

# Ethics & Integrity in Law & Business: Avoiding “Club Fed”

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# Ethics & Integrity in Law & Business: Avoiding “Club Fed”

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MATTHEW  BENDER

# *Dedication*

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This book is dedicated to my father, Milton W. Ross, who, by example, set the highest standards of ethics and integrity for his children.



## *Acknowledgements*

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I am grateful and indebted to Michelle Mersey, a 2010 graduate of the University of California Berkeley School of Law. After successfully taking the New York bar exam, prior to her joining the London office of Skadden, Arps, Slate, Meagher, Flom LLP, she spent many hours and a great deal of effort working on the text and footnotes.

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## *About the Author*

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Mr. Ross is a former corporate partner at Latham & Watkins where he specialized in mergers and acquisitions. He is also a former Senior Vice President, General Counsel and Secretary of Safeway Inc. In that capacity, he had responsibility for the legal, real estate law, environmental, health and safety, security and risk management departments. During his tenure as an executive officer at Safeway, he had primary responsibility for its Code of Business Conduct and compliance programs.



# *Preface*

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The target audience for this book is law students who will be practicing at law firms after graduation. The emphasis is on ethical issues that arise for lawyers and law firms representing businesses.

The approach is a practical one. The situations and text present recurring circumstances in which ethical issues arise. Many come from personal experience or second-hand reports; others come from relatively recent media reports.

There are often warning signs or “red flags” that can alert junior professionals that something unethical or illegal may be afoot. This book will help junior lawyers to recognize these warnings and be prepared to react thoughtfully.

A premise of the book is that issue-spotting is not enough. Neither is a remote conclusion about what is ethical or seems to be required by the relevant rules of professional conduct. The challenge is to consider thoroughly the consequences of alternative courses of action, including doing or saying nothing.

The law firm practice is full of pressures both from within the law firm and from the firm’s clients. The pressures to “go along” or “just do it” are very strong and have led junior (and not so junior) professionals to “go off the reservation” and engage in unethical or illegal conduct when, in retrospect, they admit they “knew better.”

It is very difficult for most junior lawyers to confront more senior lawyers or clients directly on ethical grounds. The prospect of doing so and the potential adverse consequences deter many junior professionals from doing or saying anything about ethics issues they confront.

One of the most important features of this book is the exploration of the practical steps that may be taken and practical arguments that may be made to persuade more senior lawyers or clients to avoid unethical conduct. The goal is to provide junior lawyers with tools to analyze issues thoroughly and use their lawyering skills to encourage ethical conduct. One example is the use of a thorough cost-benefit or risk-reward analysis that questions some common assumptions about the benefits, risks and costs. Such an analysis that includes the costs and benefits to all the affected parties can complement the guidance from ethical principles and rules of professional conduct.

The book uses many “situations” to raise ethical issues. Students will put themselves in the situations, as inside or outside counsel, and determine what they should do and why. They will consider factors that influence their decisions for better or for worse. Unlike in a case-oriented textbook, they will not always have all the facts.

The book progresses from a brief exploration of the sources and contents of ethical standards and principles to some personal and general employment situations. These pre-law firm situations are useful because many of the relevant factors in these situations are similar to those that arise in the law firm and lawyer-client contexts. Most of the book presents situations and summaries of media reports of recurring issues that confront lawyers and their clients.

The book raises important questions that have broad application. One involves the role of law in ethics, and why setting a standard of obeying the law is not enough, at least for

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## *Preface*

lawyers. Another is the relative efficacy of rules and principles in motivating ethical conduct. Law students also need to understand that higher ethical standards apply to lawyers than to members of most other professions. Although this may seem unfair, there are good reasons for society's relatively high expectations (notwithstanding all the lawyer jokes) for lawyers. Fair or unfair, reasonable or unreasonable, the consequences for lawyers who act unethically can be severe. Accordingly, there is emphasis in the book on the importance of considering appearances and how they are likely to affect various audiences, such as, the media, government enforcement agencies, plaintiffs' attorneys, judges and juries.

The principal objective of the book is to create a professional responsibility course that is more focused, interesting and fun than traditional courses.

