

158. Id.

159. See, e.g., Nicholas Gaffney, In Conversation with Attorneys with Disabilities, Law Prac. Today, July 6, 2018.

160. U.S. Equal Emp't Opportunity Comm'n, Americans with Disabilities Act, Questions and Answers, https://www.eeoc.gov/eeoc/publications/adaqa1.cfm (last visited June 6, 2022). The explanation also explains that "but an individual with a minor, nonchronic condition of short duration, such as a sprain, broken limb, or the flu, generally would not be covered." Id.

161. U.S. Equal Emp't Opportunity Comm'n, Reasonable Accommodations for Attorneys with Disabilities, https://www.eeoc.gov/laws/guidance/reasonable-accommodations-attorneys-disabilities (last visited June 6, 2022).

Enormous progress has been made in recognizing and respecting people who have a range of disabilities. However, the full inclusion of people with disabilities remains a work in progress.

5. Lawyers from low-income families

Socioeconomic background has an enormous impact on who enters the legal profession. People from lower-income families are far less likely to become lawyers than those whose families have higher income. One study found that only 5 percent of law students come from families whose income is in the bottom quartile in the United States, while 67 percent are from the top quartile. The situation at elite schools is even more extreme: Only 1 percent of students are from the bottom quartile, while 82 percent are from the top quartile, with 57 percent coming from the top 10 percent.[162]

6. Other bases of discrimination in the legal profession

The legal profession aspires to judge people based on knowledge and skills, but it still has some way to go to eliminate prejudice and discrimination. For example, despite laws prohibiting employers from discriminating against older people, many law firms still maintain mandatory retirement policies or otherwise make older lawyers feel less welcome.[163] Also, many lawyers experience discrimination based on other criteria. One study found that lawyers with easy-to-pronounce last names were more likely to be promoted than those with difficult-to-pronounce names.[164]

Other bases of discrimination are not yet fully recognized as prohibited categories of discrimination, including height (tall people are preferred),[165] weight (thin people are preferred),[166] hairstyle,[167] and physical attractiveness.[168]

---

162. Richard H. Sander, Class in American Legal Education, 88 Denv. U.L. Rev. 631, 636-637 (2011).

163. See Susan DeSantis, Law Firms Ease Mandatory Retirement Policies, but Tensions Remain, N.Y. L.J., Feb. 4, 2019.

164. Adam Alter, People with Easy-to-Pronounce Names Are Favored, NYU Experience: Faculty and Research (Feb. 7, 2012), http://www.stern.nyu.edu/experience-stern/faculty-research/adam-alter-names-study.

165. Omer Kimhi, Falling Short: On Implicit Biases and the Discrimination of Short Individuals, 52 Conn. L. Rev. 721, 731-739 (2020) (summarizing a number of studies finding discrimination against short job applicants, including one finding that the "effect of height on hiring decisions is even greater than the effect of the applicant's gender, age, sexual orientation, or religion").

166. Jennifer Bennett Shinall, Why Obese Workers Earn Less: Occupational Sorting and Its Implications for the Legal System (2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379575. "Numerous studies have documented a negative correlation between obesity and wages." Id. at 1.

167. In 2019, the New York City Commission on Human Rights issued guidelines prohibiting discrimination based on hairstyle, which is now recognized as one form of race discrimination. The guidelines recognize the right of people to wear "natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state." Stacy Stowe, New York City to Ban Discrimination Based on Hair, N.Y. Times, Feb. 18, 2019.

168. Dan-Olof Rooth, Obesity, Attractiveness, and Differential Treatment in Hiring: A Field Experiment, 44 J. Hum. Res. 710 (2009) (finding that women who are obese and men who are unattractive are less likely to be interviewed than those who are not); S. Baert & L. Decuypere, Better Sexy than

What steps is the organized bar taking to stop discrimination and sexual harassment in the workplace?

In recognition of the continuing evidence of discrimination in the legal profession, the ABA in 2016 adopted a new Rule 8.4(g):

> It is professional misconduct for a lawyer to. . . (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

As of 2017, 24 states and the District of Columbia had rules prohibiting lawyers from engaging in harassment and discrimination, but none was as broad as the new rule adopted by the ABA.[169] To implement its new rule with respect to sexual harassment, the ABA House of Delegates adopted a resolution in 2018 that

> all employers in the legal profession [should] adopt and enforce policies and procedures that prohibit, prevent, and promptly redress harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.[170]

Flexy? A Lab Experiment Assessing the Impact of Perceived Attractiveness and Personality Traits on Hiring Decisions, 21 Applied Econ. Letters 597 (2014) (finding that perceived attractiveness significantly increased the chances an applicant would be invited to interview).

169. Stephen Gillers, A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g), 30 Geo. J. Legal Ethics 195, 197 (2017).

170. ABA, The Problem of Sexual Harassment in the Legal Profession and Its Consequences, n. 10 (2018), https://perma.cc/J6KL-DJJN.

CHAPTER 2

The Legal Profession: Regulation, Discipline, and Liability

This chapter lays the groundwork for the rest of the book by discussing the many institutions that regulate lawyers and the consequences for lawyers who violate professional norms. Although state courts adopt ethical rules for lawyers and impose discipline on lawyers who violate those rules, many other institutions, organizations, and individuals, including clients, play a role in governing the behavior of lawyers. The first part of this chapter identifies the actors in this complex system of regulation. The next part explains the evolution and functions of the state ethics codes. Then we move on to describe the system for imposing discipline, including license suspension and revocation, on lawyers who violate professional standards. The remaining sections explain that lawyers can incur civil liability and criminal penalties as well as professional discipline.

A. Institutions that regulate lawyers

Lawyers, judges, and scholars often assert with great confidence that law is a self-regulated profession, governed primarily by its members because of their respected status and unique role in society. Each lawyer is said to have a duty to participate in the governance and improvement of the profession. The Preamble of the Model Rules of Professional Conduct explains it this way:

> The legal profession is largely self-governing. . . . [It] is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.
>
> To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination . . . for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.[1]

1. Model Rules of Prof'l Conduct, Preamble, Comments 10 & 11 (2009).

It is important for lawyers to be independent from abuses of power by the government, but the organized bar has used claims of self-governance to try to protect lawyers from regulatory restrictions.

In fact, the law governing lawyers is complex, with numerous federal, state, and local legislatures, courts, and agencies making rules that apply to lawyers. Although lawyers play a central role in all lawmaking, assertions that the legal profession is self-regulating are charming but anachronistic.

Is it a good idea to insulate lawyers from governmental control?

Maybe. The rules governing lawyers are more protective of lawyers and impose less regulatory constraint than they would if state legislatures wrote them.[2] But shielding lawyers from governmental regulation can benefit society because in representing clients, lawyers sometimes challenge the validity of statutes and regulations. Also, they defend people charged with crimes by the state. If lawyers were subject to greater state control, they might be restricted in their representation of clients whose interests are contrary to those of the government. In many countries, it can be hazardous to be a lawyer.

> **FOR EXAMPLE:** In the Philippines, 34 lawyers who opposed President Rodrigo Duterte's "lethal war on drugs" were murdered over a two-year period beginning in 2016 when Duterte became president. Benjamin Ramos, for instance, represented indigent families that were targeted by military and law enforcement forces connected to the president's drug war. Ramos was shot and killed by men on motorcycles as he left his workplace one day in November 2018. Duterte had instructed the police to shoot lawyers who were "obstructing justice" by investigating thousands of murders committed in the name of the drug war.[3]

The government of China has a long history of persecuting lawyers who advocate for the rights of others. In July 2015, the Chinese government launched a nationwide sweep and arrested more than 200 human rights lawyers, depicting them as rabble-rousers or swindlers. Some of the lawyers were charged with subversion of state power. The lawyers were detained at undisclosed locations.[4] Several of the lawyers were given prison sentences of up to 12 years.[5]

2. Restatement § 1, comment 1d.

3. Jason Gutierrez, Philippine Lawyer Who Resisted Duterte's Drug War is Gunned Down, N.Y. Times, Nov. 7, 2018.

4. Andrew Jacobs & Chris Buckley, China Targeting Rights Lawyers in Crackdown, N.Y. Times, July 22, 2015; Michael Forsythe, China Is Said to Arrest 4 Human Rights Advocates, N.Y. Times, Jan. 12, 2016.

5. Rule of Law, Overruled, Wash. Post, Sept. 28, 2016.

Ni Yulan

FOR EXAMPLE: One Chinese lawyer, Ni Yulan, had helped her neighbors to fight eviction and had tried to photograph the crews who demolished their houses. After she was arrested, the police beat and kicked her during a 15-hour period, breaking her legs and leaving her incontinent. She served three years in prison. While she was in prison, one officer urinated on her face. The prison guards often took away her crutches so that she had to crawl to the prison workshop. She also was disbarred. Even so, after she was released, she continued her work, and she was arrested again.[6] She continues to advocate for farmers and others whose land has been seized by Chinese authorities.[7] Before the Bejing Olympics, she and her husband were forcibly evicted from their home, which was then destroyed, in retaliation for her activist work. This is part of a 20-year period of evictions, surveillance, and harassment of Yi Lulan by the Chinese authorities.[8]

Karinna Moskalenko

FOR EXAMPLE: The Russian government tried to disbar Karinna Moskalenko, who has successfully represented Russian citizens charging their government with human rights violations before the European Court of Human Rights. In 2007, the Council of Moscow's Board of Attorneys refused the disbarment request.[9] Moskalenko continued to represent clients whose cases presented human rights concerns, including the family of murdered journalist Anna Politkovskaya, for whom she got a court order that required the government to reopen its investigation into the death.[10] In 2008, Moskalenko delayed

6. In 2016, the U.S. Department of State honored Ni Yulan as one of 14 "international women of courage," but she was not allowed to leave China to attend the ceremony. The Chinese authorities put her under house arrest and would not allow foreign diplomats to visit her. Andrew Jacobs, China Set to Punish Another Human Rights Activist, N.Y. Times, Jan. 3, 2012; Javier C. Hernandez, Activist Says China Didn't Allow Her to Receive Award in U.S., N.Y. Times, Mar. 31, 2016; Chinese Rights Lawyer Ni Yulan under House Arrest, Guardian, Apr. 25, 2016.

