Why Context Matters

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CHAPTER ONE

Why Context Matters

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How do lawyers resolve ethical problems in the everyday context of law practice? Does zealous advocacy mean the same thing for corporate litigators, criminal defense attorneys, and divorce lawyers? How are lawyers’ decisions influenced by their roles within an organization, such as in-house counsel or law firm associate? What do disclosure requirements mean in practice for prosecutors—or for securities lawyers? This book examines lawyers’ ethical decision making in context, that is, through close attention to different office settings and practice areas. Lawyers now specialize in specific legal fields more than ever before. Hence, the research reported here deconstructs the general obligations of professional responsibility to show how lawyers specializing in different areas of law understand them. While there are continuities across fields, we also find that each practice area has its own particular norms and challenges, shaped not only by substantive, procedural, and ethical legal rules, but also by clients, practice organizations, economics, and culture.

Rather than address the professional responsibility of lawyers primarily through professional rules and the substantive “law of lawyering,” or through individual case studies, this book combines empirical research on lawyers with analysis of ethical issues that arise in particular areas of legal practice. A central feature of the volume is its interdisciplinary nature, in which lawyers’ decision making is firmly embedded both in the professional world of regulation and the sociological and economic setting of the workplace. By situating lawyers in their everyday practices, this book also builds on existing research to explore how organizational, economic, and client differences across the legal profession actually matter for the work that lawyers do and the decisions that they make.
A generation of sociolegal scholarship has pointed out the implications of legal stratification for the construction of bar rules, differences in the meaning and enforcement of ethical codes for different segments of the bar, the ways in which personal identity intersects with professionalism, and the limited ability of a single set of professional rules to promote appropriate conduct in work settings as diverse as those that exist within the legal profession (Wilkins 1990; Nelson and Trubek 1992). Yet the organized bar and many law schools continue to focus their discussion of legal ethics primarily on bar rules of professional conduct. That approach, this book suggests, is a serious mistake. Those rules are extremely general, unevenly understood and enforced, and sometimes at odds with the realities of legal practice. But that does not mean that lawyers lack normative ideals and constraints. We agree with Robert Nelson and David Trubek that legal professionalism exists “not [as] a fixed unitary set of values, but instead . . . [as] multiple visions of what constitutes proper behavior by lawyers” (1992, 179). Through empirical studies of ethical decision making by lawyers in different practice areas, this book provides a partial answer to the challenge Nelson and Trubek posed: “to explain how different professional ideologies emerge in various contexts and with what effects” (179).

To identify and understand lawyers’ professional ideologies and the informal norms that shape their conduct requires engagement with particular “communities” of legal practice—“groups of lawyers with whom practitioners interact and to whom they compare themselves and look for common expectations and standards” (Mather, McEwen, and Maiman 2001, 6). The ideals and norms of professionalism vary across networks or groups of lawyers practicing in different areas of law, among lawyers in the same practice area but with different clienteles, between large law firms and small firms, and across firms with different law firm cultures (Mather, McEwen, and Maiman 2001; Carlin 1966; Kelly 1994). Definitions of acceptable lawyering conduct are constructed by lawyers within their offices; in interactions with one another in negotiations and litigation; in contacts with agencies; through appearances before judges; as well as through professional rules, disciplinary boards, and other third parties that regulate lawyer conduct. Legal professionalism, in other words, emerges from the bottom up as well as the top down, and indeed, the most powerful normative constraints on lawyers likely stem from their clients, colleagues, and practice organizations and not from edicts of the organized bar.

In order to examine the ethical decision making of lawyers, it is necessary to fully understand—in a fundamental sense—the context in which they work.
Jerome Carlin (1966) was one of the first to do so when he studied the social setting of lawyers’ work and its impact on lawyers’ ethics. He described significant differences in the work lives and ethical responses of New York City lawyers in large firms and those in solo and small firm practice. Carlin documented the stratification of the New York City bar and found that the type of clients a lawyer serves affected the lawyer’s ability to conform to ethical standards, as did the lawyer’s work setting (166–167). In a similar vein, but with a focus on geographic community rather than firm size, Joel Handler (1967) studied the bar in a middle-sized midwestern city. He showed how the continuing relationships and homogeneity of the local community powerfully affected lawyers’ conduct and their understanding of their professional responsibilities. Donald Landon’s (1990) account of rural lawyers added further to our knowledge of how geographic context can shape lawyers’ norms and behavior.

John Heinz and Edward Laumann’s (1982) study of the Chicago bar provided even more information about the differences in the backgrounds, work, incomes, and status of urban lawyers. In particular, they emphasized the importance of clients—organizational or individual—to distinguish the “two hemispheres” of the legal profession according to the type of client a lawyer represents. In a follow-up survey conducted in 1995, Heinz et al. (2005) found that almost two-thirds of Chicago lawyers’ time was devoted to working for large organizations (including work for nonbusiness entities such as labor unions and the government), while only 29% was devoted to individuals and small business clients. David Wilkins revisits the two hemispheres thesis in chapter 2. He explains how this evidence on contextual differences among lawyers led to his 1990 proposal for context-specific rules for lawyer regulation. Wilkins also identifies six major trends in the profession that have emerged in recent years. These trends—lawyer mobility, technology, unbundling and outsourcing of legal tasks, new organizational forms for providing legal services, institutionalization of pro bono, and globalization—break down and complicate some of the contextual distinctions among groups of lawyers. Wilkins also cites more recent Chicago data showing that substantive or skill-type specialization now plays a greater role than it did 20 years earlier in explaining differences in the bar. His conclusions point to the vital importance of understanding context when thinking about the ethical decisions lawyers make in their everyday work.

