The Legal Profession: Regulation, Discipline, and Liability

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This chapter lays the groundwork for the rest of the book by discussing the many institutions that regulate lawyers and the consequences for lawyers who violate professional norms. Although state courts adopt ethical rules for lawyers and impose discipline on lawyers who violate those rules, many other institutions, organizations, and individuals, including clients, play a role in governing the behavior of lawyers. The first part of this chapter identifies the actors in this complex system of regulation. The next part explains the evolution and functions of the state ethics codes. Then we move on to describe the system for imposing discipline, including license suspension and revocation, on lawyers who violate professional standards. The remaining sections explain that lawyers can incur civil liability and criminal penalties as well as professional discipline.

A. Institutions that regulate lawyers

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 said to have a duty to participate in the governance and improvement of the profession. The Preamble of the Model Rules of Professional Conduct explains it this way:

The legal profession is largely self-governing. . . . [It] 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. Self-regulation also helps maintain the legal profession’s independence from government domination . . . for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.1

It is important for lawyers to be independent from abuses of power by the government, but the organized bar has used claims of self-governance to try to protect lawyers from regulatory restrictions.

1. Model Rules of Prof’l Conduct, Preamble, Comments 10 & 11.
In fact, the law governing lawyers is complex and multifaceted. Numerous federal, state, and local legislatures, courts, and agencies make rules that apply to lawyers. Although lawyers play a central role in all lawmaking, assertions that the legal profession is self-regulating are charming but anachronistic.

**Is it a good idea to insulate lawyers from governmental control?**

Maybe. The rules governing lawyers are more protective of lawyers and impose less regulatory constraint than they would if state legislatures wrote them. But shielding lawyers from governmental regulation can benefit society because in representing clients, lawyers sometimes challenge the validity of statutes and regulations. Also, they defend people charged with crimes by the state. If lawyers were subject to greater state control, they might be restricted in their representation of clients whose interests are contrary to those of the government. In many other countries, it can be hazardous to be a lawyer.

**FOR EXAMPLE:** In the Philippines, 34 lawyers who opposed President Rodrigo Duterte’s “lethal war on drugs” were murdered over a two-year period beginning in 2016 when Duterte became president. Benjamin Ramos, for instance, represented indigent families that were targeted by military and law enforcement forces connected to the president’s drug war. Ramos was shot and killed by men on motorcycles as he left his workplace one day in November 2018. Duterte had instructed the police to shoot lawyers who were “obstructing justice” by investigating thousands of murders committed in the name of the drug war.

The government of China has a long history of persecuting lawyers who advocate for the rights of others. In July 2015, the Chinese government launched a nationwide sweep and arrested more than 200 human rights lawyers, depicting them as rabble-rousers or swindlers. Some of the lawyers were charged with subversion of state power. The lawyers were detained at undisclosed locations. Several of the lawyers were given prison sentences of up to 12 years.

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2. Restatement § 1, comment 1d.
FOR EXAMPLE: One Chinese lawyer, Ni Yulan, had helped her neighbors to fight eviction and had tried to photograph the crews who demolished their houses. After she was arrested, the police beat and kicked her during a 15-hour period, breaking her legs and leaving her incontinent. She served three years in prison. While she was in prison, one officer 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, she continued her work, and she was arrested again.  

FOR EXAMPLE: The Russian government tried to disbar Karinna Moskalenko, who has successfully represented Russian citizens charging their government with human rights violations before the European Court of Human Rights. In 2007, the Council of Moscow’s Board of Attorneys refused the disbarment request. Moskalenko continued to represent clients whose cases presented human rights concerns, including the family of murdered journalist Anna Politkovskaya, for whom she got a court order that required the government to reopen its investigation into the death. In 2008, Moskalenko delayed travel after she developed headaches and a strange giddiness. About ten pellets of mercury (which can damage organs, the immune system, and the nervous system) were found in her car in Strasbourg. This may have been one of several attempts by the Russian government to poison dissidents.

These examples serve as warnings of what could happen to a legal profession when a government wants to suppress dissenters and the lawyers who represent them.

American lawyers retain a fair degree of independence but are subject to regulation by both governmental and nongovernmental actors. What follows is an overview of the main institutions that regulate lawyers.

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6. In 2016, the U.S. Department of State honored Ni Yulan as one of 14 “international women of courage,” but she was not allowed to leave China to attend the ceremony. The Chinese authorities put her under house arrest and would not allow foreign diplomats to visit her. Andrew Jacobs, China Set to Punish Another Human Rights Activist, N.Y. Times, Jan. 3, 2012; Javier C. Hernandez, Activist Says China Didn’t Allow Her to Receive Award in U.S., N.Y. Times, Mar. 31, 2016; Chinese Rights Lawyer Ni Yulan under House Arrest, Guardian, Apr. 25, 2016.


1. The highest state courts

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,10 not the legislature, adopts the rules of conduct that govern lawyers.11 The courts rely heavily on model rules produced by the American Bar Association. In this respect, the high court performs a role usually played by a legislature.

The highest court in each state enforces its ethics rules by disciplining lawyers who violate them. As with the rulemaking function, state supreme courts often delegate primary responsibility for enforcement to disciplinary agencies run by lawyers.

The legal profession is far from 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 have considerable influence over the regulations. But lawyers have an unusual degree of influence when it comes to regulating their own industry.

How do state courts regulate lawyers?

The highest courts in each state usually perform the following roles, though some delegate one or more of these functions to other government agencies. The courts

- adopt ethics codes and court procedural rules that govern lawyers;
- set and implement standards for licensing lawyers, including educational and moral character requirements;
- supervise agencies that investigate and prosecute complaints of unethical conduct by lawyers;
- oversee administrative judicial bodies that impose sanctions on lawyers who violate the ethics codes; and
- decide appeals in lawyer disciplinary cases.

Why have courts assumed primary responsibility for regulating lawyers?

