CHAPTER 1

INTRODUCTION: WHY STUDY PROFESSIONAL RESPONSIBILITY?

Welcome to Professional Responsibility! This is the one (mostly) required course in law school that involves the study of the law that applies, not to your client, but to you. Its position in the law school curriculum is largely an artifact of history (more on that later), and for decades the subject received relatively little scholarly attention. In recent years, there has been an explosion of interest in the field. It has become a significant practice area of its own, with its own professional organizations, research tools, and specialty journals.

This might be an equally accurate description of many subjects: securities regulation, or environmental law, or tax. While specialists in those subjects might think that courses in those areas should be a required part of the curriculum, at most law schools students have the choice of whether to study them or not. Why is professional responsibility different?

Most of you are probably taking this class because it is required, and you may be wondering why you have to bother with it. Many students may also be thinking, “Why do I need an ethics class? I’m an ethical person. I don’t need a semester-long lesson in morality.”

It is probably true that your ethical sensibilities with regard to the issues that arise in your ordinary life are already well-ingrained. You go to a store, and the clerk inadvertently gives you $10 too much in change. What do you do? You go through the drive-thru and get the wrong bag of food—$25 worth of snacks, instead of the soda you ordered and paid for. What do you do? Your best friend is planning to marry someone you know is cheating on her—what do you do? You bought cheap tickets in the bleachers, but no one’s watching when you walk by the exclusive boxes right behind third base—do you sit in the expensive seats, even though you didn’t pay for them? Chances are that, however you answer these questions, you will not find these decisions all that difficult. You are familiar with these kinds of dilemmas, and are probably comfortable with how you would address them. Your views about how to handle these situations may come from a wide range of sources: your religious faith, if you have one; your own moral views; your sense of your community’s standards; your fear of or perhaps the likelihood of getting caught; and your awareness of any applicable rules, as well as the potential sanctions for
violating them. To the extent that you find ethical dilemmas challenging in your everyday life, it is probably because they pit two strongly held values against each other: your desire to protect your friend versus your desire not to tattle, perhaps, or your desire to enjoy yourself versus your desire to do the right thing.

Two things are true about the world of legal ethics that are not true of your prior experience. First, you are now entering a new community, and new and different rules apply to your conduct. To some extent, as a lawyer, you are still just a human being, and your moral intuitions will still be extremely relevant to your law practice. But you have some additional obligations and duties imposed by virtue of your role as a lawyer that may affect your choices and decisions. This course will acquaint you with those legal rules. Special rules don’t just apply to lawyers, of course. Many professions have specific obligations that apply to their members. It is appropriate for you to learn the rules that apply to yours.

The second important factor in developing your sensibility to ethical decisionmaking in the context of law practice is that the situations that will arise in this context, unlike the everyday ones we have already discussed, are neither common to your experience nor intuitive. Can you represent a criminal defendant when one of the witnesses who will testify against him is a former client for whom you wrote a will six years ago? If your client tells you that he has cheated on his taxes, do you have the right to report him to the IRS? Do you have an obligation to do so? Does that depend on whether you helped him cheat on his taxes? If you move from one law firm to another, will your new firm need to withdraw from representing a client in a case if, at your old firm, you worked on the case for the other side? Your ordinary, seat-of-the-pants intuitions about right and wrong are probably of little help to you in addressing these specialized problems. While these kinds of issues may seem novel and somewhat puzzling to you now, this course will help you become familiar with the kinds of issues that are likely to arise in the practice of law and will equip you with the skills you need to address them.

The ethical decisionmaking of lawyers is also problematic because the unique role of the lawyer may create situations in which the lawyer’s moral intuition is at odds with what the law requires. Deciding to act in a way that is both moral and legal is not difficult; deciding not to act in a way that is neither moral nor legal is similarly obvious. It is the situations where law and morality conflict that pose the most difficulty.

To analyze problems that pose these kinds of complex concerns, you need to know what your moral intuitions suggest and what the law requires. Learning what the law requires in the context of professional responsibility is, like any other area of the law, harder than it sounds. There are areas where the rules are clear, and areas where they are more
nuanced or uncertain. Ethics issues may require the close parsing of statutory or regulatory language, the review and interpretation of caselaw and persuasive authority, and the factual distinction of precedent. Lawyers contemplating their ethical obligations need to figure out what the law is that governs their conduct. In this area of the law as in any other, that means both a base level of fundamental knowledge and an obligation to advance that knowledge using research tools.

Lawyers also need to contemplate the level of certainty under which they wish to operate. Should lawyers making decisions about their own conduct treat those issues in the same way they treat the defense of past conduct by a client? The same way they treat advising a client about future conduct? In a different and more conservative way than either of those? Should these answers be the same for all lawyers, or should there be a sliding scale that takes into account the risk tolerance of particular individuals or the nature of their practices? There are no clear answers to these questions, though there is a lot of discussion about them. You will want to contemplate them yourself as you go forward.

Professional Responsibility is also a course that is organized differently than much of the law school curriculum. Most courses explore an area of the law as it applies to the different players who may be affected by it. In the basic tax course, we learn the law of federal income taxation and think about that area of law from the perspective of both the taxpayer and the government. In criminal procedure, we consider the law as it applies to the police and to criminal defendants. In that respect, most law study is distinctly vertical, requiring the mastery of a field of law in its myriad application to all the actors who are affected by it.

