The Regulation of Lawyers

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The legal profession is formally governed by the highest court in each state, but a large number of other institutions also play roles in the governance of lawyers. This chapter provides a brief guided tour
of the primary institutions and the primary sources of law that govern lawyers. It also discusses the requirements for admission to the bar.

A. Institutions that regulate lawyers

The law governing lawyers is complex and multifaceted, and is created by a panoply of federal, state, and local legislatures, courts, and agencies. Professor Fred Zacharias explains:

Law in the United States is a heavily regulated industry. Lawyers are licensed in each state. They are governed by professional rules, usually adopted and enforced by state supreme courts. The courts regulate lawyers separately as well, through supervisory decisions in the course of litigation and by implementing common law civil liability rules that govern legal practice. These include malpractice, breach of fiduciary duty, and other causes of action. Administrative agencies — particularly federal agencies — also establish and implement rules governing lawyers who practice before them. Federal and state legislatures play a further role in regulating the bar, providing statutory regulations and criminal penalties that apply to lawyers.

Despite the reality that Zacharias describes, lawyers, judges, and scholars assert often and with great confidence that law is a self-regulated profession, governed primarily by its members because of their respected status and their unique role in society. Each lawyer is urged to have the responsibility to participate in the governance of and the improvement of the profession. The Preamble of the Model Rules of Professional Conduct explains it this way:

The legal profession is largely self-governing. . . . The legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.

Ideas about self-governance have been used to inspire lawyers to take active roles in improving the legal profession and the justice system. But these same ideas have been used to support self-interested arguments that lawyers should be exempt from regulation by legislatures and administrative agencies. In recent

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decades, the reality that the legal profession is a heavily regulated industry renders assertions of self-regulation charming but anachronistic. Lawyers do play a dominant role in devising many of the standards that apply to them, whether those standards are embodied in the formal ethics codes that are ultimately promulgated by state supreme courts or in laws that are created by legislators or administrators and made applicable to all of society. But they are also governed by a complex web of statutory and regulatory law.

1. The highest state courts

a. The responsibility of “self-regulation”

Most law is made by legislatures, courts, and administrative agencies. Is this also true of “lawyer law”?

In most states, the highest court of the state, not the legislature, is responsible for adopting the rules of conduct that govern lawyers. In this respect, the high court performs a role usually played by a legislature. Most of the rules are based on a model that was written (and is occasionally amended) by the American Bar Association (ABA). Much of the drafting of the rules and amendments is done by a committee of practicing lawyers, judges, and law professors. When considering the adoption of ethics rules for their own states, state courts often rely heavily on committees of lawyers at the state bar associations. These committees produce drafts of new or amended rules and usually seek public comment. Typically, most of the comments come from lawyers. Most of the people involved in the writing of the ethical rules, then, are licensed lawyers, though judges (who are themselves lawyers) have the ultimate responsibility for adopting them.

The highest court in each state enforces its rules by disciplining lawyers who violate them. As with the rulemaking function, state supreme courts often delegate primary responsibility for seeing that rules are enforced to disciplinary agencies run by lawyers. In addition, the ethical rules require lawyers to report serious misconduct by other lawyers to these disciplinary agencies, so every lawyer has a duty to help enforce the ethics codes.

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3. The highest court in most states is called the supreme court. In some states, however, the highest court has a different name. In New York and Maryland, for example, the highest court is called the court of appeals.

4. See the discussion below of the inherent powers doctrine. The notable exception is California, where many of the ethical rules for lawyers have historically been embodied in statutes enacted by the state legislature.

5. Rule 8.3. The duty to report misconduct is explained in Chapter 2.
Is the legal profession unique in the role it plays in writing many of its standards of conduct?

In many regulated industries, from the medical profession to the insurance industry, trade associations of those who are regulated have considerable influence over the regulations. Often, lawyers or lawyer-lobbyists for those groups advocate for or against proposed regulatory laws or administrative rules. But lawyers have an unusual degree of influence when it comes to regulating their own industry. Even the judges who promulgate the rules are lawyers and, in most cases, practiced law before they became judges.

Is it a good idea to give lawyers such a major role in regulating their profession?

Maybe. Many scholars and consumer advocates observe that the rules governing lawyers are more protective of lawyers and impose less regulatory constraint than they would if state legislatures wrote them. But insulating lawyers, to some degree, from regulation by the executive and legislative branches of government can benefit society because lawyers often challenge governmental actions in the course of representing clients. Lawyers raise questions about the validity of statutes and regulations and defend people charged with crimes by the state. If lawyers were subject to greater control by the state, they might be restricted in their representation of clients whose interests were contrary to those of the government.

FOR EXAMPLE: According to one report, 50 Chinese lawyers who advocated for human rights or the rule of law were effectively disbarred in 2009; others were arrested, held incommunicado, or beaten by unidentified persons. One Chinese lawyer, Ni Yulan, had helped her neighbors to fight eviction and had tried to take pictures of the crews who demolished their houses. After she was arrested, the police beat and kicked her over the course of 15 hours, breaking her legs and leaving her incontinent. She served three years in prison. During her time in prison, an officer once urinated on her face. The prison guards often took away her crutches, so that she had to crawl to the prison workshop. She also was disbarred. Even so, after she was released from prison, she continued her legal work, and she was arrested again; in 2016, the U.S.

6. Restatement § 1, comment d.
How do state courts regulate lawyers?

The highest court in each state usually performs the following roles, though it sometimes delegates one or more to other government agencies. It

- adopts ethics codes and court procedural rules that govern lawyers;
- sets and implements standards for licensing lawyers, including educational and moral character requirements (covered in more detail later in the chapter);
- supervises agencies that investigate and prosecute complaints of unethical conduct by lawyers; and
- supervises administrative judicial bodies that impose sanctions on lawyers who violate the ethics codes.

A license to practice law in one state does not entitle a lawyer to practice law across the border in the next state. Also, the ethical and procedural rules that govern lawyers vary from one state to another. So a lawyer who is licensed in both Wyoming and South Dakota is expected to know the rules of both jurisdictions. She is also expected to know when she is subject to the rules of one jurisdiction and when the other.

b. The inherent powers doctrine

The regulation of lawyers by courts is an exception to the usual principle that rules of law should be made by democratically elected representatives of the people. Under a traditional view of separation of powers, legislatures make the law, the executive branch implements the law, and courts interpret the law. At least with respect to ethical and procedural rules that govern lawyers, the courts make most of the rules, implement the rules, interpret the rules, enforce the rules, and hear challenges to the validity of those rules.

Why are courts mainly responsible for regulation of lawyers?

Courts claim authority to regulate lawyers as an aspect of their authority to administer the courts. A few state constitutions expressly assign to courts the

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9. It isn’t always possible to know which of two conflicting state rules applies. The first step is to look at each state’s version of Rule 8.5, which provides guidance for lawyers who are licensed in one state but undertake permitted activities in a state that has different ethical rules.
authority to regulate the conduct of lawyers.\(^{10}\) In other states, courts claim inherent authority to regulate lawyers’ conduct as a matter of common law, reasoning that they need to be able to govern the conduct of those who appear before them. This is called the inherent powers doctrine.\(^{11}\)

**Can the legislature pass a bill to change a court rule, as it does when it wants to change the common law?**

Some state courts have asserted that their regulatory authority over lawyers is exclusive of other branches of government. This version of the inherent powers doctrine is called the negative inherent powers doctrine. Based on this rationale, some courts have invalidated legislation regulating lawyers.\(^{12}\) The cases in this arena most often strike down laws that allow nonlawyers to engage in some activity that overlaps with the practice of law, such as drafting documents for the sale of real estate or handling hearings before administrative agencies.\(^{13}\)

**FOR EXAMPLE:** The legislature of Kentucky passed a statute that authorized nonlawyers to represent workers’ compensation claimants in administrative hearings. The state supreme court held that the law violated the state constitution, which gave the supreme court exclusive power to regulate the practice of law.\(^{14}\)

Some state court decisions acknowledge that, in fact, all three branches of government play roles in regulating lawyers.\(^{15}\) Also, many statutes regulating lawyers have been adopted and implemented without objection.

**FOR EXAMPLE:** Most states have passed statutes authorizing law firms to reorganize as limited liability partnerships (LLPs). These statutes protect lawyers from vicarious liability for some acts of their partners.\(^{16}\) None

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\(^{10}\) Restatement § 1, comment c, reporter’s note.


\(^{12}\) See, e.g., Shenandoah Sales & Serv. Inc. v. Assessor of Jefferson Cnty., 724 S.E.2d 733 (W. Va. 2012) (declaring unconstitutional a statute that would have allowed a corporate officer who was not a lawyer to appeal a real estate tax assessment).

\(^{13}\) See the examples discussed in Nathan M. Crystal, Core Values: False and True, 70 Fordham L. Rev. 747 (2001) (urging that the negative inherent powers doctrine impedes the ability of legislatures to act to improve the availability of legal services to those who are not affluent).

