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Preamble & Scope

Key Concepts



- A lawyer represents clients, is an officer of the legal system, and is a public citizen having special responsibility for the quality of justice.
 - Lawyers have an interest in earning a satisfactory living.
 - Ethical problems often arise when these interests conflict.
 - The rules of professional responsibility provide a framework for resolving these ethical problems, but lawyers still must exercise sensitive professional, legal, and moral judgment beyond the terms of the rules.
 - The violation of a rule of professional responsibility does not in and of itself establish a lawyer's civil liability.
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Introduction



Ask a few lawyers to define their job along with their job's professional responsibilities. You may hear fairly diverse responses because lawyers can perform many roles with varying professional priorities. The public prosecutor, for instance, may identify some very different conceptions of her role and priorities as a lawyer than what the defense lawyers she regularly faces in court would offer. Now consider the corporate lawyer working in a large firm, the family law lawyer practicing as a solo practitioner, the lawyer working as a consultant to a large intellectual property venture, the lawyer serving as a dispute mediator, the legal services lawyer working in a rural community, the transactional lawyer providing *pro bono* litigation services on weekends to a local environmental advocacy organization, or the lawyer working as a law clerk to a federal judge. Lawyers can perform an almost

limitless range of professional roles for individuals, organizations, and communities, and each role may ask something unique from the lawyer professionally.

This diversity in legal practice offers a wide range of career opportunities for lawyers. But this same role diversity can make lawyer ethics more challenging: if your professional role can shift significantly depending on what you actually do as a lawyer, your ethical responsibilities may also seem more like a moving target. Moving targets are not especially well-suited to regulation by a codified body of legal rules like the rules of professional responsibility.

The Preamble to the Rules of Professional Conduct provides an important anchor to the rules by framing a unifying purpose and function of those rules for all lawyers.¹

More specifically, the Preamble articulates a universal job description for lawyers. This job description by no means resolves ethical quandaries for lawyers. Rather, the Preamble helps lawyers to identify the different professional responsibilities they are balancing when resolving a problem under one or more of the rules.

The Scope to the Preamble advises lawyers and law students on how they should read, understand, and apply the rules as a code of ethics. The Scope thus identifies proper modes of interpreting and applying the ethical rules. The Scope further limits the rules in resolving some legal problems, including legal issues outside of pure professional responsibility questions, such as a lawyer's civil liability.

Lawyers and law students thus should study the Preamble and Scope carefully. The Preamble provides valuable insight into the legal profession. Moreover, the Preamble and Scope together offer an important interpretative anchor to lawyers and law students each time they analyze an ethical problem under one or more of the rules.

The Rule

The Preamble and Scope contain no rules enforceable by professional discipline. But, the rules, which are enforceable, are informed and guided by the Preamble and Scope.² The Preamble contains 13 paragraphs identifying all lawyers' core professional responsibilities. The Preamble further indicates how a lawyer properly can balance and prioritize those responsibilities when they conflict. The Scope, by

contrast, explains the purpose, function, and limits of the rules themselves. The Scope adds an additional seven paragraphs to this introductory section.

1. Preamble: A Lawyer's Responsibilities

The Preamble begins by identifying every lawyer's three core roles "as a member of the legal profession": (1) a representative of clients, (2) an officer of the legal system, and (3) a public citizen having a special responsibility for the quality of justice. Lawyers must know these core roles when working through negotiating the rules because almost "all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."³

As a representative of clients, a lawyer performs four functions. First, as an *advisor*, the lawyer "provides the client with an informed understanding of the client's legal rights and obligations and explains their practical limitations."⁴ This function is client-centered for the lawyer, but is also objective in nature: a lawyer must advise the client accurately and completely about legal rights and obligations.

Second, the lawyer is an *advocate* for the client. In this role, the lawyer "zealously asserts the client's position."⁵ This function is the most partisan role a lawyer performs for a client: the role of a zealous advocate. Illustrating this point, one of the most heavily quoted expressions of zealous advocacy reads this way:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is the first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring onto others.⁶

This hyper-partisan expression of loyalty to the client has been questioned and challenged.⁷ But in one form or another, zealous advocacy remains a core feature of a lawyer's representational role.⁸

Third, as a *negotiator*, the lawyer “seeks a result advantageous to the client but consistent with requirements of honest dealings with others.”⁹ This function combines objective and partisan roles for the lawyer: the lawyer negotiates with the goal of advantageous outcomes for the client, but in that process, the lawyer must honor the *requirement* of honest dealings with third parties.

