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# PRACTICE SETTING AS AN ORGANIZING THEME FOR A LAW AND ETHICS OF LAWYERING CURRICULUM

JAMES E. MOLITERNO\*

## I. INTRODUCTION

The law and ethics of lawyering is now a distinct area of substantive law with a distinct place in the legal academy. Twenty-plus years of work by pioneers in the area<sup>1</sup> has moved both the law that governs lawyers and its teaching from Watergate-induced forced entry into the legal academy to near-equal status among subjects in the law curriculum. The substantive law of lawyering area now has its own Restatement,<sup>2</sup> an unusually diverse wealth of teaching materials and methodologies, and a vital and well-developed scholarly community. Much remains to be done, to be sure, but the progress in the law of lawyering during the past twenty years has been more pronounced than in most other substantive law areas.

The substance of the law of lawyering draws on contract, tort, agency, property, procedure, etc., but so do many upper-division subjects, such as administrative law, corporations, and criminal procedure. That is why university legal education traditionally has been organized around the teaching of a set of core courses in the first year followed by elective offerings, many of which draw upon the principles of the first year's basic curriculum.

As the substance of the area matures and the need to teach beyond the basic course emerges, the law of lawyering needs to pursue and develop its own jurisprudence, a jurisprudence of

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1. See, e.g., Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 411 (1998).

2. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS chs. 2, 3, 5, 8 (Proposed Final Draft No. 1, 1996); *id.* chs. 4, 6, 7 (Tentative Draft No. 8, 1997).

lawyering.<sup>3</sup> To do so, we must find central organizing themes for the substantive law, and the attendant distinctions that guide curricular design will flow. Important curricular choices face us: should course offerings beyond the basic course be organized by doctrinal topic,<sup>4</sup> by relationship with other substantive law areas,<sup>5</sup> by practice setting,<sup>6</sup> or by some other factor? This Article is about the curricular implications of finding one aspect of such an organizing theme. I propose that practice setting become the primary organizing factor for curricular development in the law of lawyering area.

## II. THE LAW AND ETHICS OF LAWYERING IS ORGANIZED BY PRACTICE SETTING

Lawyers in different practice settings behave according to different sets of norms. In other words, the ethics of lawyering varies according to the practice setting in which the affected lawyer's work exists. Because defining much of the law of lawyering depends on the norms of practice, so too the law of lawyering varies according to the practice setting in which the affected lawyer's work exists. The simplistic notion that one set of legal rules, the American Bar Association's (ABA) Model Rules ("Model Rules")<sup>7</sup> as modified by adoption in a particular jurisdiction, for example, govern every lawyer subject to their jurisdiction in precisely the same way is well behind us. Even the Model Rules acknowledge as much by their inclusion of rules that have application in only certain practice settings,<sup>8</sup> and by the comments to other rules that establish practice-setting dis-

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3. See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 474 (1990).

4. Under such a regime, course offerings beyond the basic course might be called, for example, Confidentiality or Conflicts of Interest or Limitations on Client-Getting Activity, just as upper-division torts electives are called Products Liability or Worker's Compensation.

5. For example, substantial legal areas could be addressed in courses entitled Tort Aspects of the Law of Lawyering or Agency Law in the Lawyer Context.

6. For example, practice setting courses could be entitled Criminal Defense, Corporate Practice, Government Agency Lawyers or Child Advocacy Practice.

7. MODEL RULES OF PROFESSIONAL CONDUCT (1995).

8. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (1983) (discussing the lawyer's representation of an organization).

tinct norms or practice-interpretive principles.<sup>9</sup> In sociological terms, expecting differences in norms from practice setting to practice setting is only a small step from Talcott Parsons's situational orientation theory explaining what motivates individuals to act as they do.<sup>10</sup>

In order to know much about the differences in the law of lawyering that attend changes in practice setting, one must examine the culture of the particular practice settings,<sup>11</sup> the nature of the lawyer-client relationship in the setting, and, to some extent, the substantive law upon which lawyers in the practice setting operate.

