I TEACH LEGAL ETHICS

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“I teach legal ethics.” In all of legal education there may be no four words that evoke more pity and pathos than those. Tell the truth, didn’t you shudder when you read the title? What a thankless task. What a soft subject. What a daunting undertaking. But how can this be? Is there any subject more central both to lawyering and legal academics than the manner in which we lawyers conduct ourselves? Is there any subject more exciting than searching for the interface between public duty and individual rights? Is there any subject more engaging than the introspection required to imagine how we would respond in times of stressful decision making? Why don’t my students understand this? Why don’t my colleagues?

There are two recurring problems in teaching legal ethics. The first is widespread student apathy and dissatisfaction with what is often the only required course in the upperclass curriculum. Although I think that I have succeeded in making my course generally interesting and occasionally provocative (some might say that it is generally provocative and occasionally interesting), the endemic problem of student disinterest in legal ethics is present at both Northwestern and Emory, as I am told it is at most other law schools.

The second problem is one of course identity. At least three separate topics are tied up in what we generically call legal ethics: (1) the disciplinary rules and the “law of lawyering,” (2) the concept of professionalism and role differentiation, and (3) the question of how to do justice. These topics, of course, inform one another. The disciplinary rules both require and place limits on attorney zeal; the problem of role differentiation asks us whether we can be both zealous and good; inquiries into justice question the adversary system itself. But the three aspects are also in conflict regarding student expectations. Are they there to learn rules, morality, or philosophy?

Well, why do we teach legal ethics? Putting aside the ABA accreditation requirement, there are two, shall we say “pedagogical,” reasons. First, we teach ethics because students must know the law of lawyering

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in order to pass the bar and "stay out of trouble. Second, we hope to initiate some personal engagement in the process of ethical reflection. Students, by their nature, tend to be preoccupied by the rules. Teachers, by inclination if not by breeding, concentrate on the process. Can we teach adults to be ethical or moral? Obviously not. The temptation to corruption and dishonesty can hardly be countered in a two-hour course. However, we can teach them the rules of the game. More importantly, we can create an awareness of the centrality of ethical dialogue and introspection.

Based on this understanding, I see the two problems merging. Students are unhappy with the legal ethics course because it lacks clarity of mission. It tries to do too many things, some of which cannot be done well in the lecture format, especially in classes of over 100 students. I think, therefore, that we need to separate the issues of law and ethics, both in terms of course coverage and actual teaching technique.

Let me discuss the "law of lawyering" first. As with any other code-based subject, this can be taught in a socratic/lecture format. Unlike other code subjects, there has been relatively little litigation over professional responsibility issues. Moreover, many of the issues are relatively fact-dependent or trivial. After we say that advertising cannot be misleading or undignified, what is left to discuss? How much class time can profitably be spent distinguishing between drawings of Dalkon Shields and pictures of hypothetical lawyers in clown suits? Even in the widely litigated areas, such as conflict of interest and subsequent representation, the questions are more factual than doctrinal. In short, it is no heresy to say that the law of lawyering, standing alone, does not warrant two semester hours.

Legal ethics, the questions of professionalism and justice, on the other hand, can consume a limitless number of semester hours. The problem here is that the 100 student lecture format is far too sterile a setting in which to explore the subject. These are questions that ought to engage students personally; they are questions about who we are, how we live, and to what we ought to aspire. Does that look corny on the printed page? You can imagine how corny it sounds to a room of 100 third-year law students. This is the problem that, to my knowledge, no one has solved. How can one talk about ethics to a large, undifferentiated, unself-elected mass of students without coming across like a preacher, scold, or (in my case) yenta.

My conclusion is that it can't be done. The ethics part of the subject needs to be taught in smaller groups. We could offer seminars, but this would require most schools to give at least five additional seminars.
per semester in order to achieve the necessary coverage. Furthermore, a required seminar might well fail to achieve the necessary personal engagement. The result of teaching the same subject to a smaller group of students might be only to reduce the universe in which to hunt for someone who has thought about the readings.