Substantive legal specialization provides the organizational framework for this book in order to highlight the contextual differences and informal norms
that influence lawyers’ decision making in different communities of practice. The idea that attorneys in different fields of law might have different ethical standards and display different ethical conduct is something of a truism, but it receives some support in reputational rankings of Chicago lawyers by practice area (Heinz and Laumann 1982; Heinz et al. 2005). Evidence of ethical differences also comes from observations of lawyers about practitioners in their own areas of practice. Data from 5,892 Michigan alumni surveyed from 1997–2006 (including graduates 5, 15, 25, 35, and 45 years out of law school) found considerable variation in lawyers’ responses to the following: “The lawyers with whom I deal (other than those in my own office) are highly ethical in their conduct.” Although only 57.1% of lawyers overall agreed (mildly to strongly) that their peers were highly ethical, more than 65% of attorneys in the areas of energy, securities, real property, and estates viewed lawyers in their fields as highly ethical. By contrast, less than 50% of lawyers in the areas of criminal (prosecution and defense), labor, antitrust, communications, and civil rights/discrimination law agreed that lawyers with whom they deal outside their offices were highly ethical.

While the Michigan survey data reveal differences by field of practice in lawyers’ perceptions of their peers, no definition of “ethical conduct” was provided to respondents. Thus, they relied on their own definitions, so it is possible that lawyers who choose to work in different fields of law bring different ethical standards with them. Alternatively, it could be that lawyers were all using the same bar definition of ethical conduct (or perhaps their own moral sensibility) so that the resulting variation reflects real differences across areas of practice. Such speculation raises the crucial question Elizabeth Chambliss explores in chapter 3, “Whose Ethics? The Benchmark Problem in Legal Ethics Research.” Chambliss identifies the difficulties in empirically assessing lawyers’ ethics: “Should lawyers’ ethical standards and conduct be compared to ordinary (lay) morality? To the formal rules of legal ethics? Or to the prevailing professional norms within a specialized area of practice (which may or may not be consistent with the formal rules)?” (chapter 3, 48). These questions, as she explains, have profound theoretical and practical implications for research on lawyers’ professional conduct.

1. The survey was sent annually to Michigan law graduates over 40 years, with an average response rate of 67%. Respondents used a 7-point scale to indicate the strength of their agreement with the statement. For further details and analysis of responses to this question, see Mather (forthcoming). We thank David Chambers, co-director of the Michigan alumni survey, for making the data available for use in this chapter.
Before proceeding, it is important to define what we mean by “ethical” decision making. David Luban identifies four strands of legal ethics: the hard law of ethics, ethics of role, ethics of professionalism, and ethics of honesty (Luban 2005). When lawyers talk about “ethical” conduct, they often mean the first strand—conduct that is permitted or prohibited by the formal rules of professional responsibility (Suchman 1998; Levin 2004). Somewhat related to this conception is the second, the role morality lawyers assume when they act as one-sided partisans for clients, zealously advocating for them within the adversary system (Wasserstrom 1975). The third strand considers what values and conduct are expected of lawyers (and lawyers expect of themselves) as professionals, balancing obligations to the public and their clients with the need to make a living. Finally, legal ethics consists of basic honesty and truthfulness, what Chambliss refers to in chapter 3 as “ordinary (lay) morality” (48). We include in our definition of ethical decision making all four of these strands. The formal rules of professional conduct and the law of lawyering provide a useful starting point for analysis, along with the concept of role morality. But both “the rules” and lawyers’ conceptions of professional role leave considerable room for individual discretion. Consequently, we define ethical decision making much more broadly to include the ways in which the rules and norms of lawyering, individual values, and considerations of justice, clients, and practice organizations, shape individual conduct.

With this broad definition in mind, we deferred to our contributors to select which ethical issues to address. Our only other criterion was that the ethical dilemmas be common or particularly troubling in the area of practice about which they were writing. As a result, the dilemmas discussed in part 2 of this book range from narrower ones involving possible violations of law or formal rules (e.g., responding to a lying client, how to advertise professionally, how much disclosure to provide an adversary) to broader ones of professional role and identity (e.g., the corporate litigator’s obligation to the truth, the role of in-house counsel, the accountability of public interest lawyers). Each chapter describes the resolution of the ethical dilemma from the practitioners’ point of view in that particular area of practice. Our goal in this book is to help students and scholars understand how and why lawyers make the decisions they do, invoking or ignoring formal rules, succumbing to self-interest or furthering the public good, acting in ways they consider moral or not. Such knowledge, we believe, could increase ethical self-awareness in lawyers as well as provide information to help construct more effective systems of professional regulation.
The Legal Profession and the Rise in Specialization

