



Legal **Ethics**

THIRD EDITION

Kent D. Kauffman

Legal Ethics

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KENT D. KAUFFMAN



Australia • Brazil • Japan • Korea • Mexico • Singapore • Spain • United Kingdom • United States

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ISBN-13: 978-0-8400-2465-7

ISBN-10: 0-8400-2465-7

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Printed in the United States of America

1 2 3 4 5 6 7 17 16 15 14 13

Dedication

This third edition is dedicated to my wife Karen, and my son Reagan. The first provides inspiration and the second perspiration (just a little). Both make any book worth writing if it gives me the chance to tell them in print how wonderful they are and how I am forever charmed by their ebullience.

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Preface

It has been said of the über-brilliant Mozart that once he placed a note on the musical staff, there it was almost certain to stay, not because the eighteenth-century composer lacked an eraser, but because his talent was so great that perfection was achieved on the first attempt. Thankfully, for the rest of us mere mortals, there is a wonderful thing called another edition. It is my hope that the third edition of *Legal Ethics* achieves its aim: to more clearly and vibrantly explain the key professional responsibility topics and issues facing those who work in a law office.

Legal Ethics springs from the author's first experiences teaching a legal ethics course at a college where he was the Legal Studies Program Chair and discussing with his students in that class what they liked and did not like about their course and the textbook he chose. Their generosity of spirit and willingness to be pioneers in that college's initial legal ethics class inspired the writing of this textbook's first edition, which was written with them—the ideal group of students—in mind.

Organization

The chapter topics in the book logically progress in the following order: an examination of how lawyers are regulated; a history and overview of the paralegal profession; the unauthorized practice of law; confidentiality and attorney-client privilege; conflicts of interest; advertising and solicitation; legal fees and fee sharing with paralegals; and miscellaneous ethics issues that primarily concern litigation, including competence, truthfulness, malpractice liability for the nonlawyer, and pro bono services. Special attention is paid to particularly thorny issues, such as the following: whether paralegals should be licensed; whether independent-contracting paralegals engage in the unauthorized practice of law; the hidden risk of violating confidentiality because of “metadata” in electronic documents; the confidentiality risks that attend the increasing use of cloud computing; the work product rule as it applies to paralegals; conflicts of interest for paralegals switching law firms and the realization of paralegal screening; fee sharing between lawyers and paralegals; the recovery of paralegal fees under statutes that only explicitly provide for the recovery of lawyer's fees; malpractice liability risks for paralegals; and the specific issues that apply to those who work in prosecuting attorney's offices.

Pedagogy

Readers from any jurisdiction will benefit by reading and relying on *Legal Ethics, 3rd Edition*, because it continues to provide a fresh and vibrant approach to the study of the significant professional responsibility issues facing the legal profession.

Legal Ethics starts with the premise that legal students should not be “talked down to.” Accordingly, it is written at a level that is fitting for its audience. And because nonlawyer employees are required to act with the same professional care as lawyers, the text provides a thorough and substantive analysis of the major principles that affect how the practice of law is regulated. The text then applies those major principles to paralegals, as well as lawyers. Supporting citations to the American Bar Association’s Model Rules of Professional Conduct, federal and state statutes and case law, as well as national, state, and local ethics opinions are provided in-text. That level of supporting detail provides students and professors in every jurisdiction the opportunity to find the “primary authority” for themselves.

Because the study of ethics rules can get tedious, *Legal Ethics, 3rd Edition* gives the reader a variety of methods designed to improve understanding and interest. It begins by explaining how one becomes licensed to practice law, how the American Bar Association affects the practice of law (including a discussion of Ethics 20/20, the ABA’s most recent effort at revising some of the ABA’s Model Rules of Professional Conduct), and how the behavior of lawyers is regulated. Other real-world examples and hypotheticals are provided throughout the chapters to facilitate a better grasp on the technical material. Close to seventy visual aids are in this edition, so that critical and difficult concepts can be better understood and retained.

Vignettes of lawyer or paralegal misbehavior, all of them true and some of them quite odd, have been placed throughout the text to enliven the reading experience. The first category of those vignettes is called “Not Quite Lincoln,” an ironic reference to the admirable and character-building legal career of America’s sixteenth president. Many of those lawyers (and a few paralegals) who are in the Not Quite Lincoln vignettes are there because they haven’t lived up to the ideals espoused by Abraham Lincoln in a written speech from around 1850 that has come to be called “Notes for a Law Lecture.” In that short speech intended for law students, Lincoln pontificated beautifully on what character traits a lawyer should possess. The tenets he stressed for good lawyering included discouraging litigation, encouraging diligence, billing fairly, and most importantly, advocating honesty. Perhaps the most famous line of that speech is, “[I]f in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer.” A second category of vignettes that is new to the third edition, called “Ethics Matters,” provides bite-size, work-a-day illustrations of the material in narrative form, all with references to the source material. There are close to thirty Ethics Matters throughout the third edition, many of which have paralegals as the protagonists.