\(^{14}\) Turner v. Ky. Bar Ass’n, 980 S.W.2d 560 (Ky. 1998), discussed in Crystal, supra n. 13, at 766-767.

\(^{15}\) Restatement § 1, comment c, reporter’s note.

of these statutes has been invalidated because of the negative inherent powers doctrine.\textsuperscript{17}

2. \textbf{State and local bar associations}

Most state bar associations are organized as private nonprofit organizations, but some courts delegate lawyer regulatory functions to state bar associations. State bars often administer bar exams and review candidates for admission. Historically, state bar associations had an important role in establishing lawyer disciplinary systems.\textsuperscript{18} A state bar that accepts delegated functions from the state's highest court is called an integrated or unified bar rather than a voluntary bar. In unified state bars, membership is a condition of obtaining a license to practice law. Most bar associations have numerous committees that draft ethical rules, write advisory opinions interpreting the rules, and undertake law reform activities in many different fields of law.\textsuperscript{19} Bar associations do not require their members to participate in association activities (except for continuing legal education), but many members participate because they want to be involved in law reform work. Some lawyers attend bar association activities for other reasons — to meet people, to keep up in their fields, or to obtain client referrals.

\textbf{Does each state have only one bar association?}

No. In addition to the state organizations, there are many voluntary bar associations — city and county bar associations, bar associations for women and minorities, bar associations for lawyers in particular fields, and so on. With the exception of the patent bar, which has a separate licensing exam, a lawyer is not required to join any voluntary bar association to practice in a particular field. A lawyer admitted to practice in a state may appear in any of that state's courts. However, the lawyer may need separate admission to appear in the federal courts located in that state.

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\item[17.] For decades, bar associations supported the negative inherent powers doctrine to prevent regulation of the legal profession by state legislatures. But when they perceived that leaders of law firms might achieve limited liability for their partners' negligence through the passage of legislation to authorize the organization of firms as LLPs, bar associations and prominent lawyers led the lobbying efforts to pass this legislation. Wolfram, supra n. 16, at 381-382.
\item[18.] See Wolfram, History of Legalization, supra n. 11, at 217.
\item[19.] See, e.g., Connecticut Bar Association, Sections & Committees, http://www.ctbar.org/?page=SectionCommittees (last visited Aug. 30, 2017) (linking to websites of 42 substantive sections and 39 committees to which Connecticut lawyers could join or be appointed).
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3. Lawyer disciplinary agencies

Lawyer disciplinary agencies (often called bar counsel’s offices or disciplinary counsels) investigate and prosecute misconduct that violates the state ethics code. Possible sanctions include disbarment, suspension, and public or private reprimand. These agencies usually are run by the highest court in the state, by the state bar association, or jointly by the court and the state bar. The disciplinary process is explained in Chapter 2. Published opinions in disciplinary cases are available on the websites of the disciplinary agencies, Lexis, or Westlaw.

4. American Bar Association

The American Bar Association (ABA) is a private nonprofit membership organization founded in 1878.\(^{20}\) The state bar associations are independent of, not subordinate to, the ABA, although a majority of the membership of the ABA House of Delegates (the main governing unit) is selected by state and local bar associations.\(^{21}\) Each ABA member pays an annual membership fee.\(^{22}\) The ABA has nearly 400,000 lawyer members;\(^{23}\) this means that more than half the lawyers in the United States are not members of the ABA. Although it is the primary drafter of lawyer ethics codes, the ABA has very limited governmental authority.\(^{24}\) That’s why the ABA ethics rules are called the Model Rules of Professional Conduct.\(^{25}\) These rules have no legal force unless they are adopted by the relevant governmental authority, usually a state’s highest court.\(^{26}\)

\(^{22}\) As of 2016, the ABA asks lawyer members with ten or more years of experience to pay annual dues of $467. Lawyers with fewer years of experience, as well as government lawyers, judges, legal aid lawyers, and public defenders, are charged a reduced amount. For the first year after a lawyer is admitted to the bar, ABA membership is free. Law student dues are $25. ABA, Dues & Eligibility, https://www.americanbar.org/membership/dues_eligibility.html (last visited Aug. 20, 2017).
\(^{24}\) For example, the ABA’s Section of Legal Education is recognized by the U.S. Department of Education as the organization that provides accreditation to law schools. ABA, The American Bar Association Law School Approval Process 3, https://www.americanbar.org/content/dam/aba/publishing/abanews/1307552148abalawschacredproc.authcheckdam.pdf (last visited Aug. 20, 2017).
\(^{25}\) Charles W. Wolfram, Modern Legal Ethics 57 (1986). Wolfram explains that the word Model was added to the earlier version of the ABA rules as one term of a settlement of a lawsuit brought by the U.S. Department of Justice against the ABA. The Department of Justice had charged the ABA with attempting to regulate lawyers in a manner that violated the federal antitrust laws.
\(^{26}\) It is asserted sometimes that state ethics codes do not have the force of law. See, e.g., In re Thelen LLP, 736 F.3d 213, 223 (2d Cir. 2013) (“Although the professional rules of conduct lack the force of law . . . New York Courts interpret other laws to harmonize with these rules to the extent practicable.”). Although courts do not necessarily apply state ethics rules in malpractice and disqualification controversies, they certainly do apply them in disciplinary cases, which can lead to the suspension or disbarment of lawyers.
How are ethics rules written and adopted?

Usually, an ABA committee drafts a model rule or a set of revisions to the existing rules. Next, the model rule is debated and approved by the ABA as a whole through its House of Delegates at one of its twice-yearly national meetings. Committees of the state bar associations then review these model rules, sometimes at the request of their states’ highest courts. The state bar committee or the court may solicit comments from members of the bar and from the public. Ultimately, the state’s highest court accepts, rejects, or amends the rule. The court is under no duty to consider a rule just because it was proposed by the ABA or analyzed by a state bar association. However, the ABA’s work strongly influences the views of most state bar associations and courts.

Some ABA decisions about ethical rules are controversial, particularly when the Association appears to protect lawyers at the expense of clients. In fact, on some occasions when the ABA’s House of Delegates has considered proposals by its committees to change the rules to better protect client interests, the House has rejected the proposals as being unnecessarily intrusive on lawyers’ discretion.27

5. American Law Institute

The American Law Institute (ALI) is a private organization of 3,000 judges, lawyers, and law teachers that produces summaries of the law called Restatements. During the 1990s, the ALI wrote the Restatement (Third) of the Law Governing Lawyers, which summarizes the rules of law that govern lawyers. The Restatement includes rules governing malpractice liability to clients and third parties, rules governing disqualification of lawyers for conflicts of interest, and ethical rules for violation of which a lawyer may be subject to discipline. The Restatement also covers the evidentiary rules on attorney-client privilege, the criminal law governing lawyers, the law of unauthorized practice, and many other topics.

The Restatement includes black-letter rules, which often summarize the rule followed in a majority of jurisdictions.28 The black-letter rules are followed by textual comments and by Reporter’s Notes, which cite court decisions, statutes, statutes, statutes.


books, and articles on each topic addressed. A practicing lawyer is well advised to keep a copy of the Restatement (Third) of the Law Governing Lawyers for reference. The Restatement is not law, but it is the best available synthesis of information about “lawyer law,” and it includes information about a much broader range of legal authority than the ABA Model Rules or the state ethics codes.

Is the Restatement consistent with the Model Rules?

Not always. In some instances, the Restatement’s summary of the law appears at odds with a model rule or with a rule adopted by some states. In these instances, the comments in the Restatement usually note the discrepancy and explain why the authors of the Restatement take a different position. Sometimes the Restatement diverges from the ethical rules because the liability rules differ from the ethical rules, because the authors of the Restatement do not agree with the ABA about what the rule should be, or because the Restatement is more specific than the Model Rules.

When a state ethics rule and the Restatement are inconsistent, shouldn’t a lawyer always follow the state rule?

It’s not so simple. Many ethical questions are not addressed by the ethical rules or are addressed only in general terms. If a state ethics rule clearly requires or prohibits certain conduct, in most cases a lawyer should follow the rule. On rare occasions, a lawyer might decide not to follow a rule because compliance seems inconsistent with the lawyer’s own ethical judgment. More often, a lawyer will find that the text of the state’s ethical rule does not provide clear guidance on her specific ethical dilemma. Then the lawyer must seek additional guidance from sources such as the commentary in the Restatement.

6. Federal and state courts

State and federal courts play important roles in the regulation of lawyers by setting rules for the conduct of lawyers in litigation, by sanctioning lawyers who violate those rules, by ruling in malpractice and other cases, and by hearing and deciding motions to disqualify lawyers who may have conflicts of interest that preclude their representation of particular clients.