In order to understand the importance of context, it is first necessary to understand the composition of the US legal profession. There are almost 1.2 million US lawyers who work in a wide range of office settings, both in the United States and abroad. More than 75% work in private practice, approximately 10% work for the government, 8% work for private organizations as in-house counsel, and less than 1% work for legal services organizations or as public defenders (Nelson 2008). Despite the emphasis in the popular and scholarly press on the growth of large law firms, more than 60% of all lawyers in private practice still work in offices of 1 to 5 lawyers (Nelson 2008). These sole and small firm practitioners often represent individual clients in personal plight matters such as divorce, criminal law, and consumer bankruptcy, and small businesses, although some represent large corporate clients (Seron 1996; Levin 2004).

Almost 22% of all private practitioners work in firms of 6 to 100 lawyers, while about 16% of all private practitioners work in large firms of more than 100 lawyers, with some firms having more than 1,000 lawyers (Nelson 2008). In-house attorneys work for organizations that employ from 1 to over 1,000 lawyers. Government lawyers and legal services lawyers also work in offices ranging in size from a few to several hundred lawyers.

Differences such as these in practice sites and firm size have substantial implications for how attorneys think about and do their work. Office size can affect the ways in which lawyers are socialized to the norms of the profession and influence the availability of internal monitoring and ethical support. It is also associated with major differences in the economics of law practice, which in turn affects incentives and constraints on attorneys. For example, lawyers’ 2009 starting salaries in private practice varied by firm size with new lawyers in small firms (2–10 lawyers) earning a median salary of $50,000, compared to large firm lawyers (over 250 lawyers) earning a median salary of $160,000 (NALP 2010a). In contrast, new law school graduates in legal service jobs earned a median income of $42,000 annually, while the median income for new prosecutors in local government jobs was $50,000 (NALP 2010b).

Other economic incentives for lawyers may come from the ways in which they are compensated for their work. In theory, compensation is unrelated to professional conduct, but common sense and research suggest otherwise. While in-house lawyers work for fixed salaries, their bonuses—often a large component of their income—are not fixed, creating potential ethical conflicts since their sole client is also their employer. Lawyers in private practice charge
clients directly for their services, and they depend on those fees to pay for the overhead associated with running a firm. Their fee arrangements include a flat fee (often charged by lawyers when working for individuals), a contingent fee (meaning that their ability to collect a fee depends on the case outcome), or an hourly fee. Each of these fee arrangements raises potential ethical issues for lawyers because of the conflicts of interest inherent in them (Fortney 2000; Kritzer 2004). For instance, the flat fee incentivizes lawyers to limit the time spent on a case, whereas the hourly fee might encourage inflated hours.

Changes in the economy and the economics of law practice over the last 20 years have brought many challenges for lawyers. Recent evidence suggests that the large firm business model built on high associate salaries and an intense tournament for partnership cannot be sustained (Galanter and Henderson 2008). Large firm clients more closely watch and contain law firm costs and are much more price sensitive when making decisions about legal representation. Large firm lawyers report less client loyalty, which puts increased pressure on them to satisfy their clients’ demands and to constantly seek new clients (Suchman 1998; Kirkland, chapter 8). These lawyers increasingly confront competition for business from foreign law firms and from nonlawyers, including accounting firms. Law firm mergers and individual lawyer mobility present challenges for law firm management and for maintaining the ethical culture of law firms (Suchman 1998; Kelly 2007).

Economic challenges also affect lawyers working in smaller firms. Private practitioners who represent individual clients often struggle with cash flow and with finding new clients (Seron 1996). Many individuals, unable to afford lawyers’ fees, are turning to self-help through books, computer programs, and the Internet to address their legal needs. They are also, in some cases, turning to nonlawyer providers, who may be engaged in the unauthorized practice of law. Competition for clients and concerns about cash flow may tempt lawyers to interpret professional rules in self-serving ways that allow them to address these pressures (Mather and McEwen, chapter 4; Levin, chapter 5; Daniels and Martin, chapter 6).

Lawyers in different office settings and practice specialties do not always share the same incentives and concerns. Law firm associates seek to satisfy partners, on whom they rely for promotion (Kirkland, chapter 8). Midsize to large firm partners seek to satisfy clients in order to maintain their income and positions within their firms. Solo and smaller firm lawyers face constant pressure to bring in new clients so that they can pay the rent. In-house lawyers do not need to bring in business, but still seek to facilitate their client’s goals
for personal advancement and other reasons (Kim, chapter 10). Prosecutors
have no traditional clients or direct economic incentives, but are concerned
with conviction rates, which provide a measure of status and aid in promotion
(Yaroshefsky and Green, chapter 13).

