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Chapter 12

Addressing Lawyer Competence, Ethics and Professionalism

Nigel Duncan and Susan L. Kay

Education is the art of making human beings ethical.¹

Training law students involves more than teaching them to think like lawyers, and more than teaching them the technical and doctrinal constituents of law practice. Law students must also be exposed to the ethical constructs and rules that confine the practice of law. Exploring and developing the ethical sensibilities of law students are among the most exciting and worthwhile aspects of law teaching. These ethical sensibilities help students to understand better the context of the other vectors of legal education: the sometimes technocratic vocational training and the vessel for intellectual development. They provide a foundation to help students maintain a principled approach when they enter practice.

Real understanding of legal ethics is best understood by students undertaking classes which expose them, in simulation or reality, to the actual practice of the law. Globally, the clinical legal education movement has been a powerful source of change for many law students and this chapter will address that phenomenon. It will survey the requirements for the teaching of professional ethics around the world and then focus on the particular ways in which clinical experience can fulfill the needs of ethical education. To this end, it will provide examples of learning methods from different jurisdictions that incorporate clinical methodology in unique and effective manners.

Variety in how ethics and professionalism are addressed.

Chief among the responsibilities of legal education is the preparation of professionals for the practice of law. Nonetheless, many jurisdictions do not require ethical training as part of the required curriculum for law students. Even among those jurisdictions that do require ethics training, there is considerable variance in their chosen modes of teaching ethics and professionalism. This section will consider some of the reasons for this variety and explore the limited research into how educational establishments approach this important subject.

The responsibility for addressing professional ethics lies with different participants in different jurisdictions. For example, in the United States, where legal

¹ G. W. F. Hegel, Elements of the Philosophy of Right §151.

education is entirely postgraduate, students may practice law with neither further training nor experience once they have completed their law degree (JD) and the appropriate state bar exam. One of the few compulsory elements of the JD curriculum is training in professional responsibility, including knowledge of the American Bar Association's Model Rules of Professional Conduct,² a version of which has been adopted by a majority of the states. And all state bar examinations must include the Multistate Professional Responsibility Exam (MPRE), a multiple-choice test that covers the ABA's Model Rules.

In England and Wales, by contrast, students complete an academic law program (LLB) before going on to a professional program—the Legal Practice Course (LPC) for solicitors or the Bar Vocational Course (BVC) for barristers—and may not enter independent practice until they have completed an apprenticeship (the Training Contract for solicitors or Pupilage for barristers).

Most law degrees in Australia are completed in five years, but studies begin with a multi-disciplinary education. Students may either complete the material required for law practice during a five-year degree program or may choose to attend a post-graduate course focused on the demands of legal practice. Consequently, Australian universities have a strong financial motivation to ensure that their degrees cover all the material that is required for practice, including the so-called “Priestley Eleven.”³

Most jurisdictions have adopted a regime similar to either the United States, the United Kingdom or Australia, and most of these regimes are enforced by the relevant licensing or supervisory authority within the jurisdiction. However, there are some examples (including Poland, Russia and South Africa) where the regulation is by the State or a state agency, and other jurisdictions (including Kuwait) where there is no regulation. (Chandler & Duncan, 2007) Until recently, Japan had no regulation; however new reforms introduced by the Justice System Reform Council have encouraged wide experimentation in curriculum design and many Japanese law schools are very focused on addressing ethical issues. (Economides, 2007)

While there is diversity in the approaches for mandatory ethical training taken by the various jurisdictions, all seem to lack pedagogical creativity. In the United Kingdom, where there is a requirement to teach “professional conduct,” the goals of the course are relatively narrow, largely focused on ensuring the recognition of formal ethical dilemmas and Code compliance. There is no professional pressure to address ethical issues on the

² This requirement is contained in Standard 302(a)(5) of the American Bar Association's Standards for the Approval of Law Schools.

