

Preface

No matter what area of law you choose to specialize in, I guarantee that you will practice the subject of this course. You may never file a motion for summary judgment, appear at a preliminary hearing or sentencing, perfect a security interest, prepare a will, or draft comments on proposed new regulations, but you will, at some time, think about what you are learning in your professional responsibility course. You may have to decide whether you can represent a new client, in light of your obligations to an existing client. You certainly will have to keep client confidences, and at some point you may need to assert a privilege covering certain confidential communications to prevent them from being discovered by others. You may bill clients for your services, in which case you need to know the rules governing attorneys' fees, and you may even advertise for business. One way or the other, you will have to know the law of professional responsibility.

One of the major themes of this book is that you cannot understand your duties and responsibilities as a lawyer just by looking at the disciplinary rules, sometimes called "ethics codes" or "rules of ethics." The ABA's Model Rules of Professional Conduct, in whatever version they are adopted in your state, are the basis for potential professional discipline by state bar authorities, but this discipline is not the only thing lawyers must worry about in practice. Your day-to-day actions also will be influenced by the possibility of liability for malpractice to your client, sanctions imposed by a court under its inherent power or rules of procedure, potential loss of entitlement to fees, disqualification from representing a client, and waiver of evidentiary privileges. Not to slight the importance of the disciplinary system, but by the calculations of some scholars, a lawyer is over a thousand times more likely to pay out in excess of \$10,000 in a malpractice lawsuit, by way of judgment or settlement, than to be disbarred. Which risk do you think is more likely to focus one's attention? Furthermore, many significant areas of professional responsibility law, such as conflicts of interest and the attorney-client privilege, are driven almost entirely by considerations unrelated to professional discipline, such as disqualification and loss of fees in the case of conflicts, or the desire to protect client communications from disclosure in court in the case of the attorney-client privilege. Thus, it is vitally important to consider the whole field of the law governing lawyers, not just the disciplinary rules.

This does not mean we will not consider the disciplinary rules carefully. In fact, the Model Rules will be central to much of the book. In many cases,

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however, we will move beyond the state bar disciplinary rules and discuss the relationship with other sources of law. For example, the professional duty of confidentiality, stated in Model Rule 1.6, is often confused with the attorney-client privilege, which is a creature of the law of evidence. By looking at the evidentiary privilege with some care, you can see the distinctions and overlap between these two doctrines. Even if your law school course is limited to study of the Model Rules, the contrast with the attorney-client privilege can sharpen your understanding of the precise boundaries of the duty of confidentiality. It is more likely, however, that your professional responsibility course will touch on other areas of law, such as the evidence rules governing privileges; the Sixth Amendment doctrines pertaining to ineffective assistance of counsel, the law of agency, partnership, and corporations as it pertains to conflicts of interest; client identification; fiduciary duties; and the tort and regulatory law of fraud.

Thus, the first goal of this book is to integrate these other sources of law with specific professional responsibility rules, so that you can get a complete picture of your duties as a lawyer. Unlike some other textbooks, this book does not draw an artificial distinction between analysis of the disciplinary rules and other law that applies to lawyers representing clients. In some places the result of this integration may be greater complexity and length of treatment, but I believe it is warranted by the importance of understanding the interaction between the bar's own rules and other legal norms that lawyers must take into account. The second goal of the book is to make you aware of the theory and policy reasons underlying the law governing lawyers. Your law school course may be aimed more at ethics (in the philosophical sense of reasoning about right and wrong) than at law. In other words, you may be asked to step back from the law and understand the role of lawyer in terms of its function in our society, the history of the profession, general rational standards of right and wrong, or the perspective of some other discipline. Although no textbook of reasonable length can do justice to these alternative perspectives on the legal profession, I do hope at least to introduce them and show how they affect the law as it develops.

The field of professional responsibility law has never been more exciting. Since the year 2000 the ABA completed a major revision to the Model Rules, the American Law Institute completed its Restatement of the Law Governing Lawyers, and there has been renewed attention on the role of lawyers in large-scale abuses of trust by powerful clients. As I was preparing this book, there were news stories almost every day that touched on the ethical and legal responsibility of lawyers, of which the participation of professionals in the massive accounting frauds of the late 1990s were only the most prominent example. I hope you come away from your professional responsibility course with some appreciation for just how fascinating and important this subject is for all lawyers, and also with a better understanding of the law governing the practice of law and its basis in public policy.