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Problems in Professional Responsibility for a Changing Profession

Fifth Edition

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For Linda; Anne and Rob; David and Carol; Daniel and Stefanie;
and Sophie, Maya, Nathan, Miriam, and Drew.
ALK

For Ann Marie and Brian. And for Jim Vorenberg, who taught me ethics,
hired me to teach it, and exemplified what it means to live an ethical life in the law.
DBW

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Preface to the Fifth Edition

Much has happened in the seven years since the last edition was published. The profession has changed greatly, bringing new problems for the profession and new developments with respect to long-standing issues of professional responsibility. These are discussed in the Introduction that precedes Chapter One. The purpose of this preface is only to explain a few matters of form and to express a few words of thanks.

Omission of textual material in excerpted cases, articles, books, or other works is always indicated by ellipses. Footnotes, references to case records, and portions of citations, however, have been omitted freely in cases and in other written material without notation. We have also corrected without notation a variety of minor typographical errors in the quoted materials.

We are grateful to the many authors and publishers who gave us permission to reprint copyrighted material. They are acknowledged in the following pages. Prefaces to earlier editions have recognized the contribution of many friends and colleagues to this work. A number of people, chiefly David Herwitz, Dan Coquillette, Ann Southworth, Detlev Vagts, and James Vorenberg, used earlier versions of this edition and made many useful comments. Our research assistants, Christopher M. Assise, Matthew Bobys, Trevor Farrow, Dan Markel, Darrell Miller, Sava Savov, David Shelton, and Keith Swisher were invaluable in their assistance. For many years, Melinda Eakin has prepared and read and reread version after version of this edition for student use, providing an endless number of fabulous editorial services in preparing this manuscript for publication. In the last year, she was joined in this effort by Amanda Barry. We are more than grateful for the skill and good cheer with which these unsung heroes performed all the major and minor tasks.

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Introduction

A commonplace remark of students, teachers, and practitioners of law is that the practice of professional responsibility is very different from the precepts of the profession in that practice includes a great deal of "unethical" conduct condemned by the precepts. Our view is that whatever the magnitude of "unethical" conduct in the profession, and it is very difficult to measure, even assuming agreement on the meaning of that phrase, there is widespread insensitivity to issues of professional responsibility. A great deal of the insensitivity derives, we believe, from the fact that the typical lawyer has not devoted enough thought to those issues before they arise in practice. The problems are then often ignored because they are not recognized as such. Or, if they are recognized, they are dealt with inadequately because the lawyer has not developed a philosophy of, or at least a general attitude toward, practice and a sense of the kind of lawyer he or she wants to be. How and why the profession is in that situation is an interesting question. There are many institutions that can share the blame, for there is more than enough to go around.

One impetus for the development of these materials was the desire to expose students to issues of professional responsibility by discussion of the difficult problems that lawyers face in their daily practice and something about the context in which these problems are likely to arise. While students are in law school, they are able to examine difficult professional issues without the heavy weight that self-interest exerts on the practitioner to reach a particular result that is financially rewarding. If students see the issues and competing considerations involved in typical problem situations and begin to develop their own reactions and philosophies before the issues arise in their own professional lives, then they will be better equipped to recognize and respond to them in practice. Obviously, subsequent experience may modify views, but students will have some background with which to face their experiences.

A second impetus to development of these materials was the desire to familiarize students with issues of professional responsibility that are facing the profession as a whole—questions of the quantity and quality of the provision of legal services to the public, admission and discipline, specialization, and the like. The textual materials presented in these particular chapters are somewhat more adapted to discussion in themselves, but even here many of the issues are developed in the problem form that characterizes much of the book.

A third impetus is the desire to present issues relating to the structure, organization, and demographics of the profession. Chapter 13, presenting these materials, reflects research on these issues over the past seven years. The profession is changing at a rapid pace—both with respect to its composition and the units in which its members are practicing—and these changes have thrown up new issues that need to be faced by students, by practitioners, and by those who study and those who regulate the profession. Chapter 13 has been placed near the end of the book, but it could well be assigned first or assigned as essential material to be read during the first month of the course because it

informs every issue considered in the course. Throughout the book, we note places where the material in Chapter 13 is especially relevant.

Professional responsibility is a course in which students can and should be engaged deeply in the materials. We think it the most important course in the curriculum because it is the one course that forces students to confront their own futures and the decisions that they will have to make every day in their professional lives. In addition to providing exposure to pervasive ethical issues, the problem method has proved to be an excellent method for achieving student involvement. It also makes classes a good deal more fun. Either we discuss what the lawyer should do, or we take the role of client, and the student-lawyer conducts an interview with us based on the fact situation set out in the Problem. Other students then try their hand as lawyer or evaluate the first lawyer's performance, or sometimes we just discuss the issues. Occasionally, we will take the lawyer's role.

Students sometimes ask whether the Problems around which most chapters are structured are "real." They are. They have either happened to one of us, or been related by a lawyer to one of us, or adapted by one of us from a reported case or ethics opinion. The Problems have been designed to force students to think through some difficult areas in the practice of law. None are easy or have solutions that are noncontroversial. The Problems therefore cannot be answered by following the old bar examination cliche of advising the lawyer to do what is "most ethical" or the more cynical version currently in circulation about the Model Professional Responsibility Exam, which cautions students that when in doubt always choose "the second most ethical answer." Where the Problems are concerned, usually a clash of values is involved.

While the Problems are the heart of the course and can be used in a variety of ways, we have provided supporting materials to present background information and insight. We have tried to provide enough materials to illuminate the issues in the Problems without overwhelming the reader. One can focus on either the Problems or the supporting materials. Usually we do one or the other although sometimes we do both.

One characteristic of this approach to the teaching of professional responsibility is that it is essentially inductive. The idea is for students to face situations, see what guidelines the law of professional responsibility offers or fails to offer, and decide for themselves what the appropriate solution or solutions should be. After developing "solutions" to a number of Problems, which is perhaps analogous to developing practical experience, the student should then consider whether these "solutions" fit together into a coherent professional attitude. Obviously, since the materials are designed to provide exposure to professional responsibility problems encountered in actual practice, they presume a legal system that resembles our present one. However, their purpose is not to invite automatic acceptance of our system's premises. The premises should first be understood and then evaluated. There are a number of places in the book, beginning most explicitly with selections in Chapters 3 and 4, that are designed to provide some insight into the present system and to stimulate consideration of specific and general alternatives to it.

This book is planned for use in two, three, and four credit courses. Each user will have his or her own preferences, but in years when we do not plan to cover the whole book, we teach Chapters 1–4, 9, 13, and 14 and then pick different topics from the remainder.