Hypothetical scenarios called “Ethics in Action” tie real-world issues to the material covered. They are placed at the end of each chapter to help students review the material in an alternative manner while preparing for what might be faced at work. In an attempt to provide brevity without sacrificing content, some case law has been removed in this edition, and in some instances, more recent case law has replaced older cases. All the case law continues to be set in the text immediately following the material it is designed to amplify, and the case questions are framed to promote both the understanding of the legal analysis, as well as the cultivation of the reader’s own opinions.

Review questions at the end of the chapter, called “Points to Ponder,” will, if studied, enable students to easily get outstanding grades on any quizzes or tests and will serve as a springboard for further, independent study. The legal ethics movie guide has been updated and expanded. Found in the last appendix of the text, the legal ethics movie guide contains summaries of over thirty movies that have a connection to legal ethics or the practice of law.

Features

There are many notable, new features for the third edition.

- Chapter outlines and chapter highlights have been added to each chapter in order to emphasize key terms and introduce and summarize key points of the material.
- Short narratives about paralegals and lawyers entitled “Ethics in Action” can be found in each chapter.
- New “Not Quite Lincoln” stories have been added to each chapter. Each Not Quite Lincoln is an easy-to-read, mid-sized vignette that is a warning about what not to do.

In addition to the brand new features, the third edition has many other attributes and updates that distinguish this book from other legal ethics books, including the following:

- A discussion of the latest trends affecting the paralegal/legal assistant profession, including the controversial subjects of the licensing and certification of paralegals, the application of the recent changes to the federal overtime pay requirements, and recent paralegal/legal assistant compensation information.
- A current analysis of Ethics 20/20, the ABA’s latest project on revising the ABA Model Rules of Professional Conduct. Technology is the primary focus of the Ethics 20/20 Commission, and where the Ethics 20/20 rules are substantively different from their Model Rules’ predecessor, explanations on the changes are provided.
- Explanations of the key distinctions between the current version of the ABA Model Rules of Professional Conduct and its earlier counterparts, some of which are still in effect in certain jurisdictions across the country.
- Analyses on how the latest trends on the Internet affect legal ethics, including LegalZoom and accusations of the unauthorized practice of law, cloud computing and its connection to lawyer-client confidentiality, the use (or misuse) by lawyers and paralegals of Facebook and other social media sites in law practice, and the use (or misuse) by lawyers of new-client discounts on Groupon.com.
- Exhibits designed to help explain some of the more difficult concepts in the book, including the unauthorized practice of law, confidentiality, the work product rule, conflicts of interest, lawyer and nonlawyer screening, lawyer advertising and solicitation, and fee sharing with and fee recovery of paralegals and legal assistants.
- A discussion of news events of famous and infamous people who relate to the chapter topics, including Hillary Clinton and Michelle Obama, Richard Nixon and Joe Biden, Martha Stewart, Dr. Phil, Bill Gates, billionaire lawyer Joe Jamail,

and Mike Nifong, the former prosecutor in what is known as the Duke Lacrosse rape case.

- The latest versions of the significant ethics codes for paralegals and legal assistants.
- Inclusion of current and classic case law, which help the reader see how courts interpret and apply the ethics rules to lawyers and their nonlawyer employees.
- Even more margin-placed definitions of key legal words used in the text, and an accompanying glossary.
- Legal ethics websites and links strategically placed throughout the chapters, as well as an accompanying legal ethics website directory, focusing on the addresses of state bar associations, national paralegal associations, and key ethics websites, as well as paralegal blogs.
- An updated legal ethics movie guide that summarizes and reviews movies such as *Erin Brockovich*, *A Civil Action*, *The Rainmaker*, *Michael Clayton*, *Fracture*, and *The Lincoln Lawyer*.

Ancillary Materials

This new edition is accompanied by a support package that will assist students in learning and aid instructors in teaching.

Instructor's Manual

There is an accompanying instructor's manual that will significantly assist in class preparation because it has features such as chapter outlines, teaching suggestions, and full case briefs for all the case law in the text. The instructor's manual also includes answers for the questions that follow the case law, as well as the chapter review questions, called "Points to Ponder." The instructor's manual also contains complete test banks for each chapter, including essay questions and accompanying answers. Because of the text's organization and chapter sequence, professors and instructors will be able to logically divide the material into either a traditional sixteen-week, or shorter, semester.

Instructor Companion Site

Instructor resources for this text are available on a password-protected website. These resources include an instructor's manual, PowerPoint® lecture slides, and a computerized test bank. Go to login.cengage.com and sign in with your Single Sign-On (SSO) account to access these resources.

Student Companion Site



A free companion website for students includes weblinks, crossword puzzles, and ethical scenarios with dialogues and questions. To access these materials, visit www.cengagebrain.com and search for the title or ISBN (9780840024657) of this book.

Webpage

Please visit our website at <http://www.paralegal.delmar.cengage.com/>, where you will find valuable information on Delmar Cengage Learning products.

Please note that the Internet resources are of a time-sensitive nature and URL addresses may often change or might be deleted.