For example, in many respects the law that governs lawyers' conduct in the criminal defense practice setting differs from the law that governs lawyers' conduct in the in-house corporate counsel practice setting.<sup>12</sup> To know how the law should differ between these two diverse practice settings, one examines the differences in culture between the two practice settings, the differences in lawyer-client relationships between the two, and, to some extent, the differences in substantive law between criminal law and corporate law. The differences in the law that governs the lawyers' conduct will diminish, though perhaps not entirely disappear, when the corporate lawyer finds herself defending the corporation against criminal charges.

The mere fact that principles from various areas of law are pulled together to form parts of another area is insufficient reason to spread the teaching of that other area throughout the curriculum. Although the law and ethics of lawyering pulls principles from a variety of other substantive law areas, the same can be said of corporate law, for example, and several other subjects typically taught in the second or third year. The mere fact that an area of law draws much from these core subjects has

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9. See, e.g., *id.* Rule 4.1 cmt. 2.

10. See generally TALCOTT PARSONS, *The Professions and Social Structure*, in ESSAYS IN SOCIOLOGICAL THEORY 34, 43-46 (1954) (analyzing the relation of motivation to institutional patterns).

11. See Thomas B. Metzloff, *Seeing the Trees Within the Forest: Contextualized Ethics Courses as a Strategy for Teaching Legal Ethics*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 227, 229.

12. See *infra* notes 19-27 and accompanying text.

never meant, and should not mean for the law of lawyering, that the area should be taught throughout the curriculum or that its teaching should be organized around the connections it has with other substantive law areas. Professional responsibility law uses agency principles;<sup>13</sup> so does corporate law.<sup>14</sup> Professional responsibility law uses tort principles;<sup>15</sup> so does corporate law.<sup>16</sup> Professional responsibility law uses contract principles;<sup>17</sup> so does corporate law.<sup>18</sup> Professional responsibility law has a core of its own that in some respects is dependent on "other law"; so does corporate law. Does anyone suggest that corporate law should be taught not in its own course, but rather by sprinkling it across a variety of courses from whose substantive law principles it draws or by putting significant portions of its teaching into the hands of teachers of other subjects even if it also has its own course?

The law of corporations, like the law of lawyering, has its own jurisprudence, its own central principles that animate its study and practice. The thought that legal education should rely on

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13. See, e.g., *In re Goldstein*, 85 A.2d 361, 363 (Del. 1951) (disciplining a lawyer who used client confidences for personal gain for breach of trust and noting "a lawyer is not permitted to traffic in his client's affairs for his own profit"); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(b).

14. See *Philadelphia, Wilmington & Baltimore R.R. v. Quigley*, 62 U.S. 202, 210 (1858); *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985); Michael E. Baughman, *Defining the Boundaries of the Adverse Domination Doctrine: Is There Any Repose for Corporate Directors?*, 143 U. PA. L. REV. 1065, 1093 n.124 (1995); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1305 (1984).

15. See, e.g., *Spaulding v. Zimmerman*, 116 N.W.2d 704, 710 (Minn. 1962) (holding that fraudulent nondisclosure of a material fact vitiated settlement contract); MODEL RULES OF PROFESSIONAL CONDUCT Preamble, Scope and Terminology (1995) (defining the terms "fraud" and "fraudulent").

16. See, e.g., *Magnum Foods, Inc. v. Continental Casualty Co.*, 36 F.3d 1491, 1499 (10th Cir. 1994); *Phoenix Sav. & Loan, Inc. v. Aetna Cas. & Sur. Co.*, 427 F.2d 862, 868 (4th Cir. 1970); Larry E. Ribstein, *Writing About and Teaching Corporate Law: Reflections on Corporate Law and Economic Analysis*, 40 EMORY L.J. 509 (1991) (book review).

17. See, e.g., *Rosenberg v. Levin*, 409 So. 2d 1016, 1021 (Fla. 1982) (regarding contract rights analysis applicable upon lawyer discharge); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16(a)(3).