A judge who becomes aware of lawyer misconduct in a matter before the court may sanction the lawyer directly under the federal or state civil procedure rules. For example, the court may hold a lawyer in contempt or may impose sanctions for obstructive behavior during discovery. Sanctions include fines, fee forfeiture, or other penalties. The judge must report the misconduct to the lawyer disciplinary agency if it violates an ethical rule that “raises a substantial question regarding the lawyer’s honesty, trustworthiness or fitness as a lawyer
in other respects."\(^{29}\) Despite this requirement, many judges tend not to report lawyer misconduct to disciplinary agencies.\(^{30}\)

Federal courts in each jurisdiction adopt their own standards for bar admission, and some adopt their own ethical rules.\(^{31}\) Many federal courts adopt the same ethical rules that are in force in the states in which they are located. Some adopt additional rules of practice. Federal courts impose sanctions on lawyers who engage in misconduct in the course of federal litigation.\(^{32}\)

Appellate courts also contribute to the regulation of lawyers. State appellate courts review malpractice and disqualification decisions of lower state courts, and the federal appellate courts play the same role with respect to federal trial decisions. The U.S. Supreme Court has increasingly become involved in regulation of the legal profession through decisions protecting lawyer advertising under the First Amendment, construing statutes that sometimes require one party to litigation to pay the legal fees of another party, and reviewing convictions when defendants assert ineffective assistance of counsel.

**Is a member of a state bar automatically allowed to practice in the federal courts of that state?**

No. Each federal district court and court of appeals requires lawyers to be admitted to practice before it. Applicants for admission to practice in the federal courts are not required to take another bar exam. Usually any licensed lawyer who applies and pays a fee is admitted to practice before the federal court.\(^{33}\)

### 7. Legislatures

Despite the inherent powers doctrine, Congress and the state legislatures play major roles in the regulation of lawyers. Legislatures adopt constitutions and statutes, including criminal laws, banking laws, securities laws, and so on, that

\(^{29}\) Model Code Jud. Conduct canon 2 (as amended, 2007). This language is in the rules that govern judges in most states. The rule requires judges to take "appropriate action" upon receiving information "indicating a substantial likelihood" that a lawyer has violated the rules of professional conduct. An accompanying comment states that "appropriate action" may include reporting the lawyer to disciplinary authorities.


\(^{32}\) For a discussion of the sources of the federal courts' authority to regulate lawyers, see Fred C. Zacharias & Bruce A. Green, Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory, 56 Vand. L. Rev. 1303 (2003).

\(^{33}\) Some federal courts condition admission to practice before them on admission to the bar in the states in which the courts are located. Others condition admission to practice on admission before some other state or federal court. McMorrow & Coquillette, supra n. 31, § 801.20[3].
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apply to everyone doing business in the state, including lawyers.\(^{34}\) Some state consumer protection laws explicitly govern lawyers, while others exempt lawyers.\(^{35}\) In California, statutory law governing lawyers is extensive and addresses some topics that are covered by the ethics codes in other states.\(^{36}\) Nearly every state has a statute that makes it a criminal offense to engage in the unauthorized practice of law (UPL), and at least four impose felony sanctions for some UPL offenses.\(^{37}\)

**Are lawyers who testify at legislative hearings or meet with legislators on behalf of clients required to comply with additional statutes and regulations?**

Yes, in some cases. Usually a lawyer may appear at a legislative hearing without any “admission” process, but federal and some state laws require lawyers who engage in legislative advocacy for profit to register as lobbyists and to report financial and other information about their activities.\(^{38}\) Federal law imposes additional conflict of interest rules on those who engage in lobbying and requires a separate registration process for lobbyists who represent foreign nations.

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34. Restatement § 8 (pointing out that with the exception of “traditional and appropriate activities of a lawyer in representing a client in accordance with the requirements of the applicable lawyer code,” lawyers are subject to criminal law to the same extent as nonlawyers). See Bruce A. Green, The Criminal Regulation of Lawyers, 67 Fordham L. Rev. 327 (1998); Ted Schneyer, Legal Process Scholarship and the Regulation of Lawyers, 65 Fordham L. Rev. 33 (1996); Charles W. Wolfram, Lawyer Crime: Beyond the Law, 36 Val. U. L. Rev. 73 (2001).


36. California went through a 15-year process of revision of its ethical rules, in part to bring them more in line with those of most states. See Jason Doly, Viewpoint: State Supreme Court Resets Ethics Rewrite, Recorder, Oct. 10, 2014. But in 2014, the California Supreme Court rejected the proposal to adopt an ethics code more similar to the Model Rules. Id.

37. George C. Leef, Lawyer Fees Too High? The Case for Repealing Unauthorized Practice of Law Statutes, http://www.cato.org/pubs/regulation/regv20n1/regv20n1c.html (last visited Aug. 20, 2017). One example of a criminal UPL statute is Cal. Bus. & Prof. Code § 6126 (2011) ("Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand dollars ($1,000), or by both that fine and imprisonment."). In a few states, UPL may be prosecuted as a felony. See, e.g., S.C. Code Ann. § 40-5-310 (1991 & Supp. 2003). A 2013 survey of unauthorized practice of law committees in 42 states revealed that criminal prosecution for UPL is uncommon. 32 jurisdictions responded to a question about the number of enforcement cases that went to court. In 88 percent of those jurisdictions, five or fewer cases per year resulted in court proceedings, whether civil or criminal. Deborah L. Rhode and Lucy Buford Ricca, Protecting the Profession or the Public: Rethinking Unauthorized-Practice Enforcement, 82 Fordham L. Rev. 2587, 2592 (2014). See ABA/BNA Laws. ‘ Man. on Prof’l Conduct 21:8008 (1984). UPL is discussed in more detail in Chapter 14.

8. Administrative agencies

Do lawyers need separate admission to practice before an administrative agency?

Lawyers often represent clients in administrative adjudication (such as social security or immigration hearings) or in agency rulemaking proceedings. A lawyer admitted to practice in a state usually may appear before an agency of the state and before any federal agency, without a separate admission to practice before the agency.\(^\text{39}\)

Do administrative agencies impose additional ethical or procedural rules on lawyers who appear before them?

Many agencies have special ethical or procedural rules. Such rules may impose disclosure or other duties that are more stringent than those imposed by other law.\(^\text{40}\) Lawyers who engage in misconduct in practice before these agencies may be subject to civil or criminal penalties.\(^\text{41}\)

**FOR EXAMPLE:** The law firm of Kaye, Scholer, Fierman, Hays & Handler was the object of a 1992 administrative action by the Office of Thrift Supervision (OTS), a federal banking agency. The firm had assisted one savings and loan bank in reports to bank examiners. The OTS alleged that those reports included some misleading information and omitted some material information. OTS sought $275 million in compensation from the firm. When the administrative action was initiated, an order was issued freezing all of the firm’s assets to prevent their transfer until the matter was resolved. The law firm settled the matter within a week after the charges were filed by agreeing to pay $41 million to the OTS.\(^\text{42}\)

9. Prosecutors

An increasing number of lawyers are indicted and prosecuted each year for crimes, some of which were committed in the course of practicing law.\(^\text{43}\) Prosecutors have enormous discretion as to whether to file charges against a particular defendant. Prosecutors may once have been reluctant to bring charges against lawyers, but any reservations about prosecuting lawyers evaporated in the last quarter of the twentieth century.

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39. 5 U.S.C. § 500 (2011); see Wolfram, History of Legalization, supra n. 11, at 219 n. 48.
40. See, e.g., 17 C.F.R. § 205.3 (2004) (requiring lawyers to assure that material information is not omitted from papers filed before the agency).
41. Id.
43. See generally Green, supra n. 34.
This cultural change began with the Watergate scandal, a series of events in which President Nixon used government officials and other associates to commit and cover up various crimes, including breaking into the office of the psychiatrist of a Department of Defense official who leaked Vietnam War documents to the press. The conspiracy unraveled when five burglars who were part of the conspiracy were caught while breaking into the Watergate building offices of the Democratic National Committee. One of them was carrying the business card of a White House official to whom the burglars were reporting. Eventually the president, himself a lawyer, was forced to resign to avoid imminent impeachment. For their participation in Watergate, 29 lawyers—including two U.S. attorneys general, the president’s White House counsel, and other high government officials—were convicted of crimes, named as unindicted co-conspirators, or otherwise disciplined for misconduct related to efforts to reelect President Nixon.44

Ten years later, several prominent savings and loan associations collapsed, and lawyers were found to have participated with them in the perpetration of massive financial frauds. The federal banking agencies, seeking to recoup some of the losses resulting from these frauds, indicted scores of lawyers and accountants who had served the savings and loan associations.45

These events shattered public assumptions that lawyers would never be involved in criminal activity. At the same time, the disciplinary agencies were becoming better staffed and more effective, and some of the disciplinary investigations sparked criminal investigations. During the 1990s, prosecutors indicted a rising number of lawyers, including several affluent partners of large law firms.46

46. Some examples of such cases are discussed in Lisa G. Lerman, Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers, 12 Geo. J. Legal Ethics 205 (1999).
10. Malpractice insurers

Insurance companies sell malpractice insurance policies to lawyers and law firms, but these companies also “regulate” the lawyers they insure. A malpractice insurer may require a law firm that it insures to adopt a system to evaluate potential conflicts of interest, or it may insist that senior partners review all opinion letters that the firm sends to its clients. It may require a firm to have a “tickler” system to help prevent lawyers from missing deadlines. These “risk management” and “loss prevention” measures are designed to reduce the likelihood that a lawyer or a law firm will be held liable for malpractice. Many of these policies also promote compliance with ethical rules. These rules form a body of “private law” that governs lawyers who contract with those companies.

