

CHAPTER 1

INTRODUCTION: A LAWYER'S PROFESSIONAL RESPONSIBILITIES



Chapter hypothetical. For more than a decade, you and your law firm have represented H.P. Simmons, a famous author known for her science fiction series *Immortal Beings*. After the final book in the series was published in 2012, H.P. announced that she was retiring from writing. *Immortal Beings* fans were devastated. Unbeknownst to these fans, H.P. recently released a new science fiction book, *The October Chronicles*, under the pen name Constance Fellows. You and two other lawyers at your law firm know about H.P.'s new book and pen name. You represented H.P. in negotiations with her new publisher, Little Blue Press.

A week ago, you were chatting with your spouse's best friend, Pat, at a dinner party. Pat always describes you as a "boring lawyer," so maybe you were showing off a little when you mentioned that your client H.P. Simmons just released a book under the pen name Constance Fellows. You immediately regretted the slip, and you swore Pat to secrecy. Pat assured you that your secret was safe as she pulled out her phone to order *The October Chronicles*.

This morning, you read a story in the *Sunday Times* reporting that H.P. Simmons has released a book under the pen name Constance Fellows. You feel certain that Pat is the source of the story and that the leak will soon be traced back to you.



This textbook prompts you to consider the issues you will face throughout your professional career from law school through your retirement. As a member of the legal profession, you will have numerous responsibilities and opportunities. You will represent clients who will trust you with some of the most important issues in their lives and businesses. You will also be a member of the bar, with the obligation to abide by professional conduct rules. Finally, you must decide what kind of person you will be in your personal and professional life. How will you treat others and contribute to your community? How will you balance the demands of being an attorney with obligations to your family, friends, and other interests?

Despite what you may have heard, the study of professional responsibility is not limited to the study of professional conduct rules. Professional responsibility is the study of every aspect of the lawyer's professional life: duties to clients, obligations to the bar, and the personal traits essential to being an excellent lawyer. This textbook provides a framework that will help you understand your various duties and opportunities to succeed as a professional.

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A. FIDUCIARY DUTY TO CLIENTS

Please read Restatement (Third) of the Law Governing Lawyers §§ 16, 48–50 & 52–54.

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Lawyers and clients are in a fiduciary relationship—a special relationship of trust and confidence. This means that when a lawyer agrees to represent a client in a matter, the lawyer must fulfill fiduciary duties of care and loyalty to the client. This is not something that the lawyer and client negotiate; the relationship is by definition fiduciary and comes with these responsibilities.

This text will often refer to the Restatement (Third) of the Law Governing Lawyers for a statement of the law of fiduciary duty. In practice, you would rely upon case law in the appropriate jurisdiction for a statement of the law.

The fiduciary duty of care requires a lawyer to act with the competence and diligence normally exercised by lawyers under similar circumstances. This is not a *reasonable person* standard but a *reasonable lawyer* standard. Clients can expect a level of knowledge and skill based on the lawyer's training and study. In order to perform competently, a lawyer must be mindful of the role that he or she is playing for the client. Advisor, negotiator, and courtroom advocate are just some of a lawyer's roles. The demands of each role are different and will be explored further throughout this book.

A lawyer's breach of the duty of care can give rise to liability for malpractice or professional negligence. You will see examples of such cases in various chapters in this textbook.

The lawyer's other duty to the client is the duty of loyalty. It requires the lawyer to protect client property and confidences, avoid prohibited conflicts of interests, and take no advantage arising from the attorney-client relationship. In many jurisdictions, the breach of the duty of loyalty gives rise to a cause of action for breach of fiduciary duty. You will also see cases involving these claims throughout the book.

As a lawyer, fiduciary duty to your client should be your touchstone. If you are in doubt about whether a course of conduct is right, you can often ask yourself if it is in your client's interest. Are you diligently working on your client's behalf? Are you providing the advice, advocacy, guidance, and representation your client deserves? Are you acting in your client's interest or in the interest of someone else or your own personal interest?

