

LEGAL ETHICS IN THE  
PRACTICE OF LAW  
  
FOURTH EDITION

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# LEGAL ETHICS IN THE PRACTICE OF LAW

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## Fourth Edition

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MATTHEW  BENDER

# *DEDICATION*

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To Jesse, Gabriel, and Maya (RZ)

To Gregory . . . and to Nicholas (CML)

For Chuck and Griz — Who are always there (LRC)



# ACKNOWLEDGMENTS

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The creation of this fourth edition was made more challenging and interesting by all the sea changes in the world of legal ethics that have occurred since 2007. We could not have kept up with these changes without the help of many people, and we are indebted to each. Over the years we have had the help of many colleagues — academics and practitioners alike. Ethics professors Steve Berenson, Kathleen Clark, Steve Derian, Mary Jo Eyster, Monroe Freedman, Peter Joy, Drew Kershen, Rory Little, Judith Maute, Morris Ratner, Cindy Slane, and especially Bob Kuehn, now at Washington (St. Louis), have provided valuable comments over the years.

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Richard Zitrin

Carol M. Langford

Liz Ryan Cole

October 2013



# *PREFACE TO FOURTH EDITION*

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For students and those teachers who have not previously read this book, the first part of our Introduction, which follows, serves to explain our practice-oriented, “real world,” problem-driven approach. It also outlines both our approach to the discipline of legal ethics and the book’s organizational structure. We suggest you begin there.

The purpose of this Preface is to give those with some working familiarity with our first three editions a brief overview of what has changed — in the world of legal ethics and in this volume.

In both instances, the changes have been substantial. Following the adoption of the ALI’s Restatement (Third) of the Law Governing Lawyers and the wholesale revision to of the ABA’s Model Rules of Professional Conduct in 2002 and 2003, widespread rule modification has slowed down. But rules revisions continue in several venues, most importantly: the ABA’s Ethics 20/20 Commission, whose rules modifications on technology and international issues were largely adopted by the House of Delegates in 2012 and 2013; and a series of controversial changes in conflict of interest rules to allow broader “advance waivers” and more screening than previously permitted — changes by no means universally adopted by the states. Substantively, we have seen many changes in several areas of law and ethics. Most significantly, technology and ethics continues to evolve at a rapid pace. Some issues: What is a secure, confidential communication? Must we now encrypt information we transmit? What does it mean to “friend” someone as a lawyer, or reach out to people on LinkedIn? How does commercial free speech relate to lawyer blogs and other Internet presence?

In this Fourth Edition, we have tried to be responsive to these changes, while keeping intact the core of what seemed to work well in previous editions. Throughout, we have maintained our predisposition for accessible, readable materials that still satisfy necessary academic rigor.

Without exception, every Problem (for we continue to divide the book by Problems rather than Chapters) is changed from the last edition, and while several have mostly nips, tucks, and updates of citations, many more have undergone more substantial revision. We have excerpted several dozen new articles and cases that were published since our last edition, but we have maintained the last edition’s structure and, we’re glad to report, only modestly lengthened the text despite our desire to maintain a “full coverage” approach to this discipline.

Among the most important new material we have added are:

- A new half of a problem and several readings addressing the ethics of mass multi-plaintiff cases;
- An increased emphasis on wellness, including a recent detailed prescriptive article, our own key suggestions, and an article about developing trust between lawyer and client;
- Deeper discussions about mentoring, changes in the law school curriculum, and the adequacy of current law school training;
- Confidentiality and the emerging issue of whether law firms should be able to consult themselves about possible mistakes on their own clients’ cases;

- Confidentiality and the wrongfully convicted;
- Further updated readings on technology and “the Cloud,” including tweeting, “virtual” law offices, and seven recent ethics opinions on use of the Cloud;
- Detailed analysis of the state of the law on the ethical requirements of electronic discovery;
- Updated readings reflecting the evolution of conflicts of interest law, especially as it relates to disqualification, law firm imputation, waivers, and screening;
- Extensive revisions and expansion of material on multi-cultural and cross-cultural lawyering;
- An entire reworking and modernization of the problem on advertising and solicitation.

We hope you, both professors and students, find the changes useful and enjoyable. Anyone with questions or comments can reach us at [zitrinr@uchastings.edu](mailto:zitrinr@uchastings.edu), [langford@usfca.edu](mailto:langford@usfca.edu), and [lcoble@vermontlaw.edu](mailto:lcoble@vermontlaw.edu). We look forward to hearing from you.

Richard Zitrin

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October 2013

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