18. See *Ainsworth v. Southwestern Drug Corp.*, 95 F.2d 172, 173 (5th Cir. 1938); *Gross v. Texas Plastics Inc.*, 344 F. Supp. 564, 566 (D.N.J. 1972), *aff'd*, 523 F.2d 1050 (3d Cir. 1975); Ribstein, *supra* note 16, at 522.

Torts, Contracts, Constitutional Law, Property, Civil Procedure, and Criminal Law teachers to convey the animating principles of corporation law by inserting some coverage of corporation law topics that are in one way or another connected to their respective courses is utterly foreign. To convey those animating principles, an area of the law needs its own course and curriculum, organized by its own principles, and taught by experts in that field.

The question then, for organizational purposes, is: By what factor is the law and ethics of lawyering organized? There may of course be multiple factors, but chief among them is the practice setting of the governed lawyer. What are the clues to identifying this organizational factor?

### A. *Practice Norms*

Lawyers engaged in various practice settings have attempted to establish their rules and ethics apart from those of other lawyers. Some have attempted to draft model ethics rules for their practice setting.<sup>19</sup> The creation of these expressions of what is different about the norms of practice in particular practice settings offers both insight and teaching material upon which to draw in a course about a particular practice setting.

### B. *Law of Lawyering*

The law of lawyering distinguishes lawyers in different practice settings. Even viewing the law of lawyering in the narrowest possible way—merely the Model Rules and their interpretations by courts—it is clear that the law of lawyering differs from practice setting to practice setting in critical ways. Indeed, it must be so because the essence of the lawyer's role differs from practice setting to practice setting. The Model Rules themselves acknowledge as much by their inclusion of rules that have application in only certain practice settings,<sup>20</sup> and by the comments to other

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19. See, e.g., Robert Aronson et al., *Bounds of Advocacy*, *American Academy of Matrimonial Lawyers, Standards of Conduct*, in 9 J. AM. ACAD. MATRIMONIAL LAW 1 (1992).

20. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13.

rules that establish norms-of-practice interpretive principles.<sup>21</sup>

Implications of the confidentiality rules are different according to practice setting. Special implications of confidentiality apply to in-house corporate counsel,<sup>22</sup> government practice,<sup>23</sup> criminal practice, both prosecution<sup>24</sup> and defense,<sup>25</sup> and insurance defense,<sup>26</sup> among others.

Circumstances that would present conflicts of interest in one practice setting do not do so in others.<sup>27</sup> The definition of a party or person for purposes of Model Rule 4.2 changes from practice setting to practice setting.<sup>28</sup> Even the fundamental measure of diligence and loyalty to the client vary in different practice settings.<sup>29</sup>

Some of the Model Rules rely on what amounts to "trade usage" in the practice, which also differs from one practice setting to another, changing the law that governs lawyers in those practice settings accordingly. When Model Rule 4.1 defines the law governing negotiation conduct by reference to what amounts to

21. See, e.g., *id.* Rule 4.1 cmt.

22. See *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981); *Kachmar v. Sanguard Data Sys., Inc.*, 109 F.3d 173, 179 (3d Cir. 1997); *Hull v. Celanese Corp.*, 375 F. Supp. 922, 923 (S.D.N.Y. 1974), *aff'd*, 513 F.2d 568 (2d Cir. 1975).

23. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S. Ct. 2482 (1997).

24. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d).

25. See, e.g., *People v. Meredith*, 631 P.2d 46, 53 (Cal. 1981).

26. See, e.g., *Spaulding v. Zimmerman*, 116 N.W.2d 704, 711 (Minn. 1962).

27. See, e.g., *Wheat v. United States*, 486 U.S. 153, 159 (1988) (recognizing that there are special considerations in criminal defense of multiple clients); *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1179, 1185 (Fed. Cir. 1995) (noting that patent law dictates disclosures of copending applications, leading to possible conflict among lawyer's clients); *In re McKinney Ranch Assocs.*, 62 B.R. 249, 254 (Bankr. C.D. Cal. 1986) (explaining that special duties implicated in bankruptcy practice dictate broader than normal disqualification of lawyers); *United States v. Linton*, 502 F. Supp. 871, 876 (D. Nev. 1980) (recognizing that there are special conflicts in corporate practice between representation of the entity and the employees).

