

# Notes on the Teaching of Ethics in Law School

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The word "ethics" is a particularly amorphous concept in the context of legal training. It is critical to spell out the several distinct meanings of legal ethics:

First, there are professional rules of protocol (Ethics I): a client's funds must be kept in a special escrow account separate from the attorney's funds;<sup>1</sup> a lawyer only contacts the adverse party through his or her own lawyer;<sup>2</sup> a lawyer can advertise services only in certain prescribed ways.<sup>3</sup> These are relatively easy to communicate and easy to grasp.

A second form of ethics is the more "open texture" rules (Ethics II) which require analysis of cases and formal ethical opinions of bar association committees to establish relevant principles and appropriate modes of conduct. These are accessible to treatment typical of the best law school classroom work in substantive law courses. For example, the proscription in Canon Five<sup>4</sup> against conflicts of interest has developed a sufficient gloss in the case law to provide a number of guidelines to practitioners as well as many difficult questions for analysis.<sup>5</sup>

Thus far we are describing a subject matter that focuses largely on the ABA Code of Professional Responsibility<sup>6</sup> and analytical treatment of the Code as a statute. The provisions

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1. ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], DR 9-102.

2. ABA CODE, DR 7-104 (A)(1).

3. ABA CODE, DR 2-101 to -105.

4. ABA CODE, Canon 5. All references to Canons throughout this article refer to Canons in the ABA CODE OF PROFESSIONAL RESPONSIBILITY.

5. ABA CODE, DR 5-105, 4-101. See, e.g., *T.C. Theater Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953).

6. Hereinafter sometimes referred to in text as CODE.

of the Code, its ambiguities, and the overall framework of the Code requires interpretation. The complexity of the statute we need to interpret, as well as the special importance of the material, justifies the creation of a course on this subject. In this respect, law school training in ethics may be said to be more advanced than that of other professional disciplines. The Code is a rather complex document and a well-articulated system of interpretation compared to the systems of other professions, and most law schools—unlike other professional schools—reserve a special required course in ethics for all students.

There are two other important concepts of ethics that complicate the formulation above, and cast doubt about the sufficiency of the required ethics course as a means of teaching legal ethics.

Legal ethics, for example, includes criticism of our laws and society for failure to meet standards of justice (Ethics III). Ethics III could involve an inquiry whether the justice delivery system works fairly and responsively for the public. A number of specific issues often raised in legal ethics courses can be addressed in this way. *Bates v. State Bar of Arizona*<sup>7</sup> can be viewed as a criticism of the formulation of advertising rules in Canon Two which unnecessarily restrict access of the public to lawyers. The statutory enactments of more simplified rules of procedure, discovery, and evidence are a direct criticism of existing legal practices and an attempt to reduce the impact on litigants of delay, surprise, and differences in lawyers' ability.<sup>8</sup> Using this sense of ethics, there is probably more "pervasive" method teaching throughout the curriculum than is commonly credited to American legal education. It would not be surprising for example to have no-fault automobile insurance taught in a Torts class, not only because it is essential to an understanding of contemporary accident compensation systems, but also because it represents a critique of the contingent fee system for some

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7. 433 U.S. 350 (1977).

8. See Schnapper, *The Myth of Legal Ethics*, 64 A.B.A.J. 202, 204 (1978).

categories of cases.

A more troublesome, and in many respects more important, sense of legal ethics (Ethics IV) is the practice situation in which a lawyer has a decision to make with respect to the handling of his or her client. Obviously, all three of the meanings of legal ethics previously discussed inform this decision. On the other hand, some of the most difficult decisions are not prescribed by the rules or principles of the profession, nor are answers to be found in criticisms of the institutions and policies of the law. Moreover, in some of these areas the ABA Code of Professional Responsibility is either silent or not helpful. How, for example, does a lawyer respond to a client whom he suspects of questioning him (the lawyer) in order to prepare false testimony? How does a lawyer deal with a client who seeks to pursue unethical, but arguably legal, conduct? What is the lawyer's obligation to report a client's illegal conduct (of which she has knowledge given in confidence) to a court or other governmental agencies?

This Ethics IV category is troublesome because analysis appears to involve principles of personal morality that have traditionally been viewed as inappropriate for law school teaching. Quite apart from the heterogeneity of the moral backgrounds and training of students and professors at American law schools, Ethics IV questions appear to require covering some ground that has been off limits in American higher education for some years now, namely the inculcation of moral values. The difficulties of such an undertaking, let alone the unwillingness of personnel to undertake it, seem formidable. As a result, most teachers of professional ethics in law schools confine themselves to raising issues in this area, and discussing some alternative responses by professionals. The one concession to the special ethical problems raised by these issues is a belief by most teachers that they have what might be termed a moral obligation (which often overrides the principles of a socratic method pedagogy) to spell out explicitly their own personal resolution of these issues.