Instead, I think that we ought to tie the introspection/dialogue aspect of legal ethics into other course offerings—preferably into the practice oriented courses such as trial advocacy and negotiation.

Why have I settled upon the practice oriented courses? First, they tend to be small classes, or at least classes that are taught in small sections. Second, they tend to have an intense, relatively collegial, student-teacher relationship. Finally, and most important, they engage students in the real practice of law.

The practice oriented classes involve students in the process (or at least the simulated process) of lawyering. By definition, they present the sorts of problems that lawyers face, and search for solutions or ways of thinking about these problems. Legal ethics will fit this model perfectly. Confronted with a problem, how will the student solve it? How will the student think about it? How will the student learn to recognize it? In other words, how can we better study role differentiation than in classes that rely upon role playing?

Of course, this is a utopian proposal; it trespasses on too much turf. After struggling to obtain a secure place in the curriculum, simulation and clinical teachers (of whom I am one) will not readily give over their hard won credit hours to something more akin to traditional academics. Moreover, the economics of coverage may be an insuperable problem. There will always be considerable institutional drag on transforming a large lecture course into a collection of small practica. Even at schools that successfully offer combined practice and ethics courses (and there are a few), it is likely that in most places the large lecture course will continue to exist as an economical alternative.

What I have attempted to do, then, is not to abandon the lecture course for simulation, but rather to bring simulation into the lecture hall.

I have divided my course (Legal Ethics at Northwestern; Legal Profession at Emory) into two distinct parts. Part I, “The Law of Lawyering,” consists of six “straight” lectures (accompanied by appropriate readings) covering the principal rules, codes and cases that govern the legal profession. These lectures take place at the very beginning of the course, so as to give the students a common basis for the discussions in the balance of the semester. Following the sixth lecture I have the students raise their right hands and I swear them in as lawyers. From that
point forward they are held to a knowledge of, and are obliged to follow, the law of lawyering.

Part II of the course, comprising the remaining 22 or so classes, is called "Problems in Legal Ethics." Each class is devoted to the discussion/simulation of a single problem. I use the T. MORGAN & R. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (4th ed. 1987) casebook, but any problem method materials will do.

The discussions occur in the format of a simulated courtroom, conference room, office meeting or disciplinary proceeding. They are not moot courts; students are not asked to argue legal positions in a representative capacity. Rather, I divide each problem into five or so roles—client, opponent, lawyer, judge, public—and require assigned students to participate (in role) from the standpoint of their own needs and interests. I don’t ask "what should the lawyer do?" but rather "what will you do?"

We discuss "the law" (to the extent that it can be identified), and also the deeper issues concerning the profession. What should the law be? How will your lawyering relate to justice and the public good? Can a lawyer be a good person? How? Where do client responsibilities end and public responsibilities begin?

From that point we proceed with the normative discussion. Are you happy with your choice? Are the results fair to the client? Would different choices lead to better or worse outcomes? “Client, has your lawyer done what you need?” “Adversary, how are you affected by that conduct?” “Public, has your interest been served?”

To facilitate this I post the syllabus at the beginning of the semester, with a list of the available roles for each class. Students may then sign up for the class of their choice. (100 plus students divided by 22 classes give me roughly five students per class). In this way I achieve a fair amount of natural role identification. The prosecution-minded sign up to be prosecutors. The corporate-minded sign up as corporate counsel. Those drawn to public interest, such as they are these days, take appropriate roles. The children of physicians vie for the problem on medical malpractice.

The system is far from perfect. The class is still too big, the problems are too artificial. I am only able to assign students once each semester, and I often have to cut off good discussions in order to give all of the participating students their chance. On the other hand, most of the expected difficulties have not developed. For example, students do not ignore the class on their nonassigned days. My attendance stays high—well, relatively high during call-back season. And, in the words of
one colleague who did me the favor of sitting in on a class, "the ball definitely stays in the air."