Some malpractice insurers provide advice to lawyers at the firms they insure about ethical or professional dilemmas that could mushroom into lawsuits or disciplinary proceedings. With careful management, these crises are often prevented or resolved. Some insurers conduct audits to verify compliance with conditions of the insurance contracts. This guidance to and supervision of law firms by insurers is an important, though nongovernmental, form of regulation. The regulatory behavior of malpractice insurers may have more impact on practicing lawyers than the prospect of discipline by a public agency.47

11. Law firms and other employers

While one responsibility of every organization that employs lawyers is to ensure compliance with ethical rules and other law, many employers have their own additional rules of practice. Some larger law firms have developed a comprehensive “ethical infrastructure” to provide lawyers and nonlawyers with training, offer expert advice about ethics and liability questions, and prevent conflicts of interest. This internal regulation may dramatically reduce malpractice claims against the firm.48


48. Martin Kaminsky, the general counsel of the law firm Greenberg Traurig, reported at the 2015 ABA Professional Responsibility conference that at his firm, the introduction of user-friendly ethical infrastructure allowed the firm to resolve many potential liability issues before they became problems. The number of claims against the firm, said Kaminsky, had dropped very dramatically. One key element in his firm’s structure was to allow associates to report issues to the firm’s general counsel in confidence. Presentation of Martin Kaminsky, panel on “Law Firm ‘Ethics Audits,’” ABA 41st Nat’l Conference on Prof’l Responsibility, Denver, Colo., May 29, 2015.
Law firms and government agencies sometimes have stricter confidentiality rules than those imposed by the state ethics code.\textsuperscript{49} Likewise, many firms have policies on file maintenance, consultation with other lawyers, timekeeping, and other issues. Like the “rules” made by malpractice insurers, law firm rules constrain lawyer employees as do rules of law, but they are imposed by a contract rather than by a licensing authority or legislature.

12. Clients

Institutional clients have a quasi-regulatory role in relation to the law firms that they employ. While many individual clients have very little ability to “regulate” their lawyers, large corporations and government agencies are major consumers of legal services. Government agencies and corporations, of course, have their own lawyers, but they sometimes hire outside counsel to provide a variety of services. Both governmental and corporate clients have a great deal of bargaining power in dealing with law firms.

A federal agency, for example, might make a policy prohibiting lawyers from doing “block billing,” in which a lawyer records time worked on a matter in eight-hour blocks without specifying what tasks were performed during each block. An insurance company might impose a policy prohibiting its outside counsel from billing more than ten hours of paralegal time on each case. Many institutional clients have lengthy and detailed policies. Institutional clients also may insist on some oversight of the lawyers who represent them. For example, some hire outside auditors to review the work performed and the bills submitted.\textsuperscript{50} Law firms that represent those corporations must agree to comply with these policies and to submit to client oversight as a condition of their employment.

B. State ethics codes

While many institutions govern lawyers, applying many different bodies of law, perhaps the most important source of guidance for lawyers about their ethical obligations is found in the state ethics codes. In this section, we briefly summarize how these codes developed.

\textsuperscript{49} Students who work as externs at government agencies, for example, are sometimes prohibited from carrying texts out of the office or from talking with anyone about the substance of the matters that they are working on. See generally Alexis Anderson, Arlene Kanter & Cindy Slane, Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom, 10 Clin. L. Rev. 473 (2004).

The ABA adopted its first set of Canons of Ethics, based in large part on the Alabama code, in 1908.\(^{51}\) While some states treated the canons as a set of mandatory rules, others treated them only as nonbinding guidance for lawyers.\(^{52}\)

In the 1960s, Justice Lewis F. Powell, then in private practice, led an initiative within the ABA to rewrite the canons. This produced the ABA Model Code of Professional Responsibility, adopted by the ABA in 1969. This code was quickly adopted by courts in the vast majority of states, superseding the 1908 Canons.\(^{53}\) Suddenly, the standards for lawyers became a lot more like binding “law.”

The codification of the law governing lawyers in the 1960s marked a major change in the structure and content of the ethical rules, but there was little regulatory infrastructure to implement the rules.

**When was the old ABA Model Code replaced by the current ABA Model Rules?**

Some critics observed that the Model Code was too focused on litigation-related issues and ignored some important problems that practitioners encounter. In 1977, the ABA appointed a committee that became known as the Kutak Commission to rewrite the rules. That commission produced a draft of the Model Rules of Professional Conduct. In 1983, after much discussion and many amendments, the ABA adopted the Model Rules. The states did not rush to adopt the Model Rules as they had done with the Model Code. Most states made significant amendments to the ABA Model Rules before they adopted them.

In 1997, the ABA undertook another revision of the Model Rules. Dramatic changes in the legal profession during the 1980s and 1990s had made this new revision necessary. One such change was that law practice increasingly involved interstate and international issues or parties. One aspiration of the revision was to promote greater uniformity among the state ethics codes to reduce conflicts of law and to reduce confusion about how particular situations should be handled.\(^{54}\) The revision committee, called the Ethics 2000 Commission, proposed significant amendments to the Model Rules. Between 2001 and 2003, the ABA House of Delegates accepted most, but not all, of the Commission’s recommen-

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52. Restatement § 1, comment b, reporter’s note.
53. Wolfram, supra n. 25, at 56.
By 2015, nearly every state had adopted some version of the Model Rules, as revised, as well as some version of its numbering system. However, the state ethics codes that govern lawyers contain substantial variations from the ABA Model Rules, so practitioners must rely on the pertinent state rules, not the Model Rules.

California has been slower than other states to embrace either the content or the format of the Model Rules of Professional Conduct. In 2010, the Board of Governors of the State Bar of California approved a comprehensive revision of its ethical rules that would have adopted the format of the Model Rules. Substantively, the rules would have followed the Model Rules on some issues and diverged on others. But in 2014, the state's supreme court rejected the revision, sending the process back to the drawing board.

What are the functions of the state ethics codes?

The primary functions of all state ethics codes are to guide lawyers in evaluating what conduct is proper in various situations and to provide a basis for disciplining lawyers who violate the rules. Courts also consult the ethics codes for guidance in determining whether a lawyer has engaged in malpractice, has charged an unreasonable fee, or should be disqualified from representation of a client because of a conflict of interest. The ethics codes are a primary source of guidance for lawyers and judges about standards of conduct for lawyers. Also, many of the rules in the ethics codes are drawn from rules of tort law, contract law, agency law, and criminal law.

Does the state ethics code in each state apply to every lawyer admitted in the state?

Yes. Every lawyer admitted to practice in a state must comply with the ethics code of that state. (If the lawyer litigates or practices elsewhere, some of the lawyer’s conduct may be governed by a different state code.) The drafters of the rules attempted to write one-size-fits-all rules to guide the conduct of every lawyer admitted to practice in the state, whether a solo practitioner or

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57. Every state posts its rules of professional conduct on the Internet. For a selection of some of the state rules that diverge from the ABA Model Rules, see Lisa G. Lerman, Philip G. Schrag & Anjum Gupta, Ethical Problems in the Practice of Law: Model Rules, State Variations, and Practice Questions (2017).
58. Doly, supra n. 36.
59. Restatement § 1, comment b.
60. Id.
a partner in a large law firm, and regardless of practice area. However, certain rules are written to apply more narrowly. For example, because of the constitutional protections afforded to criminal defendants, certain provisions in the codes include special rules for prosecutors and for lawyers representing people who are charged with crimes.

**Do judges also have ethical rules?**

Another important code drafted by the ABA is the Model Code of Judicial Conduct, which sets out ethical rules for judges. The development of the judicial ethics code has followed a course similar to the lawyer codes. The ABA adopted Canons of Judicial Ethics in 1924. The ABA adopted a much-expanded Code of Judicial Conduct in 1972 and updated it in 2007. The Code has been adopted in some form in a majority of states.

**Do other ethics codes apply to lawyers in specialized practice areas?**

Yes. Various bar organizations have recommend standards of conduct for lawyers in particular practice areas. Perhaps the most influential are the ABA Standards for Criminal Justice, which include standards of conduct for prosecutors and criminal defense lawyers. The current version of the standards (extensively amended in the early 1990s) includes separate sets of guidance for “The Prosecution Function” and “The Defense Function.” Like other ABA recommendations, these standards do not have the force of law, but more than 40 states have made changes in their criminal codes to incorporate some of these standards.