28. See, e.g., *United States v. Lemonakis*, 485 F.2d 941, 955 (D.C. Cir. 1973) (referring to criminal suspects as "parties"); *Vega v. Bloomsburgh*, 427 F. Supp. 593, 595 (D. Mass. 1977) (referring to government employees as "parties"); *Niesig v. Team I*, 558 N.E.2d 1030, 1035 (N.Y. 1990) (referring to corporate employees as "parties").

29. See, e.g., *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (limiting criminal defense zealotness); *United States v. LaRouche Campaign*, 682 F. Supp. 610, 614 (D. Mass. 1987) (defining prosecutor's diligence), *aff'd*, 866 F.2d 512 (1st Cir. 1989); *Westlake v. Abrams*, 504 F. Supp. 337, 342 (N.D. Ga. 1980) (outlining differences in zealotness and moral responsibility between lawyer litigation and planning activities).

trade usage, it implicitly creates a rule of law that varies from practice setting to practice setting.<sup>30</sup> Acceptable practice rules of the negotiation game are different in labor practice than in, say, family law practice or criminal law practice. Although these differences are, to some extent, referenced by differences in the substantive labor, family, and criminal law, they are to an even greater extent the product of the varying practice cultures and norms in these different practice settings. As such, if it is helpful to teach professional responsibility law as one part of a variety of different substantive law courses, the primary reason for doing so is to teach the norms of the practice-setting cultures that attend the substantive law field being taught.

### C. Scholarship

The scholarship has begun to develop around practice-setting distinctions. Scholarship on professional ethics law as it relates to specific practice settings is current and rich.<sup>31</sup> This material is at least as much about the practice settings, and the attendant trade usage of them, as it is about the imported law of torts, family law, administrative law, corporations, criminal law, and so on upon which lawyers in these various practice settings operate.

Working with the writing of key jurisprudence-of-lawyering scholars is advanced by a practice-setting orientation. Practice-setting distinctions are a key ingredient in an effort to apply and appreciate the lessons of Bill Simon, David Wilkins, or David Luban, for example.<sup>32</sup> Knowing in what practice setting a law-

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30. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.1 (1995).

31. See, e.g., Kathleen Clark, *Do We Have Enough Ethics in Government Yet?: An Answer from Fiduciary Theory*, 1996 U. ILL. L. REV. 57; David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729 (1993); Michael J. Mahoney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: "Where Angels Fear to Tread,"* 36 S. TEX. L. REV. 933 (1995); Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255 (1995); William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993); Symposium, *Recommendations of the Conference on Ethical Issues in the Legal Representation of Children*, 64 FORDHAM L. REV. 1301 (1996).

32. See, e.g., DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); William H. Simon, *The Ideology of Advocacy*, 1978 WIS. L. REV. 29; William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); David B.



yer exists tells a great deal about who should regulate that particular lawyer, what circumstances should dictate whether the lawyer should obey or not obey the law, and the breadth of ethical discretion that the lawyer has available to her.<sup>33</sup> Their own scholarship, and others, has in some instances followed the practice-setting organizational theme.<sup>34</sup>

#### *D. Professional Development*

As the legal universe and practice in particular continue to become more complex, the likelihood that individual lawyers will spend a career in a limited range of practice settings increases. Lawyers have changed and will continue to change employment situations more and more frequently,<sup>35</sup> but they are also more likely to stay within a relatively small range of practice areas because of the significant investment necessary to achieve competence in a particular area. As such, the law and ethics of lawyering will continue to grow more specialized by practice setting as well.

Of the possible organizing themes, the practice-setting theme offers the greatest promise for the development of a coherent jurisprudence of lawyering and a coherent, multipart curriculum for the law and ethics of lawyering.

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Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 801 (1992) [hereinafter Wilkins, *Who Should Regulate Lawyers?*].

33. See Wilkins, *Who Should Regulate Lawyers?*, *supra* note 32, at 814-19.

34. See, e.g., Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355 (1996); Luban, *supra* note 31; Simon, *supra* note 31; Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: Response to Little*, 65 FORDHAM L. REV. 429 (1996).