7. Poornima Weerasekara, China Targets Land Grabs, Forced Evictions, Asia Times (June 6, 2020); https://asiatimes.com/2020/06/china-targets-land-grabs-forced-evictions/ (last visited June 13, 2022).

8. Amnesty International, Out in the Cold: Housing Activist Ni Yulan Feels the Pain of the Thousands Forced from Their Homes in Beijing (December 8, 2017), https://www.amnesty.org/en/latest/campaigns/2017/12/out-in-the-cold-housing-rights-activist-ni-yulan-in-beijing-china/ (last visited June 13, 2022).

9. Peter Finn, Moscow Panel Backs Rights Lawyer, Wash. Post, June 9, 2007.

10. Michael Schwartz, New Probe Ordered in Killing of Russian Journalist, N.Y. Times, Sept. 3, 2009.

travel after she developed headaches and a strange giddiness. About ten pellets of mercury (which can damage organs, the immune system, and the nervous system) were found in her car in Strasbourg. This may have been one of several attempts by the Russian government to poison dissidents.[11] Undeterred, Moskalenko continues her work as a human rights lawyer, representing, among others, Alexei Navalny, a leading critic of Putin.[12]

These examples serve as warnings of what could happen to a legal profession when a government wants to suppress dissenters and the lawyers who represent them.

American lawyers retain a fair degree of independence but are subject to regulation by both governmental and nongovernmental actors. What follows is an overview of the main institutions that regulate lawyers.

1. The highest state courts

Most law is made by legislatures, courts, and administrative agencies. Is this also true of "lawyer law"?

In most states, the highest court of the state, not the legislature, adopts the rules of conduct that govern lawyers.[13] The courts rely heavily on model rules produced by the American Bar Association. In this respect, the high court performs a role usually played by a legislature.

The highest court in each state enforces its ethics rules by disciplining lawyers who violate them. As with the rulemaking function, state supreme courts often delegate primary responsibility for enforcement to disciplinary agencies run by lawyers.

The legal profession is far from unique in the role it plays in writing many of its standards of conduct. In many regulated industries, from the medical profession to the insurance industry, trade associations have considerable influence over the regulations. But lawyers have an unusual degree of influence when it comes to regulating their own industry.

11. Elias Groll, A Brief History of Attempted Russian Assassinations by Poison, Foreign Policy, Mar. 9, 2018; Michael Schwirtz & Alan Cowell, Toxins Found in Russian Rights Lawyer's Car, N.Y. Times, Oct. 15, 2008.

12. German Press Agency, DPA, Putin Critic Navalny Arrested Upon Return to Russia after Five-month Recovery, Daily Sabah, Jan. 17, 2021; https://www.dailysabah.com/world/europe/putin-critic-navalny-arrested-upon-return-to-russia-after-5-month-recovery (last visited June 13, 2022).

13. The notable exception is California, where many of the ethical rules for lawyers have historically been embodied in statutes enacted by the state legislature.

How do state courts regulate lawyers?

The highest courts in each state usually perform or delegate to other agencies the following roles:

- adopt ethics codes and court procedural rules that govern lawyers;
- implement standards for licensing lawyers;
- supervise agencies that investigate and prosecute complaints of unethical conduct by lawyers;
- oversee administrative judicial bodies that impose sanctions on lawyers who violate the ethics codes; and
- decide appeals in lawyer disciplinary cases.

Why have courts assumed primary responsibility for regulating lawyers?

While a few state constitutions mandate that only courts have authority to regulate the conduct of lawyers,[14] other courts claim they have such authority as a matter of common law under the "inherent powers doctrine." The courts justify this doctrine because they administer the judicial system and need to govern the conduct of those who appear before them.[15]

Some state courts have asserted that their regulation of lawyers is exclusive, which precludes regulation by other branches of government. Based on this "negative inherent powers doctrine," some courts have invalidated legislation regulating lawyers.[16] The cases in this arena most often strike down laws that allow nonlawyers to engage in some activity that overlaps with the practice of law, such as drafting documents for the sale of real estate or handling hearings before administrative agencies.[17]

> **FOR EXAMPLE:** The legislature of Kentucky passed a statute that authorized nonlawyers to represent workers' compensation claimants in administrative hearings. The state supreme court held that the law violated the state constitution, which gave the supreme court exclusive power to regulate the practice of law.[18]

Some state court decisions acknowledge that, in fact, all three branches of government play roles in regulating lawyers.[19]

---

14. Restatement § 1, comment c, reporter's note.
15. See Eli Wald, Should Judges Regulate Lawyers?, 42 McGeorge L. Rev. 149 (2016).
16. See, e.g., Shenandoah Sales & Serv. Inc. v. Assessor of Jefferson Cty., 724 S.E.2d 733 (W. Va. 2012) (declaring unconstitutional a statute that would have allowed a corporate officer who was not a lawyer to appeal a real estate tax assessment).
17. See examples discussed in Nathan M. Crystal, Core Values: False and True, 70 Fordham L. Rev. 747 (2001).
18. Turner v. Ky. Bar Ass'n, 980 S.W.2d 560 (Ky. 1998), discussed in Crystal, supra n. 17, at 766-767.
19. Restatement § 1, comment c, reporter's note.

FOR EXAMPLE: Most states have passed statutes authorizing law firms to reorganize as limited liability partnerships (LLPs). These statutes protect lawyers from vicarious liability for some acts of their partners.[20] None of these statutes have been invalidated because of the negative inherent powers doctrine.[21]

2. State and local bar associations

Most state bar associations are organized as private nonprofit organizations, but some courts nevertheless delegate to them certain lawyer regulatory functions. State bars often administer bar exams and review candidates for admission. Historically, state bar associations had an important role in establishing lawyer disciplinary systems.[22] A state bar that accepts delegated functions from the state's highest court is called an integrated or unified bar rather than a voluntary bar. In unified state bars, one must be a member to obtain a license to practice law.

Most bar associations have numerous committees that draft ethical rules, write advisory opinions interpreting the rules, and conduct law reform activities in many different fields of law.[23] Bar associations do not require members to participate in association activities except for continuing legal education, but many members do so to meet people, keep up in their fields, obtain client referrals, or get involved in law reform work.

Does each state have only one bar association?

No. Most states have one central organization that performs a variety of regulatory and professional leadership functions, including those described above. California has split its main bar association in two as the result of state legislation. The state bar had received a great deal of negative attention because of a number of financial scandals, leading to a legislative mandate to split the organization. Starting in 2018, the state bar of California has focused on regulatory

20. See generally Charles W. Wolfram, Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign, 39 S. Tex. L. Rev. 359, 376-377 (1998).

21. For decades, bar associations supported the negative inherent powers doctrine to prevent legislative regulation of lawyers. Later, when they realized that law firm partners might achieve limited liability by organizing as LLPs, bar associations and prominent lawyers led lobbying efforts to pass this legislation. Wolfram, supra n. 20, at 381-382.

22. See Charles W. Wolfram, Toward a History of the Legalization of American Legal Ethics — II The Modern Era, 15 Geo. J. Legal Ethics 205, 217 (2002).

23. See, e.g., Conn. Bar Ass'n, Sections, Committees and Task Forces, https://www.ctbar.org/members/sections-and-committees (last visited June 9, 2022) (listing dozens of sections, committees, and task forces that Connecticut lawyers could join or be appointed to). The State Bar of Maryland has a similar list. State Bar of Md., Member Committees, https://www.msba.org/for-members/committees/ (last visited June 9, 2022).

functions, chiefly bar admission and discipline. The newly formed California Lawyers' Association has assumed the other functions — leadership, advocacy, and networking — that the state bar previously handled.[24]

Some of the other 30 or so states that have unified (mandatory) bars are considering a similar organizational split, especially in light of the 2018 decision of the U.S. Supreme Court in *Janus v. AFSCME*.[25] That decision concluded that public sector unions could not force government employees who declined to join the union to pay "agency fees." The Court found that requiring nonmembers to pay "agency fees" violated the First Amendment rights of those employees.[26] Four circuits have held that *Janus* does not preclude unified bars from charging mandatory dues,[27] but citing *Janus*, the U.S. Court of Appeals for the Fifth Circuit preliminarily enjoined the unified bar in Texas from requiring members to pay dues to support positions taken by the state supreme court's Access to Justice Commission.[28] *Janus* may lead other unified state bars to restrict their social justice advocacy, divide into two organizations, or charge reduced dues to members who disagree with positions for which the bar spends funds to advocate.

In addition to the state organizations, many smaller voluntary bar associations serve subgroups of attorneys, such as women, people of color, and LGBTQ individuals; those from cities or counties; lawyers in particular fields; and so on. Except for the patent bar, which has a separate licensing exam, a lawyer is not required to join any voluntary bar association to practice in a particular field. A lawyer admitted to practice in a state may appear in any of that state's courts but may need separate admission to appear in the federal courts located in that state.

3. Lawyer disciplinary agencies

Lawyers at disciplinary agencies (often called bar counsels, disciplinary counsels, or ethics counsels) investigate and prosecute misconduct that violates the state ethics code. Possible sanctions include disbarment, suspension from practice, and public or private reprimand. Some jurisdictions also provide that a disciplinary body may order "restitution to persons financially injured,

24. Lyle Moran, California Split, 1 Year After Nation's Largest Bar Became 2 Entities, Observers See Positive Change, ABA J., Feb. 2019.