Acknowledgments

This third edition would not have been possible without the help of many, and they deserve to be thanked in print. First, to Shelley Esposito, my Cengage acquisitions editor, thank you for your expertise and steady hand in shepherding and guiding this book through the multi-year gestation required of textbook publishing. It's been a privilege to work with you since the first edition. To Aravinda K. Doss, Project Manager at PreMediaGlobal, and to the copyediting team, who had the task of turning my work into a book, thank you for your patience and your attention to detail. Collecting the many threads of a manuscript and spinning them into a completed product requires a special gift.

I greatly appreciate that various copyright holders graciously allowed me to use some of their materials as appendixes, exhibits, or articles. Thank you to the Florida Bar, the Indiana Continuing Legal Education Forum and its Program Director Jeff Lawson, the New Hampshire Bar Association, the National Federation of Paralegal Associations, and the National Association of Legal Assistants. Your work has vastly improved the quality-quotient of this edition.

Thank you to the following reviewers of the third edition manuscript:

Randi Ray

*Des Moines Area Community College
Des Moines, IA*

Anita Whitby

*Park University
Parkville, OH*

Two former students of mine were instrumental in helping me with this edition. Ryan Kreger conducted many hours of online legal research for the third edition. His work included checking the citations for accuracy and current relevancy, and he did a most impressive job. Jessica Heath proved me right with the A's I put on her transcript years ago—which she earned—by adeptly offering her keen eye and insight to some fine-tuning that was a critical part of the manuscript revision process.

Bob Colestock has for well over a decade occupied a special place in my professional life, even from states away where he has been a sounding board with a pitch-perfect ear. My nascent career likely would have died on the vine had it not been for him. He has been both mentor and colleague, but always a friend.

And to my luminous wife Karen, whose everlasting encouragement and Job-like patience helped to make all the editions of this text possible, thank you. Every day with you is a new gift.

About the Author

Kent Kauffman, Esq., is assistant professor of Business Law in the Doermer School of Business at Indiana University, Purdue University, Fort Wayne (IPFW), in Fort Wayne, Indiana. He is a *summa cum laude* graduate of Temple University, and a graduate of The Dickinson School of Law of the Pennsylvania State University, and is licensed to practice law in Indiana. Mr. Kauffman is also the co author of *Legal Terminology, 6th Edition* and the author of *The Legal Movie Guide: Key Scenes for the College Class*. He was for fifteen years the Legal Studies Program Chair at Ivy Tech Community College, in Fort Wayne, Indiana. Mr. Kauffman is a multiple recipient of *Who's Who Among America's Teachers*, a recipient of *Who's Who in American Law*, and has been given multiple teaching awards.

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Lawyers, Paralegals, and the Regulation of the Legal Profession

1

CHAPTER OUTLINE

- Who Regulates Lawyers and the Practice of Law?
- What Are Rules of Ethics?
- A Summary of the Disciplinary Process
- Why Doesn't the Legislature Regulate the Practice of Law?
- How to Brief a Case
- Final Thoughts on the ABA's Role in Regulating Lawyers

CHAPTER HIGHLIGHTS

- Admission to the practice of law is jurisdiction-specific, with most states administering their own bar examination.
- Despite popular sentiment to the contrary, sound character and a solid understanding of legal ethics are, in fact, prerequisites to the practice of law.
- Although the rules of ethics have their roots in the American Bar Association's (ABA) Model Rules of Professional Conduct (formerly known as the Model Code of Professional Responsibility), an attorney is not required to abide by the rules issued by the ABA. Only the version of the rules adopted by a jurisdiction's highest appellate court is binding upon the attorney.
- The ABA has revised its Model Rules of Professional Conduct several times. The most recent effort is called Ethics 20/20, and its focus is on revising rules that concern technology and the international practice of law.
- Because of the principle of judicial review, the practice of law is regulated by the courts, *not* the legislature.
- An attorney who violates his or her jurisdiction's ethics rules is subject to the discipline of the court that granted his or her law license.
- A jurisdiction's ethics rules are one part of the ethical framework; case law is the key to understanding the application of the rules to lawyer conduct.
- A paralegal is not professionally responsible for violating the rules of ethics; however, such a violation may result in a sanction against the supervising attorney—including revocation of the license to practice law.

"The first thing we do, let's kill all the lawyers."

William Shakespeare
King Henry VI (1591)

"What do you call one thousand lawyers at the bottom of the ocean? A good start."

unknown

Introduction

Admit it—you like lawyer jokes. In fact, if you were paid \$10 for every lawyer joke you could think of off the top of your head, you could probably make enough money to buy this textbook. Why are lawyer jokes so much a part of our culture that books and websites are dedicated solely to poke fun at lawyers? Is it because lawyer jokes are especially hilarious? Or is it because lawyers remain one of the last groups in American society—the other group being politicians, who just happen to be mostly lawyers—that can still be safely lampooned?

For more lawyer jokes and cartoons than anyone thought could be categorized, check out the aptly titled following links: <http://www.lawyer-jokes.us> and http://www.ahajokes.com/lawyer_jokes.html.