35. See RICHARD L. ABEL, AMERICAN LAWYERS 239 (1989).

### III. CURRENTLY USED CURRICULUM ADDITIONS TO THE BASIC COURSE COULD BE ORGANIZED BY PRACTICE SETTING

As the law of lawyering has become more complex, the need for multiple courses in the curriculum to cover its major components has emerged.<sup>36</sup> The basic course exists in a wide variety of formats, certainly wider than the basic course in any other substantive law area covered in the curriculum. The two- or three-credit, free-standing basic course is by far the most popular,<sup>37</sup> but the basic course also exists in the form of free-standing pervasive method,<sup>38</sup> first-year live-client clinic,<sup>39</sup> upper-division live-client clinic,<sup>40</sup> long-term simulation,<sup>41</sup> single semester simulation,<sup>42</sup> a menu of contextualized choices,<sup>43</sup> and the short-term blitz.<sup>44</sup> By whatever formula it is designed, the basic course is now a given in legal education.<sup>45</sup>

But the basic course is no longer enough, if it ever was. The mission of this area of law teaching is broader than that of other areas, encompassing not only the substantive law and the analy-

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36. See Mary C. Daly et al., *Contextualizing Professional Responsibility: A New Curriculum for a New Century*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 193.

37. See PROFESSIONALISM COMM., AMERICAN BAR ASS'N, TEACHING AND LEARNING PROFESSIONALISM 40 (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM].

38. For example, Stanford uses this method. See Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 139.

39. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995).

40. See Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605 (1996).

41. See James E. Moliterno, *Legal Education, Experiential Education, and Professional Responsibility*, 38 WM. & MARY L. REV. 71 (1996).

42. See Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 37.

43. See Daly et al., *supra* note 36.

44. See Carol Bensinger Liebman, *The Profession of Law: Columbia Law School's Use of Experiential Learning Techniques to Teach Professional Responsibility*, LAW & CONTEMP. PROBS., Summer-Autumn 1995, at 73; Metzloff, *supra* note 11 (describing Duke Law School's short course).

45. Most of the design choices for the basic course are described and evaluated in James E. Moliterno, *An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991).

sis skills that attend the teaching of other areas in the curriculum, but also moral development.<sup>46</sup> As well, the substantive law of lawyering has exploded. The adoption of new test specifications for the Multistate Professional Responsibility Examination (MPRE) acknowledges that explosion by employing a "law-governing-lawyers approach."<sup>47</sup> The scope of the new specifications indicates the breadth and complexity of the law of lawyering area.<sup>48</sup> The basic course cannot do justice to the subject, any more than the basic Torts course could do justice to the complexity of that area without the offering of Products Liability, Compensation Systems, etc. Indeed, because of the moral development mission and the centrality of the law of lawyering to the life of nearly every law graduate, the argument for more than the basic course is stronger for the law of lawyering than it is for any other area of law.

By what theme, then, should the curriculum be organized beyond the basic course? I suggest that it should be organized not by substantive law connections but by practice setting.

Currently, in addition to being variously used as the basic course, live-client clinics, contextualized courses, pervasive method infusion into the curriculum, and simulations are used as additions to the basic course. Any of the four can in some circumstances be used to support practice-setting organized offerings.

### A. Clinics

Many clinics are, and others could be, organized and structured to teach their practice setting, most classically the civil public service practice setting.<sup>49</sup> In many ways, clinics have taught the special aspects of the lawyer's role in public service settings since the Council on Legal Education for Professional Responsibility (CLEPR) days and before.<sup>50</sup> When clinics focus

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46. See Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue about Goals*, 39 WM. & MARY L. REV. 457 (1998).

47. Memorandum from the National Conference of Bar Examiners to Law School Deans 2 (Aug. 21, 1997) (on file with author) (announcing the new test specifications, outlining the subject matter covered, and describing the test).