Specialized ethics codes have been adopted by voluntary bar associations of lawyers who work for the federal government, lawyers who handle domestic relations matters, and others. These standards and codes also are advisory in nature, but even so, some of them are very influential, as they offer guidance on many issues not addressed by the mandatory ethics codes.

**Do the ethics codes explain most of what a lawyer needs to know about his ethical obligations?**

No. The ethics codes do not anticipate or provide answers to most of the ethical problems that lawyers encounter. Although they contain quite a few clear requirements and prohibitions, they mostly provide general guidelines only. A

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62. See ABA, State Adoption of Revised Model Code of Judicial Conduct (Nov. 2015) (stating that 32 states have approved a revised judicial code). Some issues of judicial ethics are discussed in Chapter 10.
lawyer faced with an ethical issue must exercise professional judgment informed by the ethics codes about how to handle a particular situation. But the ethics codes are not necessarily the final word. Some of the problems in this book, for example, present circumstances in which a lawyer might make a well-considered decision to take action that he knows will violate an ethical rule.

**Does a lawyer need to read more than the ethics code to understand her ethical obligations?**

Yes. Many lawyers believe that to understand their ethical obligations, they need only read the ethical rules adopted by their states’ highest courts and perhaps the official comments. This belief is mistaken. A large body of disciplinary case law and advisory ethics opinions interprets the ethics codes.

**How does a court opinion in a lawyer discipline case differ from an advisory ethics opinion?**

As we explain in Chapter 2, a lawyer may be sanctioned for violating the state ethics code. A case in which a lawyer is charged with ethical violations is a discipline case, and the decision on the case may be reported in an administrative or judicial court opinion.

An advisory opinion is not a decision in a case but is written by a bar committee, sometimes in response to an inquiry from a lawyer. These opinions interpret the ethics codes and provide guidance to lawyers as to the meaning of the rules. The ABA, the state bar associations, and the bar associations of some cities and counties have ethics committees that write advisory opinions for lawyers seeking guidance on ethical questions. The committees are comprised of both lawyers and nonlawyers. Courts rely on these advisory opinions with increasing frequency.\(^{65}\)

**What should a lawyer do if, after reading the ethics rules and cases, she still doesn’t know whether a contemplated course of action is permissible?**

The lawyer might call the bar counsel or the bar’s ethics committee. Sometimes off-the-cuff, nonbinding guidance is available from either the disciplinary counsel or from a staff lawyer for the ethics committee. A lawyer may write a formal inquiry to the ethics committee, giving a factual scenario in hypothetical form, but it can take months between submission of an inquiry and issuance of an opinion.

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Besides the ethics codes, the disciplinary cases, and the advisory ethics opinions, what other bodies of law govern lawyers?

The ethics codes are just one branch of the law governing lawyers. A large body of case law involves legal malpractice, motions to disqualify lawyers from representing particular clients, appeals by criminal defendants who claim that they didn’t receive competent representation, motions to sanction lawyers for violating court rules, challenges to lawyers’ fees, and so on. In addition, a large number of statutes applicable to lawyers have been enacted by federal, state, and local legislative bodies. Some of the other “lawyer law” is explained further in Chapter 2.

C. Admission to practice

1. A short history of bar admission

The requirements to become a lawyer have changed a lot over the last century. In the colonial era, there were no law schools. A man who wished to become a lawyer first had to be an apprentice to another lawyer. In the middle of the nineteenth century, many law schools were established or reestablished, and legal education took root in American legal culture. By 1860, all but two states had established bar examinations, but the questions were administered orally and the process was fairly informal. The states did not require attendance at law school as a condition of admission. Only 9 of 39 states required a defined period of apprenticeship as a precondition of admission to the bar.

In the late nineteenth and early twentieth centuries, law school training was not mandatory to practice law. During this period, many states began to require applicants to take written bar examinations. As of 1900, 80 to 90 percent of lawyers had never attended college or law school. Neither was college a prerequisite to law school. Some law students never even finished high school. The majority of lawyers qualified for bar admission simply by completing a three-year apprenticeship. Between 1870 and 1920, the legal education curriculum

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66. See generally Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s.
68. Id. at 25.
69. Id.
70. Id.
71. Id.
72. Id. at 38.
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expanded in many universities from one year to three years. Only later did law become a course of graduate study.\textsuperscript{74}

In the first half of the twentieth century, law school overtook apprenticeship as the primary, and later nearly exclusive, path of entry into the profession. By 1930, there were three times as many law schools as there had been in 1890.\textsuperscript{75} The ABA urged that attendance at law school should be mandatory for bar admission.\textsuperscript{76} By 1941, graduation from an ABA-accredited law school was a prerequisite to sitting for the bar exam in all but a few states. This requirement is now imposed by nearly every state.\textsuperscript{77}

2. Contemporary bar admission requirements

In most states, the rules for admission to the bar are established by the state's highest court. The licensing process is organized by state, so that a lawyer who wishes to practice law in New York and New Jersey must seek two separate bar admissions. In most states, the basic requirements for bar admission are

\begin{itemize}
  \item graduation from an accredited undergraduate college (usually required for admission to law school);
  \item graduation from a law school that meets the state's educational standards (this usually means one accredited by the ABA);
  \item submission of an application for admission to the bar;
  \item a finding that the applicant is of good moral character and is fit for the practice of law; and
  \item a passing score on the bar examination administered by the state.\textsuperscript{78}
\end{itemize}

New York State added a requirement that applicants for admission to the bar (other than those admitted in other states) must have performed at least 50 hours of pro bono legal service.\textsuperscript{79}

Pursuant to federal law, in nearly all states, an applicant for admission to the bar must be a U.S. citizen or lawful permanent resident. Undocumented

\begin{footnotes}
\item[74] Stevens, supra n. 71, at 36-37.
\item[75] Herb D. Vest, Felling the Giant: Breaking the ABA's Stranglehold on Legal Education in America, 50 J. Legal Educ. 494, 496 (2000).
\item[76] The ABA pushed the states to require attendance at law school as a prerequisite to bar membership. Records of their discussions show that their goals were (1) to raise standards; (2) to restrict numbers of lawyers; and (3) to keep out blacks, Jews, and other immigrants. Stevens, supra n. 71, at 16.
\item[77] The few states that do not require graduation from an ABA-accredited law school in order to take the bar exam usually have additional, difficult-to-meet requirements, such as prior passage of another state's bar exam combined with practice as a lawyer in that other state for a number of years. See Vest, supra n. 75, at 497.
\end{footnotes}
foreign nationals have challenged this requirement in several states and, as of 2018, at least as to certain qualifying individuals, have succeeded in California,\textsuperscript{80} Florida,\textsuperscript{81} and New York.\textsuperscript{82}

Once admitted to the bar of a state, a lawyer must comply with various requirements to maintain his admission. These may include completion of a certain number of hours of continuing legal education every year, payment of annual dues, membership in a state bar association, and compliance with any requirements to maintain or submit records relating to the operation of a law office. Some states require that each member maintain an office in the state.\textsuperscript{83}

If a lawyer has been admitted to practice in one state, the lawyer may gain admission in some other states without taking the bar examination, sometimes only after a specified number of years of practice. If a lawyer seeks admission to litigate only one case, the lawyer may be admitted \textit{pro hac vice} by association with a lawyer admitted in the state. Most federal courts admit any licensed lawyers who apply for admission to appear before them.\textsuperscript{84}

\section*{3. The bar examination}

Every state administers a bar examination to its applicants for admission, though some states allow candidates to “waive in” to the bar if they pay a fee, have practiced for a specified number of years in another state, and satisfy character and fitness requirements.\textsuperscript{85}

The state bar exams generally include a set of essay questions on identified subjects, the Multistate Bar Examination (MBE), and the Multistate Professional Responsibility Examination (MPRE). The MBE and the MPRE consist of multiple-choice questions. As of 2015, 48 states and the District of Columbia use the MBE, and 48 states and the District of Columbia use the MPRE as part of the bar examination. Each state decides what score is required to pass the multistate

\begin{thebibliography}{8}
\bibitem{81} Fla. Stat. § 454.021 (2014).
\bibitem{82} A federal law bars states from licensing an undocumented foreign national unless a state's legislature authorized the licensing pursuant to a statute enacted after 1996, when the federal law was passed. 8 U.S.C. § 1621(d). In a challenge brought by Cesar Vargas, a New York court held that the federal law unconstitutionally violates the Tenth Amendment by directing that a state's legislature rather than its court system has authority over bar admissions. Matter of Vargas, 2015 N.Y. App. Div. LEXIS 4587 (June 3, 2015). Vargas was then admitted to the bar. Liz Robbins, An Immigrant’s Four-Year Fight to Become a Lawyer Ends in Celebrations, N.Y. Times, Feb. 3, 2016.
\bibitem{83} Restatement § 2, comment f.
\bibitem{84} Id. comment b.
\bibitem{85} Nat’l Conference of Bar Examiners & ABA, Comprehensive Guide to Bar Admission Requirements 25-28 (2014). In addition, graduates of Marquette University Law School and the University of Wisconsin Law School are granted a “diploma privilege” and are admitted to the Wisconsin bar without examination. Wis. Sup. Ct. R. 40.03.
\end{thebibliography}
sections of the exam. Most candidates prepare for the bar exam by taking a six-week cram course from one of several private companies.