According to the American Bar Association (ABA) Market Research Department, in 2010 there were 1,225,452 lawyers in the country. Collectively, they are a group that has fallen on hard times, at least concerning what the public thinks of them. That wasn't always the case. Alexis de Tocqueville, the Frenchman whose examination of the state of American democracy is thought to be one of the earliest forms of sociological endeavors, wrote in the 1830s that “lawyers form the only enlightened class whom the people do not mistrust.” And now, lawyers are the class of people who are likely to be the most distrusted. In fact, in 2002 the American Bar Association released the results of two surveys it commissioned that asked nonlawyer respondents to rate various occupations, in terms of public confidence. The results from a survey done before the 9/11 attacks show that only the news media was held in greater disregard than lawyers, while doctors were held in highest regard. When the survey was done a few months after 9/11, the news media got out of the public confidence cellar by jumping one place ahead of the legal profession. Only 29 percent of the respondents from the April 2001 survey agreed with the statement, “The legal profession does a good job of disciplining lawyers.” In addition, dispelling the armchair wisdom that perceptions are influenced by the boorish and cartoonish behavior of lawyers on television shows, there was no significant difference in opinion between those respondents who did and did not watch then-popular shows like *Ally McBeal* or *The Practice*. For more on the ABA survey on the public's perception of lawyers, go to <http://www.cliffordlaw.com>; under “Working for You,” select “Robert A. Clifford, ABA Illinois State Delegate,” then select “2002 Study on Public Perception of Lawyers” to access the pdf. In 2010, a Gallup poll on honesty in the professions further demonstrated the negative perception of lawyers. For the eleventh year in a row, nurses were rated the highest in response to the question, “Please tell me how you would rate the honesty and ethical standards of people in these different fields?” Eighty-one percent of the respondents thought that nurses have “Very High” or “High” standards of honesty or ethics. Only 17 percent of those same respondents thought that lawyers have “Very High” or “High” standards of honesty or ethics. Even judges came in below a 50 percent rating, at 47 percent.

The creation of legal ethics courses in American law schools is largely a result of the Watergate scandal of the 1970s. What might have gone unnoticed in the months following that national crisis was that dozens of lawyers—mostly government lawyers—were the focus of disciplinary charges. Many of those charges resulted in disbarments for those involved, including G. Gordon Liddy (one of the chief planners of the Watergate break-in), John Dean (chief plotter of Watergate and its cover-up),

and President Richard Nixon himself. The legal community's collective embarrassment and hand-wringing did have a positive outcome, however. It led to a realization that a formal emphasis on ethics and professional responsibility was missing from the curricula of America's law schools. So if you are taking your own ethics course while reading this book, you have Mr. Nixon to thank for what you are about to encounter.

Paralegals and legal assistants continue to become more of an integral part of the legal team. Where once attorneys considered that there was a divide between themselves and everyone else in the firm, a bridge has been built and paralegals cross that bridge every day. When paralegals are used effectively, they do substantive legal work, not solely clerical tasks. Interviewing, case management, research, and writing are just some of the functions in which legal assistants can engage, thereby allowing attorneys to work on other projects. However, with more responsibility in the law office comes a recognition that paralegals need to be fully acquainted with the same rules of ethics (commonly called rules of professional responsibility or professional conduct) that their supervising attorneys are obligated to follow, or else the belief that paralegals are professionals might prove incorrect.

To put the paralegal's role and ethical obligations in perspective, it is necessary to first examine how one becomes a lawyer and then determine what rules of ethics are incumbent on that profession. The subsequent chapters will analyze specific themes of the ethics rules, with emphasis on how they affect paralegals.

Note: Throughout this book, the terms *paralegal* and *legal assistant* will be used interchangeably. Some regions in the United States prefer one title over the other. (However, not all paralegal groups consider the terms to be equal, as will be discussed in Chapter 2.)

Who Regulates Lawyers and the Practice of Law?

Once one graduates from law school, having endured years of torture, tedium, and triviality, the next step is to take—and pass—the bar exam. The practice of law is jurisdiction-specific; there is no such thing as a national bar exam. An applicant to the bar must take the bar exam of the state (including the District of Columbia) where one wants to be licensed to practice law. Proving right away in this text that for every “law” there is an exception, not every state requires law school as a prerequisite to sit for the bar exam. According to ABAjournal.com, states such as California, Maine, New York, Vermont, Virginia, and Washington allow nongraduates a path to law licensure. And as one might suspect, those who didn't go to law school before taking the bar exam have a much lower passing rate than those who did.

ETHICS MATTERS

Jennifer O'Brien became a California lawyer in 2012. Considering how many people are licensed to practice law every year in California, that might not be a remarkable fact, except Ms. O'Brien never went to law school. She worked for fifteen years as legal assistant to attorney Christopher J. Neary, who practices law in Willits, California. A few states, like California, still allow someone to take the bar exam without attending law school, provided the applicant has had a sufficient legal mentoring. Taking full advantage of California's allowance, Ms. O'Brien took the bar exam in 2011 and passed it on her first try!