25. Id.

26. Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 585 U.S.__, 138 S. Ct. 2448 (2018).

27. Schell v. Chief Justice & Justices of the Okla. Supreme Court, No. 20-6044, 2021 U.S. App. LEXIS 25575 (10th Cir. Aug. 25, 2021); Taylor v. Buchanan, 4 F.4th 406 (6th Cir. 2021); Crowe v. Or. State Bar, 989 F.3d 714, 720 (9th Cir. 2021); Jarchow v. State Bar of Wis., No. 19-3444, 2019 WL 8953257 (7th Cir. Dec. 23, 2019), *cert. denied*, 140 S. Ct. 1720 (2020).

28. McDonald v. Longley, 4 F.4th 229 (5th Cir. 2021).

disgorgement of all or part of the lawyer's or law firm's fee, and reimbursement to the client security fund."[29] These disciplinary agencies usually are run by the highest court in the state, by the state bar association, or jointly by the court and the state bar.[30]

4. American Bar Association

The American Bar Association (ABA) is a private nonprofit membership organization founded in 1878.[31] The state bar associations are independent from, not subordinate to, the ABA, although a majority of the membership of the ABA House of Delegates (the main governing unit) is selected by state and local bar associations.[32] Each ABA member pays an annual membership fee.[33] The ABA has more than 400,000 lawyer members;[34] this means that more than half the lawyers in the United States are *not* members of the ABA. Although it is the primary drafter of lawyer ethics codes, the ABA has very limited governmental authority.[35] That's why the ABA ethics rules are called the *Model* Rules of Professional Conduct. These rules have no legal force; the ethics rules that have the force of law are those adopted by the relevant governmental authority, usually a state's highest court.[36]

29. ABA Model Rules for Lawyer Disciplinary Enforcement, Rule 10, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_10/ (last visited June 9, 2022). Client security funds, discussed later in this chapter, reimburse some clients whose lawyers have taken their money.

30. Published opinions in disciplinary cases are available on the websites of the disciplinary agencies, on the website of each state's court system, or on Lexis and Westlaw.

31. ABA, History of the American Bar Association, https://www.americanbar.org/about_the_aba/ (last visited June 9, 2022).

32. ABA, ABA Groups, ABA Leadership, House of Delegates — General Information, July 18, 2018, http://www.americanbar.org/groups/leadership/delegates.html.

33. Lawyers with fewer years of experience, as well as government lawyers, judges, legal aid lawyers, and public defenders, are charged a reduced amount. For the first year after a lawyer is admitted to the bar, ABA membership is free. Law students enrolled in ABA-approved law schools may join the ABA without paying dues. ABA, Dues & Eligibility, https://www.americanbar.org/membership/dues_eligibility.html (last visited Aug. 18, 2019).

34. ABA, About the American Bar Association, http://www.americanbar.org/utility/about_the_aba.html (last visited June 9, 2022).

35. One example of a "governmental function of the ABA is that the Section of Legal Education is recognized by the U.S. Department of Education as the organization that provides accreditation to law schools." ABA, The American Bar Association Law School Approval Process 3, https://www.americanbar.org/content/dam/aba/publishing/abanews/1307552148abalawschacredproc.authcheckdam.pdf (last visited Aug. 18, 2019).

36. It is sometimes asserted that state ethics codes do not have the force of law. See, e.g., In re Thelen LLP, 736 F.3d 213, 223 (2d Cir. 2013) ("Although the professional rules of conduct lack the force of law . . . New York Courts interpret other laws to harmonize with these rules to the extent practicable."). Although state ethics rules have limited authority in malpractice and disqualification controversies, they are the primary rules applied in disciplinary cases, which can lead to the suspension or disbarment of lawyers.

How are ethics rules written and adopted?

Usually, an ABA committee drafts a model rule or a set of revisions to the existing rules. Next, the model rule is debated and approved by the ABA as a whole through its House of Delegates at one of its national meetings. Committees of the state bar associations then usually review these model rules, sometimes at the request of their states' highest courts. The state bar committee or the court may solicit comments from members of the bar and from the public. Ultimately, in most states, the state's highest court accepts, rejects, or amends the version of the rule put forward by the committee. The court is not obliged to consider a rule just because it was proposed by the ABA. However, the ABA's work strongly influences the views of most state bar associations and courts.

Some draft ABA ethical rules are controversial. On some occasions when the ABA House of Delegates has considered proposals by its committees to change the rules to better protect client interests, the House has rejected the proposals as being unnecessarily intrusive on lawyers' discretion.

5. American Law Institute

The American Law Institute (ALI) is a private organization of 3,000 judges, lawyers, and law teachers that produces summaries of the law called Restatements.[37] During the 1990s, the ALI wrote the *Restatement (Third) of the Law Governing Lawyers*, which summarizes the rules of law that govern lawyers. The Restatement covers civil and criminal liability of lawyers to clients and third parties, standards for disqualification of lawyers for conflicts of interest, and ethical rules for violation of which a lawyer may be subject to discipline. The Restatement also covers the evidentiary rules on attorney-client privilege, the law of unauthorized practice, and many other topics.

The Restatement includes black-letter rules, which often summarize the rules followed in a majority of jurisdictions. The black-letter rules are followed by textual comments and by reporter's notes, which cite court decisions, statutes, books, and articles on each topic addressed. The Restatement is not law, but it is a useful synthesis of information about "lawyer law." It covers a much broader range of legal authority than the ABA Model Rules or the state ethics codes.

Is the Restatement consistent with the Model Rules?

Not always. In some instances, the Restatement's summary of the law appears at odds with a Model Rule or with a rule adopted by some states. Sometimes the

37. "The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law." ALI, About ALI, https://www.ali.org/about-ali (last visited June 8, 2022).

Restatement diverges from the ethical rules because the liability rules differ from the ethics codes, because the authors of the Restatement do not agree with the ABA about what the rules should be, or because the Restatement is more specific than the Model Rules. The comments in the Restatement often note such discrepancies and explain why the authors of the Restatement take a different position.[38]

When a state ethics rule and the Restatement are inconsistent, shouldn't a lawyer always follow the state rule?

It's not so simple. Many questions are not addressed by the ethical rules or are addressed only in general terms. If a state ethics rule clearly requires or prohibits certain conduct, in most cases a lawyer should follow the rule. On rare occasions, a lawyer might decide not to follow a rule because compliance seems inconsistent with the lawyer's own ethical judgment. More often, a lawyer will find that the text of the state's ethical rule does not provide clear guidance on her specific ethical dilemma. Then the lawyer must seek additional guidance from advisors or from sources such as the Restatement.

6. Federal and state courts

State and federal courts play important roles in the regulation of lawyers by setting rules for the conduct of lawyers in litigation, by sanctioning lawyers who violate those rules, by ruling in malpractice and other cases, and by hearing and deciding motions to disqualify lawyers who may have conflicts of interest. (Conflicts of interest are thoroughly discussed in Chapters 6-10.)

A judge who becomes aware of lawyer misconduct in a matter before the court may sanction the lawyer directly under the federal or state civil procedure rules. For example, the court may hold a lawyer in contempt or impose sanctions for obstructive behavior during discovery. Sanctions include fines, fee forfeiture, or other penalties. The judge should report the misconduct to the lawyer disciplinary agency if it violates an ethical rule that "raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects."[39] Despite this requirement, many judges tend not to report lawyer misconduct to disciplinary agencies.[40]

38. For example, in an ex parte hearing (one in which the adverse party is not present), Rule 3.3(d) requires a lawyer to reveal all material facts to the judge, even facts adverse to her client. The rule does not explicitly create an exception for privileged information, but the Restatement states that privileged information is exempt from this requirement. Restatement § 112, comment b.

39. Model Code Jud. Conduct R. 2.15(B) (2011). This language is in the rules that govern judges in most states.

40. See Arthur F. Greenbaum, Judicial Reporting of Lawyer Misconduct, 77 UMKC L. Rev. 537 (2008-2009).

Federal courts in each jurisdiction adopt their own standards for bar admission, and some adopt their own ethical rules.[41] Many federal courts adopt the same ethical rules that are in force in the states where the courts are located. Some adopt additional rules of practice. Federal courts impose sanctions on lawyers who engage in misconduct in the course of federal litigation.[42]

Appellate courts also participate in the regulation of lawyers. State and federal appellate courts review malpractice and disqualification decisions of lower courts. The U.S. Supreme Court regulates the legal profession by ruling on issues such as lawyer advertising under the First Amendment, construing statutes that require one party to litigation to pay the legal fees of another party, and reviewing convictions when defendants assert ineffective assistance of counsel.

Is a member of a state bar automatically allowed to practice in the federal courts of that state?

No. Each federal district court and court of appeals requires lawyers to be admitted to practice before it. Applicants for admission to practice in the federal courts are not required to take another bar exam. Usually any licensed lawyer who applies and pays a fee is admitted to practice before the federal court.[43]

7. Legislatures

Despite the inherent powers doctrine, Congress and state legislatures play major roles in the regulation of lawyers. Legislatures adopt constitutions and statutes, including criminal laws, banking laws, securities laws, and so on, that apply to everyone doing business in the state, including lawyers.[44] Many statutes specifically regulate the conduct of lawyers.

> **FOR EXAMPLE:** Some state consumer protection laws explicitly govern lawyers, while others exempt lawyers.[45] In California, statutory law

41. Judith A. McMorrow & Daniel R. Coquillette, Moore's Federal Practice: The Federal Law of Attorney Conduct § 801 (3d ed. 2018).

42. For a discussion of the sources of the federal courts' authority to regulate lawyers, see Fred C. Zacharias & Bruce A. Green, Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory, 56 Vand. L. Rev. 1303 (2003).