Ethics IV deserves further clarification and definition, after which I will argue that it is not only badly taught in law school, but that there are strong reasons why it will continue to be taught badly unless some major changes are initiated in the way law schools approach the subject.

There are two important features of the lawyer-client relationship that have important ethical dimensions. The first is shared with most other professions, namely the question of professional dominance of people, the sense in which the special expertise of the professional used to restrict rather than to enhance the autonomy and range of choices exercised by the non-professional. Apart from one small section in the Ethical Considerations of Canon Seven,<sup>9</sup> there is almost no mention of a set of issues in the ABA Code of Professional Responsibility, and virtually none of the standard textbooks cover this subject. Clearly, however, the lawyer's concept of the decision-making relationship with the client has significant impact on his or her practice, ranging from the extent to which a client is given the option of differing fee arrangements, to management of the information flow to and from clients, management of decisions relating to alternative strategies in negotiation or litigation, and assessment of the degree of paternalism (if any) which a client wishes the attorney to exercise on his or her behalf.

The second, rather unique problem of the lawyer-client relationship is that the lawyer is in the position of acting for another individual whose personal morality may be at variance with that of the lawyer. Canon Seven of the ABA Code of Professional Responsibility describes this ethical duty in terms of zealousness on behalf of a client.<sup>10</sup> There has been a rather long history of public misunderstanding of this special role-differentiation of the lawyer which makes the lawyer's representation of unethical clients (viewed in terms of conventional morality) a basic tenant of what it means to be an ethical lawyer. A large number of lawyers also have difficulty

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9. ABA CODE, EC 7-8.

10. ABA CODE, DR 7-101.

with this role-differentiation both in terms of deciding what are the formal limits of loyalty to a client under Canon Four, e.g. in defense of the factually guilty criminal as well as the psychological defenses lawyers create to justify representation which can lead to contempt of clients, and ultimately all too often to slipshod performance. Particularly difficult choices are faced when the attorney feels she must risk the disapproval of a respected peer in order to represent a client zealously. This area of legal ethics, too, has important day-to-day operating significance for lawyers as well as extremely important long-term effects on the lawyer's attitude towards his or her practice.

The law school is an extremely hostile environment for the teaching of Ethics IV. The basic reason is that legal education, unlike most other forms of professional education, lacks a required clinical component. Thus, learning about, and experience with, clients is relatively rare in law school. Those schools that do offer a large number of students a practice experience (and there are very few schools that fall in this category) often do not accompany it with a reflective component that generates much thinking about Ethics IV issues. It is no exaggeration to say that the client relationship is simply not a part of American legal education. Faculty-student ratios are extremely high by most professional schools' standards. There is almost no effective component to a three-year program focusing on the acquisition and reward of intellectual performance. The classroom is heavily laced with skepticism, and for a host of reasons the faculty would be reluctant to enter the "arena of conflict" between professional morality and common notions of morality.<sup>11</sup> A large number of faculty have never practiced and therefore have almost no experience in this category of ethical problems, and some of those that have had such experience are teaching because they wish to avoid further experiences of this kind. In short, the socialization of young lawyers by which models

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11. Schwartz, *Moral Development, Ethics, and the Professional Education of Lawyers*, PROC. OF THE 1974 ETS INVITATIONAL CONF.—MORAL DEV.

are provided for the resolution of Ethics IV issues occurs almost entirely after law school in a context of apprenticeship with a law firm. Thus the total institutional impact on law students is the message that these ethical issues are simply not important because they are not susceptible to treatment as traditional law school subject matter.

Nevertheless, Ethics IV crops up in the traditional legal ethics course if it deals in any depth with the dilemmas created by the intersection of Canon Seven and Canon Four. This part of the course, which is usually the most interesting and puzzling to students, also becomes the most frustrating, because the plan of most courses is to "sensitize" to the issues, not to provide the equipment needed to deal with them. At this point, students feel on the one hand cheated at the superficiality of the analysis, and on the other hand convinced, as a result of the experience in law school generally, that the area has no intellectual rigor since a wide range of answers is possible depending on one's personal moral standards. Thus, most courses in legal ethics are not well regarded by students, who generally assess the ethics course as makework required to appease the bar.