³ The “Priestly Eleven” are: Tort Law, Criminal Law, Contract Law, Administrative Law, Company Law, Civil Procedure, Evidence, Equity and Trusts, Real and Personal Property Law, Federal and State Constitutional Law, Professional Conduct and Basic Trust Accounting (our emphasis).

undergraduate degree. Likewise in the United States, many law schools satisfy the ABA requirements with a single, doctrinal course focused solely on learning the Model Rules of Professional Conduct. (Rhode, 2007) What is common, then, is a required curriculum which addresses relatively narrow goals. Formal requirements rarely demand a deeper or more reflective approach.

This is not to say that there is no pressure for a more educationally-sound approach. The Australian Law Reform Commission, for example, has recommended the “development of ... a deep appreciation of ethical standards and professional responsibility.”⁴ In the United Kingdom, the Lord Chancellor’s Advisory Committee on Legal Education and Conduct has recommended:

Professional ethics and conduct should certainly form a central part in the extended education that we hope intending solicitors and barristers will receive in future. Students must be made aware of the values that legal solutions carry, and of the ethical and humanitarian dimensions of law as an instrument which affects the quality of life.⁵

The Carnegie Foundation for the Advancement of Teaching has recommended that in the United States and Canada:

... legal education needs to attend very seriously to its apprenticeship of professional identity. Professional education is highly formative. The challenge is to deploy this formative power in the authentic interests of the profession and the students as future professionals.

...

Further, the schools need to attend more systematically to the pedagogical practices that foster the formation of integrated, responsible lawyers.⁶

The academic community has responded to this growing interest in developing the quality of legal professional ethics in education with a regular International Legal Ethics conference and an international journal, *Legal Ethics*. University law schools have responded with a variety of new courses and teaching methods. Some of the most valuable and innovative of these courses have utilized the clinical methodology.

Why Clinic?

Though the relative efficacy of modes of teaching ethics has long been pondered, most law schools have ignored long-established principles of pedagogy and learning theory and continue to teach professional responsibility as a doctrinal, rules-oriented

⁴ Australian Law Reform Commission, *Managing Justice*, Report No. 89, (2000) Recommendation 2.

⁵ Lord Chancellor’s Advisory Committee on Legal Education and Conduct, *First Report on Legal Education and Training*, 1996, para 1.19.

⁶ SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 128 (2007).

course. As Deborah Rhode has noted, “Many [professional ethics] courses, which focus primarily (and uncritically) on bar disciplinary rules, constitute the functional equivalent of ‘legal ethics without the ethics’ and leave future practitioners without the foundations for reflective judgment.” (Rhode, 2003 at 340) Notwithstanding this practice, learning theory teaches us that several principals should animate the teaching and, more importantly, the learning of legal ethics in law schools.

First, as the Carnegie Report on Legal Education has posited, “[t]he experience of clinical-legal education . . . points toward actual experience with clients as an essential catalyst for the full development of ethical engagement.” (Sullivan et al., 2007 at 160) The Report relies on the well-established principle that learning is progressive. Students should first learn concepts and then utilize those concepts in more complex situations. Applying these principles, one should first learn the rules governing the profession, and then attempt to use these concepts in the complex and ambiguous context created by the practice of law.

Others have likewise proposed that students need to incorporate and utilize what they learn. “Most students learn better when they are engaged in ‘active learning.’ Through ‘active learning’ students are not merely ‘passive receptacles’ of information, but actively participate in the process of identifying, absorbing and understanding the material.” (Lerner, 1999 at 116) Problem solving is more efficacious than rote memorization. Allowing students to discover the problems, rather than having them spoon-fed, provides optimal learning. Drawing on the work of David Luban and Michael Millemann, Professor Rhode has noted that “moral decision-making involves more than knowledge of relevant rules and principles; it also demands a capacity to understand how those rules apply and which principles are most important in concrete settings.” (Rhode, 2007 at 1052, citing Luban & Millemann, 2005)

Finally, as John Biggs has posited, learning requires both clear objectives and consistency between those objectives and the teaching methodology that is employed. Teachers should both understand and make clear to students the expected outcomes of the course. The learning process should be consistent with these objectives. (Biggs, 2003) If teachers of professional ethics truly want students to incorporate ethical behavior into their practice of law, they must create a learning environment that allows students the opportunity to do more than learn the applicable law. Students must be placed in a context in which they must balance the often-conflicting responsibilities contained in those Rules.

