What law governs your conduct as a lawyer? You are already familiar with many of the sources of law that apply to lawyers. Lawyer agrees to write an appellate brief for a client for $5000; after reviewing the file, Lawyer realizes that this is a lot more work than she expected, and she calls the client and raises the price to $10,000. What law applies? Lawyer agrees to bring suit against a municipality on behalf of a client who slipped on an icy sidewalk, but then misses the very short deadline for filing a notice of claim against the municipality and causes the client to forfeit her claim. What law applies? Lawyer learns from a friend who works at a corporation of a forthcoming corporate acquisition and buys stock in the company that is being acquired in the hopes that the price of his stock will rise once the acquisition becomes public. What law applies? The law of contracts, torts, and criminal law apply with equal force to lawyers; lawyers must comply with securities laws, money laundering prohibitions, and the tax code. Consistent with the “law of the horse” nature of this course, we will spend some time studying with more specificity how doctrines you may have studied in other areas of law apply specifically to the obligations of lawyers.

In addition, there are several sources of law that apply uniquely to lawyers and law practice.

A. PROFESSIONAL RESPONSIBILITY RULES

Each jurisdiction imposes on lawyers admitted to practice in that jurisdiction (and sometimes beyond that) a set of rules that govern lawyer conduct. In most jurisdictions, these are court rules, adopted by the highest court of the state. Compliance with these rules is a requirement of continued admission to practice. In every jurisdiction, a disciplinary mechanism exists to investigate complaints that lawyers have disobeyed the rules of professional responsibility, to adjudicate claims of violation of the rules, and to impose sanctions when violations are found.

Every jurisdiction writes its own rules of professional responsibility. However, in most jurisdictions, these rules were developed using one of the American Bar Association’s model rules as a starting point.
The ABA began its role in developing professional responsibility rules by adopting, in 1908, the Canons of Professional Ethics. There were originally thirty-two Canons; they were quite brief, somewhat vague, and highly aspirational in tone. Consider, for example, Canon 14, on suing a client for a fee: “Controversies with clients concerning compensation are to be avoided by the lawyer so far as shall be compatible with his self-respect and with his right to receive reasonable recompense for his services; and lawsuits with clients should be resorted to only to prevent injustice, imposition or fraud.” The Canons were added to periodically, but in 1964 the then-President of the ABA, Lewis F. Powell, Jr. (later Justice), appointed a Special Committee on Evaluation of Ethical Standards (the “Wright Committee”) to assess whether the Canons needed to be changed. The Committee produced the Model Code of Professional Responsibility, which was adopted by the ABA’s House of Delegates in 1969.

The Model Code, like any model statute, was not the law anywhere—the ABA has no power to impose rules of professional responsibility on any jurisdiction. Like other drafters of model statutes, the ABA’s goal in drafting model professional responsibility rules was twofold. One goal was to provide an effective template for jurisdictions looking to adopt such codes. Another was to create some uniformity among states with regard to professional responsibility rules. The Model Code was quite successful on both counts. In the years following its adoption by the ABA, many states adopted Model Code-based rules of professional conduct.

The Model Code had a three-tiered structure. The most basic principles were “canons,” which were “statements of axiomatic norms.” These were extremely brief and were even more broad and nonspecific than the 1908 Canons; for example, the Model Code’s Canon 1 provided, “A Lawyer Should Assist in Maintaining the Integrity and Competence of the Legal Profession.” Each Canon was followed by Ethical Considerations (or “ECs”), numbered in accordance with their corresponding canons; Canon 1, for example, was followed by ECs 1–1 through 1–6. The Ethical Considerations were “aspirational in character” and were intended to provide “a body of principles upon which the lawyer can rely for guidance in many specific situations.” They were not, however, intended to be a basis for discipline. The actual rules whose violation could subject a lawyer to discipline were known as Disciplinary Rules (or “DRs”), and were again numbered in accordance with the corresponding canon; Canon 1, for example, had three disciplinary rules—DR 1–101, 1–102, and 1–103—associated with it. You will often see reported cases referring to previous Model Code-based versions of the disciplinary rules, so it is useful to have a basic understanding of how they were structured.