43. Some federal courts condition admission to practice before them on admission to the bar in the states in which the courts are located. Others condition admission to practice on admission before some other state or federal court. McMorrow & Coquillette, supra n. 41, § 801.20[3].

44. See Restatement § 8 (pointing out that with the exception of "traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code," lawyers are subject to criminal law to the same extent as nonlawyers).

45. See Mark D. Bauer, The Licensed Professional Exemption in Consumer Protection: At Odds with Antitrust History and Precedent, 73 Tenn. L. Rev. 131, 155 (2006).

governing lawyers is extensive and addresses some topics that other states cover in their ethics codes.[46] Nearly every state has a statute that makes it a criminal offense to engage in the unauthorized practice of law (UPL), and at least four impose felony sanctions for some UPL offenses.[47]

Are lawyers who testify at legislative hearings or meet with legislators on behalf of clients required to comply with additional statutes and regulations?

Yes, in some cases. Usually a lawyer may appear at a legislative hearing without any "admission" process, but federal and some state laws require lawyers who engage in legislative advocacy for profit to register as lobbyists and to report financial and other information about their activities.[48] Federal law imposes additional conflict of interest rules on those who engage in lobbying and requires a separate registration process for lobbyists who represent foreign nations.[49]

8. Administrative agencies

Do lawyers need separate admission to practice before an administrative agency?

Yes, in some cases. Lawyers often represent clients in administrative adjudication (such as social security or immigration hearings) or in agency rulemaking proceedings. A lawyer admitted to practice in a state usually may appear before an agency of that state and before any federal agency, without a separate admission, unless the agency has its own process for admitting lawyers. As to federal agencies, some have their own rules for admission of lawyers to practice before them, while others allow even nonlawyers to represent clients in hearings.[50]

Do administrative agencies impose additional ethical or procedural rules on lawyers who appear before them?

Many agencies have special ethical or procedural rules. Such rules may impose disclosure or other duties that are more stringent than those imposed by other

46. In May 2018, after a 15-year process, California became the last state to adopt a version of the Model Rules of Professional Conduct. See Wendy Chang, The New Conduct Rules: A Snapshot, Daily J., https://perma.cc/WMG4-B6W8.

47. George C. Leef, Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes, Regulation 33 (Winter 1997).

48. See, e.g., Office of the Clerk, U.S. House of Reps., Lobbying Disclosure, http://lobbyingdisclosure.house.gov/register.html (last visited June 9, 2022).

49. See generally Charles Fried, Report: Lobbying Law in the Spotlight: Challenges and Proposed Improvements, 63 Admin. L. Rev. 419 (2011).

50. 5 U.S.C. § 500 (2011); see Wolfram, supra n. 22, at 219 n. 48.

law.[51] Lawyers who engage in misconduct in practice before these agencies may be subject to civil or criminal penalties.[52] Some agencies, such as the Justice Department's Executive Office for Immigration Review, also have their own ethical rules for practitioners.[53]

Some federal agencies regulate lawyers for reasons other than participation in agency proceedings. For example, the Consumer Financial Protection Bureau has authority to enforce the federal consumer debt collection law against attorneys who have annual revenues of more than $10 million.[54]

9. Prosecutors

An increasing number of lawyers are indicted and prosecuted for crimes, some of which are committed in the course of practicing law.[55] Prosecutors have enormous discretion as to whether to file charges against a particular defendant. Although it seems that in the past, prosecutors were more reluctant to bring charges against lawyers, these reservations evaporated during the last quarter of the twentieth century.

This cultural change began with the Watergate scandal, discussed in Chapter 1, in which dozens of lawyers in senior federal government positions faced criminal charges for an array of unlawful conduct. Ten years later, several prominent savings and loan associations collapsed, and lawyers were found to have participated with them in the perpetration of massive financial frauds. The federal banking agencies, seeking to recoup some of the losses resulting from these frauds, indicted scores of lawyers and accountants who had served the savings and loan associations.[56]

These events shattered public assumptions that lawyers would never be involved in criminal activity. At the same time, the disciplinary agencies were becoming better staffed and more effective, and some of the disciplinary investigations sparked criminal investigations. During the 1990s, prosecutors indicted a rising number of lawyers, including several affluent partners of large law firms.[57]

51. See, e.g., 17 C.F.R. § 205.3 (2004) (requiring lawyers to assure that material information is not omitted from papers filed before the agency).

52. Id.

53. 8 C.F.R. § 1003.101.109 (2002).

54. 12 C.F.R. § 1090.105 (2012).

55. See generally Bruce A. Green, The Criminal Regulation of Lawyers, 67 Fordham L. Rev. 327 (1998).

56. For an exploration of the roles of lawyers in the savings and loan scandal, see James O. Johnson Jr. & Daniel Scott Schecter, In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law, 66 S. Cal. L. Rev. 977 (1993); Susan P. Koniak, When the Hurlyburly's Done: The Bar's Struggle with the SEC, 103 Colum. L. Rev. 1236 (2003).

57. Some examples of such cases are discussed in Lisa G. Lerman, Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 Geo. J. Legal Ethics 205 (1999).

10. Malpractice insurers

Insurance companies sell malpractice insurance policies to lawyers and law firms, but these companies also "regulate" the lawyers they insure. A malpractice insurer may require its legal clients to adopt a system to evaluate potential conflicts of interest, or it may insist that senior partners review all opinion letters sent to clients. It may require a firm to have a "tickler" system to help prevent lawyers from missing deadlines. These "risk management" and "loss prevention" measures are designed to reduce the likelihood that a lawyer or a law firm will be held liable for malpractice. Many of these policies also promote compliance with ethical rules. These rules form a body of "private law" that governs lawyers who contract with those companies.

Some malpractice insurers provide advice to lawyers at the firms they insure about ethical or professional dilemmas that could mushroom into lawsuits or disciplinary proceedings. With careful management, these crises are often prevented or resolved. Some insurers conduct audits to verify compliance with conditions of the insurance contracts. This guidance to and supervision of law firms by insurers is an important, though nongovernmental, form of regulation. The regulatory behavior of malpractice insurers may have more impact on practicing lawyers than the prospect of discipline by a public agency.[58]

11. Law firms and other employers

While one responsibility of every organization that employs its own lawyers is to ensure compliance with ethical rules and other law, many employers have additional rules of practice. Some larger law firms have developed a comprehensive "ethical infrastructure" to provide lawyers and nonlawyers with training, offer expert advice about ethics and liability questions, and prevent conflicts of interest. Many such firms designate one or more lawyers to be "ethics counsel" or "loss prevention counsel," or both. Other large firms form ethics committees. These structures help to establish and maintain a positive ethical culture within the firms. In addition, this internal regulation may dramatically reduce malpractice claims against the firm.[59]

58. See, e.g., Anthony E. Davis, Professional Liability Insurers as Regulators of Law Practice, 65 Fordham L. Rev. 209 (1996).

59. Martin Kaminsky, the general counsel of the law firm Greenberg Traurig, reported that the introduction of user-friendly ethical infrastructure allowed the firm to resolve many potential liability issues before they became problems. The number of claims against the firm, said Kaminsky, had dropped dramatically. One element in his firm's structure was to allow associates to report issues to the firm's general counsel in confidence. Presentation of Martin Kaminsky, panel on "Law Firm 'Ethics Audits,'" ABA 41st Nat'l Conference on Prof'l Responsibility, Denver, Colo., May 29, 2015.

Law firms and government agencies sometimes have stricter confidentiality rules than those imposed by the state ethics code.[60] Likewise, many firms have policies on file maintenance, consultation with other lawyers, timekeeping, and other issues. Like the "rules" made by malpractice insurers, law firm rules constrain lawyer employees as do rules of law, but they are imposed by a contract rather than by a licensing authority or legislature.

12. Clients

Institutional clients have a quasi-regulatory role in relation to the law firms they hire. While many individual clients have very little ability to "regulate" their lawyers, large corporations and government agencies are major consumers of legal services. Government agencies and corporations, of course, have their own lawyers, but they sometimes hire outside counsel to provide a variety of services. Both governmental and corporate clients have a great deal of bargaining power in dealing with law firms.

A federal agency, for example, might make a policy prohibiting lawyers from doing "block billing," in which a lawyer records time worked on a matter in eight-hour blocks without specifying what tasks were performed during each block. An insurance company might impose a policy prohibiting its outside counsel from billing more than ten hours of paralegal time on each case. Many institutional clients have lengthy and detailed policies. Institutional clients also may insist on some oversight of the lawyers who represent them. For example, some hire outside auditors to review the work performed and the bills submitted.[61] Law firms that represent those corporations must agree to comply with these policies and to submit to client oversight as a condition of their employment.

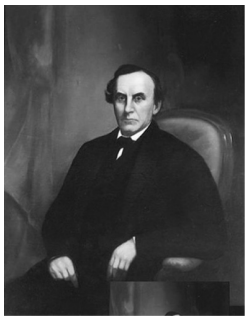
B. State ethics codes

While many institutions govern lawyers, applying many different bodies of law, perhaps the most important source of guidance for lawyers about their ethical

60. For example, federal law imposes criminal penalties for revealing confidential government information. 18 U.S.C. § 1905; see U.S. Dep't of Justice, Criminal Resource Manual § 1665, https://www.justice.gov/jm/criminal-resource-manual-1665-protection-government-property-disclosure-confidential-government (last updated Jan. 17, 2020). Also, students who work as externs at government agencies are sometimes prohibited from carrying texts out of the office or from talking with anyone about the substance of the matters that they are working on. See generally Alexis Anderson, Arlene Kanter & Cindy Slane, Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom, 10 Clin. L. Rev. 473 (2004).