Critics charge that the bar examination favors those who can afford the time and money for the bar review course, tests nothing that has not already been tested by the law schools, and discriminates against minorities and disabled persons. One critic argues that “whether the bar exam tests for legal skills or abilities

86. Information about the multistate exams, including lists of which jurisdictions administer each one, is available at the National Conference of Bar Examiners, http://www.ncbex.org/ (last visited Aug. 20, 2017). Many jurisdictions also use the Multistate Performance Test, an essay test that measures performance skills, and some use the Multistate Essay Examination.

related to lawyering is highly questionable.” Nevertheless, states continue to administer the examination because “no one has advanced a persuasive substitute.”

4. The character and fitness inquiry

How does a bar admissions authority evaluate the character and fitness of an applicant for admission to the bar? The point, obviously, is to try to assess whether the applicant will practice law in an honest and competent manner. This is a difficult exercise in prediction. If someone did something dishonest last year, will she do something dishonest next year? What should be the scope of the inquiry? What is relevant to the assessment of the “moral character” of a lawyer? Suppose the person has radical political views, an unusual lifestyle, or peculiar personal habits? What if the applicant has had trouble repaying debts, plagiarized an article while in college, was arrested in a political protest, pled guilty to shoplifting, or has a history of mental illness? The character committee members’ political or moral biases might unfairly deny admission to an applicant. An overly broad question could demand that an applicant disclose highly sensitive personal information that may not be relevant to the individual’s qualifications for admission to the bar.

a. Criteria for evaluation

Most states require each bar applicant to fill out an application. This may require assembly and submission of a wide range of information, including residence and employment history, criminal records, traffic records, credit history, records of any litigation in which the applicant has been a party, and other information. The National Conference of Bar Examiners’ standard moral character application form, which is used in many states and which runs 31 pages, asks for the following information, among many other things.

List every permanent and temporary physical address where you resided for a period of one month or longer [for the last ten years]:

Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, or allowed to resign in lieu of discipline from any college or university (including law school), or otherwise subjected to discipline by any such institution or requested or advised by any such institution to discontinue your studies there? . . .

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List your employment and unemployment information [for the last ten years]. . . . Employment encompasses all part-time and full-time employment, including self-employment, externships, internships (paid and unpaid), clerkships, military service, volunteer work, and temporary employment. . . . Account for any unemployment period of more than three months. . . . Describe your activities while unemployed.

Have you ever been a named party to any civil action? . . . Note: Family law matters (including continuing orders for child support) should be included here. . . .

Have you ever been cited for, arrested for, charged with, or convicted of any moving traffic violation during the past ten years? . . . Include matters that have been dismissed, expunged, subject to a deferred prosecution program, or otherwise set aside. . . .

Have you ever been cited for, charged with, or convicted of any violation of law other than a case that was resolved in juvenile court? Include matters that have been dismissed, expunged, subject to a deferred prosecution program, or otherwise set aside. . . .

Have you had any debts of $500 or more (including credit cards, charge accounts, and student loans) which have been more than 90 days past due within the past three years? . . .

Most states ask some questions about abuse of drugs or alcohol and/or treatment for substance abuse.90 All states ask questions about past criminal conduct. Some states ask not only about criminal convictions but also about arrests or citations.92 Some states include broad requests to reveal any moral indiscretions. The South Carolina questionnaire, for example, asks:

Are there any other facts not disclosed . . . concerning your background, history, experience, or activities which in your opinion may have a
bearing on your character, moral fitness, or eligibility to practice law in South Carolina and which should be placed at the disposal or brought to the attention of the examining authorities? If yes, explain fully.\textsuperscript{93}

Some states ask applicants to have lawyers write letters of recommendation for their admission. Most states require that the dean of the law school attended by an applicant attest to the moral character of that person. Some state bars conduct personal interviews with every applicant, while others interview only those whose applications raise questions. An application that raises significant problems of moral character may trigger an investigation by the bar and a formal hearing on the applicant’s qualifications for admission.

**Does it make any sense for the bar examiners to ask every applicant to compile so much information about his or her personal history?**

The moral character inquiry has been criticized as an overly broad fishing expedition into the background of applicants. In most states, there is no published list of what conduct will give rise to an inquiry and no consistency in practice. The nature of the inquiry allows unfettered discretion to the biases of the examiners. The bar admissions authorities are asked to assess applicants’ mental health even though they have no training in the mental health professions.\textsuperscript{94} The questionnaires tend to ask many questions that do not lead to investigation, such as where an applicant has lived for the last ten years. Do examiners really contact landlords to verify these residences or question applicants’ past neighbors, as the FBI does when conducting security investigations?

The lack of clear standards for fitness to practice results in a strikingly idiosyncratic body of case law. There is an unusually high rate of court reversals and remands of bar determinations on admission cases.\textsuperscript{95} Much scholarship criticizes the character and fitness process as subjective, sometimes discriminatory, and very unpredictable.\textsuperscript{96} The following table gives examples of actual cases deciding whether particular applicants satisfied the moral character requirement. Facts most relevant to the court’s decision appear in italics, and judgments are shown in boldface. The table provides a sample of the range of issues that come up in moral character inquiries. This is not a random or a representative sample, but

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\hline
Applicant & Decision  \\
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John Smith & No  \\
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Jane Doe & Yes  \\
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\begin{footnotesize}

\textsuperscript{94} See Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491 (1985) (empirical study of the moral character evaluation process). Rhode concludes that “[a]s currently implemented, the moral fitness requirement both subverts and trivializes the professional ideals it purports to sustain.” Id. at 592.

\textsuperscript{95} Id. at 534.

\end{footnotesize}
a selection of interesting cases.97 Half of the cases summarized resulted in denial of admission; all of those cases are exceptional. The vast majority of bar admission cases, even cases in which the application presents some issue — a criminal conviction, a credit history issue, a law school discipline incident — conclude with the admission of the applicant to the bar. However, bar committees sometimes delay for many months a decision on an application that raises such issues, and they may require the applicant to submit additional documentation to prove good character or rehabilitation. The cases that are litigated are the exceptional cases. Although they are atypical, they are informative as to some bar examiners’ ideas about what kinds of conduct raise questions about character and fitness.

### Bar admission issue and citation

#### Manslaughter: In re Manville, 538 A.2d 1128 (D.C. 1988)

While in college, Manville “agreed to assist another student in recovering drugs and money believed to have been stolen by [another student named Edgar. They entered Edgar’s apartment and] threatened him with a gun and a knife. When two visitors arrived unexpectedly, Manville used chloroform to render Edgar and the visitors unconscious. One of the visitors died from an unusual reaction to the chloroform.” Manville evaded arrest for four months. Charged with murder, he pled to manslaughter and was sentenced to serve from 54 months to 15 years in prison. “He became a ‘jailhouse lawyer,’ completed his college education, and helped other inmates as [a tutor]. After his release on parole [he] . . . went to Antioch Law School [and later was] . . . employed by the American Civil Liberties Union’s National Prison Project.” He also published a prisoner’s litigation manual. The court granted admission to the bar, finding that he had sufficiently rehabilitated himself.


Vaughn had been dismissed as a public school teacher after an allegation that he had had sexual and/or romantic relationships with two 14-year-old students. The criminal charges against him were dismissed. Admission was denied. The court wrote, “[W]e find his ethical value system deplorable. Vaughn has failed to demonstrate personal as well as professional ethics which are both imperative for bar admission.”