While widely adopted, Model Code-based ethics rules were subject to some criticism. Some viewed the Code as overly litigation-oriented, paying insufficient attention to the role of transactional and advisory lawyers.
More significantly, the Watergate scandal of the early 1970s—which involved lawyers in a wide range of troubling and illegal conduct—convinced some that the ethical structure of the legal profession required a fundamental overhaul. Accordingly, the ABA once again formed a group, this time the Commission on Evaluation of Professional Standards (the "Kutak Commission") to consider whether to revise the Model Code or to start over. Ultimately, the Kutak Commission produced a new and distinct model, the Model Rules of Professional Conduct, which was adopted by the ABA House of Delegates in 1983.

As with the Model Code, the ABA’s approval of the Model Rules did not make them the law anywhere. Moreover, the quick and enthusiastic adoption of the Model Code by a number of U.S. jurisdictions was not repeated when the Model Rules were promulgated. While some jurisdictions moved quickly to adopt new versions of their professional responsibility codes based on the Model Rules, others retained their Model Code-based rules of professional conduct. To the extent that consistency was viewed as desirable, this state of affairs was less than ideal. It even affected the bar examination. Many jurisdictions had adopted Model Rules-based ethics codes and some had retained Model Code-based rules. Reflecting this fact, for many years the Multistate Professional Responsibility Examination (MPRE) (which is the multiple choice professional responsibility examination that in most jurisdictions is a component of the bar examination) asked only questions that could be answered the same way under either the Model Code or the Model Rules. This approach was chosen intentionally so that the exam would be an acceptable testing vehicle for states with either Code-based or Rules-based ethics standards. This policy ended in 1999, and the MPRE now tests only the Model Rules, not the Model Code. Over the years some desire for uniformity (and the problem of testing ethics for jurisdictions which still had a Model Code-based set of professional responsibility rules once the MPRE moved to a Model Rules-only examination) has resulted in most jurisdictions moving to a Model Rules-based set of professional responsibility rules.


Because many jurisdictions have adopted a Rules-based format for their own regulation of professional responsibility, the Model Rules are worthy of considerable time and attention. Remember, though, that in any given jurisdiction significant deviations from the Model Rules are possible; the only way to know what the professional responsibility rule is on a particular issue in a particular state is to look at the state’s own rule, as
well as the cases and ethics opinions decided under it. Be careful not to make assumptions; there are many areas in which considerable deviation from the Model Rules is commonplace.

The Model Rules have a two-level format: there are Rules and Comments. Rules are organized in chapters, very roughly arranged in terms of the function the rules serve. For example, the first chapter deals with the client-lawyer relationship. The rules in that chapter, numbered from 1.1 to 1.18, deal with various facets of that relationship, from the distribution of responsibility within that relationship (Rule 1.2) to the rules governing the lawyer’s relationship with an entity client (Rule 1.13) or a client with diminished capacity (Rule 1.14). Associated with each Rule is a set of Comments, which are numbered individually and referred to by that number and by the rule with which they are associated. For example, the third comment to Rule 1.1 is described as “Comment [3] to Model Rule 1.1.” (Yes, you have to use the brackets.) The first Model Rule, 1.0, is a definitions section, which you will find helpful as you interpret the Rules.

Read the Preamble and the Scope Note to the Model Rules. What is the significance of a Rule? A Comment? Do the Rules give rise to civil liability? How else are they used?

B. SPECIALIZED REGULATION OF PARTICULAR PRACTICE AREAS

The ethics rules do not represent the entire universe of lawyer regulation. Additional layers of regulation apply to lawyers engaged in the practice of law in particular specialized practice areas. Typically, these regulations are imposed by agencies before which the lawyers practice, and they reflect concerns that are specific to the area of practice. With some exceptions, lawyers in these practice areas must obey both their jurisdiction’s rules of professional responsibility and the additional regulations imposed upon them. Some examples follow. What if the requirements of the federal practice area conflict with the state ethics rule? Which rule governs? See North Carolina Formal Ethics Op. 2005–9.

