

1

Regulation of Lawyers

This chapter provides basic background on the regulation of lawyers. Paralegals, who work under the supervision of lawyers, need to understand the rules governing lawyer conduct and how those rules affect them. Chapter 1 covers:

- the inherent power of the courts over the practice of law
- the organized bar's participation in lawyer regulation
- the role of the legislature and statutes in governing the conduct of lawyers
- the American Bar Association and its influence on legal ethics
- sanctions for lawyer misconduct

A. State Courts and Bar Associations

Like other professions that affect the public interest, the legal profession is subject to regulation by the states. Unlike other regulated professions, however, regulation of the legal profession falls mainly to the judiciary rather than the legislature. Because of the function of lawyers in the court system and the separation of powers, the judiciary has historically asserted inherent authority over lawyers.

The highest court in each state and in the District of Columbia is responsible for making rules related to law practice admission and to lawyers' ethical conduct. The codes of ethical conduct promulgated by the states' highest courts include mechanisms for disciplining lawyers who violate the codes. Most state legislatures have also passed statutes that supplement the ethical rules adopted by the courts. Some states consider legislative authority over the practice of law to be concurrent with judicial authority; others consider legislative action to be only in aid of judicial action. A few state supreme courts have allowed the legislature to assert substantial authority over the practice of law. For example, the New York state legislature has the power to regulate the legal profession and has vested the power to impose sanctions on lawyers with the intermediate courts (which are called supreme courts in New York although they are not the highest state courts).

Sometimes the judiciary and the legislature have conflicting ideas about matters affecting the practice of law, and a court will be called on to strike down legislation that attempts to regulate some aspect of the legal profession. Several state supreme courts (including Arizona, Colorado, Idaho, and Washington) have held unconstitutional legislation that would have authorized nonlawyers to engage in conduct that the court considered to be the practice of law. (See the *Bennion* and *UPL Committee* cases at the end of this chapter for examples.) Local court rules also govern attorneys' conduct in matters before the courts.

In practice, many state supreme courts rely heavily on state bar associations to carry out their responsibilities for regulating the practice of law. These courts have delegated authority to the bar to alleviate the burden of handling ethical matters in addition to their caseload.

Some state bar associations are *integrated*, which means that membership is compulsory. In a state with an integrated bar, annual dues to renew the practitioner's law license carry automatic membership in the state bar. Some states have purely voluntary state bar associations; funds to operate the admissions and disciplinary functions in the state are derived from annual licensing or registration fees. Integrated bars generally play a more active role in the admissions and disciplinary functions of the court and in other matters relating to the legal profession. In addition to state bar associations, hundreds of "specialty" bar associations have been established in the last 15 years as a result of the trend away

Integrated bar

A bar association in which the mandatory and voluntary aspects of bar activities are combined, and membership is required

from “general” law practice to practice that is specialized in a few areas of law.

Lawyer disciplinary systems have expanded and reformed in the past 20 years to respond to the growth in complaints about lawyers that has accompanied the growth of the legal profession. Mediation and arbitration are now widely used in disputes between lawyers and clients. Integrated bars and disciplinary authorities also offer or require ethics training for lawyers, conduct random audits of client trust accounts, and some have adopted ethics rules that provide for firm-wide responsibility for ethical breaches. Programs for lawyers with substance abuse problems have expanded into all jurisdictions as it has become clear that unethical conduct is often connected to substance abuse. Disciplinary proceedings and records have been made more transparent and open to the public from their initiation. The courts and the bar understand that to retain control over the legal profession through self-regulation, lawyers must be accountable to the public.