61. Michael Zeoli & Stacey A. Giulianti, The Case For and Against Outsourced Legal Bill Review, Litig. Mgmt. 48 (2012).

obligations is found in the state ethics codes. In this section, we briefly summarize how these codes developed.



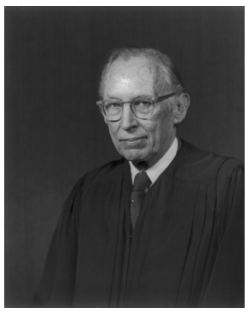
Professor George Sharswood

The earliest set of legal ethics principles seems to have been published in 1836 by a lawyer from Baltimore named David Hoffman.[62] Then, in 1854, George Sharswood (Dean of the University of Pennsylvania Law School and later Chief Justice of Pennsylvania) published a series of lectures on the subject, and in 1887 the Alabama State Bar Association wrote a legal ethics code based on those lectures.[63] During the next several decades, nine other states wrote their own codes, based largely on the Alabama code.[64]

The ABA adopted its first set of Canons of Ethics, based in large part on the Alabama code, in 1908.[65] While some states treated the Canons as a set of mandatory rules, others treated them only as nonbinding guidance for lawyers.[66]

In the 1960s, Justice Lewis F. Powell, then in private practice, led an initiative within the ABA to rewrite the Canons. This produced the ABA Model Code of Professional Responsibility, adopted by the ABA in 1969. This code was quickly adopted by courts in the vast majority of states, superseding the 1908 Canons.[67] Suddenly, the standards for lawyers became a lot more like binding "law."

The codification of the law governing lawyers in the 1960s marked a major change in the structure and content of the ethical rules, but there was little regulatory infrastructure to implement the rules. In 1970, an ABA committee chaired by former U.S. Supreme Court Justice Tom Clark issued a devastating report on the state of lawyer regulation. This report concluded that "disciplinary action [was] practically nonexistent in many jurisdictions; practices and procedures [were] antiquated; [and] many disciplinary agencies ha[d] little power to take effective steps against malefactors."[68] The enactment of the Model Code, however, was



Justice Lewis Powell

62. Thomas D. Morgan & Ronald D. Rotunda, Professional Responsibility: Problems and Materials 16-17 (13th ed. 2018).

63. Allison Marston, Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association, 49 Ala. L. Rev. 471 (1998). The lectures were published as a book called *Professional Ethics*. Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering § 19 (3d ed. 2001).

64. Wolfram, Modern Legal Ethics 57 (1986), at 54 n. 21.

65. The 1908 code included 32 Canons. Fifteen more Canons were added between 1908 and 1969. James M. Altman, Considering the A.B.A.'s 1908 Canons of Ethics, 71 Fordham L. Rev. 2395, 2396 (2003).

66. Restatement § 1, comment b, reporter's note.

67. Charles W. Wolfram, supra n. 64, at 56.

68. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems, and Recommendations in Disciplinary Enforcement, at 1 (1970), quoted in Mary M. Devlin, The Development of Disciplinary Procedures in the United States, 7 Geo. J. Legal Ethics 911, 921 (1994).

an important advance that, in time, was followed by additional initiatives to improve and to implement the ethics codes.

When was the old ABA Model Code replaced by the current ABA Model Rules?

Some critics observed that the Model Code was too focused on litigation-related issues and ignored some important problems that practitioners encounter. In 1977, the ABA appointed a committee that became known as the Kutak Commission to rewrite the rules. That commission produced a draft of the Model Rules of Professional Conduct. In 1983, after much discussion and many amendments, the ABA adopted the Model Rules. The states did not rush to adopt the Model Rules as they had done with the Model Code. Most states made significant amendments to the ABA Model Rules before they adopted them.

In 1997, the ABA undertook another revision of the Model Rules. Dramatic changes in the legal profession during the 1980s and 1990s had made this new revision necessary. One such change was that law practice increasingly involved interstate and international issues or parties. One aspiration of the revision was to promote greater uniformity among the state ethics codes to reduce conflicts of law and confusion about how particular situations should be handled.[69] The revision committee, called the Ethics 2000 Commission, proposed significant amendments to the Model Rules. Between 2001 and 2003, the ABA House of Delegates accepted most of the Commission's recommendations.[70] By 2015, nearly every state had adopted some version of the Model Rules, as revised, as well as some version of its numbering system.[71] However, the state ethics codes that govern lawyers contain substantial variations from the ABA Model Rules,[72] so practitioners must rely on the pertinent state rules, not the Model Rules.

Many state courts have also adopted some version of the ABA's official comments to the Model Rules. In May 2018, California became the last state to adopt a version of the Model Rules.[73] The comments vary substantially from state to state. A few state courts have adopted only the Rules of Professional Conduct

69. See Lucian T. Pera, Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct, 30 Okla. City U. L. Rev. 637, 639 (2005).

70. ABA, Ctr. for Prof'l Responsibility, Summary of House of Delegates Action on Ethics 2000 Commission Report, https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_summary_2002/ (last visited June 9, 2022).

71. See ABA, Status of State Review of Professional Conduct Rules (Sept. 20, 2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics_2000_status_chart.authcheckdam.pdf.

72. Every state posts its rules of professional conduct on the Internet. For a selection of state rules that diverge from the ABA Model Rules, see Lisa G. Lerman, Philip G. Schrag & Anjum Gupta, Ethical Problems in the Practice of Law: Model Rules, State Variations, and Practice Questions (2021).

73. Chang, supra n. 46.

and declined to adopt any comments.[74] And at least in New York State, the state's highest court adopted and periodically amends the state's rules of professional conduct, but the state bar rather than the court promulgates the interpretive comments.[75]

In 2009, the ABA Ethics 20/20 Commission studied the Model Rules in the context of globalization and rapidly changing technology. It recommended several amendments to strengthen confidentiality, which the ABA House of Delegates adopted. The Commission considered proposing significant changes that could have permitted lawyers to practice in other states without separate bar admissions, lawyers to partner with nonlawyer professionals, or nonlawyers to invest in law firms. Ultimately, however, the Commission decided not to propose changes to the rules on these matters. These issues are discussed in Chapter 13.

What are the functions of the state ethics codes?

The state ethics codes are a primary source of guidance for lawyers and judges about standards of conduct for lawyers. They guide lawyers in evaluating what conduct is proper in various situations and provide a basis for disciplining lawyers who violate the rules. Courts also consult the ethics codes for guidance in determining whether a lawyer has engaged in malpractice, has charged an unreasonable fee, or should be disqualified from representation of a client because of a conflict of interest.[76] Many of the rules in the ethics codes are drawn from rules of tort law, contract law, agency law, and criminal law.[77]

Does the state ethics code in each state apply to every lawyer admitted in the state?

Yes. Every lawyer admitted to practice in a state must comply with the ethics code of that state. (If the lawyer litigates or practices elsewhere, some of the lawyer's conduct may be governed by a different state code.) The drafters of the rules attempted to write one-size-fits-all rules to guide the conduct of every lawyer admitted to practice in the state, whether a solo practitioner or a partner in a large law firm, and regardless of practice area. However, certain rules are written to apply more narrowly. For example, because of the constitutional protections afforded to criminal defendants, certain provisions in the codes include special rules for prosecutors and for lawyers representing people who are charged with crimes. Sometimes particular practice groups propose specialized rules to govern a subset of lawyers,

74. See, e.g., Nev. Rules of Prof'l Conduct (2014); N.J. Rules of Prof'l Conduct (2015).

75. Updated Comments to N.Y. Rules Feature Extra Guidance on Key Confidentiality Provisions, 83 U.S.LW. 1483 (Apr. 7, 2016).

76. Restatement § 1, comment b.

77. Id.

but so far, the ABA has continued to endorse the single primary set of rules for all lawyers.[78]

Do judges also have ethical rules?

Another important code drafted by the ABA is the Model Code of Judicial Conduct, which sets out ethical rules for judges. The development of the judicial ethics code has followed a course similar to the lawyer codes. The ABA adopted Canons of Judicial Ethics in 1924. The ABA adopted a much-expanded Code of Judicial Conduct in 1972 and updated it in 2007.[79] The Code has been adopted in some form in a majority of states.[80]

Do other ethics codes apply to lawyers in specialized practice areas?

Yes. Various bar organizations have recommended standards of conduct for lawyers in particular practice areas. Perhaps the most influential are the ABA Standards for Criminal Justice, which offer guidance to prosecutors and criminal defense lawyers. The current version of the standards (extensively amended in the early 1990s) includes separate sets of guidance for "The Prosecution Function" and "The Defense Function." Like other ABA recommendations, these standards do not have the force of law, but more than 40 states have made changes in their criminal codes to incorporate some of these standards.[81]

Specialized ethics codes have been adopted by voluntary bar associations of lawyers employed by the federal government, lawyers who handle domestic relations matters, and others. These standards and codes also are advisory in nature, but some are very influential and offer guidance on many issues not addressed by the mandatory ethics codes.[82]

78. In 2011, the Law Firm General Counsel Roundtable, an organization representing 23 large law firms, suggested that a different set of ethics rules should be written for firms that serve "sophisticated" (i.e., large corporate) clients, but this proposal has met with nothing but skepticism. One member of the Ethics 20/20 Commission said that the proposal would be viewed "as an effort to carve out special treatment for larger firms and another system for the rest of us peons." James Podgers, Ethics 20/20 Pitch: Law Firms That Serve "Sophisticated" Clients Need Own Regulatory Systems, ABA J., Apr. 16, 2011.

79. See ABA, Model Code of Jud. Conduct (2011).

80. See ABA, State Adoption of Revised Model Code of Judicial Conduct (Nov. 2015) (stating that 32 states have approved a revised judicial code). Some issues of judicial ethics are discussed in Chapter 10.