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Problem 1.1. As you feared, the H.P. Simmons pen name leak was quickly traced to you. Your law firm released a statement publicly apologizing to H.P. Simmons and explaining that client confidentiality is of the utmost importance to the firm. *The October Chronicles* shot from number 4,709 to number 1 on the best-seller list within a week of the *Sunday Times* article. But that was no consolation to H.P. Simmons. In a subsequent article, H.P. was quoted as saying, "I certainly thought I could trust my lawyers with a secret. I am angry and devastated by this betrayal. I loved the freedom of releasing *The October Chronicles* without the pressure, hype, and expectation that always came with the release of an H.P. Simmons book. Now that has been taken from me."

Refer to the Restatement (Third) of the Law Governing Lawyers to determine the most appropriate cause of action for H.P. Simmons to assert in a lawsuit against you and your law firm. With citation to the pertinent section of the Restatement, explain what H.P. would have to prove at trial to prevail on her claim.

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B. PROFESSIONAL CONDUCT RULES

Another aspect of a lawyer's professional duty is the obligation to comply with professional conduct rules. These rules are adopted by the highest court of each state and by federal courts. In most jurisdictions, these rules are based to some extent upon the ABA's Model Rules of Professional Conduct. Most jurisdictions adapt the rules, which results in varying versions of the rules in each jurisdiction. This text will primarily refer you to the Model Rules, but it will sometimes reference variations on those rules adopted in various jurisdictions.

A lawyer may be disciplined for violating a professional conduct rule. Discipline can range from a private reprimand to suspension or even disbarment. You will read cases throughout this textbook in which an attorney faced possible discipline for violating a professional conduct rule.

Civil liability is not a consequence of violating a professional conduct rule. However, the same conduct that is the subject of discipline may be the subject of a client's lawsuit. For example, if a lawyer's lack of

diligence results in the client's lawsuit being dismissed, the bar may discipline the attorney for violating Rule 1.3 (the rule requiring attorneys to be diligent) and the client may sue the attorney for violating the duty of care.

Professional conduct rules can be thought of as falling within one of three categories. These categories are not signaled within the professional conduct rules. As a result, students (and lawyers) sometimes perceive the rules as a mass of disconnected and meaningless obligations. Knowing the three categories can help you understand the purpose of a given rule so you can better understand what is necessary to comply with the rule's spirit—rather than merely following the technical letter of the rule. Understanding the categories can also help you see connections among the rules.

The first category contains rules that guide attorneys in fulfilling fiduciary obligations to their clients. Such rules address issues including competence, diligence, confidentiality, and avoiding conflicts of interest. As you know from reading Part A, attorneys owe fiduciary duties to their clients irrespective of the existence of these rules. But the professional conduct rules serve as an important reminder of these duties and a guide for fulfilling them. For example, it is an attorney's fiduciary duty to avoid conflicts of interest. Model Rule 1.7 generally prohibits a lawyer representing a client whose interests are adverse to another client.

Rules in the second category describe limits of what lawyers can do on a client's behalf. The rules in this category address situations when a lawyer *may* or *must* take action that is contrary to a client's stated interests. Some of these rules are adopted by the bar as an expression of its values—such as rules that protect the integrity of the legal process or the rights of third parties. Other professional conduct rules in this category recognize ethical dilemmas that attorneys may face in practice and give the attorney discretion to make a personal judgment within the rule's parameters—such as rules that allow the disclosure of client confidences to protect a third party in defined circumstances. Still other rules in this category mirror other sources of law—a lawyer is prohibited by law from participating in a client's crime.

Finally, rules in the third category are aimed at promoting and preserving the integrity of the profession. These rules cover topics such as attorney advertising, the duty to accept court appointments and provide pro bono service to those unable to pay, bar admission, disciplinary authority, and the obligation to report professional misconduct of a lawyer.

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Problem 1.2. You receive a letter from the Disciplinary Counsel of the State Board of Attorney Conduct. The letter explains that H.P. Simmons and several lawyers (including lawyers from your firm) reported that you violated the confidentiality rule of professional conduct by revealing information learned in the representation of your client. The letter asks you to respond in writing within fourteen days and explains that your response will be considered as the Disciplinary Counsel determines whether to file a complaint for discipline.

Refer to the Model Rules of Professional Conduct to determine the specific provision you violated by disclosing your client's pen name. (The Table of Contents will be helpful as you search for the rule addressing confidentiality). Also, locate the professional conduct rule that requires a lawyer to report the professional misconduct of another lawyer. Must every rule violation be reported? Is the reporting obligation mandatory or permissive?