Fourth, the lawyer *evaluates* on behalf of the client. In this role, “the lawyer acts by examining a client’s legal affairs and reporting about them to the client or others.” This function focuses on a more objective role for the lawyer: a lawyer must provide an accurate reporting to the client of the lawyer’s examination of the client’s legal affairs.

In addition to representing clients, a lawyer is also an officer of the legal system. The law empowers the lawyer’s ability to represent clients, so the lawyer is expected to honor the law. Thus, “[a] lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and personal affairs.”¹⁰ A lawyer further should use the law only for legitimate purposes,¹¹ and should demonstrate respect for the legal system and for the persons who serve it.¹² Even when challenging the law or official action, the lawyer has a “duty to uphold legal processes.”¹³

Finally, the Preamble requires lawyers to act as “public citizens” who “should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”¹⁴ Recognizing that

the law is more than a technical trade but a “learned profession,”¹⁵ the Preamble obliges lawyers to serve as stewards of the legal system, for the benefit not just of that system, but for society as a whole. A principal commitment of lawyers in fulfilling this function should be to improve access to justice for persons of limited or no means—either directly through *pro bono legal services*, or indirectly through “civic influence.”¹⁶

This universal job description established by the Preamble fills every lawyer’s professional plate with a broad range of important priorities and responsibilities. It is easy to imagine how these professional responsibilities sometimes could conflict with each other, particularly when a lawyer’s interest in earning money is added to the mix.¹⁷ The Preamble notes that specific rules “often prescribe terms for resolving such conflicts.”¹⁸ But, terms for conflict resolution do not mean cookie-cutter solutions. To the contrary, even under the rules, “many difficult issues of professional discretion can arise.”¹⁹

The Preamble admonishes that when exercising this discretion, a lawyer must exercise “sensitive professional and moral judgment,”²⁰ relying on various principles and sources. The lawyer, for example, must remain faithful to the obligation to protect and pursue a client’s interests zealously. Indeed, as the Preamble acknowledges, the duty of zealous advocacy plays an important role in our adversary system of justice.²¹ Thus, “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”²²

The lawyer’s advocacy, however, must remain within the bounds of the law. In identifying the bounds of the law, the lawyer cannot limit him or herself to the ethical rules in isolation. Other substantive and procedural law may govern ethical issues, such as discovery rules, the law of evidence, or the U.S. Constitution.²³

Beyond positive law, lawyers' ethical discretion is "also guided by personal conscience and the approbation of peers."²⁴ Moreover, the Preamble directs lawyers to "maintain[] a professional, courteous, and civil attitude toward all persons involve in the legal system,"²⁵ and to "strive to attain the highest level of skill."²⁶

All these professional responsibilities may seem uniquely difficult and burdensome. This professional responsibility framework, however, reflects the fact that "[t]he legal profession is largely self-governing."²⁷ The legal profession is believed to depend on this political independence for lawyers properly to pursue their special role "in the preservation of society."²⁸ As a result, rather than being subject to legislative or administrative oversight, the legal profession principally is governed by the courts and members of the bar themselves.²⁹ Yet, as the Preamble observes, only "[t]o the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated."³⁰

To get a sense of how difficult the task sometimes can be to meet all the obligations of a lawyer's professional calling, consider this lawyer's predicament:

Example. Lawyer Larry represented Donna in a personal injury lawsuit brought by Paul. Paul sued Donna for injuries Paul sustained as a passenger in a vehicle accident when Donna was the driver of the vehicle. During settlement negotiations, Paul's doctor examined Paul and determined that Paul's injuries included rib cage and tissue injuries, along with a concussion. Several weeks later, Larry retained a doctor to examine Paul independently. This doctor confirmed the prior doctor's test results, but also detected an aortic aneurysm. According to this doctor, the aneurysm presented "a serious matter as far as Paul's life. This aneurysm may dilate further and rupture which would cause immediate death." This doctor could not determine whether the accident caused the aneurysm, which may have been present for some time. But the accident could have caused the aneurysm, which might not manifest for several weeks after the accident, explaining the first doctor's inability to detect it. Unaware of the

aneurysm, Paul's lawyer agreed to settle for a modest amount of damages. Larry knew that Paul's lawyer likely would increase the settlement offer exponentially if she knew about the aneurysm. Larry also knew from his own doctor that Paul could avoid the risk of death from the aneurysm through surgery if Paul learned of the condition. According to the Preamble to the rules, how should Larry advise Donna regarding the settlement offer?³¹

Analysis. This circumstance presents Donna with the opportunity to capitalize on Paul's lack of knowledge about his own medical condition. This legal decision, however, raises a serious moral question—whether Donna should allow Paul to risk an avoidable death to reduce Donna's liability, and perhaps Larry's own bottom line.