# TABLE OF CONTENTS

<b>Chapter 1</b>	<b>INTRODUCTION</b> .....	<b>1</b>
A.	SOURCES OF ETHICAL STANDARDS AND PRINCIPLES .....	1
B.	LESSONS FROM CORPORATE SCANDALS .....	2
C.	THE LEGAL PROFESSION .....	3
1.	Preamble: A Lawyer’s Responsibilities .....	3
2.	Scope .....	3
3.	Model Rule 2.1 .....	3
4.	Society’s Expectations .....	4
<b>Chapter 2</b>	<b>PERSONAL ETHICAL SITUATIONS</b> .....	<b>5</b>
A.	ERRORS IN YOUR FAVOR .....	5
1.	Extra Cash .....	5
2.	Bonus Grade .....	6
B.	“FINDERS KEEPERS” .....	6
C.	MERCHANT POLICIES .....	6
1.	Airline Pricing .....	6
2.	Department Store Returns, Refunds and Pricing .....	8
3.	Law School Bookstore Returns and Refunds .....	8
D.	UNIVERSITY AND LAW SCHOOL RATINGS GAME .....	9
E.	“JUST PRETEND” .....	12
F.	INSURANCE CLAIM .....	12
<b>Chapter 3</b>	<b>PRE-EMPLOYMENT AND GENERAL EMPLOYMENT</b> ...	<b>15</b>
A.	RESUME EMBELLISHMENT .....	15
1.	Your Job Search .....	18
2.	Omissions of Information .....	20
3.	“Soft and Cold” Offers .....	22
4.	Background Checks .....	22
B.	SPEAKER PHONE USE .....	23
C.	EMPLOYER PROPERTY .....	23
<b>Chapter 4</b>	<b>LAW FIRM SITUATIONS</b> .....	<b>25</b>
A.	INTRODUCTION TO CODES OF PROFESSIONAL CONDUCT .....	25
B.	BILLING PRACTICES .....	25
1.	Applicable Rules .....	25
2.	Incidence of Billing Irregularities .....	26

---

## TABLE OF CONTENTS

3.	“Padding”	27
4.	Describing Your Time	28
5.	Application of the Factors	29
6.	Class Action Settlements	30
7.	<i>Pro Bono Matters</i>	32
C.	PERSONAL EXPENSE REIMBURSEMENT	32
1.	Applicable Rule	32
2.	Expense Account Issues	33
3.	Multiple Reimbursements	34
D.	FIRM EXPENSE REIMBURSEMENT	34
1.	Applicable Rule	34
2.	Creative Definitions of “Expenses”	34
E.	STAFFING AND EXPERTISE	36
1.	Applicable Rules	36
2.	Staffing a “Big Deal”	36
3.	To Staff or Not to Staff?	37
a.	One of the Frequent Causes of Malpractice	37
b.	An Attorney “On the Bubble”	37
c.	Timing Is Everything	38
4.	Outsourcing and Contract Attorneys	38
<b>Chapter 5 STATEMENTS TO OTHERS</b>		<b>41</b>
A.	APPLICABLE RULES	41
B.	YOUR FIRST “BIG” ASSIGNMENT	41
C.	EXPERTISE	42
D.	NEGOTIATIONS	42
E.	INVESTIGATIONS	43
1.	Leaks on the Board of Directors	43
2.	Fraud Against Your Client	44
F.	HELPING THE ENTERPRISING ENTREPRENEUR	44
G.	MEDICAL PRESCRIPTIONS	45
H.	EMPLOYMENT REFERENCES	46
I.	PERSONS REPRESENTED BY COUNSEL	47
J.	“THE CLIENT SAID IT”	47
K.	THE “WHOLE TRUTH?”	48
<b>Chapter 6 INTRODUCTION TO CONFLICTS OF INTEREST</b>		<b>49</b>
A.	CONFLICTS OF INTEREST IN BUSINESS AND OTHER PROFESSIONS	49
1.	Supermarket Product Placement	50

---

## TABLE OF CONTENTS

2.	Bookstore Placement	50
3.	Wine Ratings	51
4.	University Services and Credit and Debit Cards	51
5.	Law School Textbooks	52
6.	Financial Broker's Advice	53
7.	Drug Companies and Medical Device Manufacturers	53
a.	"Perks"	53
b.	Financial Incentives	54
B.	DISCLOSURE AND CONSENT	58
1.	Disclosure	58
2.	Consent	58