While a few state constitutions mandate that only courts have authority to regulate the conduct of lawyers,12 other courts claim they have such authority as a

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10. 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. In New York, the trial-level courts are called supreme courts.
11. The notable exception is California, where many of the ethical rules for lawyers have historically been embodied in statutes enacted by the state legislature.
12. Restatement § 1, comment c, reporter’s note.
matter of common law under the “inherent powers doctrine.” The courts justify this “inherent power” because they administer the judicial system and need to govern the conduct of those who appear before them.\(^\text{13}\)

**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 precludes regulation of lawyers by other branches of government. Based on this “negative inherent powers doctrine,” some courts have invalidated legislation regulating lawyers.\(^\text{14}\) 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.\(^\text{15}\)

**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.\(^\text{16}\)

Some state court decisions acknowledge that, in fact, all three branches of government play roles in regulating lawyers.\(^\text{17}\) 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.\(^\text{18}\) None of these statutes have been invalidated because of the negative inherent powers doctrine.\(^\text{19}\)

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\(^\text{13}\) See Eli Wald, Should Judges Regulate Lawyers, 42 McGeorge L. Rev. 149 (2016).
\(^\text{14}\) See, e.g., Shenandoah Sales & Serv. Inc. v. Assessor of Jefferson Cty., 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).
\(^\text{15}\) See examples discussed in Nathan M. Crystal, Core Values: False and True, 70 Fordham L. Rev. 747 (2001).
\(^\text{16}\) Turner v. Ky. Bar Ass’n, 980 S.W.2d 560 (Ky. 1998), discussed in Crystal, supra n. 15, at 766-767.
\(^\text{17}\) Restatement § 1, comment c, reporter’s note.
\(^\text{19}\) For decades, bar associations supported the negative inherent powers doctrine to prevent regulation of the legal profession by state legislatures. Later, when they realized that law firm partners might achieve limited liability for their partners’ negligence through passage of legislation to authorize organization of firms as LLPs, bar associations and prominent lawyers led lobbying efforts to pass this legislation. Wolfram, supra n. 18, at 381-382.
A. Institutions that regulate lawyers

2. State and local bar associations

Most state bar associations are organized as private nonprofit organizations, but some courts nevertheless delegate to them certain lawyer regulatory functions. State bars often administer bar exams and review candidates for admission. Historically, state bar associations had an important role in establishing lawyer disciplinary systems.20 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, one must be a member to obtain a license to practice law.

Most bar associations have numerous committees that draft ethical rules, write advisory opinions interpreting the rules, and conduct law reform activities in many different fields of law.21 Bar associations do not require members to participate in association activities except for continuing legal education, but many members do so to meet people, keep up in their fields, obtain client referrals, or get involved in law reform work.

Does each state have only one bar association?

No. Most states have one central organization that performs a variety of regulatory and professional leadership functions, including those described above. California has split its main bar association in two as the result of state legislation. The state bar had received a great deal of negative attention because of a number of financial scandals, leading to a legislative mandate to split the organization. Starting in 2018, the state bar of California has focused on regulatory functions, chiefly bar admission and discipline. The newly formed California Lawyers’ Association has assumed the other functions — leadership, advocacy, and networking — that were previously handled by the state bar.22

Some of the other 30 or so states that have unified bars are considering a similar organizational split, especially in light of the 2018 decision of the U.S. Supreme Court in Janus v. AFSCME.23 That decision concluded that public sector unions could not force government employees who declined to join the union to pay “agency fees.” Those fees were charged because even nonunion employees received benefits from union-negotiated collective bargaining agreements. The

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23. Id.
Court found that the requirement that nonmembers pay “agency fees” violated the First Amendment rights of those employees.24

Unified state bars charge members fees that are used for purposes beyond bar admission and discipline, including policy advocacy and pro bono programs. The broad functions of the unified bars might be seen to violate the First Amendment rights of lawyers who disagree with bar policies. The \textit{Janus} case may lead other state bars to follow California and divide functions between two organizations.

In addition to the state organizations, many smaller voluntary bar associations serve subgroups of attorneys, such as women, people of color, and LGBTQ individuals; those from cities or counties; lawyers in particular fields; and so on. Except for 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 but may need separate admission to appear in the federal courts located in that state.

3. Lawyer disciplinary agencies

Lawyers at disciplinary agencies (often called bar counsels, disciplinary counsels, or ethics counsels) investigate and prosecute misconduct that violates the state ethics code. Possible sanctions include disbarment, suspension from practice, and public or private reprimand. Some jurisdictions also provide that a disciplinary body may order “restitution to persons financially injured, disgorgement of all or part of the lawyer’s or law firm’s fee, and reimbursement to the client security fund.”25 These disciplinary 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.26

4. American Bar Association

The American Bar Association (ABA) is a private nonprofit membership organization founded in 1878.27 The state bar associations are independent from, 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.

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26. Published opinions in disciplinary cases are available on the websites of the disciplinary agencies, on the website of each state’s court system, or on Lexis and Westlaw.
Institutions that regulate lawyers

Each ABA member pays an annual membership fee. The ABA has more than 400,000 lawyer members, 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. That's why the ABA ethics rules are called the Model Rules of Professional Conduct. These rules have no legal force; the ethics rules that have the force of law are those adopted by the relevant governmental authority, usually a state's highest court.

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 national meetings. Committees of the state bar associations then usually 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, in most states, the state's highest court accepts, rejects, or amends the version of the rule put forward by the committee. The court is not obliged to consider a rule just because it was proposed by the ABA. However, the ABA's work strongly influences the views of most state bar associations and courts.

Some draft ABA ethical rules are controversial. On some occasions when the ABA House of Delegates has considered proposals by its committees to change

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29. 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 students enrolled in ABA-approved law schools may join the ABA without paying dues. ABA, Dues & Eligibility, https://www.americanbar.org/membership/dues_eligibility.html (last visited Aug. 18, 2019).
31. One example of a “governmental function of the ABA is that the 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/1307552148abalawschaccredproc.authcheckdam.pdf (last visited Aug. 18, 2019).
32. 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. DOJ had charged the ABA with attempting to regulate lawyers in a manner that violated the federal antitrust laws.
33. It is sometimes asserted 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 state ethics rules have limited authority in malpractice and disqualification controversies, they are the primary rules applied in disciplinary cases, which can lead to the suspension or disbarment of lawyers.
the rules to better protect client interests, the House has rejected the proposals as being unnecessarily intrusive on lawyers’ discretion.