We could, instead, teach horizontally, so that every course considered the application of a range of cross-cutting fields to a particular category of client or situation. But for the most part we don’t. We don’t ordinarily teach “the law of the police” or “the law of the employer.” Instead, we assume that we can learn the law that applies to these various actors through study of the range of legal fields that will affect them. We usually believe that particular bodies of substantive law have coherence and should be studied together. Attempts to cobble together courses that deal with a range of law that applies to a particular category of activities or people have been criticized; Prof. (and Judge) Frank Easterbrook has argued that this kind of course—which he derisively termed “The Law of the Horse”—“is doomed to be shallow and to miss unifying principles.”¹ Yet the importance of guaranteeing that lawyers have been educated about the diverse areas of law that apply to their conduct overrides that usual hesitancy. This explains why the legal ethics course contains materials that touch on a wide range of law school subjects, including agency law, evidence law,

contracts, torts, and regulatory law, as well as the rules of professional responsibility, and why it may have a different “feel” than other areas of law study.

**A. WHOSE INTERESTS ARE REFLECTED IN THE RULES GOVERNING LAWYER CONDUCT?**

The rules of lawyer conduct can be viewed as reflecting the interests of several different groups of stakeholders. Lawyers themselves, clients or potential clients, courts and judges, and the public may all have distinct interests in the regulation of lawyers. If we consider the range of areas in which lawyer behavior might be regulated, we can see two things.

The first is that these stakeholders are likely to disagree about the breadth of areas that are appropriate for lawyer regulation. Are lawyers just market actors, subject to market constraints? Or should they be governed by a higher and more demanding set of standards? Should the rules regulate the details of practice, like the fees lawyers may charge or what kinds of cases they can take? How should the law handle more fundamental questions, like the consequences if lawyers make mistakes, the degree or protection lawyers owe their clients’ secrets, or whether lawyers have a duty to protect the public as well as their clients? One’s perspective on the role of lawyers is likely to influence these issues.

The second is that the many stakeholders in these areas are likely to have very different views of the right answers to these questions. They may seek to use their leverage to advance those different views of how lawyers should be regulated. While those views are rarely couched in the language of self-interest, concerns about stakeholder interests are rarely far from the conversation. Issues like the scope of the duty of confidentiality or the attorney-client privilege, the regulation of the unauthorized practice of law, the control of attorney advertising and solicitation, or the control of funds reflect how the battles between stakeholders have been, for the moment, resolved. As you move through the materials in this course, ask yourself whether the balance has been struck properly. Law practice is changing rapidly, as technology and globalization affect what lawyers do and how they do it. What impact will those changes have on our view of how lawyers should behave?

**B. DISCIPLINARY JURISDICTION**

Suppose there is an allegation that you have violated the rules of professional responsibility. Which jurisdiction has the authority to discipline you? And which rules of professional responsibility will be applied to you? These are two separate questions, and the answers to them may surprise you.
If you are admitted to practice in a single jurisdiction, never leave that jurisdiction, and practice exclusively under the law of that jurisdiction for clients located in that jurisdiction, the answer to these questions may seem obvious. But multijurisdictional activities and rules may make these issues more complex. Consider the following hypotheticals:

(1) You are admitted to practice in Jurisdiction A. While on vacation in Jurisdiction B, you are arrested for shoplifting. Which jurisdiction[s] may subject you to discipline? See Model Rule 8.5(a).

(2) You are admitted to practice in Jurisdiction A and visit Jurisdiction B to meet with a client to discuss strategy in a case you are handling in A. It is alleged that, while in Jurisdiction B, you communicated inappropriately with a represented party. Which jurisdiction[s] may subject you to discipline? See Comment [19] to Model Rules 5.5 and 8.5(a).

(3) You are admitted to practice in Jurisdiction A. You disseminate an advertising flyer in Jurisdiction B that violates Jurisdiction B’s rules of professional responsibility. Can B discipline you for your violation of its rules? Can A? Does it depend on whether the rules in the two jurisdictions are the same or different? See Model Rule 8.5(b)(2).

(4) You are admitted to practice in both Jurisdiction A and Jurisdiction B. You violate the trust account rules in Jurisdiction A. Can Jurisdiction A discipline you for your violation of its rules? Can B? Does it depend on whether the rules in the two jurisdictions are the same or different? See Model Rule 8.5(b)(2).

(5) You are admitted to practice in Jurisdiction A. You are asked to represent a client in a litigated matter pro hac vice in Jurisdiction B. You travel to Jurisdiction B and represent the client but in doing so you make a misrepresentation to the court in B. What rules will apply to your conduct in Jurisdiction B? See Model Rule 8.5(b)(1).

One thing these problems and Model Rule 8.5(a) suggest is that it is possible to be subject to the disciplinary authority of a jurisdiction where you are not admitted to practice. That might seem peculiar, because it is hard to imagine how sanctions from such a jurisdiction could effectively govern lawyer conduct. A jurisdiction in which you are admitted to practice has the power to take away your license to practice, by suspending or disbarrying you. What can a jurisdiction in which you are not admitted to practice do to sanction you?