81. See Stephen Gillers, Roy D. Simon & Andrew M. Perlman, Regulation of Lawyers: Statutes and Standards (2015).

82. See, e.g., Am. Acad. of Matrimonial Lawyers, Bounds of Advocacy, https://www.fieldsdennis.com/wp-content/uploads/2018/03/bounds_of_advocacy.pdf (last visited June 14, 2022). The American Academy of Matrimonial Lawyers restricts access to its resources to members, but others — like this law firm — have published the standards online.

Do the ethics codes explain most of what lawyers need to know about their legal and ethical obligations?

No. The ethics codes are just one branch of the law governing lawyers. A large body of case law involves legal malpractice, motions to disqualify lawyers from representing particular clients, appeals by criminal defendants who claim that they didn't receive competent representation, motions to sanction lawyers for violating court rules, challenges to lawyers' fees, and so on. In addition, lawyers are bound to comply with countless federal, state, and local statutes and regulations.

Lawyers need to be familiar with all of these sources of law. In addition, even as to ethical dilemmas governed mainly by the ethics codes, there is more to know. The ethics codes do not anticipate or provide answers to most of the ethical problems that lawyers encounter. Although they contain quite a few clear requirements and prohibitions, they mostly provide general guidelines only. A lawyer faced with an ethical issue must exercise professional judgment *informed by* the ethics codes about how to handle a particular situation. But the ethics codes are not necessarily the final word. Some of the problems in this book, for example, present circumstances in which a lawyer might make a well-considered decision to take action that he knows will violate an ethical rule.

How does a court opinion in a lawyer discipline case differ from an advisory ethics opinion?

A lawyer may be sanctioned for violating the state ethics code. A case in which a lawyer is charged with ethical violations is a discipline case, and the decision on the case may be reported in an administrative or a judicial court opinion.

An advisory opinion is not a decision in a case but is written by a bar committee, sometimes in response to an inquiry from a lawyer. These opinions interpret the ethics codes and provide guidance to lawyers as to the meaning of the rules. The ABA, the state bar associations, and the bar associations of some cities and counties have ethics committees that write advisory opinions for lawyers seeking guidance on ethical questions. The committees are usually comprised of both lawyers and nonlawyers. Courts rely on these advisory opinions with increasing frequency.[83]

83. Peter A. Joy, Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct, 15 Geo. J. Legal Ethics 313, 319 (2002).

What should a lawyer do if, after reading the ethics rules and cases, she still doesn't know whether a contemplated course of action is permissible?

The lawyer might call the bar counsel or the bar's ethics committee. Sometimes off-the-cuff, nonbinding guidance is available from either the disciplinary counsel or from a staff lawyer for the ethics committee. A lawyer may write a formal inquiry to the ethics committee, giving a factual scenario in hypothetical form, but it can take months between submission of an inquiry and issuance of an opinion.

C. The disciplinary system

The lawyer disciplinary system is the administrative process through which lawyers may be charged with violation of the state ethics codes. A lawyer found to have violated one or more provisions of the state ethics code may lose his license to practice law, may be ordered to cease practice for a period of time, or may receive a reprimand or some other lesser sanction.

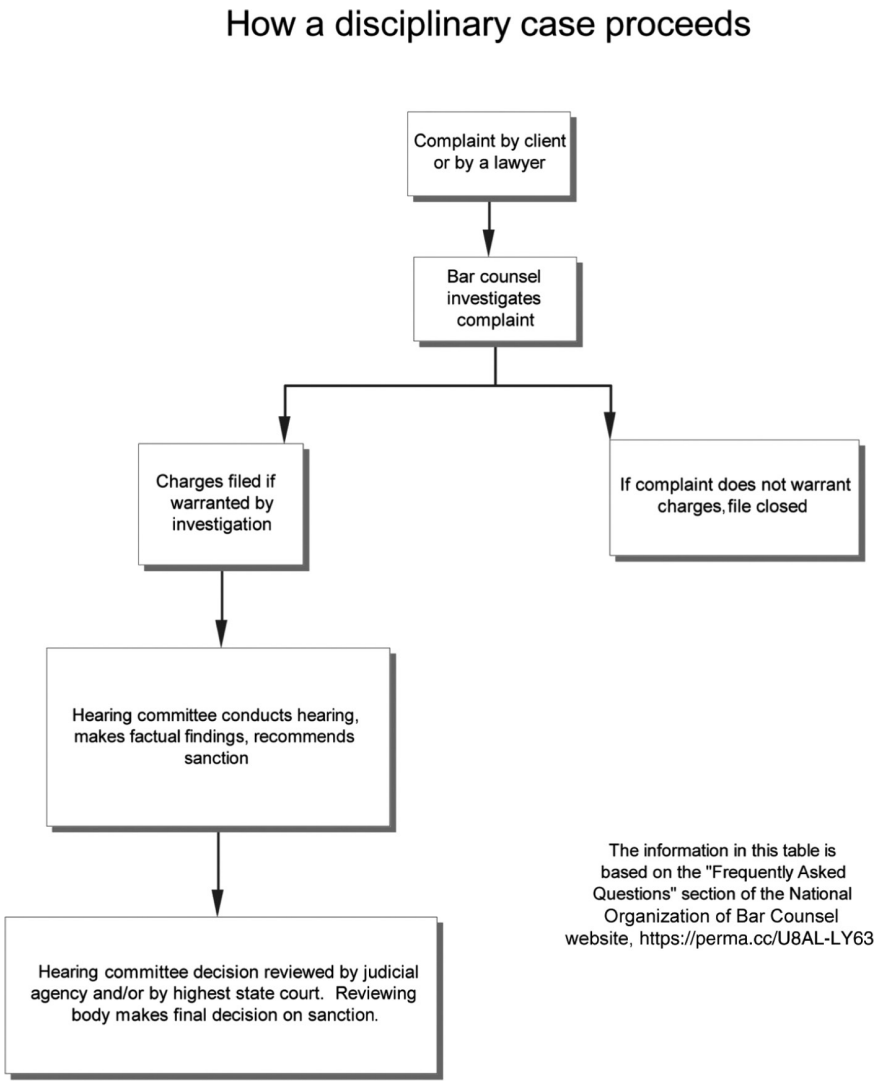
Before the twentieth century, a lawyer who engaged in misconduct might have been brought to court and charged with misfeasance (traditionally characterized as "conduct unbecoming a lawyer") by a client, another lawyer, or a bar association. A judge might then have barred the lawyer from further practice in that court.[84] After the ABA adopted the 1908 Canons of Ethics, some courts began to refer to the Canons as a basis for discipline of lawyers. Gradually, the states established administrative agencies to investigate and prosecute lawyer misconduct. Until the latter part of the twentieth century, however, lack of funding and reliance on volunteer staffing severely limited many state disciplinary systems.[85] More recently, the disciplinary systems have become "professionalized," with better funding, more staff, and greater ability to police lawyer misconduct.[86] Courts have established administrative hearing panels to make findings of fact and recommendations for sanctions. States have also adopted procedural rules for adjudication of lawyer discipline cases. Most of these are based on the ABA Model Rules for Lawyer Disciplinary Enforcement.[87] Although most disciplinary agencies are still short-staffed and many still rely on volunteer adjudicators, they are far more effective than they once were.

84. Restatement ch. 1, tit. C, introductory note.

85. See Wolfram, supra n. 64.

86. See generally Leslie C. Levin, The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline, 48 Am. U. L. Rev. 1 (1998) (chronicling this development and discussing contemporary problems with the lawyer discipline systems).

87. Restatement ch. 1, tit. C, introductory note.



How does a typical disciplinary proceeding work?

In most states, the highest court runs the disciplinary system. An independent office set up by the court uses paid staff attorneys to investigate and prosecute charges against lawyers. Some disciplinary offices are administered by state bar associations, but others are independent of the bar associations. If a disciplinary agency thinks that a complaint against a lawyer appears warranted, it first presents the case to an adjudicator, who may be (depending on the state) a three-person volunteer hearing committee (often two lawyers and a nonlawyer), a single volunteer lawyer adjudicator, or a judge.[88]

88. David Summers, Adjudicating Attorney Discipline: Are Panels Necessary?, 20(2) Prof'l Law. 30 (2010).

The adjudicators hear evidence, make findings of fact, and recommend sanctions.[89] The adjudicators' recommendations are then reviewed by an administrative board. Decisions of the administrative board may be appealed to the state's highest court.[90]

Do the lawyer disciplinary agencies investigate most of the complaints and punish violators?

Apparently not. Because of resource limitations, the agencies have tended to investigate only the most egregious complaints.[91] An ABA commission reported in 2018 that

> some jurisdictions dismiss up to ninety percent of all complaints. Most are dismissed because the conduct alleged does not violate the rules of professional conduct. The Commission has gathered much information about these dismissed complaints. It convinces us that many of them do state legitimate grounds for client dissatisfaction. The disciplinary system does not address these tens of thousands of complaints annually. The public is left with no practical remedy.[92]

Disciplinary authorities tend not to pursue certain types of cases. For example, Professor Leslie Levin reports that

> [m]any disciplinary agencies will not docket charges of incompetence against criminal defense attorneys, legal malpractice, complaints arising out of ongoing litigation, or many allegations of incivility. . . . In Virginia, . . . fee disputes are routinely dismissed by disciplinary authorities [even though] the billing of excessive fees is an ethical violation. . . . Similarly, in New Jersey, grievances concerning fee disputes are typically referred to the district fee arbitration committee.[93]

FOR EXAMPLE: William P. Robinson, a former state legislator, was held in contempt three times for not showing up in court. On two of those occasions, the court imposed suspended jail sentences. The court also found that he had defaulted on four appeals and lied to clients about

89. See Restatement, ch. 1, tit. C, introductory note. Disciplinary proceedings used to be more heavily controlled by bar associations, but partly in response to the ABA's Model Rules for Lawyer Disciplinary Enforcement, these proceedings have become more independent of bar association influence. See Wolfram, supra n. 22, at 206.