Larry has several options of how to advise Donna about this decision. For instance, Larry simply could advise Donna objectively about the pros and cons of this decision, and leave the choice to Donna. This decision would remove Larry somewhat from whatever decision Donna chose. But this decision would not advocate zealously for Donna's decision, and would not involve particularly candid advice. Nor would this decision by Larry accept real responsibility for the moral dilemma of whether to inform Paul of his medical condition.

In another option, Larry could advise Donna to protect herself from liability by authorizing Larry to settle promptly and withhold the information about Paul's medical condition. This decision certainly would advance Donna's financial interests "at all costs and hazards to other persons."³² But this decision also would accept Paul's avoidable death as a legitimate cost of the client's benefit. This decision may prove too morally questionable for some lawyers— or clients, for that matter—to handle, regardless of how financially beneficial the decision might be for the client and lawyer.

In yet another option, Larry could contact Paul's lawyer independently to inform Paul of his medical condition. This decision might seem morally palatable for many individuals. This decision also might appear more consistent with the duty of honest dealing. Yet, this decision would abandon any loyalty to the client by disclosing confidential information without the client's authorization or concern for the client's interest in how to resolve the matter.

This decision additionally could undermine Larry's own remuneration from the litigation, depending on the nature of his fee with Donna.

As this problem illustrates, the Preamble does not give Larry a firm answer for how to resolve this dilemma. Nor, as you will learn shortly, do the rules definitively solve this problem.³³ But before Larry goes to the rules for guidance, the Preamble lets him think about the competing professional responsibilities at stake, and in the process, helps Larry to frame the issues more clearly for an analysis under the rules.

2. The Scope

The Scope section of the rules supplies a number of important interpretative considerations for working with the rules themselves. The Scope begins by noting that the rules fundamentally “are rules of reason,” and “should be interpreted with reference to the purposes of legal representation and the law itself.”³⁴ Critical to reading the rules as rules of reason, the Scope notes, is whether the particular rule is cast as an imperative, an aspiration, or a discretionary judgment call. The rules use terms like “shall” and “shall not,” for example, to identify imperatives that establish legal obligations.³⁵ “Should,” by contrast, denotes an aspiration: a lawyer's choices are encouraged but not obligatory.³⁶ If a rule instead employs the term “may,” the rule is “permissive and define[s] areas ... in which the lawyer has discretion to exercise professional judgment.”³⁷

This framework demonstrates that the rules are “partly obligatory and disciplinary and partly constitutive and descriptive.”³⁸ Within this framework, the rules “presuppose a larger legal context shaping the lawyer’s role.”³⁹ This legal context includes court rules and statutes creating lawyer responsibilities, such as discovery rules,⁴⁰ as well as substantive and procedural law that regulates lawyer conduct.⁴¹ In addition to this legal context, “moral and ethical considerations ... should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”⁴² The rules thus recognize the inherent limitations of a code of professional ethics, and the rules should be construed in this light—“a framework for the ethical practice of law.”⁴³

Consider how the Scope helps to orient the analysis of this lawyer’s professional responsibility:

Example. Client Cathie filed a bar complaint against Lawyer Sam. Cathie alleged that Sam did not competently handle a real estate transaction for Cathie. To defend against the bar complaint, Sam disclosed confidential information from his representation of Cathie that he judged was reasonably necessary to refute Cathie’s claim of incompetence. This confidential information, once disclosed, compromised Cathie’s position in the real estate matter. Cathie accordingly sued Sam for malpractice, arguing that Sam’s violation of his duty of confidentiality *prima facie* breached his duty of care to Cathie in tort. Does Cathie have a legitimate civil claim against Sam?

Analysis. Sam had an ethical duty to maintain confidentiality with Cathie, even as a former client.⁴⁴ This duty provided that Sam “shall not reveal” confidential information, an ethical imperative. But, as the Scope explains,

even if Sam violated that ethical duty, that violation alone did not create a presumption that Sam violated an actionable duty of care in malpractice. Cathie would need to demonstrate that Sam's disclosure of confidential information breached a recognized civil duty of care.⁴⁵ Sam's conduct under his ethical duty of confidentiality, however, could be admissible as relevant to that duty of care.