Concerns about the role of lawyers in corporate scandals have resulted in the federal government’s adoption of new rules governing the conduct of lawyers in advising corporations in matters relating to securities law. The Sarbanes-Oxley Act of 2002 (15 U.S.C. §7245) led to the Securities and Exchange Commission’s adoption of rules that require lawyers to report suspected violations of securities laws up the ladder within the corporate governance structure. Not all attempts of the federal government to regulate lawyers have been successful, however. Some federal cases involve limited application of consumer protection laws to lawyers, in recognition of two important principles: that lawyers are regulated by the states and that lawyers are regulated by the courts. (See *American Bar Ass’n v. F.T.C.*, 430 F.3d 457 (D.C. Cir. 2005).) In 2010, federal legislation designed to reform financial markets exempted lawyers from the authority of a newly created enforcement agency, recognizing that lawyers are subject to discipline by states.

B. American Bar Association

All states but one (California) have patterned their codes of ethics on the models of the American Bar Association (ABA). The ABA is a national voluntary professional association of lawyers, which currently has more than 400,000 members, nearly half of the lawyers in the country. Over 100 years old, the ABA is the chief national professional association for lawyers, asserting a strong voice in matters affecting revision and development of the law, the judiciary, and the administration of justice. Among its many contributions to the profession is the promulgation of model codes of ethics.

The ABA first published the **Canons of Professional Ethics** in 1908. These Canons were patterned after the first code of ethics for lawyers adopted in 1887 by the Alabama State Bar Association. Prior to the adoption of state codes, lawyer conduct was governed largely by common law and some statutes. The 1908 Canons consisted of 32 statements of very general principles about attorney conduct, mainly conduct in the courtroom. Many states adopted these ABA Canons through court rule or statute.

In 1964, the ABA began work on a new set of ethical guidelines at the request of its then-president, Lewis F. Powell, who later served on the U.S. Supreme Court. This new code, called the **Model Code of Professional Responsibility**, was published in 1969. It was designed as a prototype for states to use in developing their own codes. The Model Code, which was adopted at least in part by every state, contained:

- **Canons**, or statements of general concepts;
- **Disciplinary Rules**, or mandatory rule statements; and
- **Ethical Considerations**, or interpretive comments that are aspirational or advisory.

Although the Model Code was quite well received, other events in the legal field led to a call for a revised code within a very short time. Watergate was one of the most pivotal of these events. The misconduct of lawyers in the Watergate scandal damaged the public image of lawyers. Also during this period the U.S. Supreme Court decided several cases relating to the legal profession that struck down rules prohibiting lawyer advertising. Finally, changes in law practice brought about by economic developments and the proliferation of new laws resulted in more and different kinds of ethical problems that were not addressed effectively in the Model Code.

In 1977, the ABA established a new body to revisit the Model Code. The Commission on the Evaluation of Professional Standards, which came to be known as the Kutak Commission after its chair, developed the Model Rules of Professional Conduct, which were adopted by the ABA in 1983. The Model Rules are formatted differently than the Model Code; the difference between mandatory and aspirational language was eliminated and the rules are written as directives and followed by interpretive comments.

Specific amendments have been made many times to the ABA Model Rules since they were adopted, with a major revision completed in 2002. In 2009, the ABA created the Ethics 20/20 Commission, which is examining the rules in view of globalization and the rapidly changing environment for practicing law. Among the topics for review are law firm structures and models of ownership and the continued efficacy of state-by-state regulation.

C. Statutes and Other Forms of Regulation

Although the state codes of ethics contain most of the rules with which we are concerned in this text, attorney conduct is also governed by **statutes**. For example, some states have statutes that prohibit attorneys from engaging in certain conduct in their professional capacity as lawyers and provide for criminal and civil penalties. As we will see in Chapter 3, several states have laws that make the unauthorized practice of law a crime, usually a misdemeanor. Federal securities law, referred to earlier in Section A, is another example of how legislatures govern the conduct of lawyers.

Usually not binding on attorneys but often consulted when ethical issues arise are **ethics opinions** of state and local bar associations and the ABA. Bar associations have ethics committees that consider ethical dilemmas posed to them by attorney-members. The committees write opinions that are published in bar journals and on their Web sites to give additional guidance to lawyers facing similar dilemmas. Some state and ABA advisory opinions, especially those that involve paralegals, are cited in this text.