90. ABA, Ctr. for Prof'l Responsibility, Model Rules for Lawyer Disciplinary Enforcement (2002).

91. See ABA, Ctr. for Prof'l Responsibility, Comm'n on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century xv (1992).

92. ABA, Comm'n on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century (2018), https://perma.cc/KE5H-U8PS.

93. Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 Geo. J. Legal Ethics 1, 18 & n. 115 (2007).

> the dismissals.[94] Despite this parade of misconduct, a court considering the state bar's complaint against him suspended his law license for only 90 days.[95] The *Washington Post* reported that "[o]ne of the judges . . . said that 'if I was in trouble, I wouldn't hesitate to hire Mr. Robinson if I could just get him to court on time.'"[96] The Virginia Supreme Court affirmed the light sanction even though the state bar wanted to disbar Robinson.[97]

Professor Levin adds that "horror stories abound about clients who were defrauded by their lawyers while those same lawyers were under investigation by disciplinary counsel in other discipline cases."[98] In addition, she writes,

Professor Leslie Levin

> the sanctions imposed on lawyers are often light and inconsistent. . . . [P]rivate sanctions — the lightest form of discipline — are imposed almost twice as often as any other type of sanction. Lawyers often receive several private admonitions before they receive any public discipline. If a lawyer is suspended from practice, the period of suspension is frequently so brief that it does not interrupt a lawyer's practice. In many of these cases, sanctions fail to achieve the primary goal of lawyer discipline, which is protection of the public.[99]

There are other problems too:

- Although serious misconduct occurs in large firms and small firms, in government agencies and in corporate general counsel's offices, most of the people disciplined are sole practitioners. For example, the 2016 report of the Illinois Attorney Registration and Disciplinary Commission stated that 83 percent of the 107 lawyers sanctioned were sole practitioners or practiced in a firm of 2-10 lawyers at the time of the misconduct.[100]

94. Wash. Post, Editorial, A Lawyer's Tale, Aug. 6, 2004 (reporting that Robinson had defaulted on eight other appeals and asking, "What exactly does it take to get disbarred in Virginia? Mr. Robinson is an extreme example, but as our study has shown, he is far from the state's only defense lawyer who frequently tosses a client's rights away.").

95. Va. State Bar ex rel. Second Dist. Comm. v. Robinson, Case CL-04-2184 (Cir. Ct. Norfolk, Va. June 2, 2005), http://www.vsb.org/disciplinary_orders/robinson_opinion060905.pdf (suspension by three-judge panel of circuit court).

96. Wash. Post, Editorial, Another Slap on the Wrist, May 11, 2005.

97. Wash. Post, supra n. 94; Va. State Bar, Disciplinary Actions Taken by the Virginia State Bar (Jan.-June 2005), https://perma.cc/J6BP-CF3J (noting that the Supreme Court of Virginia had affirmed the suspension on Oct. 6, 2005).

98. Levin, supra n. 93, at 8.

99. Levin, supra n. 86, at 9.

100. Attorney Registration & Disciplinary Comm'n of the Supreme Court of Ill., Annual Report of 2016, at 34, chart 21C, https://www.iardc.org/Files/AnnualReports/AnnualReport2016.pdf; Patricia Manson, Solo Practitioners Draw Majority of Sanctions, Chi. Daily L. Bull., May 3, 2004, at 1. This pattern is observed throughout the United States. Ted Schneyer, Professional Discipline for Law Firms?,

- Formal discipline is disproportionately imposed on members of minority groups.[101]
- Most disciplinary complaints come from clients. Much lawyer misconduct is unknown to clients, so the types of misconduct that lead to discipline are skewed toward the problems that clients discover. (See discussion of reporting misconduct below.[102])

Are some states making significant improvements in their disciplinary systems?

Yes. Many states are engaged in an ongoing process of review and implementation of improvements in their disciplinary systems.

FOR EXAMPLE:

- Although the California disciplinary system has shortcomings,[103] the state bar does post to the Internet the names of attorneys who have been charged with violations of the state's ethics rules, even if those charges have not yet been adjudicated.[104] Attorneys who opposed public posting of pending charges argued that disciplinary authorities routinely charged lawyers not only with violating specific rules but also with being guilty of "moral turpitude," that litigation opponents of lawyers thus charged would quote that charge routinely in court papers, and that innocent lawyers charged with moral turpitude would lose clients even though they might ultimately be vindicated.[105]
- The Arizona bar has a well-developed diversion program that considers client complaints involving neglect, lack of diligence, inadequate communication by lawyers to their clients, and problems of poor law

77 Cornell L. Rev. 1 (1992). But see Julie Rose O'Sullivan, Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal, 16 Geo. J. Legal Ethics 1 (2002) (arguing that sole practitioners are not disproportionately disciplined).

101. Manson, supra n. 100 (reporting that the Illinois disciplinary data showed that "Black lawyers were disciplined in disproportionately larger numbers than their white counterparts." Eleven percent of the lawyers disciplined were Black, but only about 4.9 percent of the lawyers who are admitted in Illinois are Black.).

102. See William T. Gallagher, Ideologies of Professionalism and the Politics of Self-Regulation in the California State Bar, 22 Pepp. L. Rev. 485, 612-614 (1995).

103. See Cal. State Auditor, State Bar of California: It Has Not Consistently Protected the Public Through Its Attorney Discipline Process and Lacks Accountability, Rep. 2015-030 (June 18, 2015).

104. See State Bar of Cal., Proposed State Bar Policy Re Posting of Notices of Disciplinary Charges on the State Bar's Website, https://perma.cc/7AZR-GQJP (text of proposal); California State Bar to Post Notice of Disciplinary Charges on Web Site, 77 U.S.L.W. 2069 (Aug. 5, 2008) (approval).

105. California State Bar Eyes Proposal to Post Notice of Disciplinary Charges on Web Site, 77 U.S.L.W. 2035 (July 15, 2008).

office management; it trains lawyers to improve their skills so they can prevent similar incidents.[106]

If the disciplinary agencies tend to underenforce the rules, does that mean that lawyers need not worry about compliance with the ethics rules?

No. Lawyers must take seriously their duty to comply with ethics rules for a number of reasons. First, although disciplinary agencies do not prosecute every violation, they do prosecute a large number of cases every year. Second, even being accused of unethical conduct is professionally damaging. Third, noncompliance with the ethics code can be a basis for legal malpractice liability if the violation causes harm to a client or a third party. Fourth, noncompliance with the ethics code might lead an employer to fire a lawyer or to decline to hire a candidate. In most circumstances, then, lawyers should comply with ethics rules and other law regardless of their chances of being caught or punished for a violation.

Is there a statute of limitations on disciplinary violations?

No, at least in states that have adopted the ABA's Model Rules for Lawyer Disciplinary Enforcement. Rule 32 provides that "proceedings under these rules shall be exempt from all statutes of limitations."[107]

1. Grounds for discipline

What kinds of professional conduct can result in discipline?

Lawyers are disciplined for a wide variety of conduct in and out of practice. Among the most common conduct that leads to discipline are misappropriating client funds, commingling law firm and client funds, missing court filing deadlines, failing to respond to client communications, committing mail fraud and tax evasion, and neglecting client cases (often because of substance abuse problems).

106. See Ariz. Sup. Ct., Arizona Attorney Diversion Guidelines (Jan. 1, 2011); Diane M. Ellis, A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers, 52 Emory L.J. 1221 (2003).

107. ABA, Model Rules for Lawyer Disciplinary Enforcement, July 16, 2020, https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_32/. According to the Restatement, "many states have followed all or most of the recommended procedures and institutional arrangements" specified in those Rules. Restatement § 5.

FOR EXAMPLE: In Illinois in 2020, the most common problems that led to charges against a lawyer being docketed were neglect of client cases (1,265 cases); failure to communicate with a client, including failure to communicate the basis for a fee (534 cases); fraudulent or deceptive activity (527 cases); excessive or improper fees (402 cases); incompetent representation (373 cases); criminal conduct (373 cases); and improper management of client or third party funds, including commingling and theft from clients (325 cases).[108]

Lawyers can be disciplined for abusing clients or employees.

FOR EXAMPLE: Milo J. Altschuler, a Connecticut lawyer, received a reprimand from the lawyer disciplinary agency in a case involving an alleged spanking of a client in a conference room at the courthouse, but he was criminally charged and received a suspended sentence and three years' probation based on this incident. Altschuler claimed that he threatened to spank his clients as part of his preparing them to testify, to make them "more afraid of him than they would be of the prosecutor."[109]

FOR EXAMPLE: In Ohio, Michael Fine was disbarred for hypnotizing female clients and having sex with them while they were hypnotized.[110]

While the most common bases for imposition of disciplinary sanctions are criminal or fraudulent activity or inattention to clients, some lawyers are punished for other types of conduct.

FOR EXAMPLE: In Florida, Sean Conway was fined and reprimanded for blogging that a judge who had ruled against him was an "evil, unfair witch."[111]

108. Attorney Registration & Disciplinary Comm'n of the Supreme Court of Ill., Annual Report of 2020, at 48, Chart 12, https://perma.cc/HZ4G-TQXN.

109. Scott Brede, Spanking Client Not Legitimate Trial Prep Tactic, Conn. L. Trib., July 15, 2002. A court later held that his $250,000 settlement payment to the woman was not covered by his malpractice policy. Id. Oddly enough, these are not the only two cases in which lawyers have gotten in trouble for spanking their clients. See, e.g., Martha Neil, Accused of Spanking Client for Saying "Uh Huh," Suspended Lawyer Faces Criminal Case, ABA J., May 1, 2013; Associated Press, Tenn. Lawyer Pleads Guilty to Spanking Client, July 13, 1990.