SOURCES: http://www.abajournal.com/news/article/long-time_legal_assistant_bypasses_law_school_passes_the_bar/.
http://www.abajournal.com/news/article/abe_lincolns_route_to_law_practice_a_vanishing_option/.

In the absence of a national bar exam, there are **multistate bar exams**. Jurisdictions that allow out-of-state applicants to be licensed will likely use the Multistate Bar Exam (MBE), the Multistate Essay Exam (MEE), and the Multistate Performance Test (MPT), all created by the National Conference of Bar Examiners. These exams test the applicant's general knowledge about particular subjects of the law (such as contracts, constitutional law, and evidence) or legal analysis and problem-solving skills without regard to state specifics and peculiarities. Scores are scaled (similar to a curve). Just a few jurisdictions will license an attorney based solely on the applicant's MBE score without requiring the applicant to take a concurrent or separate bar exam. For example, the District of Columbia will admit someone to the practice of law if the applicant has graduated from an ABA-approved law school, has a scaled MBE score of 133, and has passed the written bar exam of his or her jurisdiction. Attorneys also can practice law in another jurisdiction on a limited basis by seeking permission from that jurisdiction's highest court, which is called *pro hac vice*.

The National Conference of Bar Examiners has also created the **Uniform Bar Exam (UBE)**, which is a two-day exam designed to test knowledge and skills that law graduates should be able to demonstrate prior to being granted law licenses. The exam is part essay and part multiple choice. As of this writing, ten states use the UBE: Alabama, Arizona, Colorado, Idaho, Missouri, Montana, Nebraska, North Dakota, Utah, and Washington. In spite of the lawyer jokes, a premium is placed on ethics as a prerequisite to being admitted to the bar. As part of applying for permission to take the bar exam, an applicant must be found morally fit to practice law. Permission can be refused based on prior conduct, including possession of a felony conviction. Recently, state bar associations have debated whether members of hate groups who advocate violence should be denied entrance to the bar. Some have argued that one cannot swear to uphold the Constitution—which is part of a lawyer's oath—and, at the same time, seek to deny, by violence or other methods, the constitutional rights of others. For example, white supremacist Matthew F. Hale graduated from law school in 1998 and passed the Illinois bar exam that year, but was denied admission to the Illinois Bar on the grounds that his hateful and violent speech concerning minorities demonstrated his lack of moral character and fitness to practice law. (Hale is currently serving a forty-year prison term for attempting to hire an FBI informant to murder a federal judge in Chicago.)

Beyond the bar exam, applicants to practice law in all but two jurisdictions must also pass the Multistate Professional Responsibility Exam (MPRE), a legal ethics exam created by the National Conference of Bar Examiners. The MPRE tests the applicant's specific knowledge and application of the rules of professional responsibility. The exam is also scaled and, depending on the jurisdiction, a passing score ranges from 75 (several jurisdictions) to 86 (California, Utah). So, after paying one's examination fees, passing the bar exam, passing the ethics exam, and paying the appropriate court bar fees, the applicant now becomes an attorney and is obligated by the oath of admission to the bar to honor his jurisdiction's rules of ethics.

Passing the bar exam, by the way, is no walk in the park. Although it is human nature to exaggerate the difficulty of accomplishing something even

► **multistate bar exam**

A bar exam that allows the successful applicant to be licensed in more than one jurisdiction. Such an exam is a result of a reciprocity agreement between the jurisdictions.

► **pro hac vice**

A Latin phrase that means, "for this turn" or "for this event." This refers to an attorney who is not licensed to practice in a particular jurisdiction, but is granted permission by a court in that jurisdiction to practice law there for a specific case.

► **uniform bar exam (UBE)**

A two-day exam created by the National Conference of Bar Examiners, designed to test knowledge and skills that law graduates should be able to demonstrate prior to being granted law licenses. The exam is part essay, part multiple choice. Currently, five jurisdictions offer it.

mildly difficult, many smart and diligent people who take the bar exam fail on their first or second attempt (or more). Passing rates vary jurisdictionally, and some jurisdictions have notoriously difficult rates. New York's 2010 pass rate for those taking its bar exam in February was 50 percent, while Wisconsin's 2010 pass rate in February was 87 percent. That does not necessarily mean that New York law students are not as smart as those in Wisconsin. Evidence of that is John F. Kennedy, Jr., who was the object of jokes and ridicule after failing the New York bar exam twice. However, he was never considered anything but intelligent, courteous, and ethical during his life, which was tragically cut short by a plane crash in 1998. According to all-things-lawyer-related website www.abovethelaw.com, Hillary Clinton flunked the Washington, D.C., bar exam on her first try, Michele Obama flunked the Illinois bar exam on her first try, and both Jerry Brown and Pete Wilson flunked the California bar exam on their first attempts before eventually being governors of California. California's bar exam is known to be tough, so much so that one woman, Paulina Bandy, took it fourteen times, beginning in 1999 and eventually passing it in 2007. See Exhibit 1–1 for a few bar exam statistics.