The concerns of these lawyers suggest some of the pressures that encourage
particular visions of professionalism and might also give rise to deviant con-
duct in different practice settings. Eagerness to make partner may cause young
associates to engage in questionable behavior to please a powerful partner. A
small firm lawyer who is facing a financial crunch might be tempted to “bor-
rrow” money from a client trust account or to take on more cases than she can
reasonably handle, resulting in client neglect. In-house counsel may feel pres-
sure to accommodate his client-employer because of concerns about receiving
a bonus or retaining his job. A prosecutor focused on conviction rates may be
tempted to bend the rules to achieve that goal. In short, the economic and po-
litical incentives and constraints of practice organizations motivate lawyers to
think in particular ways about their professional responsibilities.

We must also consider the variation in lawyers’ work contexts due to the
substantive area of law in which they practice. As the law becomes increas-
ingly complex and the legal market for clients becomes more competitive,
many lawyers now specialize in particular fields. In their 1995 survey of the
Chicago bar, Heinz et al. (2005) found that 33% of all lawyers they interviewed
worked in only one field, a much higher percentage than they found 20 years
earlier. And a more recent study of law school graduates reveals that 54% of
lawyers describe themselves as specialists just seven years after graduation
(Dinovitzer et al. 2010). Large law firms often hire for specific departments
or areas of practice within the firm. While solo and small firm lawyers used
to practice in several personal plight areas (Carlin 1962), more recently, even
solo and small firm lawyers often limit their practices primarily to one or two
practice areas (Levin 2004).

Even specialists are becoming more specialized. The Chicago lawyer study
identified 42 different legal specialties, but it also noted many subspecialties
within these areas (Heinz et al. 2005). For example, within the “securities”
specialty, large firm lawyers further specialize in practice areas such as “asset
management,” “capital markets,” “commodities futures and derivatives,” “fi-
nance,” “financial institutions advisory and financial regulatory,” and “struc-
tured finance” (Shearman & Sterling 2011). In immigration, some lawyers
perform business immigration work exclusively, representing large organiza-
tions that seek to hire foreign nationals, but “they wouldn’t touch an asylum
case; they wouldn’t touch a removal case. They wouldn’t touch an incarcerated alien” (Levin 2009, 414). Criminal defense lawyers who engage in white-collar defense work in federal court do not typically represent defendants in state court who are charged with ordinary street crimes.

Finally, individual differences among lawyers also affect their construction of their professional identities in ways we do not yet fully understand. Although the traditional ideology of the bar presumes that any personal values lawyers have stemming from their gender, race, or religion are put aside—or “bleached out”—of their professional identities, the reality is far more complex (Levinson 1993, 1578). The bar continues to be dominated by white males, but it is becoming increasingly feminized, with women making up almost 29% of all lawyers and close to half of all law students (ABA 2009). Although women now enter private practice at about the same rate as men, they continue to be underrepresented in the partnership ranks (NALP 2010c). Instead, women work disproportionately in government, in legal services, and for corporations. Minority groups also continue to make inroads into the legal profession, but the number of black, Hispanic, and Asian lawyers lags well behind what would be predicted based on the percentage of these groups in the US population. Approximately 3.9% of all lawyers are black, 3.3% are Hispanic, and 2.3% are Asian (Chambliss 2004). Minority lawyers also continue to be underrepresented in large law firms—at least among the partner ranks (NALP 2010c)—and overrepresented among lawyers who work for the government (Chambliss 2004).

The Regulation of Lawyers

Multiple normative frameworks exist for guiding lawyers’ decisions. Ethical rules take precedence in the rhetoric of the bar, but they often do not provide clear answers to real-world dilemmas. Some of these rules reflect the views of the elite bar, and not the norms or values of many lawyers (Carlin 1966; Auerbach 1976). A considerable body of substantive law also guides lawyers’ conduct and shapes their views through administrative or court sanctions or through malpractice liability. Finally, informal norms and shared values influence lawyers through collegial control in specific communities of practice. These shared ways of defining and answering ethical problems develop in conjunction with bar rules and substantive law to influence ethical decision making in practice. The chapters in this book look at lawyers’ decisions from the bottom up—that is, from the perspective of lawyers in practice—and not from top-down rules that often reveal more about the aspirations of the profession than the reality.
For more than 100 years, the organized bar has devoted considerable effort to defining and refining its statement of the professional rules and values that govern lawyers. Those professional rules, embodied in state-adopted variations on the American Bar Association’s (ABA) Model Rules of Professional Conduct, are a one-size-fits-all effort to define the responsibilities of lawyers and guide them in resolving ethical dilemmas. But, as Richard Abel notes, “the Rules do not resolve those dilemmas; they merely restate them in mystifying language that obscures the issues through ambiguity, vagueness, qualification and hypocrisy” (1981, 685). In substance, these rules are often vague, and in many cases, they leave considerable discretion to lawyers’ judgments. In practice, lawyers do not often consult the rules when addressing ethical issues. Not surprisingly, a few specialty bars, such as divorce, have drafted their own professional standards to guide the conduct of lawyers who practice in those areas, but they lack enforcement mechanisms.