Most courses designed to develop moral reasoning in students are based on the theories of Lawrence Kohlberg, in which he identified six stages of moral reasoning. There are two “pre-conventional” stages. The first is fundamentally punishment avoidance and accepts authoritarianism: might is right. The second is self-interestedly instrumental in that collaboration between others may be seen as desirable if it brings benefits. These two stages are seen as pre-conventional as they operate independently of the moral conventions of the culture within which the individual lives. Two “conventional” stages are based on those cultural conventions. Stage Three involves

conformity and establishing longstanding trusting relationships. People operating at this level tend to be highly concerned with approval by those close to them. Stage Four involves a more conscious acceptance of the rules through which moral conventions are articulated. There is an acceptance of authority and recognition of the values of maintaining social order. Two “post-conventional” stages are more concerned with principled moral reasoning. Stage Five, which Kohlberg described as “social contract driven,” engages the individual with fundamental moral principles such as justice and equality, involving a critical analysis of rules and recognition that there are competing values of individual rights and collective interests. Stage Six involves reasoning based on universal ethical principles, and remains a very abstract concept. (Kohlberg, 1981)

The significance of Kohlberg’s research for legal educators is that “[f]ormal education seems to be the most important factor in continued moral development. As people continue in school, they generally continue to progress toward the higher stages of moral reasoning, and, when they leave school, their progress stops.” (Hartwell, 1994 at 511) This is both an indication of the need to continue to address ethics in our teaching and the basis of a guide to promoting students’ moral development through experiential courses.

All of these theories lead inexorably to the conclusion that ethics and professionalism are best learned in the crucible of experience. While the classroom may be the appropriate venue for learning the words of rules and concepts underlying the rules, these principles of conduct can be absorbed fully only in context. To thoroughly understand and appreciate the conflicting obligations and responsibilities inherent in the actualization of the rules, students must utilize them in practice. Put differently, one can only understand the rules in theory if one has experienced them in practice. As Gary Bellow has observed: “Experience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases.” (Bellow, 1973 at 391) Eleanor Myers finds this this observation to be “particularly true of ideas about values, much of whose content is lost when understood in a purely intellectual way.” (Myers, 1996 at 835)

Context thus makes the rules and the doctrine come alive to law students. It is through experiential education—a key element of the clinical methodology—that students “begin to internalize and make their own moral and ethical judgments.” (Id.) All types of experiential education provide learning in context; the question remains as to which are best suited for teaching specific ethical problems and concepts to law students.

Teaching legal ethics and professionalism experientially

There are three generally accepted methods for teaching legal ethics and professionalism experientially: simulation, externship, and live-client clinics. Simulation courses provide mock or simulated problems as the vehicle for learning; students learn in role and in context, but it is a context created by the faculty member specifically for the purpose of teaching particular skills or doctrine. Externship courses place students in real

legal settings outside the law school. The materials of the course are the cases and problems on which the students work under the supervision of their site supervisors. Perspective and reflection is provided by the faculty supervisors who generally teach the students in the classroom component of the externship. Finally, in live-client clinics students represent clients under the supervision of law school faculty members. In these clinics, faculty select cases for their pedagogical value and students may engage in the full panoply of lawyering on behalf of their clients. Each of these types of experiential learning provides the context for discussion and resolution ethical questions. But surely each mode has its own benefits and detriments.