Ethics opinions

Written opinions issued by a bar association interpreting relevant ethical precedents and applying them to an ethical dilemma

D. Sanctions and Remedies

Three main formal sanctions can be imposed on lawyers for ethical misconduct by the state's highest court or other disciplinary body. The most severe sanction is **disbarment**, in which a lawyer's license to practice law is revoked. Disbarment is only imposed for the most egregious violations or when there is a long-term pattern of serious unethical conduct. Although disbarment is in theory permanent, many admitting authorities allow for re-admission of a disbarred lawyer after some period of time if the lawyer demonstrates complete rehabilitation.

The second most severe sanction is **suspension**, in which the attorney is deprived of the right to practice law for a specified period of time. Some disciplinary authorities also exercise the option of imposing **probation**, under which the disciplined attorney may continue to practice on the condition that certain requirements are met, such as restitution to injured clients, passing an ethics examination, attending ethics "school," or participating in counseling. The suspension is stayed, but the attorney remains on probation for some period during which the disciplinary body may reinstitute the suspension if further ethical violations come to light. Probation may also be imposed following a suspension to allow the disciplinary body ongoing close monitoring of the lawyer.

Disbarment

Rescinding of a lawyer's license to practice

Suspension

Attorney is deprived of the right to practice law for a specified period of time

Probation

Attorney can practice, but certain requirements must be met

Reprimand or Reproof

Attorney is warned that ethical violations have occurred and further violations will warrant a more severe sanction

The mildest sanction is a **reprimand**, sometimes called a **reproof**. This represents a slap on the hand, a warning that the conduct will not be tolerated. Reprimands may be public — placed in the public record — or private — confidentially communicated in writing to the attorney. In either case, the reprimand becomes part of the attorney’s record at the court or the state bar. It is considered in determining the appropriate sanction if other violations occur.

In deciding the appropriate sanction, the disciplinary body considers the nature and severity of the offense and whether the attorney has a record of prior misconduct. Other **aggravating and mitigating factors** may be taken into account, such as:

- the extent to which the attorney cooperated in the investigation and appreciates the seriousness of the matter
- the attorney’s reputation and contributions to the community through public service and professional activities
- the circumstances surrounding the offense and the extent to which these make the attorney more or less culpable for the conduct
- whether the offense was a one-time incident because of those circumstances or is likely to be repeated
- the degree to which the lawyer is remorseful and willing to remedy the problems that led to the discipline

In addition to direct discipline by the court or state bar, an attorney may be **prosecuted criminally** for violations of statutes governing attorney conduct or conduct that may relate to an attorney’s practice, such as laws prohibiting solicitation of clients in hospitals and jails and laws limiting the methods that can be used to collect debts. Civil **legal malpractice** lawsuits brought by former clients also constitute a major incentive for conforming to ethical requirements and standards of practice. (See Chapter 8 on Competence for more on legal malpractice.) Judges exercise **contempt power** to sanction lawyers appearing before them who engage in improper conduct that affects the administration of justice and the smooth functioning of the courts. (See Chapter 9 on Special Issues in Advocacy.) The courts also play a major role in deciding on matters in conflicts of interest because they rule on **motions to disqualify counsel**, usually brought by the opposing counsel, who claims that a lawyer or law firm has a conflict of interest that jeopardizes client confidentiality. (See Chapter 5 on Conflicts of Interest.)

Legal malpractice

Improper conduct in the performance of duties by a legal professional, either intentionally or through negligence

Contempt

Improper conduct that impairs the administration of the courts or shows disrespect for the dignity or authority of the court

Disqualification

A court order that a lawyer or law firm may not continue to represent a client in a litigated matter before it

REVIEW QUESTIONS

1. What branch of government is primarily responsible for regulating attorney conduct? What level of government? State or federal?
2. What role do state bar associations play in governing lawyer conduct?