Unquestionably, many of the ABA’s rules do align with or inform some practice norms (most notably, in the area of confidentiality), but the rules’ power to directly shape conduct is undercut in a variety of ways. Some of the rules—like those governing advertising and the duty to report lawyer misconduct—are notoriously under- or unenforced by disciplinary authorities (Zacharias 2002; Greenbaum 2003; Daniels and Martin, chapter 6). Courts sometimes disregard the rules, for example, in conflicts of interest and malpractice cases. The ABA’s rules occasionally diverge from substantive law, and that law almost invariably trumps the bar rules.

In fact, efforts to influence lawyer conduct through substantive law have increased steadily in recent years. Most notably, Congress responded to corporate scandals in the early 2000s by directly imposing gatekeeping functions on lawyers who practice before the Securities and Exchange Commission (SEC) (Sarbanes-Oxley 2002). This occurred notwithstanding vigorous opposition from the ABA, which publicly charged that the new law conflicted with the lawyer’s duties of confidentiality and privately feared that the law undermined the bar’s claim to be a self-regulating profession. But efforts outside the bar to regulate lawyer conduct pre-date that legislation. Since the 1960s,

2. The ABA Model Rules of Professional Conduct set forth lawyers’ duties to clients, the courts, third parties, and the public. The Model Rules can be found at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html. Virtually every state has adopted some version of the ABA Model Rules to govern the conduct of lawyers, and violations of a state’s rules can result in the imposition of lawyer discipline.
prosecutors have shown an increased willingness to indict lawyers who aid their clients in illegal conduct (*United States v. Benjamin*, 1964). The SEC began to pursue enforcement actions against lawyers in the 1970s (*SEC v. National Student Marketing*, 1978). The Office of Thrift Supervision sent shock waves through the elite bar when it sought to freeze the assets of the Kaye Scholer law firm in connection with its representation of the failed Lincoln Savings and Loan (Simon 1998). Less famously, other federal agencies, such as the Internal Revenue Service, the US Patent and Trademark Office (PTO), and the Executive Office for Immigration Review (EOIR) have sanctioned lawyers who violate their rules and standards of conduct.

The ethical rules of the legal profession are enforced through state disciplinary systems that are underfunded and largely reactive (Levin 2007). Disciplinary agencies are reasonably effective at monitoring lawyer behavior with respect to the money maintained in client trust accounts due to arrangements with banks that notify the agencies when there are overdrafts in these accounts. For other misconduct, discipline agencies lack sufficient investigative resources and primarily rely on reporting by clients, who may not know that they have been victimized by their lawyers or may have reasons not to report the misconduct (Wilkins 1992). Discipline complaints are most often filed for neglect of client matters and failure to communicate with clients (Abel 2008; Daniels and Martin, chapter 6). Initial complaints come most frequently against lawyers practicing in certain areas of law such as divorce, criminal, tort, and real estate (Mather and McEwen, chapter 4). Solo and small firm practitioners who practice in these areas receive a disproportionate number of discipline sanctions, as they often lack the resources of larger firms to manage their practices or the financial means to hire lawyers to represent them in discipline proceedings (Levin 2007). Moreover, larger firm clients often do not file complaints as they have more resources and options for seeking redress from their lawyers (Wilkins 1992).

The threat of malpractice liability also shapes the conduct of lawyers—or at least those in private practice. For example, fear of malpractice actions arising out of missed deadlines leads many firms to use sophisticated calendaring software and to implement backup systems to avoid such problems. Certain areas of law consistently rank high on the list of malpractice claims filed, including plaintiffs’ personal injury and real estate (with family law often third) (*ABA Standing Committee* 2008). Most legal malpractice claims are brought against solo and small firm lawyers. However, midsize and large law firm lawyers are also sued frequently for malpractice. Settlements can range in the
millions of dollars, and even large law firms have closed their doors in the face of significant malpractice claims (Fairbank and Maxon 2007).

Malpractice insurance also plays an important role in regulating some lawyer behavior (Ramos 1994; Cohen 1997). For instance, malpractice suits based on conflicts of interest have prompted carriers to require their insureds to use conflicts checking software (Fortney and Hanna 2002). Malpractice carriers promote competent conduct by requiring lawyers to identify the areas in which they practice and then limiting coverage to those areas. They also set premiums according to what they view as riskiest areas of law practice and place caps on coverage, require high deductibles, and impose exclusions from coverage for certain activities. In exchange for lower premiums, many insurers require in-house ethics committees and other internal mechanisms that will help avoid lawsuits. They often offer seminars, firm audits, and hotlines (Cohen 1997). But a substantial minority of private lawyers do not carry malpractice insurance (Qualters 2006; Illinois ARDC 2009); thus, insurers’ efforts to reduce risky practices have no impact on this group.

As this discussion suggests, legal and regulatory efforts affect lawyers in different practice contexts unevenly. Enforcement efforts by various agencies matter only for the lawyers who practice before them. And enforcement varies tremendously from agency to agency: PTO and SEC enforcement efforts have ramped up in recent years while the EOIR lacks the resources to mount significant enforcement efforts (Conley and Mather, chapter 12; Schmidt, chapter 11; Levin, chapter 5). Discipline is a concern for solo and small firm lawyers, but is imposed on large firm lawyers infrequently, and on prosecutors almost never (Yaroshefsky and Green, chapter 13). Malpractice liability matters especially to private practitioners, but malpractice claims against legal services lawyers, government lawyers, or in-house counsel are rare.