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C. PERSONAL TRAITS ESSENTIAL TO BEING AN EXCELLENT LAWYER

Throughout this course, you should think about your personal values and the type of lawyer and person you want to be. What are your personal values and how will you reconcile those values with your other duties as a lawyer? What values do you hope to further develop in law school and as you begin practicing law?

A growing body of legal scholarship explores the qualities and traits of the best lawyers. Beyond complying with professional conduct rules and fulfilling obligations to clients, excellent lawyers share a number of key traits. They are effective in building relationships with others; they accept a special role in the legal system and society; they have a strong work ethic and work effectively with others; and they seek growth and fulfillment in their personal and professional lives. These traits and qualities are discussed in this part.

1. EFFECTIVE IN RELATIONSHIPS WITH AND TREATMENT OF OTHERS

The best lawyers are skilled at building and sustaining relationships with other people. They understand the importance of their relationships with all participants in the legal system—clients, colleagues, judges, opposing counsel, law office staff, and others. Adjectives used to describe these lawyers include: respectful, honest, trustworthy, civil, and courteous.

Notable research on how successful lawyers interact with others includes the following. The book *Best Practices for Legal Education* explains the need for lawyers to act with “honor, integrity, fair play, truthfulness, and candor” and to demonstrate “sensitivity and effectiveness with diverse clients and colleagues.” Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map*, 62 (2007), available at www.law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf [hereinafter “*Best Practices*”]. In her article *Lawyers as Leaders*, Professor Deborah L. Rhode describes a leader’s values as including “integrity, honesty, trust, [and] an ethic of service.” 2010 MICH. ST. L. REV. 413, 417 (2010). Professor Susan Brooks has researched and written about the importance of lawyers being “relationship-centered.” She explains how lawyers should attend to client needs for “trust, respect, fair-mindedness, judgment, and perceptions around the opportunity to be heard.” *Meeting the Professional Identity Challenge in Legal Education Through a Relationship-Centered Experiential Curriculum*, 41 U. BALT. L. REV. 395, 405–10 (2012). Finally, Professor Neil Hamilton’s research into law firm evaluation systems reveals that firms consider integrity, honesty, and trustworthiness in evaluating attorneys. *Law Firm Competency Models and Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 9 (2013).

2. ACCEPTS A SPECIAL ROLE IN THE LEGAL SYSTEM AND SOCIETY

Being a member of the legal profession means accepting the role of public servant—a person who provides access to the legal system and seeks individual and social justice. The best lawyers devote time to pro bono service, bar associations, and community. They show respect for the rule of law and courts and work to improve both.

Best Practices describes “respect for the rule of law” as one of five professional values deserving special attention in legal education. *Best Practices* authors explain, “As gatekeepers to the judicial system . . . lawyers have a special obligation to respect and foster respect for the rule of law, irrespective of their personal opinions about particular aspects of the law.” *Best Practices*, at 64–65. The Carnegie Foundation’s 2007 book on the future of legal education addresses the need for law students to be trained in providing both individual and social justice. William M. Sullivan et al., *Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law* 14, 130–31 (2007) [hereinafter “*Carnegie Report*”]. The ABA’s 1992 report on legal education describes two of the fundamental values of the legal profession as “striving to promote justice, fairness, and morality” and “contributing to the profession’s fulfillment of its responsibility to enhance the capacity

of law and legal institutions to do justice.” American Bar Association, *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap, Legal Education and Professional Development—An Educational Continuum* 140–41 (1992) [hereinafter “*MacCrate Report*”].

3. DEMONSTRATES A STRONG WORK ETHIC AND WORKS EFFECTIVELY WITH OTHERS

The profession’s best lawyers demonstrate a strong work ethic and work effectively with others. They are responsive to clients and are hard-working, dependable, and self-motivated. Beyond that, outstanding lawyers have the ability to collaborate with and lead others.

In his article *Law Firm Competency Models*, Professor Neil Hamilton notes the following results from his survey of law firms concerning how they evaluate associates.