48. See *id.*

49. See *Report of the Committee on the Future of the In-House Clinic*, 42 J. LEGAL EDUC. 508, 513-16 (1992).

50. See, e.g., William Pincus, *Legal Education in a Service Setting*, in CLINICAL

on the practice setting and are accompanied by readings and seminar sessions that address the culture and special rules of lawyering that most affect the public service practice setting, they are already an important aspect of a school's law and ethics of lawyering curriculum.

Live-client clinics have expanded well beyond the general civil public service practice setting<sup>51</sup> to criminal defense and prosecution settings, to include, for example, family law practice<sup>52</sup> and health care practice.<sup>53</sup>

To an extent, externships with sound seminar components can work similarly. The practice settings for externships are boundless.

### *B. Contextualized Courses*

Creating full-semester contextualized courses that focus on areas of practice, such as corporate practice, criminal law practice, and public service practice is one way to build a curriculum beyond the basic course.<sup>54</sup> These courses were designed specifically to teach the law and ethics of lawyering for particular practice settings or employment circumstances.<sup>55</sup> Created expressly for this purpose, these courses have significant promise for becoming the core of an advanced law and ethics of lawyering curriculum organized by practice setting. To do so, they should exist as additions to the basic course rather than as substitutes for it, as they currently exist at some schools. Nonetheless, these courses are designed to take advantage of the soundest and most promising of the possible organizing themes. Some of the contextualized courses use traditional teaching methodologies,

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EDUCATION FOR THE LAW STUDENT 27, 28 (CLEPR ed., 1973).

51. See, e.g., Howard S. Erlanger & Gabrielle Lessard, *Mobilizing Law Schools in Response to Poverty: A Report on Experiments in Progress*, 43 J. LEGAL EDUC. 199 (1993).

52. See, e.g., *id.* at 213, 215 (describing a juvenile law clinic and a battered women's clinic).

53. See, e.g., *id.* at 216 (describing Gary Bellow's legal-medical services project).

54. See Daly et al., *supra* note 36, at 193; Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 370-77 (1998); Metzloff, *supra* note 11, at 228.

55. See Daly et al., *supra* note 36, at 193.

such as classroom analysis of cases and materials, while others use experiential methodologies.<sup>56</sup>

### C. *Pervasive Method*

The growth in popularity of the pervasive method in recent years has been astounding. Approximately two-thirds of the schools responding to the recent ABA survey indicated that they had implemented some form of pervasive method program, and interest is on the rise.<sup>57</sup>

Fortunately, only a few of the schools using the pervasive method use the method as a replacement for a basic, required course.<sup>58</sup> As a replacement for the basic course, the pervasive method is doomed to fail: without the basic course, pervasive method offers too little and inconsistent coverage by faculty without expertise.<sup>59</sup> Such a regime would be without a theme and could never produce a jurisprudence of lawyering. Fortunately, though, in its modern version, the pervasive method is seen as an addition and not a replacement for the basic professional responsibility course.

The modern pervasive method is organized primarily according to connections between the law of lawyering and other substantive topics.<sup>60</sup> The polestar text for teaching by the pervasive method follows the basic, cross-cutting material with matters to be taught in "civil procedure, constitutional law, contracts, corporations, criminal law and procedure, evidence and trial advocacy, family law, property, tax, and torts."<sup>61</sup> The "central claim [of the pervasive method] is that legal ethics deserves discussion in all substantive areas because it arises in all substantive areas."<sup>62</sup> The text offers topics to be covered, some of which are

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56. *See id.*

57. *See* TEACHING AND LEARNING PROFESSIONALISM, *supra* note 37, at 42-43.

58. *See* Deborah L. Rhode, *Pervasive Ethics: The Professional Responsibilities of Professional Schools*, in ABA SYMPOSIUM ON TEACHING & LEARNING PROFESSIONALISM tab 3, at 1-2 (1996).

59. *See id.* at 7.

60. *See* DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 4-5 (1994).

61. *Id.* at 5.