Informal collegial control operates alongside the formal mechanisms of regulation to influence lawyers’ conduct. In large law firms, such control might be seen in the organizational logic of the firm, the incentive structure, or even cultural ties. Emmanuel Lazega (2001), for example, analyzes the ways in which overlapping networks, competition for status, and social niches within a large firm create powerful collegial controls over lawyers. For lawyers working in solo or in small firms, informal norms and practices often develop that teach newcomers how to behave and also sanction those who deviate. The importance of an attorney’s reputation has been noted in numerous studies (Landon 1990; Mather, McEwen, and Maiman 2001; Kritzer 2004), in particular the way in which peer pressure induces conformity to local practice norms or to the norms
of specialized communities of practice. Shared identities and values, such as those that characterize attorneys working in legal services or public interest law firms, may also act as informal mechanisms of control. Some law firms or specialized communities of practice seem to be quite cohesive and have widely shared norms, whereas others—for whatever reason—have weaker collegial control (Kelly 1994; Mather 2010).

The Legal Profession’s Sites of Socialization

How do lawyers come to learn the rules and norms of practice? They learn through direct instruction, through conversations they overhear, and from observation of the lawyers around them (Zemans and Rosenbaum 1981; Garth and Martin 1993; Seron 1996). Robert Nelson and David Trubek (1992, 179) use the term “arenas of professionalism” to describe the four institutional settings in which lawyers construct their understanding of professional norms and values. One of these arenas, disciplinary enforcement, has already been discussed. The other arenas are legal education, bar associations, and the workplace.

The first arena, legal education, plays an important role in socializing lawyers into the norms and values of the profession (Granfield 1992; Mertz 2007). Law schools teach the formal professional rules, respect for the law, certain habits of mind, and the hierarchy of the profession, which places large firm corporate practice at the top. But the impact of law school on the ethical decisions that lawyers make in practice may be limited (Pipkin 1979). Granfield and Koenig reported in their follow-up study of Harvard law school graduates that respondents “almost uniformly felt that their ethics training in law school had done little to prepare them for the issues they now confront as practicing attorneys” (2003, 508). They observed that the focus on formal rules was insufficient because it severed the cases from the social and other contexts in which they were embedded.

Bar associations also play an important role in the construction of lawyers’ understanding of professionalism. As previously noted, the ABA drafts the model professional rules that govern lawyers, and a few other specialty bars construct guidelines that have persuasive effect. Even a quick glance at their mission statements reveals that bar associations consciously promote their visions of professionalism, which include high-quality lawyer performance and strong advocacy for clients. At the same time, those statements reflect their members’ unique interests and values, which they disseminate through
educational materials and programming efforts. More important, bar associations introduce lawyers with similar interests to one another, both in person and via the Internet. They help lawyers identify effective office management practices, which reduce the likelihood of discipline complaints. They also facilitate informal information exchange among lawyers, both with respect to the law and professional norms (Kilpatrick 1997–1998). They do this through substantive meetings and social gatherings, through mentoring programs and listservs, and through lobbying and other advocacy efforts (Levin 2011).

The most powerful arena of professionalism, however, is probably the workplace. It is here that professional values are most powerfully communicated and inculcated. Attorneys working in large law firms or other large organizations learn values and guides for decision making within the organization. In the solo and small firm context, however, the workplace may be a looser association of lawyers who share office space or provide advice, even if they are not formally associated or even physically proximate (Carlin 1966; Levin 2004). For these lawyers, Mather, McEwen, and Maiman’s (2001, 6) concept of “communities of practice” may be more useful. For example, divorce lawyers, who practice mostly in solo and small firms, work within overlapping communities that include the bar as a whole, lawyers in particular locales, specialists and nonspecialists in family law, and individual law firms. Communities of practice not only communicate norms through example, but they can also exert limited control over lawyers.

The impact of these communities on lawyers’ decisions has been found in a variety of practice contexts. The communities of practice within which divorce lawyers work encourage the norm of the reasonable lawyer (Mather, McEwen, and Maiman 2001; Sarat and Felstiner 1995). The norm of reasonableness also permeates the local professional community of legal aid lawyers when dealing with judges, opposing counsel, and clients (Katz 1982). Cooperativeness, courtesy, and trust were hallmarks of the country lawyers that Donald Landon studied (1990), and that community of lawyers imposed informal sanctions against those who did not comply with those norms. In the large law firm setting, one of the communities may be a single practice group or work group, from which younger lawyers learn the norms of aggressive discovery practice (Suchman 1998).

Social psychology, in addition to the economic, organizational, and cultural incentives discussed above, helps to explain why lawyers learn informal norms in these communities. Ralph Hertwig (2006) notes that “social learning—of which imitation is an example—allows individuals to learn about their envi-
enronment without engaging in potentially hazardous learning trials or wasting large amounts of time” (398). But imitation is not the only social process at work. The psychological pressure on individuals to conform to the behavior of a group can be powerful. A group is more effective at inducing conformity if (1) it consists of experts, (2) the members are important to the individual, or (3) the members are comparable to the actor in some way (Aronson 1999). In this way, experienced lawyers transmit their norms and induce compliance with them, especially in organizations or in communities with repeated social interactions.

