Teaching Professional Responsibility in Law School

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I was pleased to be asked to write about teaching professional responsibility in law school. Ten years and sixteen classes of professional responsibility have allowed me to form many views. The following is organized in a variation of the journalist's standard five questions (who, what, when, where, and how). I consider WHAT to teach in professional responsibility courses, WHO should teach them, WHEN to teach the subject, HOW to teach it, and WHY it is hard to do. (PR in this article refers to Professional Responsibility.)

My assigned topic actually was teaching ethics in law school. First, a brief explanation for the shift in title. Most of us have heard lawyer joke punch lines on the subject. "Legal ethics is: 1) an oxymoron; 2) one of the world's shortest books." "Legal ethics is to ethics as military music is to music." Those cheap shots bear no relationship to my reasons.

There is a set of ethical principles generally accepted to underpin a lawyer's professional role. Ethics (not just the "legal ethics" described in the previous sentence) should be discussed in law school. I believe ethics (both the kind in the first sentence and the kind in the second sentence) are best considered in law school against the overall doctrinal body of law regulating lawyers. Calling a course Legal Ethics can have the counterproductive effect of encouraging students not to take it seriously — more on these views later.

WHAT should be taught about professional responsibility in law school?

My course begins with "Context," including: the legal structure for bar control; sources of authority; consideration of what, in addition to disciplinary codes, regulates lawyer conduct; antitrust limitations on lawyer regulation by state bars; and what exactly are the Model Code, Model Rules, and state codes. In the first class, I inventory student views on what it means to be "a professional."

A second section looks at bar admission and discipline, constitutional limitations on bar authority (including the years of dispute on interstate mobility) self-regulation, and the duty of bar members to supply information on applicants and report violations of the disciplinary standards.

After these background sections, we begin to consider the building blocks of conventional legal ethics: who is a client for the purpose of defining duty; loyalty; confidentiality; competence; communication; what decisions are the client's; clients with diminished capacity; crossing the line from permitted representation to participation in illegal conduct; handling client funds; advancing funds to clients; and withdrawal from representation. Conflicts of interest are complex enough to get their own unit and five or six hours of class time. A fifth section, entitled "Rules of the Game for the Advocate (Particularly the Litigator)" deals primarily with limitations on advocacy.
flowing from duties to the tribunal.

Criminal practice comes up in the previously described sections, but I devote three or four hours to some issues unique to criminal practice — duties regarding physical evidence that could be termed a fruit or instrumentality of the crime, legal ethics in plea bargaining, and prosecutorial conduct.

Next comes "the practice of law as a business" where we take up advertising and solicitation, fee agreements, fee collection, retainer agreements, professional association with non-lawyers, unauthorized practice, trade names, buying a practice, specialization, restrictive covenants, lawyer's responsibility for others in the firm, and entering and leaving firms. I do not teach law office management, but I want students to realize that when the business aspects — an adequate flow of paying clients, record keeping, and such matters — are out of control it is difficult to maintain high professional standards.

We end the course by considering making legal services available (the unpopular client, court appointments, pro bono work) and particular issues in representing special clients (groups and class actions, corporations, government entities). I briefly mention matters covered by the Code of Judicial Conduct and end the course as it began — with a discussion of what it means to be a professional, specifically a member of the legal profession.

In a few instances, I take the time to deal with matters not always covered in legal ethics courses. One cannot understand confidentiality without understanding the attorney-client privilege and its exceptions.

While teaching the body of law regulating lawyers, I tell students that a primary goal is for them to develop gut instincts about what to do in dangerous situations — the professional responsibility course as fire drill. I wear a red and white striped dress on the first day of class that I call the stop sign dress. (After ten years, I am on my second such dress.) I want to drill into their subconscious some points in practice where they should instinctively "stop" before a possibly irrevocable step is taken. In professional responsibility, "I'll look that up" comes too late once a lawyer has heard the confidence or taken custody of the physical evidence.

When people talk about the importance of teaching professional responsibility, they usually refer to client protection or enhancing respect for the profession. Both are worthy goals, but I think about how many sleepless nights I can save a student by focusing on how to prevent problems from arising. I worry not only about the PR problems of the selfish lawyer, but the hot water into which selfless lawyers can get when sympathy or zeal for clients clouds their judgment.