62. *Id.* at 3.

subject-matter connected while others are practice-setting connected. In the torts chapter, topics include "Frivolous Cases and Malicious Prosecution"<sup>63</sup> and "Competence and Malpractice,"<sup>64</sup> which seem subject-matter connected. "Joint Representation," addressing representation of personal injury plaintiffs and insurers/insureds,<sup>65</sup> and "Solicitation" in the context of personal injury plaintiff practice,<sup>66</sup> seem practice-setting connected but are also covered in the torts chapter. Similarly, the constitutional law chapter topics include "Freedom of Expression and Association," addressing limitations on the bar's power to regulate lawyer conduct,<sup>67</sup> which seems subject-matter connected, and "Representing Groups"<sup>68</sup> and "Representing the Government,"<sup>69</sup> which seem practice-setting connected. Other chapters are mixed similarly between the two rationales, with the balance appearing to slightly favor the subject matter connectedness rationale.

If we try to teach professional ethics law by a pervasive method, that is by teaching parts of it in a variety of courses, then we would do better to focus on the practice settings typical of lawyers who are working with the course's substantive law topics: in-house and outside corporate counsel for Corporations; public defenders, prosecutors, and private criminal defense practices for Criminal Law and Criminal Procedure; insurance defense and plaintiff's personal injury for Torts and Products Liability; and government agency practice for Administrative Law. The law of lawyering differs by practice setting, not by connections with the substance of various law topics. The pervasive method as presently conceived is organized primarily around the less than optimal theme: rather than being pervasive or divided up by substantive law course or subject area, the law and ethics of lawyering is more usefully organized around diversity of practice settings.

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63. *Id.* at 842.

64. *Id.* at 859.

65. *Id.* at 848.

66. *Id.* at 859.

67. *Id.* at 528.

68. *Id.* at 506.

69. *Id.* at 517.

### *D. Practice-Setting Specific Simulations*

Practice-setting specific simulations have proliferated in recent years. They simulate a range of settings that include corporate practice,<sup>70</sup> estate-planning practice,<sup>71</sup> labor,<sup>72</sup> administrative agency practice,<sup>73</sup> and general commercial practice.<sup>74</sup>

Many of these new simulation experiments are conducted as part of the related substantive law course. Because practice setting is a more efficacious organizing theme for the law of lawyering, practice-setting specific simulations, which coincide with the appropriate substantive law courses, should produce greater pervasive method benefits than merely having the corporations professor teach the aspects of the law of corporations that are imported into professional ethics law.

Through these practice-setting focused teaching, learning and research vehicles, a jurisprudence of lawyering may be fully developed. The offerings would, one might say, provide a pervasion of contextualized experiential education. They would pervade the curriculum in much the same way that the pervasive method coverage does. They would be contextualized in the best sense, teaching about a particular set of practice settings, and they would be experiential, placing students in the role of lawyers in the particular practice setting.<sup>75</sup>

## IV. CONCLUSION

The most efficient and constructive organizational theme for the law and ethics of lawyering curriculum is practice setting.

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70. See, e.g., Lynne L. Dallas, *Limited-Time Simulations in Business Law Classes*, 45 J. LEGAL EDUC. 487 (1995); Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. LEGAL EDUC. 498 (1995).

71. See Thomas A. Robinson, *Simulated Legal Education: A Template*, 42 J. LEGAL EDUC. 296 (1992).

72. See Roberto L. Corrada, *A Simulation of Union Organizing in a Labor Law Class*, 46 J. LEGAL EDUC. 445 (1996).

73. See Kristine Strachan, *Curricula Reform in the Second and Third Years: Structure, Progression, and Integration*, 39 J. LEGAL EDUC. 523, 527 (1989).

74. See John F. Dolan & Russell A. McNair, Jr., *Teaching Commercial Law in the Third Year: A Short Report on a Business Organizations and Commercial Law Clinic*, 45 J. LEGAL EDUC. 283 (1995).

75. For a description of how such additional simulations might function, see Moliterno, *supra* note 41, at 111-17.

Practice-setting differentiation allows a focus on the varying cultures of practice and the attendant differences in the law and ethics of lawyering that attach to the various practice settings. Creating experiential models for the education of lawyers that are about the ways lawyers behave, professional ethics, and professional techniques, can usefully advance the teaching and learning of professional ethics law and practice.