

## PREFACE TO THE FOURTH EDITION

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It is with a heavy heart, but a renewed sense of purpose, that we present this new edition. Both the heavy heart and the renewed sense of purpose result from the loss of our dear friend, Jim Devine, shortly after we started work on this edition.

Jim loved lawyers and lawyering, and his interest in Professional Responsibility stemmed from an intense fascination with the realities of legal practice and the many ethical issues lawyers and judges inevitably face. He believed in the high standards that the organized profession seeks to articulate and to which most lawyers try their best to adhere, and saw the teaching of Professional Responsibility as a crucial opportunity to help future attorneys not only learn primary values but also begin to understand the concrete and sometimes counterintuitive complexities of the rules they will be expected to follow.

Joining the University of Missouri law faculty in 1980 following several years of successful practice in New Jersey, Jim immediately put his passion and experience—which included service on the ethics committee of his county bar—to work in teaching a section of Professional Responsibility and in helping to develop problem-oriented teaching materials. He was a man of many passions, including Civil Procedure, Sports Law, and sports in general (swimming in particular), but much of his academic zeal was reserved for this field. This casebook, which began in the 1970s as a set of handout problems for Fisch’s use in the course, would not have grown to a more complete package of teaching materials and then to full fruition as a published coursebook without his dedication to the subject, to his students, and to the practice of law. Particularly in subsequent editions, he took the lead in planning and organizing our efforts.

Missing our leader, completion of the Fourth Edition has taken a bit longer than we hoped and planned, but we have had the advantage of Jim’s many suggestions as well his full revised draft of Chapter 2.

This edition is a bit longer than the Third Edition, which was neither as long as the first, nor as short as the second. It continues our purpose of introducing students to the law of lawyering, with a focus on the practical but also an eye to the theoretical underpinnings behind the Model Rules. It remains our view that professional responsibility involves not only the Model Rules, the assorted state versions of these rules, the RESTATEMENT OF THE LAW GOVERNING LAWYERS, statutes, cases, and advisory opinions, but also concepts of morality, ethics, etiquette, competence, and education. Discussion of all is encouraged throughout the book.

Reflecting the work of the ABA’s Ethics 2000 Commission, this edition focuses primarily on the ABA Model Rules of Professional Conduct adopted

after 2002, including those adopted in the summer, 2003, in response to the federal Sarbanes–Oxley Act. It reflects the changes to the Model Rules enacted by the ABA after the previous edition, especially the changes allowing possible curing of conflicts of interest from an attorney’s previous work at another firm via notice and screening. It also reflects the 2007 revision to the ABA Model Code of Judicial Conduct, another new development since the publication of the Third Edition. While there are never any certainties when multiple authors are involved, we believe the book references virtually all of the current Model Rules of Professional Conduct as well as almost all of the Code of Judicial Conduct.

As in prior editions, however, the rules need context. As a result, students are introduced to rules, the RESTATEMENT, cases, advisory opinions, statutes, constitutional provisions, and other materials by problem situations that lawyers might face. Each problem is followed by readings and notes designed to help students solve the questions following the problems. Some of the notes raise further, related issues. In this edition, notes are generally titled and numbered for ease of reference.

**Chapter 1, *Pervasive Issues***, attempts to provide context to all of the material. The first problem raises issues of personal morality as well as questions about the adversary system, etiquette between lawyers, and professional responsibility. The readings are selected to provide a definition of “ethics” for all of the material that follows. The readings in this chapter can often be used later in the semester for philosophical foundation to some of the more difficult rules.

**Chapter 2, *The Legal Profession and the Practice of Law***, considers the legal profession as an institution, its relation to the various branches of government, and the processes of admission and discipline.

**Chapter 3, *The Attorney–Client Relationship***, examines how lawyers attract clients through advertising and solicitation, the several ways in which the attorney-client relationship is established, the mutual rights and obligations of the parties (including malpractice and the fee relationship), and termination of the relationship.

**Chapters 4 and 5, *Confidentiality and Conflicts of Interest***, deal with two of the most important dimensions of the lawyer’s duty of loyalty to the client. The duty of confidentiality protects against voluntary disclosure of information acquired by the lawyer during the representation. Conflict of interest rules focus on the avoidance of situations creating competing loyalties for the lawyer to the potential detriment of a particular client. The conflict of interest chapter contains analogous material regarding judicial disqualification and recusal.

**Chapter 6, *Particular Lawyer Roles and Responsibilities***, discusses problems specific to certain roles of the lawyer, many of which bring into play additional rules or procedures governing the lawyer’s conduct. The role of advocate, for example, involves the relationship between Federal Rule of Civil Procedure 11 and ethics rules relating to “frivolous claims.” The roles of both prosecutor and criminal defense attorney often involve specific constitutional

rights, as well as rules of ethics. Included in the concerns of any advocate, and timely in today's legal world, are the constitutional and ethical issues of fair trial and free press. The chapter also reviews roles outside traditional advocacy in litigation, including the lawyer as counselor, advisor, evaluator, and participant in alternative dispute resolution. This chapter explores the lawyer as judge, focusing primarily on judicial elections and trial conduct, then concludes with a brief consideration of the lawyer as human being.

As in prior editions, each problem is followed by one or more references to the Model Rules of Professional Conduct and/or the Code of Judicial Conduct. Because the states seem to be somewhat slower in adopting new versions of the Judicial Code than in implementing ABA-proposed changes to the Model Rules, we have adopted the practice of referencing the previous (pre-2007) version of the Judicial Code. As in the Third Edition, we have also included references to the American Law Institute's RESTATEMENT (SECOND) OF THE LAW GOVERNING LAWYERS.

In editing materials cited in the text, we used the following conventions. First, when quoting, we have generally followed the format found in the material being quoted, with occasional minor formatting changes to keep the readings relatively consistent. Other modifications of the original material are indicated by [bracketed phrases or letters]. Where the only modification is deletion of material in the original, we have inserted three asterisks, i.e., \* \* \*. A [bracketed phrase or letter] or \* \* \* may, therefore, indicate a deletion of any length. Absent unusual circumstances, you will not see \* \* \* next to a [bracketed phrase or letter], because the latter indicates a change, possibly including a deletion of material. We have not inserted \* \* \* when the only deletion from the original is a footnote, because it is assumed that most footnotes are not included in this text. When a footnote found in the original is included in this text, we have retained the number from the original. When we added a footnote, we used small letters (i.e., a, b, c, etc.). In many instances, when a principal case or article cites a state-specific or outdated version of a Model Rule (or of another provision), we have made a [bracketed] change to the citation, to cite the latest version.

This book is primarily designed for a three credit hour course in Professional Responsibility or Legal Ethics. We believe that the entire book can be covered in such a course, though we admit that this goal requires the instructor and the students to pick up the pace in certain areas. In a two credit hour course, Chapters 1-5 can comfortably be covered, with some pruning, probably in Chapter 2 (Unauthorized Practice?) or Chapter 3. In a four credit hour course, instructors can add state cases, statutes, and variations to the current rules for a very comfortable course.

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