### **Chapter 7                    LAW FIRM AND LAWYER CONFLICTS OF INTEREST .. 61**

---

A.	APPLICABLE RULES	61
B.	PERSONAL INTERESTS	63
1.	Tax "Shelters"	63
2.	Law-Related Services	64
3.	Opposing Counsel	64
4.	Investment in Client	65
5.	Personal Professional Interest	65
6.	Law Firm Partner on the Board of Directors	66
7.	Other Personal Interest — An Unusual Fee Arrangement	66
C.	THIRD PARTY PAYING LEGAL FEES	67
D.	MULTIPLE CLIENTS	68
1.	Current Clients	68
2.	Former Clients	69
3.	Prospective Clients	70
E.	MANAGEMENT OF CONFLICTS OF INTEREST	71
1.	"Ethics Walls"	72
2.	Informed Consent	72
3.	Advance Waivers	73
4.	Declining and Terminating Representation	73

### **Chapter 8                    WHO IS THE CLIENT? ..... 75**

---

A.	APPLICABLE RULES	75
B.	THE ORGANIZATION AND ITS EXECUTIVES	75
1.	An Important Assignment for the Boss	75
2.	Another Important Assignment for the Boss	76
3.	The Boss Has Trouble	76
4.	Option Backdating	77

**TABLE OF CONTENTS**

C. TRANSACTIONS BETWEEN THE ORGANIZATION AND ITS EXECUTIVES . . . . . 83

    1. New Technologies . . . . . 83

    2. Very Good Deals . . . . . 83

    3. Tax “Shelters” From the Audit Firm . . . . . 84

D. TRANSACTIONS WITH OTHER COMPANIES . . . . . 85

    1. Senior Management Conflicts of Interest . . . . . 85

    2. “Spinning” . . . . . 86

E. INVESTIGATIONS . . . . . 87

    1. Applicable Rules . . . . . 87

    2. Typical Investigations . . . . . 88

**Chapter 9 CODES OF BUSINESS CONDUCT . . . . . 91**

A. PRELIMINARY CONSIDERATIONS . . . . . 91

B. VENDOR RELATIONS . . . . . 92

    1. “Perquisites” . . . . . 93

    2. Educational Programs . . . . . 96

    3. Personal Relations . . . . . 97

    4. Charitable Contributions . . . . . 98

C. COMPETITION . . . . . 98

    1. Competitively Sensitive Information . . . . . 98

        a. A Marketing Plan From an Unknown Source . . . . . 99

        b. Mistaken Identity? . . . . . 99

        c. Just an Interview? . . . . . 99

    2. “Behind the Scenes” Support for Opposition Groups . . . . . 100

D. PERSONAL CONDUCT . . . . . 101

    1. Relations Among Employees . . . . . 101

    2. Plagiarism . . . . . 102

E. CONFIDENTIAL INFORMATION . . . . . 102

F. ENFORCEMENT OF RULES . . . . . 103

    1. The “Sting” . . . . . 103

    2. Monitoring Employee Email and Website Visits . . . . . 103

    3. Reporting Non-Compliance . . . . . 104

    4. Consequences of Non-Compliance . . . . . 105

**Chapter 10 COMPLIANCE WITH LAWS . . . . . 107**

A. APPLICABLE RULES . . . . . 107

B. DATING DOCUMENTS . . . . . 107

    1. Calendar Questions? . . . . . 108

    2. Questions of Accuracy . . . . . 109

---

## TABLE OF CONTENTS

C.	INSIDER TRADING .....	109
1.	“All in the Family” .....	110
2.	More Family Ties .....	111
3.	Faulty Economic Analysis .....	111
4.	A GC’s Bad Timing .....	111
5.	It Was Only “Research” .....	111
6.	A “Fox in the Chicken Coop” .....	112
7.	Two More Foxes .....	112
8.	Selling Shares During Company Share Repurchases .....	113
D.	ENVIRONMENTAL LAWS .....	113
E.	REPORTING UP AND OUT .....	113
1.	Applicable Rules .....	113
2.	Profits v. the Environment .....	115
3.	“Whistleblowers” .....	115
a.	Applicable Rule .....	115
b.	Retaliatory Discharge .....	116
<b>Chapter 11           STAKEHOLDER INTERESTS .....</b>		<b>117</b>
A.	APPLICABLE RULE .....	117
B.	CORPORATE RESPONSIBILITIES .....	117
C.	CONFLICTS AMONG STAKEHOLDERS’ INTERESTS .....	120
1.	Price-Gouging .....	120
2.	Outsourcing .....	121
3.	Real Estate Development .....	122
4.	Environmental Laws .....	123
5.	Possibly Contaminated Food Products .....	123
6.	Going “Green” .....	125
a.	Operational Changes .....	125
b.	Advertising .....	125
7.	Illegal Payments .....	125
8.	“Coal Washing” .....	126
9.	Senior Executive Alleged Illegal Conduct .....	127
10.	Health Insurance Policy Rescission .....	127
11.	Contributions to “Pet” Charities .....	128
12.	Union Pension Plan Activism .....	129
13.	Preferred Dividend Payments .....	129
<b>Chapter 12           OBLIGATIONS TO COUNSEL .....</b>		<b>131</b>
A.	APPLICABLE RULES .....	131
B.	CONFIDENTIAL NOTES .....	131

