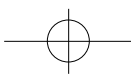
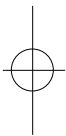
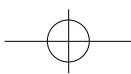
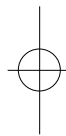
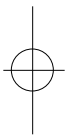


Lawyers Crossing Lines



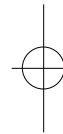
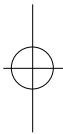


Lawyers Crossing Lines

Nine Stories

James L. Kelley

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Durham, North Carolina

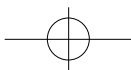


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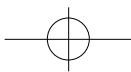
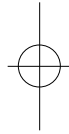
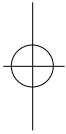
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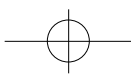
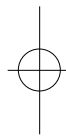
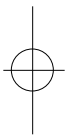
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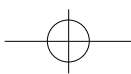
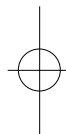
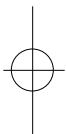
For my students





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Preface

This is a collection of true stories about lawyers who crossed lines and ended up being sued for malpractice, disbarred, or prosecuted. Based on the records of litigated cases, the stories are rich in detail, sometimes bizarre, and always sad—sad because they are about self-inflicted wounds and betrayals of trust.

Lawyers Crossing Lines is intended as supplemental reading for students in professional responsibility courses at American law schools. I have taught professional responsibility as an adjunct professor at Georgetown University Law Center in Washington, D.C. for the past several years, assigning widely used casebooks. Casebooks include much essential material, but their manner of presentation—whether of appellate decisions, rules, or excerpts from commentary—is necessarily somewhat abstract. The stories in this book go beyond the dry recitations in edited cases to the settings and human elements that emerge from court testimony, revealing more of the realities of law practice and the people behind the parties and their counsel. Each story is followed by comments and questions on the issues it presents.

Why tell stories to students of professional responsibility? Of course, there is nothing wrong with making a law school class interesting for the students. More important, principles of legal ethics are more effectively conveyed, and more likely to be remembered, when narratives of real events supplement traditional casebooks. Oliver Sachs said it well in *The Man Who Mistook His Wife for a Hat*: “To restore the human subject at the centre, we must deepen a case history to a narrative or tale.”

A course in professional responsibility should be about more than “learning the rules” well enough to pass the Multistate Professional Responsibility Examination. It should prepare students for the problems and pressures they are likely to face after graduation. For example, a story about a firm fraudulently increasing billable hours (Chapter 5, “Two Scorpions on a Bottle”) can be an effective launch for discussion of the minimum billable-hours requirements imposed on associates in many big firms today, and the pressures those requirements exert to in-

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flate billable hours or do unnecessary work. A story about a partner overriding associates' conflict-of-interest concerns (Chapter 3, "Breaking Up Is Hard to Do") poses a not uncommon dilemma and may suggest questions students might raise in job interviews. Will my ethics concerns be respected? Can I take my concerns anonymously to an ethics committee?

— "Liars in Court" relates painful realities in representing a client who turns out to be a liar and subsequently sues the lawyer for malpractice. The lawyer is caught between conflicting duties of loyalty to the client and telling the truth.

— "The Case of the Frozen Broccoli" tells the story of two lawyers who crossed, sometimes leaped over, lines between legitimate representation of a criminal enterprise—the Columbian cocaine cartel—and assisting criminal activity.

— Conflicts of interest are a core concern of professional responsibility. "Breaking Up Is Hard to Do" introduces the subject with a straightforward conflict between current clients. "Of Chinese Walls and Comfort Zones" involves a former-client situation that raises complex theoretical and policy issues.

— "The Gatekeeper" is about an associate who gets in over his head representing an underwriter in a questionable securities offering. The partner ostensibly responsible for supervising the associate leaves him twisting in the wind.

— The setting of "Hot Seat" is Salomon's Brothers, then the dominant government bond trader in New York and the subject of the best-selling memoir, *Liar's Poker*. A trader submitted a false bid in a Treasury auction which senior management failed to report to the government, contrary to the advice of its chief legal officer. The story illustrates pressures on in-house counsel and the "whistleblower" problem

— "Ambulance Chasing Redux" describes aggressive and tacky solicitation of victims of an airplane crash by the firm of John O'Quinn, a nationally-known tort lawyer. Nevertheless, it calls phrophylactic solicitation rules into question, considering the quality of representation provided by lawyers like O'Quinn and the need to level the playing field against insurance adjusters.