Moreover, Sam disclosed confidential information in response to Cathie's bar complaint. The rules include an exception to the duty of confidentiality that permitted Sam to disclose confidential information when reasonably necessary to defend against a bar complaint.⁴⁶ This exception did not *require* Sam to disclose this information, but the exception provided that Sam "may" disclose. The decision whether to disclose thus rested with Sam's discretionary judgment, and "[n]o disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion."⁴⁷ Thus, to the extent that Sam's ethical duty of confidentiality might be relevant to whether Sam breached a civil duty of care to Cathie, so would be the discretion the rules afforded to Sam in deciding whether to disclose in this context.

The Scope also advises on how the Comments apply to the rules. The Comments to each rule play an important interpretative role. The Scope explains this role:

The Comments accompanying each Rule explain and illustrate the meaning and purpose of the Rule. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.⁴⁸

A lawyer therefore cannot be disciplined for violating a Comment to the rules, only for violating a rule itself.⁴⁹ But, the Comments are a critical, interpretative resource for construing the rules.

The Preamble and Scope are easy to overlook. But these sections of the rules are critical resources because they "provide general orientation" to the rules' purpose

and application to specific problems.⁵⁹ Lawyers and law students thus would do well to consult these sections when applying the rules—especially in the many cases where the text of a rule does not provide straightforward resolution of a particular ethical problem.

Quick Summary



The Preamble and Scope provide general orientation to the rules. The Preamble defines a lawyer's three core roles under the rules: (1) the representation of clients, (2) an officer of the legal system, and (3) a public citizen having special responsibility for the quality of justice. Many ethical dilemmas for lawyers arise when these responsibilities conflict with each other or the lawyer's interest in earning a satisfactory living. The Scope provides interpretative guidance to the rules, such as the meaning of obligatory rather than permissive responsibilities, and the role of the Comments to the rules.

Test Your Knowledge



To assess your understanding of the material in this chapter, [click here](#) to take a quiz.

¹ The Delaware Lawyers' Rules of Professional Conduct (DLRPC) have adopted the Preamble and Scope to the Preamble found in the A.B.A. Model Rules of Professional Conduct.

² See DLRPC Scope ¶ 21.

³ DLRPC Preamble ¶ 9; cf. *Lawyer Disciplinary Bd. v. Artimez*, 540 S.E.2d 156, 164 (W. Va. 2000) (referring to Preamble's three-part role of lawyers in addressing lawyer's misconduct).

⁴ DLRPC Preamble ¶ 2.

⁵ *Id.* (emphasis added)

⁶ See Monroe H. Freedman, Henry Lord Brougham and Zeal, 34 HOFSTRA L. REV. 1319, 1322 (2006), quoting 2 Trial of Queen Caroline 2 (1821).

⁷ See e.g., Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 GONZ. L. REV. 327, 333–24 (2006) (noting that changes to language in the Washington Preamble and rules “signal[] a firm rejection in Washington of the traditional ‘zealous advocacy’ model”); Fred C. Zacharias & Bruce Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. W.A. L. REV. 1 (2005) (reframing traditional zealous advocacy, as articulated by Lord Brougham, into a “professional conscience” model of lawyering).

⁸ See Zacharias & Green, *supra* note 7, at 2 (acknowledging zealous advocacy as the “dominant” lawyering model).

⁹ DLRPC Preamble ¶ 2.

¹⁰ DLRPC Preamble ¶ 5.

¹¹ See *id.*

¹² See *id.*

¹³ *Id.*; cf. *In re Karavidas*, 999 N.E.2d 296, 317 (Ill. 2013) (emphasizing that “[t]he preamble ... likens the practice of law to a public trust, and charges lawyers with maintaining public confidence in a system of justice by acting competently and with loyalty to the best interests of the client”).

¹⁴ DLRPC Preamble ¶ 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See DLRPC Preamble ¶ 9.

¹⁸ *Id.*

¹⁹ *Id.*; cf. *The Florida Bar v. Machin*, 635 So .2d 938, 940 (Fl. 1994) (emphasizing a point from the Preamble that, “[w]hen confronted with possible ethical conflicts, it is the lawyer’s obligation to look to the rules of professional conduct and discipline for guidance,” and “an attorney must use sound judgment in applying these ethical standards to a given set of facts”).

²⁰ DLRPC Preamble ¶ 9.

