

Preface

This book represents a unique collaboration between a law professor with extensive academic experience (Susan Martyn) and a long-time practitioner who has dealt with most of the issues in this book (Larry Fox). We suspect that our casebook is unlike many you have encountered so far in law school, and therefore we begin your study by introducing you to our pedagogical goals as well as several distinctive features of the book you are about to use.

In this second edition we again hope to accomplish four goals. First, we have updated the problems, cases, and materials to engage you in a fascinating and dynamic subject. Second, we have added two chapters (Control and Communication and Judicial Ethics) to teach you more about the rapidly expanding law governing lawyers. Third, we have included a series of notes to focus on practice context. Here we examine the ethical challenges unique to specialized areas of practice, including criminal and insurance defense, as well as representing organizations, governments and pro bono clients. Fourth, throughout these materials, we continue to invite you to recognize good lawyering, or the need to develop practical ethical judgment, a task that requires more than just compliance with the law. Overall, we hope that our combination of problems, cases, short stories, and continuing notes will engage and assist you in your study of the law governing lawyers.

The Problems

The short problems that introduce each section of the book ask you to evaluate the actions of a hypothetical law firm, Martyn & Fox. Each set of problems is followed by citations to the relevant professional code provisions and sections of the Restatement of the Law Governing Lawyers found in your rules supplement. You should prepare for each class by formulating answers to the problems after considering these provisions along with the relevant cases and other materials in the book.

As you address the dilemmas faced by Martyn & Fox, you will discover that the firm is capable of great inconsistency. At times, the lawyers at Martyn & Fox may seem wise and capable. On other occasions, you will wonder at their fallibility. In many situations, you may identify with their confusion and angst. Most often, the firm can be rescued from disaster by sage advice.

We intend these problems to promote all of our pedagogical goals, so you should expect to approach them on several levels. First, we hope they will engage you in interesting issues faced by modern lawyers. Second, we want them to motivate you to study the relevant provisions in various lawyer codes, the

Restatement of the Law Governing Lawyers, and the cases and other materials that explain and construe them. Third, we anticipate that the relative brevity of each problem will lead you to conclude that the answer “depends on” additional facts that might change the advice you offer Martyn & Fox. Indeed, issues of professional responsibility often require careful attention to facts as well as law. We invite you to articulate your assumptions and to anticipate how additional facts might change your answer. For example, does it matter whether Martyn & Fox is a two- or two-hundred-person law firm? Whether it focuses primarily on litigation or transactional work? Whether its practice is located in a rural area or a major city? Whether the lawyer is a partner or an associate? Whether Martyn & Fox’s client is an individual or an entity? How much Martyn & Fox’s client can pay?

Finally, once you get into the law that governs the situation described in a problem, you will discover occasions when Martyn & Fox has a range of options. In these instances, you should identify the discretion ceded to the lawyer’s individual moral conscience and articulate how you believe that discretion should be exercised. Here, we hope to assist you in developing practical ethical judgment as well as learning the law.

The Cases

Most people new to this subject are surprised at the vast array of cases that explain and expand on the professional code provisions and other remedies that make up the law governing lawyers. We offer you a rich assortment of these cases, emphasizing those decided in the past decade. Each of the 55 cases in this book has been edited for clarity. We use ellipses or brackets to indicate omissions from the court’s opinion, but omitted citations and footnotes are not identified.

The Short Stories

The short stories in this book offer you the opportunity to engage in a difficult issue of legal ethics from the viewpoint of the lawyers confronting the situation. Larry wrote these stories to offer you an alternative way to learn some substantive law. Primarily, however, we intend these excerpts to show you the human face of some of the legal issues raised in the story. The extended detail of the story will enable you to understand more fully the context in which the lawyer must make a practical ethical judgment.

The Continuing Notes

Unlike the note material in most casebooks, the notes in this book are short essays organized around six general themes. These notes provide transitions between various topics in the materials, further explanation of a case or series of cases, and an opportunity to explore a topic at an accessible but more advanced level. They also serve as occasions to connect and integrate the basic ideas and themes that the courts have woven throughout the law governing lawyers.