**FOR EXAMPLE:** One revision of the rules sent to the House of Delegates by an ABA revision commission proposed that lawyers should be required (rather than encouraged) to communicate the basis or rate of their fees to clients in writing. The House of Delegates voted not to adopt this change.34

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.35 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 covers civil and criminal liability of lawyers to clients and third parties, standards for 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 law of unauthorized practice, and many other topics.

The Restatement includes black-letter rules, which often summarize the rules followed in a majority of jurisdictions. The black-letter rules are followed by textual comments and by reporter’s notes, which cite court decisions, statutes, books, and articles on each topic addressed. The Restatement is not law, but it is a useful synthesis of information about “lawyer law.” It covers 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. Sometimes the Restatement diverges from the ethical rules because the liability rules differ from the ethics codes, because the authors of the Restatement do not agree with the ABA about what the rules should be, or because the Restatement is more specific than the Model Rules. The comments in the Restatement often note such discrepancies and explain why the authors of the Restatement take a different position.

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FOR EXAMPLE: In an ex parte hearing (one in which the adverse party is not present), Rule 3.3(d) requires a lawyer to reveal all material facts to the judge, even facts adverse to her client. The rule does not explicitly create an exception for privileged information, but the Restatement takes the position that privileged information is exempt from this requirement.\(^{36}\)

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 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 advisors or from sources such as 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. (Conflicts of interest are thoroughly discussed in Chapters 6-10.)

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 should 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.”\(^{37}\) Despite this requirement, many judges tend not to report lawyer misconduct to disciplinary agencies.\(^{38}\)

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36. Restatement § 112, comment b.
37. Model Code Jud. Conduct R. 2.15(B) (2011). 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.
Federal courts in each jurisdiction adopt their own standards for bar admission, and some adopt their own ethical rules.\(^39\) Many federal courts adopt the same ethical rules that are in force in the states where the courts are located. Some adopt additional rules of practice. Federal courts impose sanctions on lawyers who engage in misconduct in the course of federal litigation.\(^40\)

Appellate courts also participate in the regulation of lawyers. State and federal appellate courts review malpractice and disqualification decisions of lower courts. The U.S. Supreme Court regulates the legal profession by ruling on issues such as lawyer advertising under the First Amendment, construing statutes that 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.\(^41\)

**7. Legislatu res**

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 apply to everyone doing business in the state, including lawyers.\(^42\) Many statutes specifically regulate the conduct of lawyers.

**FOR EXAMPLE:** Some state consumer protection laws explicitly govern lawyers, while others exempt lawyers.\(^43\) In California, statutory law

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40. 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).
41. 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. 39, § 801.20[3].
42. See 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); Charles W. Wolfram, Lawyer Crime: Beyond the Law, 36 Val. U. L. Rev. 73 (2001).
governing lawyers is extensive and addresses some topics that other states cover in their ethics codes. 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.

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. 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.

8. Administrative agencies

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

Yes, in some cases. 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 that state and before any federal agency, without a separate admission, unless the agency has its own process for admitting lawyers. As to federal agencies, some have their own rules for admission of lawyers to practice before them, while others allow even nonlawyers to represent clients in hearings.

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

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48. 5 U.S.C. § 500 (2011); see Wolfram, supra n. 20, at 219 n. 48.
law. Lawyers who engage in misconduct in practice before these agencies may be subject to civil or criminal penalties. Some agencies, such as the Justice Department’s Executive Office for Immigration Review, also have their own ethical rules for practitioners.

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; the money was paid out of pocket by some of the partners. The settlement imposed restrictions on the ability of some partners to represent savings and loan banks.

Some federal agencies regulate lawyers for reasons other than participation in agency proceedings. For example, the Consumer Financial Protection Bureau has authority to enforce the federal consumer debt collection law against attorneys who have annual revenues of more than $10 million.

9. Prosecutors

An increasing number of lawyers are indicted and prosecuted for crimes, some of which were committed in the course of practicing law. Prosecutors have enormous discretion as to whether to file charges against a particular defendant. Although it seems that in the past, prosecutors were more reluctant to bring charges against lawyers, these reservations evaporated during the last quarter of the twentieth century.

This cultural change began with the Watergate scandal, discussed in Chapter 1, in which dozens of lawyers in senior federal government positions faced criminal charges for an array of unlawful conduct. Ten years later, several

49. 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).
50. Id.
54. See generally Green, supra n. 42.
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.55

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.56

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 its legal clients to adopt a system to evaluate potential conflicts of interest, or it may insist that senior partners review all opinion letters sent to 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.57

56. 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).
11. Law firms and other employers

While one responsibility of every organization that employs its own lawyers is to ensure compliance with ethical rules and other law, many employers have 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. Many such firms designate one or more lawyers to be “ethics counsel” or “loss prevention counsel,” or both. Other large firms form ethics committees. These structures help to establish and maintain a positive ethical culture within the firms. In addition, this internal regulation may dramatically reduce malpractice claims against the firm.58

Law firms and government agencies sometimes have stricter confidentiality rules than those imposed by the state ethics code.59 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.

58. Martin Kaminsky, the general counsel of the law firm Greenberg Traurig, reported that 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 dramatically. One 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.

59. For example, federal law imposes criminal penalties for revealing confidential government information. 18 U.S.C. § 1905; see U.S. Dept of Justice, Criminal Resource Manual § 1665, https://www.justice.gov/jm/criminal-resource-manual-1665-protection-government-property-disclosure-confidential-government (last visited Aug. 18, 2019). Also, 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).
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{60} 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.

\section*{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.