110. Debra Cassens Weiss, Disbarred Lawyer Is Sentenced for Hypnotizing Clients for Sexual Gratification, ABA J., Nov. 14, 2016.

111. Fla. Bar v. Conway, 2008 WL 4748577 (Fla. Oct. 29, 2008); John Schwartz, A Legal Battle, Online Attitude vs. Rules of the Bar, N.Y. Times, Sept. 12, 2009 (reporting that Conway was angry because the judge gave criminal defense lawyers only one week to prepare for trial to pressure them to ask for a postponement, thereby waiving their clients' rights to have felony cases tried within 175 days).

Perhaps lawyers should have a First Amendment right to criticize judges, but not everyone thinks so. Attorney Michael Downey comments that "[w]hen you become an officer of the court, you lose the full ability to criticize the court."[112]

Can a lawyer be disciplined for advising a client about proposed conduct that may be criminal or fraudulent?

It depends. A lawyer may advise a client who wants to know whether a possible course of action is lawful, but a lawyer may be disciplined if the lawyer guides the client as to how to violate the law or helps the client to engage in conduct that is criminal or fraudulent. Rule 1.2(d) provides that

> **[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.**

"I'll work on the appeal. You try to escape."

112. Quoted in Schwartz, supra n. 111.

This rule bars lawyers from assisting a client's criminal or fraudulent conduct. But what constitutes assistance? The term is not defined in Rule 1.0, the definitions section of the Model Rules. Comments 9 and 10 after Rule 1.2 explain the rule but do not define "assisting":

> [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
>
> [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. . . .

Rule 1.2 prohibits assisting a client only in conduct that the lawyer "knows" is fraudulent (which seems to exclude a lawyer's negligent and perhaps even reckless conduct). Ordinarily, a client won't tell her lawyer that she wants help in defrauding someone. But a lawyer could be accused of fraud if he prepared a fraudulent document, even if he did not know that some of the information in the document was false. Disciplinary authorities might infer from the circumstances that a lawyer did know that the legal assistance would be used for fraudulent purposes.[113] Also, law other than the ethics rules might require a lawyer to verify the information that the client provides. If a lawyer does not exercise the required level of diligence to discern client fraud, the lawyer might be liable for negligence to those injured by the fraud. In addition, a lawyer could be subject to discipline or criminal charges merely for advising a client to engage in criminal or fraudulent action, or for advising the client how to evade detection or prosecution.

The Restatement offers examples of "assisting fraud." In one case, a lawyer was charged with obstruction of justice because he had advised a client to destroy documents. In a second case, a lawyer was disciplined for advising a client to conceal the identity of the owners of a business when applying for a liquor

113. Rule 1.0(f). According to the Restatement, "a lawyer's intent to facilitate or encourage wrongful action may be inferred if in the circumstances it should have been apparent to the lawyer that the client would employ the assistance to further the client's wrongful conduct, and the lawyer nonetheless provided the assistance." Restatement § 94, comment c.

license. In the third example, a lawyer was disciplined for advising his client to leave the state to avoid prosecution.[114]

A good rule of thumb is that a lawyer should be wary if a client's past or contemplated conduct appears to involve intentional or knowing misrepresentation to another person. Legal consequences are more likely if the false statement concerns something important, if it is made to induce another person to act, if the other person acts in reliance on the statement, and if harm results.

Another term in Rule 1.2(d) that warrants interpretation is the word "fraudulent." What is fraud? Rule 1.0(d) offers a somewhat circular definition of the term: " 'Fraud' or 'fraudulent' denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." The "purpose to deceive" prong of this test of fraud is easy enough to understand, but "fraudulent under the substantive or procedural law of the applicable jurisdiction" raises more questions than it answers. Fraud has somewhat different meanings in tort law, contract law, criminal law, and procedural law, not to mention variations from state to state. Case law on fraud may be fact-specific and therefore of relatively little help in a new situation. Generally, however, fraud involves an intentional misrepresentation of a material fact — a lie or a purposeful deception.

Under what circumstances might a lawyer commit or assist a fraud by failing to state a fact (omission) or by telling a half-truth?

Omissions and half-truths can constitute fraud. In many legal contexts, such as the sale of securities, material omissions and half-truths are regarded as fraudulent. Under the Model Rules, a lawyer's omission may be fraudulent if the lawyer intended to deceive another person. For example, Rule 4.1(b) bars a lawyer from knowingly failing to disclose a nonconfidential material fact when disclosure is necessary to avoid assisting a client's fraudulent act. Comment 1 after Rule 4.1 explains that "[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements."[115]

Would a lawyer assist a fraud or crime in violation of Rule 1.2(d) if he adheres to a state law that is at odds with a federal one?

After Colorado voters approved a referendum legalizing recreational marijuana, the state supreme court adopted a new comment to Rule 1.2, which concludes

114. Restatement § 94, comment c, reporter's note. Just as you could be charged with a tort or a crime for conduct that would not be assisting a fraud under the ethical rules, you could be subject to ethics discipline even if your conduct is not tortious or criminal. For example, civil liability for fraud requires a showing of reliance on the fraud and damage resulting from the reliance. Neither reliance nor damages need be shown in a disciplinary proceeding. Id. § 94, comment c.

115. The Restatement also takes the view that there is not much difference between false statements and deliberate deception by half-truths and omissions. It explains that "inaction (through nondisclosure) as well as action may constitute fraud under applicable law." Restatement § 67, comment d.

that it is not a violation for a Colorado lawyer to provide legal advice to businesses that sell recreational marijuana, but the lawyer must advise those clients about the federal criminal law.[116] The federal district court in Colorado ordinarily adopts the rules adopted by the state supreme court, but in this instance, the federal court decided to opt out of adopting this comment. The federal court's version of the comment states that a lawyer may advise a client about the applicable state and federal law but stops short of permitting a lawyer to assist a client in conduct that is permitted by state law but barred by federal law. This guidance would apply to Colorado lawyers who have been admitted to practice in the local federal district court.[117]

PROBLEM 2-1

THE DYING MOTHER

This problem is based on events that occurred in a mid-Atlantic state in the first decade of the twenty-first century.

You are an experienced estates lawyer who is preparing an estate plan for a married couple, Nancy and Edgar Binder. Nancy mentions that her aging mother, Gloria Sanza, lacks an estate plan. You invite Gloria to contact you, but despite her daughter's suggestion, she doesn't follow up. Several years later, Nancy contacts you again to discuss her mother's estate plan.

You have a telephone conversation with Gloria and her daughter. During this conversation, you learn that Gloria is ill; that her only asset is a $250,000 house, which she has willed to her four adult children; and that she wants to minimize the fees and expenses that her children will incur on her death. Gloria's existing will would need to go through probate after her death, which would cost the children $10,000 in legal fees. You explain that these fees can be avoided if Gloria creates a new will assigning the ownership of the house to a living trust. This would give Gloria sole control of the house during her lifetime. The children would be beneficiaries of the trust. After Gloria's death, the house would be

116. Colo. Rules of Prof'l Conduct R. 1.2, Comment 14. New Jersey amended its Rule 1.2(d) to provide that a lawyer could advise clients about the legality of using medical marijuana under New Jersey law and to "assist [the client] in conduct that the lawyers reasonably believes is authorized by those laws" but must also advise the client about "related federal law and policy." N.J. R. Prof'l Conduct 1.2(d).

117. Lino S. Lipinsky de Orlov & Mason J. Smith, Law Week: New Federal Ethics Rule Precludes Colorado Attorneys Practicing in U.S. District Court from Assisting Clients in Complying with State Marijuana Laws, CBA CLE Legal Connection (June 8, 2015).

sold and the proceeds divided evenly among the four children. The family would avoid the fees and expenses of a probate proceeding but would achieve the same result, to divide the mother's property among her children. Gloria did not ask you to prepare the documents — it seemed she wanted to think about it.

Two months pass. Gloria's daughter Nancy calls you to say that her mother is dying of cancer. She asks you to meet her and her siblings at the hospital where Gloria is a patient. Nancy says that her mother wants to go forward with the estate plan that you had discussed previously. Based on this request, you prepare the documents necessary to effectuate this plan.

You go to the hospital to visit Gloria, taking the documents with you. When you arrive, you find that Gloria's condition has worsened. She drifts in and out of semi-consciousness, but she is in no condition to review estate planning documents. It is clear that she is nearing the end; the doctor thinks she will not return to full consciousness. All four children are with her at the hospital. They are distraught at their mother's condition and crying openly. Nevertheless, you explain to them why you are there and how the estate plan you have drawn up would work.

Gloria's children ask whether they can sign the documents on their mother's behalf. They point out that the family already has limited resources and very heavy medical expenses as a result of Gloria's hospitalization. They say that they cannot afford to throw away $10,000 for nothing. You tell them that legally they cannot sign on their mother's behalf. Some of the documents need to be witnessed and certified. You also explain that if they are not all of one mind about the desirableness of this estate plan, it would be a bad idea to sign their mother's name on the documents because if any one of them was to object, the documents would not be honored. The children insist that they are in agreement. They plead with you to let one of them sign her mother's name to the new will and trust; to have you certify that the signature was their mother's; and, when you return to your office, to have two of your employees sign the will as witnesses to their mother's signature.

You are moved by seeing this family in such distress. Will you do as the children request? Why or why not?

Can a lawyer be disciplined for conduct that has nothing to do with the practice of law?

Yes. A lawyer may be disciplined for violation of the applicable ethics code whether or not the violation occurs in the course of law practice. Most ethical