Simulation

The benefits of simulations are two-fold: they are created by faculty members specifically to raise particularized issues or problems and there no live clients are affected by the students' struggle with the issues. Faculty members can thus ensure that particular problems are addressed in particular ways. Real-life cases, on the other hand, are unpredictable and therefore one cannot be sure that any particular issue or problem will occur in a particular case or in a particular manner. Moreover, teachers are able to exercise considerable control over a simulated class. Thus, the experience is relatively safe and it is relatively easy to plan seminar or tutorial work where students discuss the role-play. This didactic component can be directed by the teacher so that the ethical issues which have been designed into the simulation are fully addressed. Moreover, simulations provide students with the independence and the freedom to make mistakes that can help them formulate better ways to address the issues. Faculty can force the students to make hard—and even wrong—choices as a means of teaching the consequences of behavior, with no need for faculty intervention in the students' decision-making before the results accrue. This methodology cannot be utilized where clients are involved, as the faculty member has an independent responsibility to the client to ensure that the student does not make irreparable mistakes.

The limitations of simulation are straightforward. The students are acutely aware that they are working on a mock case. They cannot—and do not—feel the same kind of responsibility and imperative that they do when they are actually responsible for a client. Also, students can become jaded by overuse of simulations. Repeated role-play with fellow students can lose its effectiveness unless special effort is made to add a degree of realism. Using actors, practitioners, or members of the public may help, but often introduces costs which are unrealistic for many institutions. Professor Clark Cunningham has developed a simulation at Georgia State University in the United States which adds realism when students undertake modest individual empirical research, leading to an understanding of the ethical issues in the lawyer-client relationship.

Professor Cunningham asks students to find a member of the public who has been dissatisfied with the services of a lawyer and to ask that person to complete a questionnaire exploring the reasons for dissatisfaction. He then collates and analyzes the results and posts a set of the findings on his website. Through their active participation in this exercise, his students quickly discover the importance of effective communication with and respect for clients, providing an experiential opening into a consideration of

lawyers' other duties to their clients and to the judicial process. The insights, freshly received from such an exercise, are also an excellent preparation for live-client clinical work, and, of course, for work as professional lawyers.

Externships

Externships allow students to work with lawyers and judges who are actively involved in practicing and making law. Students work on whatever cases their supervisors may select, addressing those issues that actually arise at the work site. Students can have a multitude of experiences otherwise unavailable at the law school, by working with prosecutors, with NGOs, or with courts.⁷ Externship students also benefit from supervision by a faculty member, who can tease out the issues and allow the student to explore his or her options without being constrained by responsibility for a client. Of course, such freedom of teaching comes at a price.

On the one hand, ensuring that students comprehend and execute appropriately all ethical constraints, including their duty of confidentiality, is a clear imperative. On the other, faculty also take their consultative role seriously and want to assist their students who are struggling with ethical dilemmas; they are constrained, though, in their ability to provide sage counsel by the need to respect the confidentiality of the externs' workplaces. (Anderson et al., 2004 at 485)

Because they are not part of the confidential relationship, faculty externship supervisors are not privy to information upon which the ethical problems arise. While they can thus discuss ethical issues without either defensiveness or loyalty to the client, they lack the information and thus cannot fully explicate the facts. Not only may faculty supervisors be protected from knowing the facts that underlie the ethical issues, they may not even know that ethical issues exist at the site. Obviously, externship programs make every effort to select only skilful, thoughtful, and ethical site supervisors. Nonetheless faculty supervisors have no way of assuring that their students are being instructed properly or that all relevant ethical issues are identified and addressed. The immediate difficulty is the faculty supervisor's relative lack of influence over the work that students undertake or the discussions that site supervisors have with the students. Indeed, if a student is placed in an environment where ethical practice is poor (or even if it is satisfactory, is unconsidered) the externship may be positively damaging.

Again, utilizing Biggs's analysis, externships are best where the faculty member wants to ensure that a student is exposed to issues in particular areas of practice that would otherwise be unavailable in the law school.

Live-client clinics

⁷ Externship programs are discussed in detail in Chapter 23.

Finally, live-client clinics can provide some of the most direct training in professional responsibility. The students are able to feel, as well as learn, the concepts that govern ethical conduct. “Only by taking primary responsibility for clients may any law student fully experience the ‘professional pulls and choices’ and the ‘balancing of loyalties and professional responsibilities’ of being a lawyer.” (Joy 2004, at 837) The student confronts ethical issues under the supervision of a faculty member in a context where both student and teacher must address and resolve the issues, and both must do so as counsel to the client. The student thus feels the full responsibility of the representation and the teacher can utilize the experience to provide the most full-bodied understanding of the tensions and balances within the rules.