The earliest set of legal ethics principles seems to have been published in 1836 by a lawyer from Baltimore named David Hoffman.\textsuperscript{61} Then, in 1854, George Sharswood (Dean of the University of Pennsylvania Law School and later Chief Justice of Pennsylvania) published a series of lectures on the subject, and in 1887 the Alabama State Bar Association wrote a legal ethics code based on those lectures.\textsuperscript{62} During the next several decades, nine other states wrote their own codes, based largely on the Alabama code.\textsuperscript{63}

The ABA adopted its first set of Canons of Ethics, based in large part on the Alabama code, in 1908.\textsuperscript{64} While some states treated the Canons as a set of mandatory rules, others treated them only as nonbinding guidance for lawyers.\textsuperscript{65}

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

\begin{itemize}
\item \textsuperscript{60} See generally Roy Simon, Conference on Gross Profits: Gross Profits? An Introduction to a Program on Legal Fees, 22 Hofstra L. Rev. 625 (1994).
\item \textsuperscript{61} Thomas D. Morgan & Ronald D. Rotunda, Professional Responsibility: Problems and Materials 288 (12th ed. 2014).
\item \textsuperscript{63} Wolfram, supra n. 32, at 54 n. 21.
\item \textsuperscript{64} The 1908 code included 32 Canons. Fifteen more Canons were added between 1908 and 1969. James M. Altman, Considering the A.B.A.’s 1908 Canons of Ethics, 71 Fordham L. Rev. 2395, 2396 (2003).
\item \textsuperscript{65} Restatement § 1, comment b, reporter’s note.
\end{itemize}
adopted by courts in the vast majority of states, superseding the 1908 Canons.66 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. In 1970, an ABA committee chaired by former U.S. Supreme Court Justice Tom Clark issued a devastating report on the state of lawyer regulation. This report concluded that “disciplinary action [was] practically nonexistent in many jurisdictions; practices and procedures [were] antiquated; [and] many disciplinary agencies ha[d] little power to take effective steps against malefactors.”67 The enactment of the Model Code, however, was an important advance that, in time, was followed by additional initiatives to improve and to implement the ethics codes.

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 confusion about how particular situations should be handled.68 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 of the Commission’s recommendations.69 By 2015,

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66. Wolfram, supra n. 32, at 56.
nearly every state had adopted some version of the Model Rules, as revised, as well as some version of its numbering system.\textsuperscript{70} However, the state ethics codes that govern lawyers contain substantial variations from the ABA Model Rules,\textsuperscript{71} so practitioners must rely on the pertinent state rules, not the Model Rules.

Many state courts have also adopted some version of the ABA’s official comments to the Model Rules. In May 2018, California became the last state to adopt a version of the Model Rules.\textsuperscript{72} The comments vary substantially from state to state. A few state courts have adopted only the Rules of Professional Conduct and declined to adopt any comments.\textsuperscript{73} And at least in New York State, the state’s highest court adopted and periodically amends the state’s rules of professional conduct, but the state bar rather than the court promulgates the interpretive comments.\textsuperscript{74}

In 2009, the ABA Ethics 20/20 Commission studied the Model Rules in the context of globalization and rapidly changing technology. It recommended several amendments to strengthen confidentiality, which the ABA House of Delegates adopted. The Commission considered proposing significant changes that could have permitted lawyers to practice in other states without separate bar admissions, to partner with nonlawyer professionals, or to permit nonlawyers to invest in law firms. Ultimately, however, the Commission decided not to propose changes to the rules on these matters. These issues are discussed in Chapter 13.

**What are the functions of the state ethics codes?**

The state ethics codes are a primary source of guidance for lawyers and judges about standards of conduct for lawyers. They guide lawyers in evaluating what conduct is proper in various situations and 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.\textsuperscript{75} Many of the rules in the ethics codes are drawn from rules of tort law, contract law, agency law, and criminal law.\textsuperscript{76}


\textsuperscript{71} Every state posts its rules of professional conduct on the Internet. For a selection of 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).

\textsuperscript{72} Chang, supra n. 44.


\textsuperscript{75} Restatement § 1, comment b.

\textsuperscript{76} Id.
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 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. Sometimes particular practice groups propose specialized rules to govern a subset of lawyers, but so far, the ABA has continued to endorse the single primary set of rules for all lawyers.77

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 2007.78 The Code has been adopted in some form in a majority of states.79

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

Yes. Various bar organizations have recommended 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.80

77. In 2011, the Law Firm General Counsel Roundtable, an organization representing 23 large law firms, suggested that a different set of ethics rules should be written for firms that serve “sophisticated” (i.e., large corporate) clients, but this proposal has met with nothing but skepticism. One member of the Ethics 20/20 Commission said that the proposal would be viewed “as an effort to carve out special treatment for larger firms and another system for the rest of us peons.” James Podgers, Ethics 20/20 Pitch: Law Firms That Serve “Sophisticated” Clients Need Own Regulatory Systems, ABA J., Apr. 16, 2011.
79. 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.
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.81

**Do the ethics codes explain most of what lawyers need to know about their legal and ethical obligations?**

No. 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, lawyers are bound to comply with countless federal, state, and local statutes and regulations.

Lawyers need to be familiar with all of these sources of law. In addition, even as to ethical dilemmas governed mainly by the ethics codes, there is more to know. 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 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.

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

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 a 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 usually

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comprised of both lawyers and nonlawyers. Courts rely on these advisory opinions with increasing frequency.\(^{82}\)

**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.

### C. The disciplinary system

The lawyer disciplinary system is the administrative process through which lawyers may be charged with violation of the state ethics codes. A lawyer found to have violated one or more provisions of the state ethics code may lose his license to practice law, may be ordered to cease practice for a period of time, or may receive a reprimand or some other lesser sanction.