Practicing law is not for the faint of heart or those who like to sleep. According to a 2012 piece in the *New York Times*, lawyers comprise the second-most sleep-deprived profession or occupation. Evidently, a mattress sales chain store named Sleepy's looked at data from the 2011 Centers for Disease Control's "National Health Interview Survey" and concluded that only home health aides get less sleep than lawyers. Even doctors sleep more than lawyers.

NOT QUITE LINCOLN

"If This Law Practice Thing Doesn't Work Out, I Can Always Go Back to Divinity School"

James Hamm's 2004 Character and Fitness Report, filed with the Arizona State Bar Committee on Character and Fitness, had one fact on it that rarely appears on such a document: Hamm had committed first-degree murder in 1974. When he was a twenty-six-year-old divinity school dropout, Hamm began selling marijuana. Hamm and an accomplice shot and killed two unsuspecting customers, as part of a plan to rob them during a sale. Hamm shot one of the victims in the back of the head. Having pled guilty to first-degree murder, he was sentenced to life in prison with no chance of parole for twenty-five years. But, after earning a college degree from behind bars, getting married and founding a prison reform advocacy group, Hamm's sentence was commuted in 1989, and he was released in 1992. He graduated from the Arizona University College of Law and passed the bar exam in 1999. However, when his admission to the bar was

denied in 2004 on character and fitness grounds, he appealed to the Arizona Supreme Court.

Acknowledging that it had found no case where a first-degree murderer had been admitted to the bar of any state, the court nonetheless inquired into whether Hamm was fully rehabilitated. The court concluded that Hamm had not met the high burden. The court also took note that not only did Hamm still seem to shift the blame for the murders (three were killed), but he also had never paid any child support to his former wife for a child born in 1969.

Regarding the unpaid child support, Hamm argued in a very lawyerly way that he never had received the final divorce decree—even though he had been arrested in 1973 for failing to pay child support. James Hamm's admission to the Arizona Bar was denied in 2005 on lack of demonstrating good moral character.

SOURCE: *In re Hamm*, 123 P.3d 652 (Ariz. 2005)

EXHIBIT 1–1 Sample Selection of Those Who Took and Passed the 2011 Bar Exam

Jurisdiction and Length of Exam	Took the February Bar	Passed the February Bar	Took the July Bar	Passed the July Bar	Total Number of Applicants and Those Who Passed	Total Passing Percentage
Alaska/2.5 days	58	38	60	32	118/70	59%
California/3 days	4,364	1,848	8,456	4,635	12,820/6,483	51%
Illinois/2 days	884	662	2,490	2,155	3,374/2,817	83%
New York/2 days	3,881	1,869	11,182	7,738	15,063/9,607	64%
South Carolina/2 days	248	173	459	341	707/514	73%

SOURCE: National Conference of Bar Examiners 2011 Statistics

Depending on where lawyers practice, they might need to keep a copy of another set of rules in their offices. They will first have consulted the Admission and Discipline Rules, which procedurally control how one might get into (and get kicked out of) the bar, and the Rules of Professional Conduct, which control how lawyers (and their paralegals and legal assistants) are to behave professionally. In addition to the just-stated rules, many state and local bar associations have passed codes or creeds of civility or courtesy—an attempt, perhaps, to combat the abject opinion of lawyers held by many of those who are not their parents. These nonbinding codes are those to which lawyers should aspire, not the kind whose violations might result in a lawyer being held in **contempt**. They include standards or maxims that focus on how lawyers should agree to treat one another, judges, their clients, and the general public in the course of their professional lives. Washington, D.C., the city with the most lawyers per capita in the world, has a civility code worthy of the bureaucracy and legalese that makes that city run. That code has nine separate portions, each with its own rules of civility, along with a preamble that is six full paragraphs.

► **contempt**

Also known as contempt of court, this is an act or omission that tends to obstruct the administration of justice or shows disrespect for the court; it can include disobeying the instructions or orders of the court.

NOT QUITE LINCOLN

Let's Take This Outside, Pal

All clients want their lawyers to be aggressive and zealous—part pit bull with glaring eyes and froth-covered teeth, and part Franciscan monk with a monastic attention for detail and (hopefully) a vow of poverty. Zealous representation is even mentioned in the ABA's and states' rules of attorney conduct. But despite the lawyer ads that claim, "We'll fight for you," no one really takes that slogan literally—or do they? They might have, had they been on the first-floor hall at the Multnomah, Oregon, County Courthouse one fateful and fist-full day.

Attorneys David Lawrence and Aaron Matusick were opposing counsel in March 2008 in a hearing on a landlord/tenant matter. (Landlord/tenant suits are often very much like divorce cases and can cause everyone involved to lose their tempers.) According to witnesses, after walking out of the courtroom from the hearing, Lawrence and Matusick began sniping at each other. Sniping led to shouting, shouting led to slapping, and slapping led to a punch in the forehead in the courtroom hallway.