Interestingly, some evidence suggests that the longer lawyers work at their jobs, the more they come to see other attorneys’ behavior as ethical. According to the Michigan law alumni survey data discussed above, there is a correlation between years in practice and perceptions of behavior as “highly ethical.” Although only 51% of lawyers 5 years from graduation viewed the conduct of attorneys they worked with (other than in their own firm) as highly ethical, that percentage increased with each group: 55% of 15-year graduates, 59% of 25-year graduates, and 63% of 35- and 45-year graduates agreed that their peers’ conduct was highly ethical. As Chambliss (chapter 3) explains these data, they could support a narrative of “ethical fading” in which younger attorneys come to accept as ethical lawyer behavior that they once decried. Alternatively, however, they could support a more positive narrative of professional specialization, socialization, and ethical learning. That is, as lawyers become more experienced in certain areas of law, they learn the nuances of their specific field of practice, including what constitutes ethical conduct in that field. Increased specialization in particular areas of legal practice thus may have significant implications for legal ethics, affecting the very definition of what constitutes ethical behavior for lawyers.

Organization of the Book

The chapters in this book examine ethical decision making in different areas of practice and the role that ethical rules—and other factors—play in everyday legal work. While the bar’s rules may be interpreted and experienced differently by individuals due to their personal characteristics (e.g., gender, race, religion, personality) and by type of office setting (e.g., solo, firm, other organization), we chose to organize the book according to areas of practice instead. A primary focus on personal characteristics or office setting runs the risk of missing other important commonalities and differences in decision making. This book
therefore is organized around what we believe is one of the most significant influences on ethical decision making: the practice area in which lawyers work.

Following the introductory chapters in part 1, the 13 chapters in part 2 examine different communities of legal practice, including legal specialty areas such as divorce, personal injury, criminal, securities, patents, and public interest law. In some of these practice areas, client characteristics are highly salient and thus require separate chapters for personal injury plaintiffs’ lawyers and insurance defense lawyers, and for prosecutors and criminal defense attorneys. Corporate legal work encompasses so much variation that it is more appropriate to think of decision making in certain corporate settings—such as the chapters here on litigation, in-house counsel, or transnational practice. Obviously, many additional chapters could be included—ranging from other legal specialties such as environmental, tax, labor, or bankruptcy law to chapters on government lawyers at the local, state, and federal levels. We hope that future editions of this book will expand on the fields presented here.

Readers can easily start with any of the chapters depending on their primary interest in different sectors of the legal profession. Since each chapter addresses lawyers’ decision making about one or more ethical issues, an alternative approach for readers might be to read the book according to the ethical issues presented, thus facilitating comparisons across legal fields in how lawyers think about and resolve such dilemmas. Decisions about disclosure are discussed in chapters on securities (chapter 11), patents (chapter 12), and prosecutors (chapter 13). Conflicts of interest are discussed in chapters on insurance defense (chapter 7), transnational lawyering (chapter 9), and patents (chapter 12). Issues of the lawyer/client relationship are explored in chapters on divorce (chapter 4), insurance defense (chapter 7), in-house counsel (chapter 10), criminal defense (14), and legal services (chapter 15). The meaning of advocacy in practice is examined in chapters on divorce (chapter 4), corporate litigators (chapter 8), criminal defense (chapter 14), legal services (chapter 15), and public interest lawyers (chapter 16). Other ethical decisions include how to handle the lying client (chapter 5) and lawyer advertising (chapter 6).

Another way to approach the chapters is in the order in which they appear. The first two chapters in part 2 look at lawyers who practice in personal plight areas and often deal with emotional and vulnerable clients. In chapter 4 on divorce lawyers, Lynn Mather and Craig McEwen report that the grievance complaints against these lawyers often arise out of the difficulties of communicating and working with emotional clients and their spouses on problems that include many nonlegal issues as well as legal ones. Divorce lawyers learn about
what constitutes appropriate conduct from their communities of practice, but the ways in which they resolve issues of professional responsibility depend heavily on client resources and attorney caseloads, the structure of law firms, and the degree of specialization. Those with less affluent clients and fewer firm resources are more likely to face grievances. In chapter 5, Leslie Levin explores how immigration lawyers deal with the client who lies or wishes to lie in order to obtain the right to live and work in the United States. Lawyers’ responses to the lying client are informed by the professional rules, but are also influenced by what they learn from their communities of practice—often early in their careers. The fear of discipline or criminal prosecution constrains some of these lawyers; but the need for clients and the perceived unfairness of the immigration system affects the willingness of others to close their eyes or even knowingly assist a lying client.