---

## TABLE OF CONTENTS

C.	NEGOTIATIONS .....	132
D.	MISDIRECTED COMMUNICATIONS .....	132
1.	Applicable Rule .....	132
2.	A Government Agency Memo .....	132
3.	Defendants' Email .....	132
4.	Intercepted Cell Phone Call .....	133
5.	Overheard Cell Phone Conversation .....	133
6.	Company-Monitored Email .....	133
E.	DOCUMENT RETENTION .....	135
1.	Applicable Rule .....	135
2.	Destruction in the Ordinary Course of Business .....	136
3.	A "Smoking Gun" .....	136
4.	Operating Records "Irregularity" .....	136
F.	SETTLEMENT OF LITIGATION .....	137
1.	Applicable Rule .....	137
2.	A Favorable Settlement Opportunity .....	137

---

### Chapter 13                    DUTIES TO TRIBUNAL AND OTHERS ..... 139

A.	MERITORIOUS CLAIMS AND DEFENSES .....	139
1.	Applicable Rules .....	139
2.	"We Know It When We See It" .....	140
3.	What Disclaimers? .....	140
4.	Price-Fixing? .....	141
5.	"He Said, She Said" .....	142
B.	EXPEDITING LITIGATION .....	142
1.	Applicable Rules .....	142
2.	Discovery Tactics .....	143
C.	CANDOR .....	144
1.	Applicable Rules .....	144
2.	Discovery "Nightmares" .....	144
D.	CONFIDENTIAL SETTLEMENTS .....	147
E.	LIMITATIONS ON REPRESENTATION OF CLIENTS .....	148
1.	Applicable Rule .....	148
2.	The Truth Comes Out .....	149

---

### Chapter 14                    ETHICS AND INTEGRITY IN MERGERS AND ACQUISITIONS ..... 151

A.	APPLICABLE RULES .....	151
B.	"GOING PRIVATE" .....	151
1.	Acquisition by Controlling Stockholder .....	151

---

## TABLE OF CONTENTS

2.	“Private Equity” Firm Acquisitions . . . . .	152
C.	“PARACHUTES” . . . . .	154
D.	FINANCIAL ADVISORS TO BOARDS OF DIRECTORS . . . . .	156
1.	Fairness Opinions . . . . .	156
2.	Managing a Competitive Bidding Process . . . . .	157
E.	SETTLEMENT OF STOCKHOLDER LITIGATION . . . . .	158

### **Chapter 15 ANALYTIC FRAMEWORK AND ETHICS LANDSCAPE . 161**

A.	LESSONS LEARNED . . . . .	161
1.	Spotting Issues . . . . .	161
2.	Relevant Questions and Factors . . . . .	161
3.	Role of Law . . . . .	162
4.	Rules Versus Principles . . . . .	163
5.	Variable and Changing Standards . . . . .	164
B.	PRACTICAL STEPS AND ARGUMENTS . . . . .	164
C.	ETHICS, CORPORATE SOCIAL RESPONSIBILITY AND BUSINESS SUCCESS . . . . .	165
D.	THE ETHICS “PENDULUM” . . . . .	166
Appendix I	FRAUD’S RED FLAGS . . . . .	167
Appendix II	WHITE FLAGS . . . . .	175
Appendix III	AMERICAN BAR ASSOCIATION (“ABA”) <i>MODEL RULES OF PROFESSIONAL CONDUCT</i> (THE “MODEL RULES”) . . . . .	181
Appendix IV	“CODE OF BUSINESS CONDUCT AND ETHICS” OF SAFEWAY INC. . . . .	185
Appendix V	BACKDATING PERILS . . . . .	195
Appendix VI	MUMBO JUMBO . . . . .	199



*All human beings seek the happy life, but many confuse the means — for example, wealth and status — with that life itself. This misguided focus on the means to a good life makes people get further from the happy life. The really worthwhile things are the virtuous activities that make up the happy life, not the external means that may seem to produce it.*

—EPICTETUS