Judge Pro-Tem Lewis Lawrence (unrelated to gladiator Lawrence) handled the matter like an experienced parent. He made each lawyer tell his side of the story, required them to apologize, gave them a stern lecture, and threatened them with banishment from his courtroom if such a thing were to ever happen again. Judge Lawrence benevolently decided against reporting the lawyers to the Oregon state bar, telling a reporter from the *Oregonian*, "Isolated incidents aren't a good gauge of who someone is." Sound advice from a judge who also said about the tensions of landlord/tenant court, "Tempers flare. That's why I don't allow children in the courtroom. I've really witnessed some horrendous things." Hopefully, those children don't have to wait in the hall outside Judge Lewis's court. Things can get nasty out there.

SOURCES: http://www.abajournal.com/news/article/biff_bam_wallop_2_lawyers_duke_it_out_in_portland_area_courthouse/
<http://wiselaw.blogspot.com/2008/04/oregon-lawyers-in-courthouse-fistfight.html>.

By contrast, Alabama (the first state with a formal code of ethics) has a State Bar Code of Professional Courtesy with nineteen sentence-length directives, including “A lawyer should always be punctual.” The Boston Bar Association Civility Standards for Civil Litigation has a section that concerns depositions, and part of it states, “A lawyer should not inquire into a deponent’s personal affairs or question a deponent’s integrity where such inquiry is irrelevant to the subject matter of the **deposition**.” Included in the Virginia Bar Association Creed is a statement on the treatment lawyers should accord each other, which states, “As a professional, I should always . . . [a]ttempt to determine compatible dates with opposing counsel before scheduling motions, meetings and depositions . . . [and avoid] personal criticism of another lawyer.” The Beverly Hills Bar Association Guidelines of Professional Courtesy announces its opposition to unnecessarily emptying an opponent’s pockets when it says, “I will advise my client that I will not engage in tactics intended to delay unreasonably resolution of the matter or to harass, abuse or drain the other party’s financial resources.”

NOT QUITE LINCOLN

Don’t Ever Ask This Lawyer to Give a Toast

Everyone says they admire the person who speaks their mind, until that person comes over for a spot of tea. Or until that person is drunk at an office party. Or until that person is Thomas Guadagno, a Chicago lawyer who could slice stone with his razor-sharp tongue. While competing to scoop up clients in traffic court, he was heard to refer to various other lawyers as “a child molester,” “homosexual,” “fag,” “a Jew who only wants to take your money,” and “idiots and morons.” He was also reputed to have told a prospective client that a certain lawyer shouldn’t be retained because the lawyer had a “sexual torture chamber in his basement.” And while in court, he called a lawyer “a scumbag” and “homosexual.”

For his verbal abuse of other lawyers over a seven-year period, Guadagno was charged and convicted of disorderly conduct in May 2009. The judge fined him \$288, sentenced him to six months of

court supervision, and ordered him to take an anger management class. Guadagno must have skipped class a lot because, according to the ethics complaint the Illinois Attorney Registration and Disciplinary Commission filed against him in May 2010, he still hadn’t cleaned up his mouth. In fact, the Commission alleged that he made the “Jew who only wants to take you money” and “child molester” slur over twelve times to that particular attorney’s clients. As a result, the Commission charged Guadagno with violations of Illinois’s professional conduct rules, including the state’s version of ABA Model Rule 8.4, which prohibits conduct that is prejudicial to the administration of justice.

SOURCES: http://articles.chicagotribune.com/2010-06-08/news/ct-met-0609-attorney-slurs-20100608_1_illinois-attorney-registration-disorderly-conduct-slurs.
<https://www.iardc.org/10PR0065CM.html>.

State and local bar associations do not regulate their members’ conduct the way the courts do, but bar associations have a role in discipline in several ways. First, a bar association has its own membership bylaws and can sanction its members for bylaw violations. Second, a bar association can contact its jurisdiction’s highest court (the regulating court) to make recommendations regarding the regulation of the practice of law, including the unauthorized practice of law. Some jurisdictions have a **unified bar association**, which means that membership is required upon being granted a law license. More than thirty states have mandatory bar associations, which are also known as **integrated bar associations**. Other jurisdictions make the decision to join the bar association a voluntary one. The U.S. Supreme Court ruled in 1990 that attorneys may be required to join state bar associations, but the mandatory dues may not be used for political purposes. *Keller v. State Bar of California*, 496 U.S. 1 (1990).

► deposition

A litigation discovery device, similar to testifying at trial, whereby the deponent is put under oath and subject to lawyer’s questions. Depositions occur in law offices or conference rooms, but not in courtrooms.

► unified bar association

A bar association whose members must join upon being admitted to the practice of law in a particular jurisdiction. It is also known as integrated bar association.

All those who want to keep their law licenses in good standing need to pay their annual **bar fees**, in addition to getting their minimum required annual **continuing legal education (CLE) credits**. This type of membership fee is often tied to the length one has been licensed to practice law, so that newer lawyers might pay a lower annual bar fee than those who have been licensed for many years. According to the *Indiana Lawyer* the median bar fees in America are \$335 per year.