In the first set of continuing notes, entitled **Lawyers’ Roles**, five notes make explicit the often-unnoticed roles lawyers assume when they represent clients, with particular emphasis on the legal risks created by each of these

roles. We hope these notes prod you to think about why some of the lawyers who became the subject of cases in this book got into trouble, as well as encourage you to consider the kind of lawyer you want to be.

Chapter 1:	The Client-Lawyer Relationship	page 12
Chapter 6:	The Directive Lawyer and Fiduciary Duty	168
Chapter 7:	The Instrumental Lawyer and the Bounds of the Law	225
Chapter 7:	Zealous Representation Within the Bounds of the Law	279
Chapter 14:	Finding Your Own Way	563

The second series of continuing notes, entitled **The Law Governing Lawyers**, encompasses seven notes where we explore the fiduciary obligations lawyers assume when they say “yes,” or agree to represent clients, and the remedies provided by the cases and materials when these obligations are ignored.

Chapter 1:	Sources of Law	page 18
Chapter 2:	Professional Discipline	47
Chapter 4:	Actual and Accidental Clients	95
Chapter 5:	Tort Liability to Clients	109
Chapter 8:	Losing a Client by Disqualification or Injunction	289
Chapter 9:	Loss of Fee or Other Benefits	339
Chapter 15:	Judicial Ethics	590

In the third group of notes, entitled **The Bounds of the Law**, six notes explain when lawyers may or must say “no” to clients, because of some external legal control that imposes a limit on the lawyer’s advocacy.

Chapter 5:	Lawyer Dishonesty, Fraud, Deceit, and Misrepresentation	page 139
Chapter 7:	Court Orders	211
Chapter 7:	Client Fraud	237
Chapter 7:	Criminal Conduct	254
Chapter 12:	A Reprise	474
Chapter 13:	The Constitution	523

In these notes, we explore the vast law of fraud, the ever-expanding criminal law, procedural sanctions, and the impact of the Constitution on the regulation of lawyer conduct. Each of these bodies of general law has been read into the professional codes to create an explicit boundary beyond which lawyers tread only at great risk both to themselves and to their clients.

The fourth series of continuing notes, entitled **Practice Pointers**, offers you practical advice about how to avoid or mitigate the legal consequences raised in the problems, cases, and other materials. Here we showcase six topics:

Chapter 5: Engagement, Nonengagement, and Disengagement Letters	page 107
Chapter 9: Written Consents to Conflicts of Interest	360
Chapter 9: Implementing a Conflicts Control System	382
Chapter 10: Trust Fund Management	430
Chapter 10: Fee Agreements	446
Chapter 13: Multijurisdictional and Multidisciplinary Practice	541

The fifth set of notes, entitled **Lawyers and Other Professionals**, examines whether the courts treat lawyers and other professionals consistently. Here we examine five issues that confront a variety of professionals:

Chapter 2: Professional Licensure	page 29
Chapter 4: Informed Consent	80
Chapter 5: Duties to Nonclients	152
Chapter 8: Sexual Relationships with Clients	311
Chapter 11: Wrongful Discharge	465

The final set of notes, entitled **Lawyers and Clients**, focuses on legal representation in five common practice settings. Here, we examine specialized legal regulation of the client's rights and responsibilities, which in turn shapes a lawyer's advocacy on behalf of the client.

Chapter 3: Service <i>Pro Bono Publico</i>	page 66
Chapter 5: Criminal Defense	124
Chapter 6: Representing Organizations	181
Chapter 8: Insurance Defense	324
Chapter 9: Governments	388

The Combination

Overall, we intend the problems, rules, cases, stories, and continuing notes in this book to serve as a guide to identifying, understanding, and avoiding the minefields and mistakes that the lawyers in these materials have confronted. We also hope you enjoy this study as much as we have enjoyed preparing it.

Susan Martyn and Larry Fox
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