1. SARBANES-OXLEY

The corporate scandals in the early 2000s produced a clamor for closer regulation of, among other persons, attorneys involved in advising corporations. In response, Congress passed the Sarbanes-Oxley Act of 2002. Section 307 of the Act expressly directed the Securities and Exchange Commission (SEC) to promulgate rules regarding the conduct of attorneys “appearing and practicing before the Commission,” 15 U.S.C. § 7245. The SEC accordingly promulgated those rules, which appear at 17 C.F.R. §§ 205.1–205.7. While you might think that very few lawyers—perhaps only those involved in hearings or proceedings before the SEC—are
appearing and practicing before the Commission,” the definition of that term is much broader than a casual reading would suggest. The standards define “appearing and practicing before the Commission” to include “[p]roviding advice in respect of the United States securities laws or the Commission’s rules or regulations thereunder regarding any document that the attorney has notice will be filed with or submitted to, or incorporated into any document that will be filed with or submitted to, the Commission, including the provision of such advice in the context of preparing, or participating in the preparation of, any such document.” 17 C.F.R. § 205.2 (2007). This means that any lawyer who advises a client about what should or should not be disclosed to the SEC (and that could be an environmental lawyer or an employment law specialist as well as a securities lawyer) is “appearing and practicing before the Commission” even if the lawyer knows nothing about securities law and even if she does not go anywhere near Washington, D.C.

A lawyer who is “appearing and practicing before the Commission” has a series of specific obligations if he or she is representing an issuer of securities and becomes aware of evidence of a “material violation” of law by the issuer. Those obligations involve reporting to legal counsel and, if the response is not satisfactory, ultimately require “up the ladder” reporting to higher authority in the organization. These obligations are discussed in more detail in Chapter 7. For now, it is important to recognize that these obligations are imposed by federal regulations and that they apply in addition to the applicable state professional responsibility rules. Failure to comply with them can subject the lawyer to sanction for civil violation of the securities laws and may in addition subject the lawyer to discipline by the Commission, which can “result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.” 17 C.F.R. § 205.6.

2. CIRCULAR 230

Much as Sarbanes-Oxley’s provisions regulate lawyers who practice before the Securities and Exchange Commission, Circular 230 (another name for 31 C.F.R. §§ 10.0–10.93) regulates attorneys and others who “practice before the Internal Revenue Service.” The regulations, again, define this more broadly than you might anticipate; anyone “rendering written advice with respect to any entity, transaction, plan or arrangement . . . having a potential for tax avoidance or evasion” is deemed to be engaged in practice “before the Internal Revenue Service.” 31 C.F.R. § 10.2. These regulations govern several categories of behavior by tax lawyers, including the giving of tax opinions. Sanctions for violation of these regulations can range from censure to disbarment from practice before the Service. Monetary penalties are also available.
3. **PATENT AND TRADEMARK OFFICE REGULATIONS**

The Patent and Trademark Office (PTO) regulates attorneys who practice before it. 37 C.F.R. Part 10. Practice before the Office is limited to proceedings “pending before the Office.” 37 C.F.R. § 10.1(s). The PTO has, in effect, its own rules of professional responsibility, many of which mirror the traditional professional responsibility rules, others of which are unique to the area of practice. Violation of these rules can subject a lawyer to sanction, including reprimand, suspension, or exclusion from practice before the PTO.

4. **BANKRUPTCY CODE**

The Bankruptcy Code imposes affirmative obligations on a lawyer filing any pleading in a bankruptcy matter. 11 U.S.C. § 707(b)(4)(C), for example, provides that “[t]he signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and (ii) determined that the petition, pleading, or written motion (I) is well grounded in fact; and (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).” Failure to comply with these requirements subjects the attorney to liability for attorney’s fees and costs.