The downsides are less clear. Because the faculty member is concurrently both teacher and lawyer, he or she cannot be as dispassionate as the externship faculty supervisor. This requires delicate balancing by live-client clinic supervisors, who “must resist the urge to exert so much control that they inhibit the student's learning process while still maintaining sufficient supervision that each student-lawyer is capable of performing at a level equal to or better than practitioners handling similar client matters.” (Joy & Kuehn, 2002)

Some have queried the value of the conventional clinic for addressing professional ethics by suggesting that “moral questions ... do not arise with the same frequency as they arise by design in a professional responsibility course.” (Hartwell, 1994, at 535) Even if this is true (and it may be less valid if one takes a broader conception of professional ethics) there are methods of ensuring that students encounter ethical issues during their work in the clinic. One effective approach is that of the specialist ethics clinical course—Legal Practice and Conduct—at La Trobe University in Melbourne.

Like most clinical courses, Legal Practice and Content is an elective course. Students self-select, bringing a desire to “do good” to their decision. The title of the course and its stated objectives draw students’ attention to the centrality of ethics, which is also reinforced by the reading materials and the design of the program. This latter aspect of the course is critical, for there is a risk that in a busy clinic the everyday demands of managing the caseload will overtake the need to draw attention to ethical issues as (and after) they arise. The course design also limits the number of client cases, thus ensuring time for regular team discussions and opportunities for one-to-one supervision. Students are required to maintain reflective journals to explore ethical issues further, which also provide supervisors with insight into the students’ understanding of the issues. The circle is closed by requiring that assessments confirm the importance of ethical issues, including central concepts such as confidentiality and the development of a relationship of trust. (Curran et al., 2005)

The clinicians who teach this clinic take a broad view of legal ethics and “argue that ethical practice goes beyond mere adherence to rules and requires a lawyer to consider the implications of those rules for access to justice.” (Id. at 119) They therefore encourage students to consider whether the issues arising in their casework expose a need for law reform or for public discussion. This enables them to go further in addressing

issues of social justice than might be the situation with individual casework by undertaking research, preparing reports, and publicizing the results.

This approach provides a coherent way of ensuring that the ethical issues which are inherent in casework and those which arise from representing disadvantaged communities are brought to the fore and given the serious, reflective attention they should receive. Moreover, it is a model which may be adapted for many other types of clinical settings.

Other Approaches

What is common to all the examples of basic clinical method described in the previous sections is using an experiential approach. Whether using simulation, law school-based clinic or externship, students are introduced to experiences through which they encounter (amongst other things) ethical dilemmas to which they must respond. This is a powerful development beyond a conventional class, where students are given case studies to which they must explain what they would do. In the clinical setting they actually have to act.

Those seeking to introduce clinical teaching are often presented with objections based on its cost. A number of Indian law schools have developed opportunities for their students to go out to villages and other communities in order to learn by providing a variety of legal services through activities such as the “Legal Aid Cells” organized at V. M. Salgaocar College of Law.⁸ As in the live-client clinics discussed above, the experience, however valuable, is not enough to ensure ethical learning. However, when incorporated into a clinical program this method “provides distinctive opportunities for principled value-based teaching. Professors incorporate students’ experiences, current events and community news through debates, discussions and case questions bringing their practical skills and ethics training in line with the substantive curriculum.” (Bloch & Prasad 2006, at 203)

Another example from India where students provide a service to members of the community who cannot afford to pay a lawyer is lok adalats, informal dispute mechanisms whereby students facilitate settlements between litigants in order to avoid full court hearings. Students act as advisors or mediators to the parties, which throws a number of ethical issues into high relief and provides a contrast to conventional legal practice. Provided students are able to discuss their experiences with their teachers and are able to realize the potential conflicts that may arise from these situations, there is enormous learning potential in these activities. Of course, the discussion must also include a comparison of the conflicts the students are facing with the conflicts inherent in traditional law practice, the development of conventional legal skills, and an awareness of social justice issues. (Id.)