If this assessment of the state of teaching ethics in American law schools is valid, something more is needed than the suggestion of improved materials. While there are clear constituencies for teaching Ethics I and II in the bar and, to some extent, Ethics III in the faculty, Ethics IV, the problematic enterprise—and arguably the most important—has only a foothold in the curriculum, and unfriendly surroundings in law school generally. Indeed, teaching Ethics IV may well be subversive of the general law school environment. At the very least, a careful analysis of the politics of presenting Ethics IV is necessary if we are to face up to the institutional realities that weigh against teaching ethics in law school.

A number of efforts could be undertaken to rescue Ethics IV from its isolated position in the law school curriculum.

1. One of the difficulties with the current survey course in legal ethics typical of most schools is the extraordinary range of disparate issues covered by the course. There is

much to be said for breaking the required course into segments. Some of the more sophisticated case analyses and SEC regulations could be reserved for students in the third year. Some of the analyses of the lawyer-client relationship could be made a part of the first or second year curriculum because they introduce categories of analysis and consideration which could usefully be introduced at the initiation of the student's career, when questions of fundamental values are more amenable to open discussion. Many law schools create in the first year special small class environments for legal research and writing. A similar environment would be a good setting for discussion of the attorney-client relationship, a review of what lawyers do, and the history and sociology of the profession. One other advantage of placing this requirement in the first or second year is that it indicates to students that it is a basic part of learning to be a lawyer, not an afterthought for the third year which could not be fitted into the structure of the required curriculum.

2. A second major change that could greatly improve the teaching of ethics at law schools would be to take the "pervasive" method seriously. Virtually all commentators with any experience with the pervasive method dismiss it as ineffectual. What is less clear is whether there has been any attempt to assure that pervasive teaching takes place, other than memos and harangues from the Dean or faculty committees. For example, has any school deployed its faculty research funds to support projects to develop materials in ethics for the courses in which the faculty member ordinarily teaches? Have there been faculty hired with the specific task of supporting other faculty in the development of teaching materials? Institutional resources have rarely been systematically deployed to provide the kind of incentive needed for the "pervasive" method to be successful. At best, the pervasive method can only act as a supplement to, or enrichment of, a strong basic course in legal ethics. If students do not have some grounding in the subjects of legal ethics, the emergence of ethical issues in other substantive courses may seem rather arbitrary.

3. A third important advance in teaching legal ethics could be to introduce students to real clients in a setting in which they could freely discuss with a faculty member-lawyer and other student lawyers the problems and dynamics of the lawyer-client relationship. This is not simply a "practice" experience, but an experience deliberately designed to generate questions and a framework for discussing and resolving Ethics IV issues. One of the chief arguments for clinical legal education is its efficacy as an introduction to the ubiquitous ethical dilemmas of the practice of law.

4. A most urgent task is the development of additional teaching materials for legal ethics to enrich some of the good problem method casebooks now on the market. For example:

- a. *Moral Philosophy.* There is remarkably little literature of formal justification for the adversary system, from which so much of the relationship between lawyer and client derives. The dangers of professional domination of laymen is relatively rarely discussed, in law literature, and could use amplification. There is almost no philosophical literature of a systematic kind addressed to the distributional justice issues raised by our legal services system. Some of these tasks require an amplifying literature. For some issues there is need for a literature to be created to fill a vacuum.<sup>12</sup>
- b. *Impact of Organization in Ethical Decision Making in Law.* The management, organization, and financing of law practice is simply not a subject for analysis and study in American law schools. Most students are not introduced to this part of law practice until the completion of their apprenticeship years, yet it is fundamental to the understanding of important constraints in practice and the overall framework of case management, client contact and the investment of attorney time. Financial and management case studies of different forms of practice on the Harvard Business School "case" model could be invaluable aids to the understanding of many important Ethics IV problems.
- c. *Case Studies of Lawyers in Trouble.* The disciplinary sys-

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12. A Joint project of the Center of Philosophy and Public Policy of the University of Maryland and the University of Maryland Law School is designed to create and identify a philosophical literature that may be helpful in the professional ethics course.



tems enforcing the Code in the various states are largely focused on attorneys who commit crimes, serious fraud, or such gross negligence that students are not likely to accept the possibility that these cases bear any relationship to their future situations in the profession. With the development of some new institutions or methods of dealing with lawyers' incompetence (short of those meriting discipline) it may be possible to create case studies of incompetence by well-meaning and conscientious attorneys who were unaware of the ethical implications of their decisions in practice.

These explorations require investment of time and financial resource and no small degree of attention and leadership. It may be that it expresses a program too ambitious for legal education to undertake because it involves significant changes in legal education itself. But if ethics is as deeply imbedded in the successful practice of law as most practitioners believe it is, it is time we grew restless with the tokenism of our required course and began taking more seriously the role of ethics in the curriculum of the law school.