— “Spectator Sport” describes a particularly egregious failure to provide effective representation to a defendant in a capital case in a system—including prosecutors and judges, as well as defense lawyers—which condones, even supports, incompetence.

The selection of a case for chapter treatment was based on three criteria: whether it raises significant issues of legal ethics; whether it lends itself to classroom discussion; and whether a good story could be extracted from its voluminous record. Several prominent experts appear in the stories as witnesses or counsel, including Sherman Cohn, David Epstein, Marvin Frankel, Stephen Gillers, Geoffrey Hazard, Thomas Morgan, and Charles Wolfram. The cases I selected are relatively recent. All were decided in the 1990s, and two were pending on appeal as the book went to press.

It’s a myth that public records, like trial transcripts, are readily available to the private citizen, whether for research or other purposes. Some courts or court reporters charge \$1 or more per page, making source material from the courts for a book like this prohibitively expensive. Fortunately, in most cases I was granted free access to the full trial record by the prevailing party’s lawyer. I had the bulk of the records—ranging from 2,000 to 7,000 pages per case, some 30,000 pages in all—duplicated at commercial copy shops at reasonable cost. All of the stories are based on transcripts and other court records, with one exception. The record of the SEC investigation related to the Salomon false-bid scandal from which the “Hot Seat” story is drawn fills seven hundred storage boxes. In response to my Freedom of Information Act request, the SEC advised that the cost of its pre-release review would be “several hundreds of thousands of dollars.” That story had to be based on the SEC’s published decision and media accounts.

Over half of the stories involve misconduct, or alleged misconduct, in law firms of one hundred or more lawyers. Three of those firms—Gibson, Dunn & Crutcher, Pillsbury, Madison & Sutro, and, until it dissolved in the wake of malpractice and fraud judgments, Keck, Mahin & Cate—are (or were) among the biggest firms in the country. Two stories involve lawyers in specialized criminal defense and personal injury practices, and a third concerns an in-house counsel for a large company. The book includes only one story about a sole general practitioner, the type of lawyer who (complaints to disciplinary authorities suggest) commits most of the malpractice. In the main, however, those complaints charge neglect, conversion of funds, and other common defaults that,

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while important to the client, are not good candidates for law school discussion. Because the stories are based entirely on matters of public record, I was free to, and did, use real names of people, law firms, and places, with one exception in which access to the record was conditioned on my not using the real names of the plaintiffs.

The stories collectively involve the diverse sources of law governing ethical responsibilities of lawyers: State ethics codes, common-law fiduciary obligations, and criminal and civil statutes and rules—such as obstruction of justice and securities fraud—having counterparts in codes of ethics. Of those sources, the American Bar Association’s Model Rules of Professional Conduct, in force in some form in over forty States and the District of Columbia, are most frequently involved, either in the story itself or in the comments and questions following it. In the four stories of civil malpractice, the court and parties relied substantially on the Model Rules as evidence of the standard of care, despite the disclaimer in the Rules that a violation “should not give rise to a cause of action, nor should it create any presumption that a legal duty has been breached.” The most relevant rules are cited—and quoted, if short—as they arise in the stories. Students can refer to their selected standards books for the longer rules and official comments.

Several chapters describe gross misconduct—billing fraud, falsifying evidence, harassing accident victims—the kinds of things that give lawyers a bad name. It should go without saying that the book is not intended as a portrait of how the profession as a whole behaves. These are cautionary tales. There is, of course, no objective way to measure levels of ethical conduct among lawyers. Informed judgments about the seriousness and scope of misconduct come from practitioners, disciplinary authorities, malpractice insurers, and students of the problem. Based on thirty years as a lawyer in private practice and government and as a law school teacher of ethics, I believe that the great majority of lawyers play by the rules—most of them scrupulously, others in their fashion. Not many flout them.

The stories show how the rules apply to lawyer misconduct in some typical settings. Why lawyers break the rules raises difficult questions to which there are no complete answers. It is sometimes possible, however, to identify recurring patterns which may contribute to misconduct, and which may point the way to corrective regulation. A few such patterns are sketched in the afterword.

J.L.K.
Takoma Park, Maryland
October 2000

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The idea for this book came from my friend Peter Byrne and was refined with him over numerous lunches at *The Irish Times*. I appreciate the freedom that Keith Sipe, publisher of Carolina Academic Press, allowed me in developing the original proposal, based on things I learned along the way. Finally, my thanks to the Virginia Center for the Creative Arts for giving me a friendly and stimulating place to finish this book.