Before the twentieth century, a lawyer who engaged in misconduct might have been brought to court and charged with misfeasance (traditionally characterized as “conduct unbecoming a lawyer”) by a client, another lawyer, or a bar association. A judge might then have barred the lawyer from further practice in that court.\(^ {83}\) After the ABA adopted the 1908 Canons of Ethics, some courts began to refer to the Canons as a basis for discipline of lawyers. Gradually, the states established administrative agencies to investigate and prosecute lawyer misconduct. Until the latter part of the twentieth century, however, many state disciplinary systems were extremely limited by lack of funding and by reliance on volunteer staffing.\(^ {84}\) More recently, the disciplinary systems have become “professionalized,” with better funding, more staff, and greater ability to police lawyer misconduct.\(^ {85}\) Courts have established administrative hearing panels to make findings of fact and recommendations for sanctions. States have also adopted procedural rules for adjudication of lawyer discipline cases. Most of these are based on the ABA Model Rules for Lawyer Disciplinary Enforcement.\(^ {86}\)

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84. See Wolfram, supra n. 32.
Although most disciplinary agencies are still short-staffed and many still rely on volunteer adjudicators, they are far more effective than they once were.

How does a typical disciplinary proceeding work?

In most states, the highest court runs the disciplinary system. An independent office set up by the court uses paid staff attorneys to investigate and prosecute charges against lawyers. Some disciplinary offices are administered by state bar associations, but others are independent of the bar associations. If a disciplinary agency thinks that a complaint against a lawyer appears warranted, it first presents the case to an adjudicator, who may be (depending on the state) a three-person volunteer hearing committee (which often includes two lawyers and a
nonlawyer), a single volunteer lawyer adjudicator, or a judge.\textsuperscript{87} The adjudicators hear evidence, make findings of fact, and recommend sanctions.\textsuperscript{88} The adjudicators’ recommendations are then reviewed by an administrative board. Decisions of the administrative board may be appealed to the state’s highest court.\textsuperscript{89}

**Do the lawyer disciplinary agencies investigate most of the complaints and punish violators?**

Apparently not. Because of resource limitations, the agencies have tended to investigate only the most egregious complaints.\textsuperscript{90} An ABA commission reported in 2018 that

some jurisdictions dismiss up to ninety percent of all complaints. Most are dismissed because the conduct alleged does not violate the rules of professional conduct. The Commission has gathered much information about these dismissed complaints. It convinces us that many of them do state legitimate grounds for client dissatisfaction. The disciplinary system does not address these tens of thousands of complaints annually. The public is left with no practical remedy.\textsuperscript{91}

Disciplinary authorities tend not to pursue certain types of cases. For example, Professor Leslie Levin reports that

\[\text{[m]}\] any disciplinary agencies will not docket charges of incompetence against criminal defense attorneys, legal malpractice, complaints arising out of ongoing litigation, or many allegations of incivility. . . . In Virginia, . . . fee disputes are routinely dismissed by disciplinary authorities [even though] the billing of excessive fees is an ethical violation. . . . Similarly, in New Jersey, grievances concerning fee disputes are typically referred to the district fee arbitration committee.\textsuperscript{92}

**FOR EXAMPLE:** In 2004, the Virginia bar made public disciplinary charges against one William P. Robinson, a former state legislator who

\textsuperscript{87} David Summers, Adjudicating Attorney Discipline: Are Panels Necessary?, 20(2) Prof’l Law. 30 (2010).

\textsuperscript{88} See Restatement, ch. 1, tit. C, introductory note. Disciplinary proceedings used to be more heavily controlled by bar associations, but partly in response to the ABA’s Model Rules for Lawyer Disciplinary Enforcement, these proceedings have become more independent of bar association influence. See Wolfram, supra n. 20, at 206.

\textsuperscript{89} ABA, Center for Prof’l Responsibility, Model Rules for Lawyer Disciplinary Enforcement (2002).

\textsuperscript{90} See ABA, Center for Prof’l Responsibility, Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century xv (1992).

\textsuperscript{91} ABA, Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century (2018), https://perma.cc/KE5H-U8PS.

\textsuperscript{92} Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 Geo. J. Legal Ethics 1, 18 & n. 115 (2007).
had been reprimanded four times by the bar. He was held in contempt three times for not showing up in court. On two of those occasions, the courts imposed suspended jail sentences. In addition, a court found that he had defaulted on four appeals. Robinson also was found to have lied to two clients. In one case he told a client that his case was still pending even though it had been dismissed because of Robinson’s negligence. He falsely told the other client that the Virginia Supreme Court had dismissed his appeal.\textsuperscript{93} Despite this parade of misconduct, a court considering the state bar’s complaint against him suspended his law license for only 90 days.\textsuperscript{94} The \textit{Washington Post} reported that “[o]ne of the judges commented in open court that he’d played golf with Mr. Robinson. Another said that ‘if I was in trouble, I wouldn’t hesitate to hire Mr. Robinson if I could just get him to court on time.’”\textsuperscript{95} The Virginia Supreme Court affirmed the light sanction\textsuperscript{96} over the objection of the state bar, which wanted to disbar Robinson.\textsuperscript{97}

Professor Levin adds that “horror stories abound about clients who were defrauded by their lawyers while those same lawyers were under investigation by disciplinary counsel in other discipline cases.”\textsuperscript{98} In addition, she writes,

the sanctions imposed on lawyers are often light and inconsistent. . . . [P]rivate sanctions — the lightest form of discipline — are imposed almost twice as often as any other type of sanction. Lawyers often receive several private admonitions before they receive any public discipline. If a lawyer is suspended from practice, the period of suspension is frequently so brief that it does not interrupt a lawyer’s practice. In many

\textsuperscript{93.} Wash. Post, Editorial, A Lawyer’s Tale, Aug. 6, 2004 (reporting that Robinson had defaulted on eight other appeals and asking, “What exactly does it take to get disbarred in Virginia? Mr. Robinson is an extreme example, but as our study has shown, he is far from the state’s only defense lawyer who frequently tosses a client’s rights away.”).


\textsuperscript{95.} Wash. Post, Editorial, Another Slap on the Wrist, May 11, 2005.

\textsuperscript{96.} Va. State Bar, Disciplinary Actions Taken by the Virginia State Bar (Jan.-June 2005), http://www.vsb.org/profguides/actions_jan05-jun05.html (noting that the Supreme Court of Virginia had affirmed the suspension on Oct. 6, 2005).