²¹ See generally Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006) (exploring the history and nature of zealous advocacy); see also Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001) (recounting history of zealous advocacy model of lawyering).

²² DLRPC Preamble ¶ 8.

²³ See *id.* at ¶ 7.

²⁴ *Id.*

²⁵ DLRPC Preamble ¶ 9.

²⁶ *Id.* at ¶ 8.

27 *Id.* at ¶ 10.

28 *Id.* at ¶ 13.

29 *See id.* at ¶ 10.

30 *Id.* at ¶ 11; cf. *In re Restaurant Dev. Group, Inc.*, 402 B.R. 282, 292 (N.D. Ill. 2009) (explaining that “compliance with the rules ... depends upon understanding and voluntary compliance” by lawyers).

31 This hypothetical is based on *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

32 Freedman, Henry Lord Brougham and Zeal, 34 HOFSTRA L. REV. at 1322, quoting *Trial of Queen Caroline* 2.

33 In the *Spaulding* case, the precise issue was whether the settlement agreement would be enforced despite the plaintiff’s lack of knowledge of the aneurysm condition. The court observed, “when the parties were in an adversary relationship, no rule required or duty rested upon defendants or their representatives to disclose this knowledge.” *Spaulding*, 116 N.W.2d at 709. In reviewing the defense lawyers’ decision not to share this information, the Court commented further, “[t]here is no doubt of the good faith of both defendants’ counsel.” *Id.* The court nevertheless concluded that once the parties submitted the settlement agreement to the court for approval, the parties left a purely adversarial position with each other. *See id.* Instead, the settlement agreement became a joint application to the court. *See id.* By unilaterally concealing this material information at this stage, the defense lawyers took a “calculated risk,” that the settlement would not remain final. *See id.* at 709–10. Therefore, the lawyers were not unethical, but the court had discretionary power to vacate the settlement. *See id.* at 710.

34 DLRPC Scope ¶ 14.

35 *See id.*; *see e.g.*, DLRPC Rule 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client”); DLRPC Rule 1.8(j) (“A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced”); DLRPC Rule 2.1 (“A lawyer shall exercise independent professional judgment and render candid advice”); DLRPC Rule 6.2 (“A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause”).

36 *See* DLRPC Scope ¶ 14; *see e.g.*, DLRPC Rule 6.1(a)(1) (“Every lawyer has a professional responsibility to provide legal services to those unable to pay ... In fulfilling this responsibility, the lawyer should ... provide a substantial amount of the [50] hours of legal services without fee or expectation of fee ...”).

37 DLRPC Scope ¶ 14; *see e.g.*, DLRPC Rule 1.2(c) (“A lawyer may limit the scope of representation if the limitation is reasonable under the circumstance and the client gives informed consent”); Rule 1.5(c) (“A fee may be contingent on the outcome of the matter for which the service is rendered ...”); DLRPC Rule 1.6(b) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary ...”); DLRPC Rule 1.16(b) (“a lawyer may withdraw from representing a client if ...”); DLRPC Rule 2.1 (“In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation”).

38 DLRPC Scope ¶ 14.

39 DLRPC Scope ¶ 15.

40 *See id.*; *see e.g.*, Fed. R. Civ. Pro 26.

41 *See* DLRPC Scope ¶ 15; *see e.g.*, N.Y. Crim. P. Law 190.50(5) (requiring prosecutors in cases where a defendant has been charged by felony complaint to notify defendant of grand jury proceeding and accord defendant a reasonable opportunity to testify in the grand jury).

42 DLRPC Scope ¶ 16.

43 *Id.*

44 *See* DLRPC Rules 1.6(a) and 1.9(c).

⁴⁵ Cf. *Smith v. Morrison*, 47 A.3d 131, 135–37 (Pa. 2012) (relying on *Scope* to reject proposed jury instruction in civil liability case that verbatim incorporated the ethical fiduciary duties that applied to the lawyer-client relationship under the state rules of professional conduct, instead of referring to common law principles in tort to define the applicable standard of care).

⁴⁶ See DLRPC Rule 1.6(b)(5).

⁴⁷ DLRPC Scope ¶ 14; see also DLRPC Rule 1.6 comment 17 (acknowledging the discretionary nature of the decision whether to disclose confidential information under this exception).

⁴⁸ *Id.* at ¶ 21.

⁴⁹ Cf. *id.* at ¶ 19 (“failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process” [emphasis added]).

⁵⁰ DLRPC Scope ¶ 21.