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97. Even a random sample of litigated cases would be unrepresentative because in most cases in which an application raises issues, either a bar committee eventually admits the applicant or the applicant gives up on her effort to be admitted. Those unlitigated cases are not reported anywhere and therefore are unavailable for study by scholars.
<table>
<thead>
<tr>
<th>Bar admission issue and citation</th>
<th>Synopsis</th>
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<tr>
<td><strong>Shoplifting and misrepresentation of debt:</strong> In re Tobiga, 791 P.2d 830 (Or. 1990)</td>
<td>Tobiga, a graduate of the law school at Lewis and Clark College, was arrested for shoplifting after leaving a store with a <em>package of meat in his coat pocket</em>. The charge was dismissed upon his agreement to pay $100. Tobiga also <em>had failed to disclose unpaid loans on his bar application</em>; he claimed confusion. There were many positive character witnesses. <strong>He was admitted</strong>, found to have proven moral character. Tobiga said he didn't know how much he owed. Several debts were owed to the bar itself for educational loans. The court wrote, “[T]he Bar’s records are unclear; the collection agency’s are worse.”</td>
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<tr>
<td><strong>Declaration of bankruptcy:</strong> Fla. Bd. of B. Examiners re S.M.D., 609 So. 2d 1309 (Fla. 1992)</td>
<td>S.M.D. lived on student loans and charged a wedding, a move, and other expenses to credit cards during law school. She filed for bankruptcy during her last semester of law school because of <em>$109,000 of accumulated debt, most of which was nondischargeable student loans</em>. The state supreme court overturned a recommendation by the board to deny admission; <strong>she was admitted</strong>. The court stated, “The Board is rightly concerned over the morality of a person who continues to incur large debts with little or no prospect of repayment.” But “we cannot agree that the evidence sufficiently demonstrates financial irresponsibility. . . .”</td>
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<tr>
<td><strong>Cheating on law school exam:</strong> Friedman v. Conn. B. Examining Comm., 77 Conn. App. 526 (2003)</td>
<td>Two students at Quinnipiac reported that Friedman had <em>concealed a one-page outline on his desk during a closed-book exam</em>. Before a student disciplinary committee, Friedman denied he cheated and claimed he wrote the outline during the exam. The students gave very specific testimony that they had seen Friedman retain a written page on his desk under a blank sheet before the exam was distributed. The committee proposed to reduce Friedman’s grade and to reprimand him. The law dean reversed the committee’s reprimand because of delays in the school’s adjudication of the charge. <strong>The court denied admission.</strong> The court noted that in a dispute of fact, the bar examining committee could decide that the student who complained of cheating was more credible than the applicant, and that cheating on a law school exam was sufficient evidence that the applicant lacked good moral character.</td>
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<tr>
<td><strong>Criticism of the bar:</strong> Lawrence v. Welch, 531 F.3d 364 (6th Cir. 2008) (denying review of Mich. Supreme Court decision)</td>
<td>Lawrence, who attended an accredited law school in Michigan, had <em>unsuccessfully sued the Board of Law Examiners and the state bar, alleging that some state bar rules were unconstitutional</em>. He also operated a website called StateBarWatch criticizing those bodies for alleged dishonesty in the lawyer licensing system. He reaffirmed his opinions in his interview with the character committee, which concluded that “[w]e are concerned about providing a law license to someone who, even before he has handled his first case as a member of the bar, has effectively written off such a huge component of the justice system.” Admission was denied.</td>
</tr>
<tr>
<td><strong>Debt:</strong> In re Application of Griffin, 128 Ohio St. 3d 300, 2011-Ohio-20 (2010)</td>
<td>After he graduated from law school at Ohio State University, Griffin had $170,000 of student loan debt, $20,000 from college and $150,000 from law school. He also had $16,500 of credit card debt. He earned $12/hour working 24 to 32 hours a week for the public defender’s office. He lived with his nine-year-old daughter and the child’s mother in her home. He contributed as he could to their living expenses. He had not been able to begin loan repayment in a year since graduating from law school. Admission was denied. The court concluded that Griffin had “neglected his personal financial obligations by electing to maintain his part-time employment with the Public Defender’s Office in the hope that it will lead to a full-time position upon passage of the bar exam, rather than seeking full-time employment.” It permitted him to start over with a new bar examination.</td>
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**b. Filling out the character questionnaire**

Once you become a member of the bar, you might seek to participate in much-needed reform of the moral character inquiry process. In the coming year or two, however, your interest in this arena may focus on your own admission to the bar. Completing the character and fitness questionnaire can be a complex

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98. This case has been criticized on the ground that the debt incurred by the applicant is actually not unusual for current law school graduates. See Susanna Kim, Ohio Supreme Court Denies Law License for Grad with $170,000 in Student Loans, ABC News, Jan. 18, 2011. The court did not discuss whether full-time jobs were actually available for new lawyers in Ohio during the recession.
and time-consuming process, so it is helpful to start early. Obtain a copy of the application forms and make a list of the information and records that you need to collect. Especially if you anticipate any possible problems, it is worthwhile to begin work on this process during your second year of law school.

**Is it risky to be too candid with the bar examiners? If you tell them too much, are you setting yourself up for rejection?**

Bar admissions committees, courts, and the Model Rules take the position that, in filling out the questionnaire, you should be scrupulously honest in everything you say, even if your disclosures could delay or prevent your admission to the bar. Bar examiners particularly dislike having applicants lie to them or conceal information.

**What if you have something in your personal history that you think might raise the eyebrow of a bar examiner?**

You would be surprised how many law students have skeletons in their closets — minor brushes with the criminal justice system, academic or disciplinary problems during college, or other such life events. Such facts must be disclosed if the questionnaire or the relevant bar officials ask questions that call for the information at issue. Most of these disclosures do not lead to character and fitness inquiries. If you are worried about something, get a copy of the character questionnaire from the state where you will apply for admission and read the questions carefully to see if the questionnaire requires you to disclose the past event. If the issue is potentially serious, you might seek expert advice well in advance about how serious the problem is and how to handle it. In some jurisdictions, you can initiate the moral character part of the review during your second year of law school. If you anticipate that your history may lead to an inquiry, you can avoid a delay in your ultimate bar admission by starting this process early.

**How would you know whether a particular past event might be serious enough to warrant getting legal advice?**

Many law students get very worried about fairly trivial past problems. Use your common sense. A speeding ticket will not hold up your bar admission, but a whole series of DUIs might. A minor misdemeanor charge during college or earlier is unlikely to raise serious eyebrows, but if you have a felony conviction on your record, you would be well advised to seek legal advice. Bar examiners tend to be more concerned about events that took place in the last several years and less

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99. Rule 8.1 requires that applicants for admission to the bar be honest and forthright with bar admissions authorities.
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concerned about events that took place longer ago. They tend to be more concerned about patterns of misconduct than about single instances. If you are not sure about whether you need to seek legal advice, ask your professional responsibility teacher about whether he or she will give you informal advice. Some professors prefer not to give such advice to students, but many are willing to do so.

Do bar admission officials look at applicants’ Facebook pages?

They might, since everyone else does. Some law firms and other employers look at Facebook information about applicants. Some trial lawyers peruse the Facebook pages of people called for jury duty. Some law professors look at Facebook to help them recognize their students in class. (One of Professor Lerman’s students listed among her favorite activities “shopping on the Internet during class while pretending to pay attention.”) Law students should be cautious about putting potentially embarrassing material on public Facebook pages, even in jest. In fact, bar applicants should be careful about their private Facebook pages as well because bar examiners may require applicants to give them access.

100. The character and fitness committees will want to know about any conduct that led to discipline during law school. See, e.g., In re Mustafa, 631 A.2d 45 (D.C. 1993). An excerpt of this opinion and supplemental materials on the case are available on the companion website for this textbook.

In Florida, as a matter of policy, the Board of Bar Examiners checks the social networking sites of certain applicants, such as those who have reported substance abuse and those whose applications raise “significant candor concerns.”

What if the issue that might trouble the bar examiners is something that you should have disclosed on your application to law school?

The information you disclose on your bar application must be consistent with the information you disclosed on your law school application. The law school dean’s office is asked to fill out a questionnaire on each applicant for admission to the bar. The questionnaire asks various questions, such as whether the student has a criminal record, so an omission on your law school application could lead the dean’s office to provide information that is inconsistent with the information that you provide.

If there is something that you need to disclose on your character questionnaire, review your law school application to see whether the law school asked a question that should have elicited the information at issue. Examine your answer. (If you don’t have a copy of your law school application, you should be able to obtain a copy for review from your law school registrar.) If your earlier answer was incomplete, consider making a belated disclosure to the law school of the same information. You can write a letter to the relevant administrator explaining that in preparing your application for admission to the bar, you realized that you had omitted a piece of information on your law school application. If the information is so serious that it would have led to your being denied admission to the law school (such as a homicide conviction), the law school might take disciplinary action as a result of your disclosure. If, as is more common, the disclosure is of something minor (such as a citation for a college dorm party), the late disclosure probably won’t lead to disciplinary action. Even so, dealing with law school application omissions can be daunting. Even if the late disclosure to the law school might raise eyebrows, it is probably less professionally hazardous to correct the record than not to do so.

PROBLEM 1-1

WEED

This problem includes a question from the application form for admission to the Iowa state bar. The question was not concocted for this book; it is the actual question on the Iowa form.\(^3\)

You are a third-year law student. In a few months, you plan to apply for admission to the Iowa bar. You have just received a copy of the application form, which begins with this statement:

OFFICE OF PROFESSIONAL REGULATION, APPLICATION FOR THE IOWA BAR EXAMINATION

The contents of this application will be public information subject to the limitations of Iowa Code section 602.10141 [which provides that a member of the five-person Board of Law Examiners shall not disclose information relating to the criminal history or prior misconduct of the applicant].