Real experiences are inevitably rich in resources for learning about the ethics of legal practice, and careful design of programs that allow for discussion of—and reflection

⁸ Clinical programs in India are discussed in Chapter 3, covering South and Southeast Asia.

on—those experiences can provide the best learning. This learning will not only impact the students' life, but also their approach to the practice of law.

The Global Clinical Movement and Ethics Education

The work of the global clinical movement has been well documented in other chapters of this book. However, it is appropriate to describe here briefly the particular contribution that various conferences of the Global Alliance for Justice Education (GAJE) have made to the development of ethical ideas.⁹

The first conference, held in India in 1999, included plenary sessions on research into the values of lawyers at various stages of their careers and whether their educational experiences had an impact on those values, and on cultural factors in attempting to apply the same research questions in a different legal culture and jurisdiction. There was also a post-conference Train-the-Trainers workshop which focused on client interviewing, including considerable discussion of related ethical issues. From this workshop, participants developed training programs to deliver in the future.

The initial focus of the second conference, held in South Africa in 2001, was on ways of introducing justice as a central factor in the law school curriculum. This was developed further in the post-conference Train-the-Trainers workshops, one of which centered on legal ethics. Another workshop, on training in trial advocacy, was led by the authors and Les McCrimmon and included addressing the ethical issues which arise in that context. A further layer of ethical considerations came from exercise in which the participants were asked to design sets of materials (case papers) on which students were to work.

The third conference in Poland in 2004, included conference sessions addressing teaching values to law students. Built around a theme of teaching justice from scenes of injustice, the conference program included the powerful experience of a visit by all of the delegates to Auschwitz together with plenary session focused on teaching values to law students and a smaller session exploring how clinical programs can best prepare students for ethical challenges. During the post-conference workshops, the same team as in 2001 led a workshop exploring the specific skills of client interviewing and advocacy on behalf of refugees, providing a further opportunity to consider ethical and social justice issues.

At the fourth conference in Argentina in 2006, one of the five general themes was “Professional responsibility: Educating lawyers in social justice.” The program included a series of interactive workshop sessions on teaching ethics that explored such topics as extending clinic experiences to students who could not share them, encouraging students to question their own views of professional values, and considering post-qualification education and assessment in ethical practice.

⁹ GAJE is discussed more generally in Chapter 26.

The most recent conference, held in the Philippines in 2008, had a stream of sessions on “Justice Education and Professional Responsibility.” This stream included papers on how law schools might encourage public service as a core value of the profession and a session combining presentations and workshops on teaching legal ethics in a corrupt legal system, which challenged assumptions about “justice” and “corruption” and developed practical work identifying the sources of corruption in different jurisdictions.

A feature of an organization like GAJE is that it stimulates others to undertake valuable initiatives. For example, a number of GAJE members participated in a stream on “The legal ethics project in legal education” at the Third International Legal Ethics Conference, held at Griffith University in 2008. More recently, in July 2009, the Central European University and the Public Interest Law Institute (PILI) organized a week-long course for international participants in Hungary on “Teaching Law, Human Rights and Ethics.”

Conclusion

We have sought to indicate both why and how the use of clinical learning methods can be a powerful element in ensuring that proper attention is paid to ethics and professional responsibility in legal education. We will conclude with a reminder as to why this is important, in the words of the new President of the United States.

The study of law can be disappointing at times, a matter of applying narrow rules and arcane procedure to an uncooperative reality; a sort of glorified accounting that serves to regulate the affairs of those who have power – and that all too often seeks to explain, to those who do not, the ultimate wisdom and justice of their condition.¹⁰

This reminds us of the need to ensure legal education which does not merely teach the rules and how to manipulate them, but which explores the ethical codes of the profession, the values which underpin those codes and the questions of social justice inherent in any legal scheme.

¹⁰¹⁰ BARACK OBAMA, DREAMS FROM MY FATHER (2004).