When I started teaching PR in 1983, something bothered me about the common rhetoric that seemed to assume that a goal of bar admission and discipline was to weed out people of bad character. Although there may well be some people of bad character for whom redemption is impossible, I doubt that anything I do in teaching a law school course will lessen the possibility they will lie, cheat, or steal.

I have watched discussions on "character" shift. I now see prominence given to the role substance dependency plays in malpractice and discipline cases and what an ABA article once called the "lethal combination of case overload, insufficient office support, financial pressure and emotional isolation" with which many lawyers, particularly in solo practice or small firms, must deal.

I turn one class over to a psychologist with a practice in individual counselling of unhappy lawyers and consulting for law firms on work place issues. She talks about seeking career satisfaction as a professional responsibility duty from the premise that it is difficult for people to do top notch work at a job that makes them miserable. She also talks about sources of lawyer stress and effective stress management techniques.

In addition to teaching a substantive body of doctrine on lawyer regulation, honing instincts for danger, and raising pressures that may affect one's ability to practice, I try to nurture students' often battered idealism. Many law students take lawyer jokes personally. When the Washingtonian magazine cover depicted a blindfolded lawyer being shot with a, "First, kill all the lawyers" caption, three distressed students brought it to class.

To this end, I mix the cautionary tales about lawyers who got into trouble with some hero stories about lawyers who do a good job and make a difference. I end the semester with a tape made by University of Detroit law professor, Larry Dubin, called Legal Heroes, which features Fred Gray, the African-American lawyer who represented Rosa Parks and others involved in the Montgomery bus boycott as well as other major desegregation cases in Alabama. He also interviews Amelia Lewis, who picked up Gerald Gault as a pro bono client whose case ultimately changed the U.S. system of juvenile justice, and Vincent McCarthy, a large firm real estate lawyer, who developed homeless shelters in Boston. The film shows Rosa Parks and Gerald Gault talking about what their lawyers and their cases meant to them. We also see Amelia Lewis going to her office in Sun City, Arizona at 85, a woman who loves her work too much to retire.

My law school has started recording oral histories of some of our older alumni. Our original intent was only to recapture the history of the law school, but in one early interview, Elizabeth Guhring, a leader of the family law bar in Washington, started to talk about her career. She looked up with unmasked joy and conviction and said, "I've been practicing law for almost forty years, and I've loved every day of it." I want clips like that to show my students, many of whom have become skeptical about whether they will ever take pride and satisfaction in their legal careers.

For a course to be effective, decisions on what to teach and the perspective from which to teach it must reflect the teacher's background and convictions. David Luban from the University of Maryland is a philosopher by training. I expect his course is as engaging and arresting as the talks I have heard him give on teaching it. Tom Shaffer, from Notre Dame, uses the Atticus Finch "hero story" from To Kill A Mockingbird as almost a semester-long metaphor for teaching the PR course.

I have neither Luban's philosophical nor Shaffer's literary bent. My course bears the stamp of the social scientist I might have been had I not gone to law school. Although I find my brief experience as a trial lawyer helpful in teaching the course, I am sure the PR course of my colleague Lou Barracato, a trial lawyer through and through, reflects that world view. There is much that any PR course should teach, but we all are most effective in teaching when an authentic individuality shows through.

WHEN to teach professional responsibility? Some parts of it should be taught in the first year of law school. First year case study is enriched and enhanced if students understand the basic aspects of the lawyer/client paradigm — subjects including confidentiality (including its limits), loyalty, fiduciary obligation for funds, basic notions of conflict, the self regulating nature of lawyer
ethics codes, including duty to report.

First year students also need a little time on unauthorized practice and the duty of competency to counterbalance their eagerness to try out what they know and the eagerness of their friends and relatives to say, “Now that you are in law school, could you just . . .”

As early as possible, law students need to be made aware that the admission system looks much more harshly at offenses committed while a law student than before and that “personal” matters like poor credit history, delinquent child support, and drunk driving are likely to generate an inquiry and perhaps a hearing.