\textsuperscript{97.} Wash. Post, supra n. 93 (reporting e-mail to the Post from Bar Counsel Barbara Williams). After his suspension, Robinson returned to the practice of law but died from cancer in 2006. For a laudatory obituary that appeared in a publication of the Lyndon LaRouche organization, which Robinson supported, see Stuart Rosenblatt, In Memory of a Fighter: William P. Robinson, 34 Exec. Intelligence Rev. 39 (Jan. 19, 2007).

\textsuperscript{98.} Levin, supra n. 92, at 8.
of these cases, sanctions fail to achieve the primary goal of lawyer discipline, which is protection of the public.\textsuperscript{99}

There are other problems too:

- Although serious misconduct occurs in large firms and small firms, in government agencies and in corporate general counsel’s offices, most of the people disciplined are sole practitioners. For example, the 2016 report of the Illinois Attorney Registration and Disciplinary Commission stated that 83 percent of the 107 lawyers sanctioned were sole practitioners or practiced in a firm of 2-10 lawyers at the time of the misconduct.\textsuperscript{100}
- Formal discipline is disproportionately imposed on members of minority groups.\textsuperscript{101}
- Most disciplinary complaints come from clients. Much lawyer misconduct is unknown to clients, so the types of misconduct that lead to discipline is skewed toward the problems that clients discover. (See discussion of reporting misconduct below.)\textsuperscript{102}
- In many states, the lawyer disciplinary systems remain underfunded and overwhelmed. In Kansas, the average number of cases per staff attorney in the disciplinary system is only 26, but in Pennsylvania it is 217, and in Alabama it is 364.\textsuperscript{103}
- In 2015, the California state auditor reported that the lawyer disciplinary system was so badly backlogged with complaints against lawyers that it settled cases inappropriately. It “may have allowed some attorneys whom it otherwise might have disciplined more severely — or even disbarred — to continue practicing law.”\textsuperscript{104}

\textsuperscript{99} Levin, supra n. 85, at 9.  
\textsuperscript{101} Manson, supra n. 100 (reporting that the Illinois disciplinary data showed that “[b]lack lawyers were disciplined in disproportionately larger numbers than their white counterparts.” Eleven percent of the lawyers disciplined were black, but only about 4.9 percent of the lawyers who are admitted in Illinois are black).  
\textsuperscript{103} ABA, Center for Prof’l Responsibility, 2016 Survey on Lawyer Discipline Systems, chart V (Apr. 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2016sold_results.authcheckdam.pdf. Even jurisdictions with low caseloads for disciplinary counsel often take very long to process cases. In Nebraska, for example, each lawyer has only 30 cases, but in 2015 it took an average of 240 days before charges were filed against a lawyer, and another 320 to 365 days before a sanction was imposed. ABA, Center for Prof’l Responsibility, 2015 Survey on Lawyer Discipline Systems, chart VI (Apr. 2017), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2015_sold_results.authcheckdam.pdf.  
C. The disciplinary system

• The purposes of a disciplinary system have not been analyzed with care in most jurisdictions. It is often said that a disciplinary system exists to “protect the public,” but this shorthand conceals tensions among punitive, deterrent, and rehabilitative goals.105

Are some states making significant improvements in their disciplinary systems?

Yes. Many states are engaged in an ongoing process of review and implementation of improvements in their disciplinary systems.

FOR EXAMPLE:

• Although the California disciplinary system has shortcomings,106 the state bar does post to the Internet the names of attorneys who have been charged with violations of the state’s ethics rules, even if those charges have not yet been adjudicated.107 Attorneys who opposed public posting of pending charges argued that disciplinary authorities routinely charged lawyers not only with violating specific rules but also with being guilty of “moral turpitude,” that litigation opponents of lawyers thus charged would quote that charge routinely in court papers, and that innocent lawyers charged with moral turpitude would lose clients even though they might ultimately be vindicated.108

• The Arizona bar has a well-developed diversion program that considers client complaints involving neglect, lack of diligence, inadequate communication by lawyers to their clients, and problems of poor law office management; it trains lawyers to improve their skills so they can prevent similar incidents.109

105. Fred C. Zacharias, The Purpose of Lawyer Discipline, 45 Wm. & Mary L. Rev. 675 (2003) (identifying nine possible purposes for lawyer discipline and the conflicts among them, and noting that disciplinary agencies tend to structure their priorities haphazardly).

106. See Cal. State Auditor, supra n. 104.


If the disciplinary agencies tend to underenforce the rules, does that mean that lawyers need not worry about compliance with the ethics rules?

No. Lawyers must take seriously their duty to comply with ethics rules for a number of reasons. First, although disciplinary agencies do not prosecute every violation, they do prosecute a large number of cases every year. Second, even being accused of unethical conduct is professionally damaging. Third, noncompliance with the ethics code can be a basis for legal malpractice liability if the violation causes harm to a client or a third party. Fourth, noncompliance with the ethics code could have employment consequences; a violation might lead an employer to fire a lawyer or to decline to hire a candidate. In most circumstances, then, lawyers should comply with ethics rules and other law regardless of their chances of being caught or punished for a violation.

Disciplinary agencies have been on a steady path of expansion and professionalization over the last few decades, and this trend is likely to continue. So even though there are lots of problems in this sector of lawyer regulation, particularly in a few states, every lawyer should be concerned with ethical compliance.

Is there a statute of limitations on disciplinary violations?

No, at least in states that have adopted the ABA’s Model Rules for Lawyer Disciplinary Enforcement. Rule 32 provides that “proceedings under these rules shall be exempt from all statutes of limitations.”

1. Grounds for discipline

What kinds of professional conduct can result in discipline?

Lawyers are disciplined for a wide variety of conduct in and out of practice. Among the most common conduct that leads to discipline are misappropriating client funds, commingling law firm and client funds, missing court filing deadlines, failing to respond to client communications, committing mail fraud and tax evasion, and neglecting client cases (often because of substance abuse problems).

