

# Professional Responsibility

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## Law as a Regulated Profession

### 1 The Legal Profession

#### 1.1 Defining Professions

*[P]rofessions are exclusive occupational groups applying somewhat abstract knowledge to particular cases.*

Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* (1988:8)

Professions are organized around jurisdictions, i.e. areas of work within which professions assert the exclusive right to practice

*In claiming jurisdiction, a profession asks society to recognize its cognitive structure through exclusive rights; jurisdiction has not only a culture, but also a social structure. These claimed rights may include absolute monopoly of practice and of public payments, rights of self-discipline and of unconstrained employment, control of professional training, of recruitment, and of licensing, to mention only a few.*

Abbott (1988:59)

Jurisdictional boundaries and claims are subject to contest by other (established or aspiring) professions.

#### 1.2 Professional Culture

##### 1.2.1 Knowledge-Based Practice

Abbott (1988:8) distinguishes two “ways occupational groups control knowledge and skill”:

*One emphasizes technique per se, and occupations using it are commonly called crafts. To control such an occupation, a group directly controls its technique. The other form of control involves abstract knowledge. Here, practical skill grows out of an abstract system of knowledge, and control of the occupation lies in control of the abstractions that generate the practical techniques. The techniques themselves may in fact be delegated to other workers. For me this characteristic of abstraction is the one that best identifies the professions.*

“Diagnosis, treatment, inference, and academic work provide the cultural machinery of jurisdiction.” (Abbott, 1988:59)

Formal educational requirements are common but not universal.

##### 1.2.2 Orientation Toward Work

*Today the term “professional” refers more to a prescribed attitude toward any work than the status of some work. To act like a professional—to be professional in one’s work—calls for subjective investment in and identification with work, but also a kind of affective distancing from it. A professional invests his or her person in the job but does not “take it personally” when dealing with difficult co-workers, clients, patients, students, passengers, or customers. As an ideal of worker subjectivity, this requires not just the performance of a role, but a deeper commitment of the self, an immersion in and identification not just with work, but with work discipline. The popular injunction to “be professional,” to cultivate a professional attitude, style, and persona, serves as one way that the autonomy, especially of immaterial workers, can be managerially constituted up and down the post-Fordist labor hierarchy.*

Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, & Postwork Imaginaries* (2011:74)

## 1.3 Professional Structure

*[T]he social organization of professions affects the kinds of jurisdictional claims they make and their success in achieving those claims.*

Abbott (1988:82)

The social organization of professions includes:

- Groups
  - Professional associations
- Controls
  - Schools, Examinations, Licenses, Codes
- Worksites
  - Firms
  - Professional-cultural bodies (“not involved in practice, but only in the purely professional work of maintaining and furthering professional knowledge.” Abbott, 1988:80)

## 2 Regulation of Lawyers

### 2.1 Relevant Institutions

#### American Bar Association

- Model Rules of Professional Conduct
- Standards for Lawyer Discipline

#### State Bar

- “State Bar”: licensing and disciplinary authority
- “State Bar Association”: professional association
  - membership is voluntary, except in an “unit” or “integrated” bar, e.g. California
  - NC is an “integrated bar” (State Bar of North Carolina). But there is also a voluntary association (NCBA)

#### Courts

- Inherent authority to regulate proceedings (*Creasy*)

### 2.2 Sources of Law

#### 2.2.1 Disciplinary Rules

Disciplinary rules are part of the profession’s self-regulatory apparatus, ideological self-definition, and boundary maintenance.

Most states have adopted a version of the ABA Model Rules of Professional Conduct

State rules are what actually govern

- State rules may vary from Model Rules in particular respects
  - *Riehlman* (interpreting and applying Louisiana Rule 8.3(a) on duty to report misconduct by another lawyer)

Normative foundation of the ABA Model Rules:

- “An attorney should be one whose record of conduct justifies the trust of clients, adversaries, courts, and others with respect to the professional duties owed to them.” *Lane*, 544 NW2d at 374 (quoting Nebraska RPC Rule 3)

- “[T]he efficient and orderly administration of justice cannot be successfully carried on if we allow attorneys to engage in unwarranted attacks on the court [or] opposing counsel.... Such tactics seriously lower the public respect for ... the Bar.” *Lane*, 544 NW2d at 375
- “An attorney who exhibits a lack of civility, good manners and common courtesy ... tarnishes the ... image of ... the bar ....” *Lane*, 544 NW2d at 375
- “Attorneys who routinely exhibit abusive, disruptive, hostile, intemperate, intimidating, irresponsible, threatening, or turbulent behavior toward others involved in the legal system are not worthy of such trust and confidence.” *Lane*, 544 NW2d at 375
- “Belief unrelated to reason is a hallmark of fanaticism, zealotry, or paranoia rather than reasoned advocacy. The practice of law requires the ability to discriminate between fact and faith, evidence and imagination, reality and hallucination.” *Lane*, 544 NW2d at 375

Earlier versions of ABA standards

- Canons of Legal Ethics (1908)
- Model Code of Professional Responsibility (1970)

The Canons reflected and embodied the values and culture of elites (predominantly male, white, Protestant) who dominated the legal profession at the time.