5. **RULE 11 AND OTHER SANCTIONS PROVISIONS**

You may have considered Federal Rule of Civil Procedure 11 in your civil procedure course. Rule 11(b) provides that by signing a submission to a court, a lawyer certifies that, to the best of her “knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,” the submission

(1) . . . is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Failure to comply with this Rule subjects the attorney to sanctions, which can include “nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney’s fees and other expenses directly resulting from the violation.” F.R.C.P. 11(c)(4).

One might consider Rule 11 an additional set of professional responsibility regulations for the litigator. There are other bases for the imposition of federal court sanctions on lawyers, including Federal Rules of Civil Procedure 16, 26, and 37 as well as 28 U.S.C. § 1927, which permits the imposition of sanctions on a lawyer “who so multiplies the proceedings in any case unreasonably and vexatiously.” The sanction can include attorneys’ fees. The federal courts also have the “inherent authority” to sanction lawyers for bad faith conduct. Chambers v. NASCO, Inc., 501 U.S. 32 (1991).

6. PRECATORY STANDARDS

Some areas of practice have recommended codes of conduct which have been proffered by professional organizations. These are advisory only and there is no sanction for violating them; they are in some sense recommendations of best practices. Consider, for example, the Code of Pretrial Conduct and Code of Trial Conduct promulgated by the American College of Trial Lawyers. The American Bar Association has adopted Standards Relating to the Administration of Criminal Justice, with separate standards for the Prosecution Function and the Defense Function. These rules cannot be the subject of discipline, but they are often cited and referred to as guides to appropriate lawyer behavior.

The message here is that each area of practice may be governed by its own distinct set of ethical rules, and that any lawyer embarking on practice in a particular area needs to learn what rules apply to practice in that discipline and before the requisite agencies. These obligations are in addition to, not in lieu of, a lawyer’s obligations under his or her state ethics rules.

C. SOURCES OF GUIDANCE: FINDING THE LAW OF PROFESSIONAL RESPONSIBILITY

We have considered the rules of professional conduct and other regulations governing attorney conduct. As most law students know, however, a rule or statute seldom provides a clear and unambiguous answer to a legal issue. Professional responsibility law is law first and
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foremost, and like any other area will present issues that are complex and do not have easy or obvious answers. Where does a lawyer look to find the answer to professional responsibility problems?

1. CASELAW

Judicial decisions often address issues of professional responsibility. These might include decisions in disciplinary cases, or in other matters in which the rules of professional responsibility are for some reason relevant. Accordingly, you will spend more time than you might have imagined reading judicial decisions on professional responsibility issues. Many of the materials in this book are reported judicial decisions.

2. ETHICS OPINIONS

The ABA Standing Committee on Ethics and Professional Responsibility publishes opinions dealing with ethics issues. The ABA used to issue two types of ethics opinion: formal and informal. Formal ethics opinions dealt with broader issues, while informal opinions addressed narrower and more specific inquiries. As a theoretical matter, informal opinions are still possible, but the Committee issued its last informal opinion in 1989. Even though these opinions are advisory only, they can be of persuasive force. In addition, many jurisdictions have a mechanism for seeking an “ethics opinion” about a specific issue or problem; those opinions are often published. These “ethics opinions” can also be helpful in interpreting state professional responsibility rules.

3. THE RESTATEMENT OF THE LAW GOVERNING LAWYERS

Completed in 2000, the Restatement (Third) of the Law Governing Lawyers attempts a broader synthesis of the law governing lawyers. It includes not only matters addressed by the ethics rules, but matters addressed by other areas of the law, such as torts, contracts, and evidence law. Like any other Restatement, it is not a definitive statement of the law anywhere, but has persuasive value and is a useful resource.

4. OTHER RESEARCH RESOURCES

There are a wide range of treatises and looseleaf sources available for research in the area of professional responsibility; many state bar websites also provide access to state professional responsibility rules, disciplinary decisions, and ethics opinions.