The usual answer for adding things to the first year curriculum is the required research and writing class. These courses often are not taught by tenure track faculty, and instructors are more willing to be told what to cover than professors in the doctrinal courses. Also it would be difficult to integrate all necessary PR concepts into any one first year doctrinal course. Unfortunately, however, students sometimes think of the research and writing course as less important than their “real” courses taught by their “real” professors.

In my ideal curriculum, every professor in every law school course — first year and up — would teach at least one problem or hypothetical with a professional responsibility element. In my experience, when faculty do not do so, it often is because they feel insufficiently versed in the field. They know basics but are hesitant to teach a problem on which they do not know all the correct ethical rule sections and recent case law. A little collaboration with a professional responsibility teacher can produce a problem that will fit the teacher’s syllabus and teaching style while providing the comfort of the correct reference citations and the right “answer.”

I needed only to provide a tax teacher with Wolfman and Holden’s, Ethical Problems in Federal Tax Practice, and some articles I had clipped from time to time. She worked out several problems. She came back to me and said, almost with a little shock in her voice, “The students really liked it. They were really interested.”

A pervasive approach to professional responsibility serves two important purposes. First, the professors’ substantive expertise allows them to teach PR problems in their particular fields with depth and sophistication. Any PR teacher must teach some criminal practice issues because they are so basic to the field, but I always feel uneasy about my lack of real world experience in the area. I skate cursorily over special professional responsibility contexts like tax or estates because I have neither the expertise nor the class time to deal with them seriously.

Clinical courses are a particularly effective place for teaching professional responsibility. The good clinical teacher finds “teachable moments” about PR almost daily, and this helps to emphasize that “it really does come up.” Our clinical teachers frequently refer students to PR teachers on complicated matters, and we enjoy the opportunity to work with students in thinking out the issues.

Despite all the exposure students would have to professional responsibility in my ideal curriculum, I still would require a two or three credit PR course open to second and third year students. To teach the overall course that goes from sources of authority through ethical rules through related bodies of law, one needs the legal sophistication of the upper division students. To understand restrictions on bar regulation of advertising and license to practice, one needs some grounding in constitutional law. To understand liability for malpractice, one needs to know a little bit about torts and contracts. To consider ethical issues in representing a corporation or its employees, one needs to understand basic principles of corporate law.

WHO should teach professional responsibility? I find no particular background critical, but I think good teaching of PR requires time to master the body of law and new developments, plus the belief and energy to be a cheerleader for the subject. Whether they find the courses interesting or not, students are willing to grant that contracts, corporations, and civil procedure are important. In professional responsibility, the teacher must accept the need to keep offering real world examples and radiating enthusiasm about its importance.

I believe that many teachers who have had unhappy experiences teaching PR have lacked the time to do it right. Some law schools, like many law students, seem to find the ABA’s PR requirement a burden to be discharged. They assign all sections to adjuncts or foist it onto teachers with no particular expertise or interest as a punishment or a function of who is left once the other necessary courses are assigned.

Ideal faculty members could be adjunct or full-time. Adjuncts offer the advantage of being “real lawyers” in student eyes. They can be effective teachers of the subject if they have the time to master the body of law but that can be difficult. Few practitioners specialize in the field. Many know the slice that relates to their doctrinal specialty but are unfamiliar with issues that arise commonly in other types of practice.

The explosion of good books and reference materials on professional responsibility makes good teaching of PR an easier task than when I began in 1983. Today there were many texts as well as useful hornbooks, a couple of specialized law reviews, and many articles on the subject. The American Association of Law Schools Professional Responsibility section publishes a newsletter and sponsors programs. The ABA Center on Professional Responsibility holds an excellent continuing education conference each year.

HOW to teach the professional responsibility course? The socratic method of case analysis can be defended fairly well for the “teaching to think like a lawyer” goals of first year, but it wears thin when overused in the upper division. A master of that method probably could use one of the professional responsibility “casebooks” and get a good result. I find, however, that the subject matter particularly lends itself to problems, and several of the texts are organized in that manner. Problems in PR offer students particular immediacy because the question is not just “What would you advise your client to do?” but “What would you do?”