- Effort to maintain professional boundaries in the face of entry by those from non-elite class, race, and ethnic backgrounds
- Bordertown (1935)

Despite the more technocratic framing of the Model Rules, they continue to embody and reproduce elite values and culture.

- Influence of class, race, gender, and other social positions on interpretation and application of the rules. See *Lane*, 544 N.W. 2d 367 (1996)

## 2.2.2 Common Law & Statutes

### Common Law

- Contract
- Torts
- Agency & Fiduciary Duties

### Statutes

- e.g., Sarbanes-Oxley
- See *Milavetz* (federal statute regulating “debt relief agency” applies to lawyers providing “bankruptcy assistance”)

## 2.3 Lawyers & the Practice of Law

### Attorney

A person licensed to engage in the practice of law

### Practice of Law

NCGS § 84-2.1

*The phrase “practice law” ... is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion*

*upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts ... shall ... be construed to include the foregoing particular acts, as well as all other acts within the general definition. The phrase "practice law" does not encompass the writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers ....*

### 2.3.1 Unauthorized Practice of Law

#### Rule 5.5

- An attorney is subject to discipline for engaging in the unauthorized practice of law.
  - e.g. appearing in court or otherwise practicing in a jurisdiction where the attorney is not licensed or admitted pro hac vice
- Both the jurisdiction where the unauthorized practice occurred, and the jurisdiction(s) where the attorney is licensed, may impose discipline.

#### State Law

State law (statute or court rule) prohibits the unauthorized practice of law

- e.g. NCGS § 84-4

Applies to lawyers and non-lawyers

- See *Creasy* (holding state court rule against unauthorized practice of law applies to disbarred attorney)
- But see dissent in *Creasy* (questioning whether state court rule against unauthorized practice of law may be enforced against non-lawyers in private arbitration)

Consequences of unauthorized practice

- Disciplinary action
  - Applies to lawyers who practice in a jurisdiction where they are not admitted
    - But non-lawyers are not subject to professional discipline
  - *Creasy* (disbarred attorney who engaged in practice of law held in contempt, ordered to cease & desist from further practice of law, and ordered to pay costs and attorneys' fees incurred by State Bar in seeking enforcement)
- Criminal offense
  - NCGS § 84-8: Class 1 misdemeanor
- Civil liability
  - NCGS § 84-10.1: Any person injured by unauthorized practice may sue for damages, attorneys' fees, and injunctive relief

## 2.4 Entry to the Legal Profession

### Controlled by Legal Profession

Legal Education: ABA accreditation

Attorney Licensing: State Board of Law Examiners

### Admission to Practice

- Bar Exam
- Comity
- Pro Hac Vice

### Character and Fitness

*Lane*

Application for admission denied based on applicants lack of candor in completing application and applicant's hostile, threatening, and disruptive conduct.

*Trester*

Application for reinstatement granted where attorney, suspended following criminal convictions for unauthorized practice of law outside jurisdiction, satisfied conditions of suspension.

*Whitworth*

Application for reinstatement granted where attorney, suspended for noncompliance with MCLE requirements and for incapacity resulting from drug addiction, satisfied conditions of suspension and met heightened character and fitness standard for reinstatement.

## **2.5 Supervision of Other Lawyers**

### **Responsibilities of Supervisory Lawyers**

*Rule 5.1(a)*

All partners in law firm must ensure compliance within firm

*Rule 5.2(b)*

Lawyer with supervisory authority must ensure compliance by subordinate lawyer

*Rule 5.1(c)*

Vicarious responsibility for subordinate lawyer's actions

### **Responsibilities of Subordinate Lawyers**

*Rule 5.2(a)*

Independent duty to abide by rules

*Rule 5.2(b)*

Safe harbor when following supervisor's reasonable interpretation

### **Supervision of Non-Lawyers**

*Rule 5.3(a)*

All partners in law firm must ensure compliance within firm

*Rule 5.3(b)*

Lawyer with supervisory authority must ensure compliance by non-lawyer

*Rule 5.3(c)*

Vicarious responsibility for non-lawyers actions

## **3 Professional Independence**

### **3.1 Fee Sharing**

*Rule 5.4(a)*

Prohibits fee sharing with Non-Lawyers

- Non-lawyers may be paid for services
- But payment may not be contingent on lawyer's fee or case outcome

## 3.2 Multidisciplinary Practice

*Rule 5.4(b)*

No Partnership with non-lawyers

*Rule 5.4(c)*

Non-lawyer may not control law firm or lawyer's practice

*Rule 5.4(d)*

No direct profit-sharing with non-lawyers

- But may have profit sharing plan for non-lawyer employees

## 3.3 Law-Related Services

*Rule 5.7(a)*

Rules apply to law-related services

*Rule 5.7(b)*

Law-Related Services Defined

- *Milavetz*