The next two chapters concern lawyers who work on opposite sides in tort cases and who also struggle to reconcile their vision of themselves as professionals with their need to earn a living. Stephen Daniels and Joanne Martin in their study of plaintiffs’ personal injury lawyers (chapter 6) explore how the need for clients in a contingent fee practice shapes personal injury lawyers’ views. They report that although violations of the formal rules concerning advertising and solicitation rarely result in discipline, personal injury lawyers construct their own understanding of what type of advertising a lawyer may engage in—if any—while still maintaining their self-respect as professionals. The community’s approach to these norms is pragmatic, recognizing that some lawyers must advertise simply to stay in business. Similarly, in chapter 7, Herbert Kritzer also addresses a problem that arises out of lawyers’ need to earn a living: How do insurance defense lawyers maintain good relations with the insurance companies that pay them while at the same time provide professional representation to the insured client? As a practical matter, most insurance defense lawyers work closely with the insurance company—which has the contractual right to direct the defense—to resolve the lawsuit. But insurance defense lawyers do draw some lines to preserve the traditional attorney-client relationship, so that they can also protect the interests of the insured client.

Shifting gears, the next three chapters investigate lawyers who work in large corporate settings. In chapter 8, Kimberly Kirkland examines how the norms of the adversary system affect how the lawyers come to view their obligations to the truth, and how this affects their approach to the discovery process. She shows how the corporate law firm’s organizational structure, institutional demands, and changing norms also shape the ways in which corporate litigators
understand their roles and responsibilities as lawyers. John Flood, in chapter 9, examines how lawyers in large transnational law firms that handle complex international transactions—in which clients may change shape and sides—address conflicts of interest. Like Kirkland, he explores how corporate lawyers view their obligations to the truth—in this case, when corporate clients seek to create a transaction on paper that is at odds with reality in order to conform with regulatory requirements. In chapter 10, Sung Hui Kim looks at lawyers working in a different corporate context when she considers “The Ethics of In-House Practice.” She explores the ways in which in-house counsel balance their roles as facilitators of their client’s business objectives with their professional gatekeeping function, especially when the corporation is considering conduct that could be both unlawful and substantially harmful to the organization.

The next section considers lawyers who work in specific corporate specialties that routinely require clients to make affirmative public disclosure, that is, who work in a very different regulatory environment than the lawyers described above. Patrick Schmidt’s “The Ethical Lives of Securities Lawyers” (chapter 11) describes securities lawyers who share a culture favoring disclosure and transparency, not only because of the legal requirements of Sarbanes-Oxley, but also because of fear of shareholders’ suits against their clients and malpractice actions against their firms. These lawyers have a legal duty to serve as gatekeepers, which they continually balance against their visions of themselves as creative professionals seeking to advance their clients’ interests. In some cases, the actual disclosure is more a matter of form than substance, but it protects the client (and the lawyer) from risk of criminal penalties and financial harm. In contrast, in chapter 12, John Conley and Lynn Mather discuss the community of patent lawyers, who share a culture of disclosure that seems even more robust. The culture is encouraged by the law and consequences of nondisclosure (which can result in the invalidation of valuable patent rights), but also by the fact that patent lawyers come from a science background and seemingly share a stronger allegiance to the “truth” as a result of their training as scientists.

The final two sections of the book focus on lawyers working in various capacities on public law problems. First are attorneys who work on opposite sides of criminal cases—prosecutors and defense attorneys. In chapter 13, Ellen Yaroshefsky and Bruce Green systematically consider the many factors that influence how prosecutors interpret and execute their disclosure obligations to defense counsel. Since discipline against prosecutors is rare and malpractice is not a meaningful constraint on these lawyers, prosecutors are much
more affected by the norms and values they learn in court and from their office colleagues in interpreting their obligation to disclose. Nicole Martorano Van Cleve, in chapter 14, shows how urban criminal defense lawyers interpret their obligations as advocates—generally seeking outcomes other than acquittal and exploring mental health or drug treatment alternatives for clients. Defense lawyers reinterpret the meaning of advocacy in part because they repeatedly face the same prosecutor and judge, both of whom may be hostile and unsympathetic to their clients.

The final two chapters look at lawyers who work to further the public interest through legal services or public interest advocacy. Corey Shdaimah (chapter 15) describes the ways in which legal services lawyers struggle with their desire to encourage client autonomy—even when their low-income clients may not seek it. These lawyers also wonder how they can ever effect real social change when their day-to-day work involves small victories that have little structural impact on a legal system that facilitates the disempowerment of their clients. Explicitly addressing the issue of how lawyers can effectively advocate for structural change, Scott Cummings (chapter 16) discusses how public interest lawyers from multiple practice settings (government, public interest, private practice) come together on behalf of a variety of clients (public interest organizations, government, unions, etc.) to promote law reform efforts. He explores how these lawyers devise strategies and negotiate conflict while still remaining accountable to their clients.

We hope this book will help narrow the gap between what sociolegal scholars are learning about lawyers’ ethical decision making in context and the legal profession’s approach to the teaching and regulation of lawyers. The book deliberately focuses on empirical research rather than on normative perspectives. Normative perspectives are well represented in the literature, but to be useful, they must be grounded in the realities of lawyers’ professional lives. Knowing what “is” can help the bar, lawmakers, and other regulators construct and enforce what lawyers “ought” to do.

References


Cases and Statutes