The subject matter lends itself well to simulations that force the student to “act” in a tough situation. Students also can be pushed to see themselves as future bar leaders. In discussing what a state bar’s role in encouraging pro bono work should be, my class last year became quite engaged when they divided into small “buzz groups” and formulated recommendations. The Center on Professionalism at the University of Pennsylvania Law School is one of several sources of excellent video tapes. Many tapes have teacher’s manuals to quickly educate a new teacher on the issues.

Outside speakers can send the message that “real lawyers” in the “real world” have heard of this stuff and actually use it. They also can offer texture and richness in the specialized areas about which a teacher lacks experience.

At least in the law schools, it has been in vogue to discuss the power of narra-
tive. When the lawyer counselling committee representatives come to my class, I see students much less “grabbed” by the Director’s discussion of ABA and state bar concerns about substance dependency than by the handsome, athletic Virginia and Harvard graduate who talks about how alcohol almost ruined his practice and his personal life. He looks like them, or their classmates, or their husband or brother, and brings students face to face with the notion that it could happen to them or a colleague. In addition to “Legal Heroes,” Larry Dubin has produced tapes of disciplined lawyers and wronged clients telling their own stories.

WHY it is hard to do. Yes, I love teaching the course. No, it is not impossible, but it does present special challenges.

As the only course required of upper division students in most law schools, PR starts with a couple of strikes against it. I favor the requirement. The subject matter is critical enough to be worth ensuring that every law student in America is exposed.

I said earlier that PR requires more unrelenting enthusiasm than most courses and lots of effort to provide real world referents. Why?

Some of the reasons are the same as my basis for the resisting the course name, Legal Ethics. Some students respond, “I’m ethical. Why am I spending law school time and tuition money here when I could be taking a real course?”

I see three problems with “teaching ethics” as the highlighted focus. First, some of the law regulating lawyers, with which new attorneys should be familiar, has little to do with ethics. One can debate spiritedly whether rules on advertising, practicing with non-lawyers, restrictions on trade names and selling law practices are anticompetitive devices to hold market share or legitimate devices to protect the public. In either event, however, it devalues ethics to force them under that rubric.

Second, virtually all matters worth PR class time (as opposed to assigned reading of straightforward rules) are about ethical principles that conflict. Client perjury is about loyalty to client versus duties to the justice system. Conflict of interest law considers duties to former clients versus duties to new clients and client advantages in joint representations versus possible later contingencies that could arise. A strong sense of personal ethics does not lead one to an easy resolution of such ethical conflicts.
Third, students may find serious clashes between strongly felt personal ethics and “legal ethics.” Most PR classes force students to realize that confidentiality rules could require keeping client communications secret even when that caused serious pain to others or an injustice.

The hardest ethical questions, e.g., drawing lines between client confidences and revelation for the good of others — do not have clear cut “right” answers. (Model Rule 1.6 on revelation of confidences has generated more ABA debate and more variation in state rules than any other.) There are moments when students realize that something discussed could Get Them Into Trouble, and they want answers. The hard issues worth class time are often those on which jurisdictions’ ethical rules are in conflict and bar and judicial opinions are muddy.

Such unsettled questions heighten students’ anxieties and tempt them to say, “Why bother? There are no answers in this course.” I try to remind them that, although a problem may not have a single right answer, there usually are agreed upon parameters to the issues and some clearly wrong answers. I want the gut instincts for danger honed and enough knowledge to frame the issue when they seek expert guidance. I remind them that when there is no clear answer, it usually is because it is a hard question.

One must be philosophical and thick skinned enough to realize you never get them all — at least right away. Even in my semesters of best teaching reviews, I always have a couple of righteous, “This could have been covered in one day in a bar review course.” I always hope that five or ten years later they will have changed their minds.

I attend many alumni functions. I am gratified, and a little amused, as I find some of my 1000 or so former students who come up and say, “You know that professional responsibility stuff really does come up.” I also get lots of calls for consultation. I even had three alumni at the same function say that they remembered the stop sign dress. I guess I will have to buy my third one soon.

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