- Eight of the twenty-three competencies considered by eighteen large law firms in evaluating associates are directly related to an attorney’s work habits and work ethic.
- Fifteen of eighteen law firms studied evaluate lawyers’ initiative, ambition, drive, or strong work ethic, while sixteen of the firms evaluate lawyers’ responsiveness to clients or dedication to client service.
- Seventeen of eighteen law firms in the study evaluate lawyers’ “project management, including high quality, efficiency, and timeliness.”
- All eighteen law firms studied evaluate lawyers’ ability to initiate and maintain strong work and team relationships, while four of the subject firms specifically state that they evaluate the ability to work independently.
- Nine of eighteen studied firms evaluate an attorney’s delegation, supervision, and mentoring, while two specifically evaluate “leadership.”

Neil W. Hamilton, *Law Firm Competency Models and Student Professional Success: Building on a Foundation of Professional Formation/Professionalism*, 11 U. ST. THOMAS L.J. 6, 11 (2013).

4. CONTINUOUSLY STRIVES FOR PERSONAL GROWTH AND FULFILLMENT

Finally, the professional attorney continuously strives for personal and professional growth and fulfillment. The *MacCrate Report* notes that a fundamental value of the legal profession is “professional self-development” which includes seeking opportunities to increase knowledge

and improve skills and selecting employment that will allow the lawyer to “develop as a professional and pursue his or her professional and personal goals.” *MacCrate Report*, at 141. Professor Daisy Hurst Floyd explains that law students should “take the time to develop the inner life, to know who they are and what matters to them, to consider such questions as what their places are in the world, and how to practice law consistently with their values and morals.” *We Can Do More*, 60 J. LEGAL EDUC. 129, 132 (2010). Professor Jerome Organ has researched lawyer satisfaction and happiness. He notes studies reflecting that lawyers disproportionately experience alcoholism, depression, and other mental health issues. Professor Organ urges further study of these issues and their relationship to lawyer satisfaction with the practice of law. *What Do We Know About the Satisfaction/Dissatisfaction of Lawyers? A Meta-Analysis of Research on Lawyer Satisfaction and Well-Being*, 8 U. ST. THOMAS L.J. 225, 268–70 (2011).

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Problem 1.3. Why do you suppose our hypothetical lawyer revealed confidential information about client H.P. Simmons? Do you think most attorneys understand the confidentiality obligation? Why would a lawyer who understands the law and ethics of confidentiality nonetheless “slip up,” and how can you avoid such mistakes in practice?

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Profile of attorney professionalism. It would be easy for a professional responsibility text to focus only on the negative. After all, many cases worthy of inclusion in a professional responsibility textbook involve a lawyer’s lapse of professional judgment. In an effort to highlight positive role models, each chapter of this text includes a “Profile of Attorney Professionalism.” These short profiles feature attorneys who demonstrate exceptional professionalism in practice.

Before she became the first woman to serve on the Missouri Supreme Court, Ann Covington distinguished herself as a hard-working attorney who endeavored to provide exceptional service to her clients. She describes her early years in practice:

I enjoyed [the practice of law] and it was extremely hard work. [I] have recognized . . . what a privilege it was to help people on a day-to-day basis, so to speak. Whereas, my practice later was more of a corporate representation, [when I first started practicing, the people who came to the office . . . placed] their business affairs or personal affairs in my hands. I felt terribly responsible for them. . . . One of the partners in [my firm], when I sometimes worried aloud about something, said: “Well, Ann, you didn’t make these facts.”

Well, of course I didn't make the facts, but when [a client] would come and say, "Here's my situation," I felt responsible. Certainly in divorces, when children were involved, in contested custody matters—those were difficult. But, dissolution of partnerships could be almost as deadly as dissolutions of marriage. So, those things were a strain. And beyond that, the cases in juvenile court. We were all expected to accept appointments as guardians ad litem for children or in some cases for persons who were parents who were unable to pay. Termination of parental rights case—those are heartbreaking. . . .

I was very involved with many, many, many of my clients. [It was] gratifying to be able to help them. . . . Sometimes I felt pleasure when an opposing party would come to me and say: "You're quite the barracuda; I would never have guessed." But [it was also gratifying when a client came in with flowers for me or] said, "I made these cookies for you and your family." Those kinds of things . . . were so rewarding, and I cherish that time.

Oral History of the Honorable Ann K. Covington, American Bar Association Women Trailblazers in the Law Project, available at: http://www.americanbar.org/directories/women_trailblazers_project_listing/the_honorable_ann_k_covington.html.