**FOR EXAMPLE:** In Illinois in 2016, the most common problems that led to charges against a lawyer being docketed were neglect of client cases (2,183 cases); failure to communicate with a client, including failure to communicate the basis for a fee (859 cases); excessive or improper...
fees (833); fraudulent or deceptive activity (595 cases); and improper management of client or third party funds, including commingling and conversion (454 cases).\footnote{111}

Lawyers can be disciplined for abusing clients or employees.

\textbf{FOR EXAMPLE:} George Goldsborough Jr., a Maryland lawyer, was suspended from practice after he was found to have spanked his secretaries and his clients at the office, sometimes putting them over his knees and baring their bottoms.\footnote{112}

\textbf{FOR EXAMPLE:} Milo J. Altschuler, a Connecticut lawyer, received only a reprimand from the lawyer disciplinary agency in a case involving an alleged spanking of a client in a conference room at the courthouse, but he was criminally charged and received a suspended sentence and three years' probation based on this incident. Altschuler claimed that he threatened to spank his clients as part of his preparing them to testify, to make them “more afraid of him than they would be of the prosecutor.”\footnote{113}

\textbf{FOR EXAMPLE:} In Ohio, Michael Fine was disbarred for hypnotizing female clients and having sex with them while they were hypnotized.\footnote{114}

While the most common bases for imposition of disciplinary sanctions is criminal or fraudulent activity or inattention to clients, some lawyers are punished for other types of conduct.

\textbf{FOR EXAMPLE:} In Florida, Sean Conway was fined and reprimanded for blogging that a judge who had ruled against him was an “evil, unfair witch.”\footnote{115}

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\begin{itemize}
  \item \footnote{111}{Att’y Registration & Discipline Comm’n, supra n. 100, chart 9.}
  \item \footnote{112}{Att’y Grievance Comm’n of Md. v. Goldsborough, 624 A.2d 503 (Md. 1993). Some disciplinary cases, like this one, involve conduct that violates the ethics code and other law. Other cases involve conduct that violates only the ethics code. See Sneed v. Bd. of Prof’l Responsibility, 37 S.W.3d 886 (Tenn. 2000) (lawyer suspended for negligently failing to follow up on clients’ cases).}
  \item \footnote{113}{Scott Brede, Spanking Client Not Legitimate Trial Prep Tactic, Conn. L. Trib., July 15, 2002. A court later held that his $250,000 settlement payment to the woman was not covered by his malpractice policy. Id. Oddly enough, these are not the only two cases in which lawyers have gotten in trouble for spanking their clients. See, e.g., Martha Neil, Accused of Spanking Client for Saying “Uh Huh,” Suspended Lawyer Faces Criminal Case, ABA J., May 1, 2013; Associated Press, Tenn. Lawyer Pleads Guilty to Spanking Client, July 13, 1990.}
  \item \footnote{114}{Debra Cassens Weiss, Disbarred lawyer Is Sentenced for Hypnotizing Clients for Sexual Gratification, ABA J., Nov. 14, 2016.}
  \item \footnote{115}{Fla. Bar v. Conway, 2008 WL 4748577 (Fla. Oct. 29, 2008); John Schwartz, A Legal Battle, Online Attitude vs. Rules of the Bar, N.Y. Times, Sept. 12, 2009 (reporting that Conway was angry because the judge gave criminal defense lawyers only one week to prepare for trial to pressure them to ask for a postponement, thereby waiving their clients’ rights to have felony cases tried within 175 days).}
\end{itemize}
Perhaps lawyers should have a First Amendment right to criticize judges, but not everyone thinks so. Attorney Michael Downey comments that “[w]hen you become an officer of the court, you lose the full ability to criticize the court.”

Can a lawyer be disciplined for advising a client about proposed conduct that may be criminal or fraudulent?

It depends. A lawyer may advise a client who wants to know whether a possible course of action is lawful, but a lawyer may be disciplined if the lawyer guides the client as to how to violate the law or helps the client to engage in conduct that is criminal or fraudulent. Rule 1.2(d) provides that

[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

This rule bars lawyers from assisting a client’s criminal or fraudulent conduct. But what constitutes assistance? The term is not defined in Rule 1.0, the definitions

116. Quoted in Schwartz, supra n. 115.
section of the Model Rules. Comments 9 and 10 after Rule 1.2 explain the rule but do not define “assisting”:

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent.

Rule 1.2 prohibits assisting a client only in conduct that the lawyer “knows” is fraudulent (which seems to exclude a lawyer's negligent and perhaps even reckless conduct). Ordinarily, a client won't tell her lawyer that she wants help in defrauding someone. But a lawyer could be accused of fraud if he prepared a fraudulent document, even if he did not know that some of the information in the document was false. Disciplinary authorities might infer from the circumstances that a lawyer did know that the legal assistance would be used for fraudulent purposes. Also, law other than the ethics rules might require a lawyer to verify the information that the client provides. If a lawyer does not exercise the required level of diligence to discern client fraud, the lawyer might be liable for negligence to those injured by the fraud. In addition, a lawyer could be subject to discipline or criminal charges merely for advising a client to engage in criminal or fraudulent action, or for advising the client how to evade detection or prosecution.

The Restatement offers examples of “assisting fraud.” In one case, a lawyer was charged with obstruction of justice because he had advised a client to destroy documents. In a second case, a lawyer was disciplined for advising a client to conceal the identity of the owners of a business when applying for a liquor

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117. Rule 1.0(f). According to the Restatement, “a lawyer's intent to facilitate or encourage wrongful action may be inferred if in the circumstances it should have been apparent to the lawyer that the client would employ the assistance to further the client's wrongful conduct, and the lawyer nonetheless provided the assistance.” Restatement § 94, comment c.
license. In the third example, a lawyer was disciplined for advising his client to leave the state to avoid prosecution.\footnote{118. Restatement § 94, comment c, reporter’s note. Just as you could be charged with a tort or a crime for conduct that would not be assisting a fraud under the ethical rules, you could be subject to ethics discipline even if your conduct is not tortious or criminal. For example, civil liability for fraud requires a showing of reliance on the fraud and damage resulting from the reliance. Neither reliance nor damages need be shown in a disciplinary proceeding. Id. § 94, comment c.}

A good rule of thumb is that a lawyer should be wary if a client’s past or contemplated conduct appears to involve an intentional or knowing misrepresentation to another person. Legal consequences are more likely if the false statement concerns something important, if it is made to induce another person to act, if the other person acts in reliance on the statement, and if harm results.