[Question 41 reads as follows:]

41. Are you currently, or have you been in the last three years, engaged in the illegal use of drugs? If Yes, give complete details below (or on an attached sheet).

“Illegal Use of Drugs” means the use of controlled substances obtained illegally as well as the use of controlled substances which are not obtained pursuant to a valid prescription or taken in the accordance [sic] with the directions of a licensed health care practitioner. “Currently” does not mean on the day of, or even the weeks or months preceding the completion of this application. Rather, it means recently enough so that the condition or impairment may have an ongoing impact.

You have a right to elect not to answer those portions of the above questions which inquire as to the illegal use of controlled substances or activity if you have reasonable cause to believe that answering may expose you to the possibility of criminal prosecution. In that event, you may assert the Fifth Amendment

privilege against self-incrimination. . . . If you choose to assert the Fifth Amendment privilege, you must do so in writing. . . . Your application for licensure will be processed if you claim the Fifth Amendment privilege against self incrimination. . . .

Release

. . . I . . . authorize and request every person . . . having . . . information pertaining to me . . . to furnish to the Iowa Board of Law Examiners or their agents or representatives, any such information. . . .

I, ________, being first duly sworn, deposes and states: . . . my answers to the foregoing questions are full, true, and correct to the best of my knowledge and belief. [Applicant’s signature must be notarized.]

Several times during each of your three years of law school, you and a few law school friends have smoked marijuana at parties. The last time you did this was three weeks ago. Now that you have read this question, you certainly won’t smoke any more pot, at least not before you are admitted to the bar.

There is a rumor on campus that, a few years ago, a member of the bar admissions committee was asked what would happen to applicants who answered the question affirmatively, and he said that they would be denied admission to the bar. How will you answer the question?

c. Mental health of applicants

Should bar admissions authorities ask questions about the mental health of applicants?

Perhaps some people who suffer from serious mental illness would disserve their clients because of their illnesses. Perhaps some applicants actually pose a danger to others. Such concerns have led bar examiners to ask a variety of questions. Until the 1980s and 1990s, many states asked very detailed and intrusive questions. Most states have now narrowed their inquiries. What mental health questions, if any, do you think bar admissions examiners could appropriately ask?

The National Conference of Bar Examiners (NCBE) conducts the character and fitness evaluation for a majority of states. Applicants for admission to the bar of those states fill out an NCBE questionnaire to initiate this process. NCBE publishes a model character and fitness questionnaire that may be used in states
that do not use NCBE to conduct their character and fitness evaluations. The mental health questions on this form are reprinted below.

25. Within the past five years, have you exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner? □ Yes □ No

If you answered yes, furnish a thorough explanation below:

26. A. Do you currently have any condition or impairment (including, but not limited to, substance abuse, alcohol abuse, or a mental, emotional, or nervous disorder or condition) that in any way affects your ability to practice law in a competent, ethical, and professional manner? □ Yes □ No

B. If your answer to Question 26(A) is yes, are the limitations caused by your condition or impairment reduced or ameliorated because you receive ongoing treatment or because you participate in a monitoring or support program? □ Yes □ No

If your answer to Question 26(A) or (B) is yes, complete a separate FORM 7 & 8 for each service provider. Duplicate FORMS 7 & 8 as needed. As used in Question 26, “currently” means recently enough that the condition or impairment could reasonably affect your ability to function as a lawyer.104

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**Questions About the NCBE’s Mental Health Questions**

1. Are these questions sufficiently clear? Suppose you have been diagnosed with mild depression, are taking prescribed medication, and are passing your law school courses but think you would perform better if you were not depressed. Would you know how to answer the questions?

2. If the purpose of the questions is to assess present ability to practice, is it fair to ask, in Question 25, for disclosure of problematic conduct or behavior up to five years in the past?

3. Should the bar examiners be asking applicants any mental health questions? If so, what should they ask?

Keep in mind that one study of depression among law students (a study of students in Arizona) showed that 32 percent were depressed by the end of the first year, 40 percent were depressed by the end of the third year, and 17 percent were depressed two years after graduation.105

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In recent years, at least 18 states have created systems through which applicants with histories of emotional trouble or substance abuse can be admitted to the bar conditionally for a probationary period, during which they must comply with specified conditions, such as participating in mental health care, mentoring, or random drug tests. The purpose of these rules is to encourage law students who have such problems to seek counseling without fear that doing so would make it impossible for them to be admitted to a bar. In 2009, the ABA adopted a Model Rule on Conditional Admission to Practice Law, which can be used as a template by states that have not yet created a conditional admission procedure. At least one article has criticized conditional admission on the ground that it permits bar admission committees to ask improper and possibly illegal questions.

**d. Law school discipline: A preliminary screening process**

Most law schools have established internal disciplinary processes to evaluate student misconduct allegations and to impose sanctions. Sanctions range from asking the offending student to write a letter of apology to suspension or expulsion from law school. Sometimes the law school’s sanctions include a transcript notation that bar examiners are certain to see. In other cases, the sanction is noted only in the student’s confidential record, which the law school may or may not report to the bar. But the bar examiners often ask applicants to disclose any sanctions imposed by a law school, whether or not the law school considered them “confidential.”

Some law school disciplinary boards are staffed entirely by students, others by students and faculty, and still others by faculty only. Likewise, some schools ask student or faculty volunteers to prosecute these cases, while a few have professional staff handle the prosecution of students. Student respondents are permitted to have counsel in these proceedings. Some schools allow nonlawyer advocates to assist respondents, and some allow or require faculty to represent the respondents. A student respondent may be represented by an outside lawyer of his choosing, but generally must pay the lawyer’s fee himself. The law school disciplinary systems tend to be structured like microcosms of the lawyer disciplinary system. The law schools perform a prescreening process for the bar examiners with respect to students who engage in misconduct while in law school.

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107. ABA, Model Rule on Conditional Admission to Practice Law (2009).
108. Denzel, supra n. 91.
PROBLEM 1-2

THE DOCTORED RESUME

_The following problem is based on a true story, though some facts have been changed to protect the identity of the individual involved._

You are a member of your law school Honor Board, a judicial body that does fact-finding and recommends disposition of allegations of misconduct by law students. The Board has the authority to recommend reprimand, suspension from law school, expulsion from law school, community service, or other sanctions. The law school administration generally adopts recommendations by the Honor Board. Any finding of violation of the law school Honor Code is reported to the bar to which a respondent applies for admission. The following matter has been presented to the Board for review.

Kris Kass, a third-year law student, is charged with violation of the Honor Code for including false information on a resume and then submitting the resume to law firms recruiting through the law school placement office. The law school Honor Code specifically prohibits students from “providing false or misleading information about their academic credentials, employment history, or other matters, to the law school, to prospective employers, or to anyone else.”

Kris came to the United States from Estonia a year before beginning law school. Kris’s father is a diplomat and was sent to the United States. Kris’s undergraduate degree is from Tartu University. Kris listed the undergraduate degree as having been awarded “magna cum laude.” Upon investigation, the Honor Board learned that Tartu University has never conferred Latin honors upon graduation — to Kris or to anyone else. Also, Kris is in the bottom quarter of the law school class. But Kris listed class rank as “top third.” Kris used computer software to make some corresponding changes in the actual law school transcript. Finally, during the year before enrolling in law school, Kris worked at the Estonian Embassy in Washington. On the resume, Kris listed the position as cultural attaché. Kris’s former employer informed an Honor Board investigator that Kris’s position at the embassy was as a file clerk.

A hearing was held, at which Kris admitted that all three of the alleged falsehoods on the resume were in fact false and were put on the resume in the hope of obtaining a good job in a law firm.

“I was new to the U.S., so even though I studied very hard, I didn't do very well on my exams. It seemed unfair to me that my
grades were not good even though I worked harder than most of the other students. My normal English was pretty good by the time I started law school, but the technical language was very difficult for me.

“I have very high student loans — by the time I finish, it will be above $200,000. My family is not wealthy — they cannot help me pay for this. Also the family is watching me to see whether I will succeed in the U.S. — I felt I must get a good position or else they would be ashamed of me.

“I tried applying for jobs but I wasn't getting any interviews. I talked with one of my American friends. He's another law student, I'd rather not say his name. He looked at my resume for me, and said I just needed to fix it up a little bit. He made some suggestions — I think the changes were all his ideas.

“At first I thought he was crazy — he was telling me to lie. He said they were just little white lies, and that if I wanted to succeed in America, I had to stop being so prissy. He said at his college, no one ever wrote their own papers — they just copied over someone else's paper from the year before or downloaded one from the Internet. It's a free country, he said. I knew it wasn't right, but also I knew I needed to get a job, so I decided to take his advice. Obviously it was a mistake.”

What sanction, if any, should the law school impose on this student? Should the alleged conduct preclude Kris from admission to the bar?