ETHICS MATTERS One of the quickest ways for a lawyer to get noticed by his or her jurisdiction's disciplinary commission is to have a client trust account that doesn't balance. (Trust Accounts, which are bank accounts specially designated for clients' funds, are discussed in Chapter 7.) It's an unavoidable problem (except, of course, where a lawyer or a paralegal has put his or her hand in the proverbial cookie jar), and software exists to help lawyers and paralegals who didn't study accounting to keep their accounts in balance.

An even quicker way to get noticed is to pay your bar fees with a rubber check. In March 2010, the Pennsylvania Supreme Court Disciplinary Board noted in its email newsletter to its state's lawyers that in 2009, eighty-seven lawyers bounced checks when paying their bar fees, including four who had yet to put the sufficient funds in their accounts by the time the Disciplinary Board's email was sent. Worse, still, twelve lawyers paid their annual fees from client trust or escrow accounts instead of from their own operating or personal bank accounts. That prompted immediate disciplinary investigations. The newsletter said such form of paying one's dues was "the ethical equivalent of a 'Please kick me' sign."

SOURCE: <http://www.padisciplinaryboard.org>

What Are Rules of Ethics?

Rules of ethics, more formally known as rules of professional responsibility or professional conduct, are those rules created by the American Bar Association (ABA), the largest and most powerful national bar association in America. Founded in New York in 1878 and headquartered in Chicago, Illinois, with a significant branch in Washington, D.C., the ABA has over 410,000 members. The ABA's first set of ethics rules was its Canons of Professional Ethics in 1908, which was based in large part on the Alabama Bar Association Code of Ethics, from 1887. The inspiration for Alabama's Code of Ethics can be traced to the lectures of Judge George Sharswood in the 1850s; Sharswood's lectures were later published as a book, *Professional Ethics*.

In 1969, the ABA adopted the Model Code of Professional Responsibility. The Model Code was organized by three distinctions: *canons*, which were general statements of ethical ideals; *ethical considerations*, which were aspirational statements associated with the Canons and signified as *EC*; and *disciplinary rules*, which were the mandatory portions of the Model Code and signified by *DR*.

After a six-year process, in 1983 the ABA adopted the Model Rules of Professional Conduct, which were designed to replace the Model Code of Professional Responsibility. Formatted differently and including some substantive changes, the Model Rules consist of mandatory rules, followed by advisory paragraphs on the meaning of the rules, called **comments**.

► comments

In this context, a comment is the official commentary of the rules committee that follows specific rules of court. Comments are designed to give meaning to the specific rules.

In 2001 and 2003, the ABA adopted extensive revisions to the Model Rules of Professional Conduct, as a result of the work initiated by the ABA's Ethics 2000 Commission. Some of these revisions concerned expanding the duties owed to clients in their fee agreements, expanding the confidentiality rules, prohibiting the real-time Internet solicitation of clients, and expressly prohibiting sexual relationships between lawyers and their clients.

In 2009, the ABA impaneled a new commission, Ethics 20/20, to work on reviewing the Model Rules of Professional Conduct again, this time with a focus on recommending revisions concerning advances in technology and global legal practice developments. For example, the Commission on Ethics 20/20 proposed that a revision be made to ABA Model Rule 1.1, which concerns competence, recommending that clients be made aware of and consent to before any outsourcing of their legal work. In 2012, the Commission decided against submitting a proposal that would permit some form of nonlawyer ownership interest in U.S. law firms. Historically, only a lawyer may have an ownership or partnership stake in a law firm.

Throughout this book's chapters that concern specific ethics issues, the ABA Model Rules will be discussed. Please see Exhibit 1–2 for a family tree of legal ethics.

It is important to understand that the ABA's various sets of ethics rules are not operative on lawyers, even those who are members of the ABA. This is because the ABA, being a private organization, does not license attorneys. The rules that apply to any lawyer are the particular ABA version that has been adopted by the highest appellate court in the state where a lawyer is licensed. A state supreme court, having **jurisdiction** over its lawyers and their professional behavior, always has the authority to change the language of an ABA ethics rule it chooses to adopt or to

EXHIBIT 1–2 A Legal Ethics Genealogy

- **1850s** Alabama Judge George Sharswood's lectures lead to the book, *Professional Ethics*
- **1887** Alabama Bar Association Code of Ethics
- **1908** ABA Canons of Professional Ethics
- **1969** ABA Model Code of Professional Responsibility
- **1983** ABA Model Rules of Professional Conduct
- **1997** ABA Ethics 2000 Commission created
- **2002** ABA House of Delegates votes on the Ethics 2000 recommendations
- **2003** ABA House of Delegates votes on a few more Ethics 2000 amendments
- **2009** ABA Commission on Ethics 20/20 created
- **2011** ABA Ethics 20/20 Commission recommends various changes to the ABA Model Rules
- **2012** ABA House of Delegates votes on Ethics 20/20 resolutions

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► **jurisdiction**

In this context, jurisdiction means a particular place over which a court has authority, usually a state.