Another term in Rule 1.2(d) that warrants interpretation is the word “fraudulent.” What is fraud? Rule 1.0(d) offers a somewhat circular definition of the term: “‘Fraud’ or ‘fraudulent’ denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.” The “purpose to deceive” prong of this test of fraud is easy enough to understand, but “fraudulent under the substantive or procedural law of the applicable jurisdiction” raises more questions than it answers. Fraud has somewhat different meanings in tort law, contract law, criminal law, and procedural law, not to mention variations from state to state. Case law on fraud may be fact-specific and therefore of relatively little help in a new situation. Generally, however, fraud involves an intentional misrepresentation of a material fact — a lie or a purposeful deception.

**Under what circumstances might a lawyer commit or assist a fraud by failing to state a fact (omission) or by telling a half-truth?**

Omissions and half-truths can constitute fraud. In many legal contexts, such as the sale of securities, material omissions and half-truths are regarded as fraudulent. Under the Model Rules, a lawyer’s omission may be fraudulent if the lawyer intended to deceive another person. For example, Rule 4.1(b) bars a lawyer from knowingly failing to disclose a nonconfidential material fact when disclosure is necessary to avoid assisting a client’s fraudulent act. Comment 1 after Rule 4.1 explains that “[m]isrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.”\footnote{119. The Restatement also takes the view that there is not much difference between false statements and deliberate deception by half-truths and omissions. It explains that “inaction (through nondisclosure) as well as action may constitute fraud under applicable law.” Restatement § 67, comment d.}

**Would a lawyer assist a fraud or crime in violation of Rule 1.2(d) if he adheres to a state law that is at odds with a federal one?**

After Colorado voters approved a referendum legalizing recreational marijuana, the state supreme court adopted a new comment to Rule 1.2, which concludes...
that it is not a violation for a Colorado lawyer to provide legal advice to businesses that sell recreational marijuana, but the lawyer must advise those clients about the federal criminal law. The federal district court in Colorado ordinarily adopts the rules adopted by the state supreme court, but in this instance, the federal court decided to opt out of adopting this comment. The federal court’s version of the comment states that a lawyer may advise a client about the applicable state and federal law but stops short of permitting a lawyer to assist a client in conduct that is permitted by state law but barred by federal law. This guidance would apply to Colorado lawyers who have been admitted to practice in the local federal district court.

PROBLEM 2-1
THE DYING MOTHER

This problem is based on events that occurred in a mid-Atlantic state in the first decade of the twenty-first century.

You are an experienced estates lawyer who is preparing an estate plan for a married couple, Nancy and Edgar Binder. Nancy mentions that her aging mother, Gloria Sanza, lacks an estate plan. You invite Gloria to contact you, but despite her daughter’s suggestion, she doesn’t follow up. Several years later, Nancy contacts you again to discuss her mother’s estate plan.

You have a telephone conversation with Gloria and her daughter. During this conversation, you learn that Gloria is ill; that her only asset is a $250,000 house, which she has willed to her four adult children; and that she wants to minimize the fees and expenses that her children will incur on her death. Gloria’s existing will would need to go through probate after her death, which would cost the children $10,000 in legal fees. You explain that these fees can be avoided if Gloria creates a new will assigning the ownership of the house to a living trust. This would give Gloria sole control of the house during her lifetime. The children would be beneficiaries of the trust. After Gloria’s death, the house would be sold and the proceeds divided evenly among the four children. The family would

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120. Colo. Rules of Prof’l Conduct R. 1.2, Comment 14. New Jersey amended its Rule 1.2(d) to provide that a lawyer could advise clients about the legality of using medical marijuana under New Jersey law and to “assist [the client] in conduct that the lawyers reasonably believes is authorized by those laws” but must also advise the client about “related federal law and policy.” N.J. R. Prof’l Conduct 1.2(d).

avoid the fees and expenses of a probate proceeding but would
achieve the same result, to divide the mother’s property among
her children. Gloria did not ask you to prepare the documents — it
seemed she wanted to think about it.

Two months pass. Gloria’s daughter Nancy calls you to say that
her mother is dying of cancer. She asks you to meet her and her
siblings at the hospital where Gloria is a patient. Nancy says that
her mother wants to go forward with the estate plan that you had
discussed previously. Based on this request, you prepare the docu-
ments necessary to effectuate this plan.

You go to the hospital to visit Gloria, taking the documents
with you. When you arrive, you find that Gloria’s condition has
worsened. She drifts in and out of semi-consciousness, but she is
in no condition to review estate planning documents. It is clear
that she is nearing the end; the doctor thinks she will not return
to full consciousness. All four children are with her at the hospital.
They are distraught at their mother’s condition and crying openly.
Nevertheless, you explain to them why you are there and how the
estate plan you have drawn up would work.

Gloria’s children ask whether they can sign the documents on
their mother’s behalf. They point out that the family already has
limited resources and very heavy medical expenses as a result of
Gloria’s hospitalization. They say that they cannot afford to throw
away $10,000 for nothing. You tell them that legally they cannot do
so. Some of the documents need to be witnessed and certified. You
also explain that if they are not all of one mind about the desirability
of this estate plan, it would be a bad idea to sign their mother’s
name on the documents because if any one of them was to object,
the documents would not be honored. The children insist that they
are in agreement. They plead with you to let one of them sign her
mother’s name to the new will and trust; to have you certify that the
signature was their mother’s; and, when you return to your office,
to have two of your employees sign the will as witnesses to their
mother’s signature.

You are moved by seeing this family in such distress. Will you
do as the children request? Why or why not?

Can a lawyer be disciplined for conduct that has nothing to do with the
practice of law?

Yes. A lawyer may be disciplined for violation of the applicable ethics code
whether or not the violation occurs in the course of law practice. Most