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USE OF THE PROBLEM METHOD FOR TEACHING LEGAL ETHICS

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Underlying the 1997 W.M. Keck Foundation Forum on the Teaching of Legal Ethics was the premise that we can distinguish among several possible purposes for teaching what we call professional responsibility or legal ethics. First, we might be teaching students the law governing their professional practice—both rules that are arbitrary but relatively clear and those that have less well-defined boundaries. Second, we might be trying to help students think more clearly about ethical decisions—both decisions in resolving individual questions and larger decisions about how to commit their professional time. Third, we might be sensitizing students to broader issues of law and justice—both the impact of the way they conduct their practice and the impact the broader legal system has on different groups within our society.

Asked which of these purposes the various possible approaches to teaching legal ethics best serve, my view is that unless a methodology allows a law teacher to serve all of them well, the methodology is suspect. The purposes are not alternatives. Together, they make up the whole package each of us should be trying to construct.

This Article discusses the problem method for teaching legal ethics.[1] Although no consensus definition of that method exists, it is understood widely to be the use of hypothetical fact situations as the centerpiece for student analysis and discussion.[2] The problems typically present plausible fact situations of vary-

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1. *See* Gregory L. Ogden, *The Problem Method in Legal Education*, 34 J. LEGAL EDUC. 654, 654-57 (1984) (explaining the problem method and evaluating its advantages relative to the case method).

2. *See id.* at 654-55.

ing detail and complexity.[3] Students then select a course of conduct or predict a court's decision based on a variety of legal and nonlegal materials either provided to the students or readily available to them.[4]

I have used this approach to teaching professional responsibility for over twenty years, and Professor Ronald D. Rotunda and I have constructed teaching materials that have tried to make the methodology accessible to others.[5] Ron Rotunda and I began teaching legal ethics in 1974, the year the American Bar Association (ABA) first mandated the teaching of legal ethics.[6] We did not begin our careers in teaching expecting to teach ethics. Instead, we were simply the most junior members of the faculty at the University of Illinois, and we took on a field in which no one else was an expert. We did so with enthusiasm. Legal ethics appeared to be a field in which most everyone was at the starting line at about the same time.[7] We believed relative newcomers like us might actually have an impact.

Our strategy of using problems to teach the new course was very basic. To us, the first challenge any new required course faced was credibility among students. We believed that students should view professional responsibility as dealing with problems that they might actually experience. Centering class discussions around the students visualizing themselves in practice settings seemed to achieve that goal.

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3. *See id.* at 655-56.

4. *See id.*

5. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (6th ed. 1995).

6. *See* AMERICAN BAR ASS'N, APPROVAL OF LAW SCHOOLS: STANDARDS AND RULES OF PROCEDURE 7 (1973); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 39 & n.38 (1992) (citing ABA Standards for the Approval of Law Schools, specifically Standard 302(a)(iii) (1974)).

7. Teaching materials generally available in 1974 were limited to two case books, MAYNARD E. PIRSIG, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (2d ed. 1970), and SAMUEL D. THURMAN ET AL., CASES AND MATERIALS ON THE LEGAL PROFESSION (1970). Two texts were also available, L. RAY PATTERSON & ELLIOTT E. CHEATHAM, THE PROFESSION OF LAW (1971), and DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973). We learned later that Professor Robert Mathews had utilized the problem method in a "problem-book" first published by the American Bar Center in 1965. *See* ROBERT E. MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION vii, ix (rev. ed. 1968).

In addition, we recognized that many ethics classes would be taught or cotaught by adjunct faculty. Indeed, in our first courses, we invited local lawyers to coteach each class session. The use of problems focused the discussion and kept random war stories from dominating the visitors' contributions. We designed each problem to make particular ethical issues seem real to our visitors, and through them, to our students.

Foundation Press was willing to take a chance on our materials, and our strategies proved to be well chosen.[8] In a 1977 survey conducted for the National Conference on Teaching Professional Responsibility, a total of sixty-two percent of the responding law schools reported that they utilized the problem method in one or more of their classes.[9] Our own materials appealed to a large number of regular and adjunct professors,[10] and other books used problems as a large part of their own approach to teaching professional responsibility.[11]

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8. Foundation Press published the first edition of the Morgan and Rotunda text book in 1976. *See* THOMAS D. MORGAN & RONALD D. ROTUNDA, PROBLEMS AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (1976).

9. *See* Stuart C. Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools, in* TEACHING PROFESSIONAL RESPQNSIBILITY: MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE 21, 42-43 (Patrick A. Keenan ed., 1979). Some 50% of schools reported that they used the Socratic method for teaching legal ethics, and 47% reported use of the lecture method. *See id.* at 42. Because many schools utilized a variety of teaching methods, these figures cumulatively exceed 100%. *See id.* Professor John Strait of Seattle University presented a paper at the conference on teaching by the problem method. *See* John A. Strait, *Scenarios and Problems as a Method for Teaching Conceptual Problems in Professional Responsibility, in* TEACHING PROFESSIONAL RESPONSIBILITY, *supra*, at 147.

10. The same 1977 study showed our book in use at 48 law schools, or 31% of those reporting. *See* Goldberg, *supra* note 9, at 44. That adoption rate was almost double the number of adoptions of the next most popular book. *See id.*

11. *See* ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1976); NORMAN REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (1976). The total number of books whose titles call attention to their problem format is now up to eight. *See* ROBERT H. ARONSON ET AL., PROBLEMS, CASES, AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (2d ed. 1995); ROBERT P. BURNS ET AL., EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1994); NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION (1996); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS (4th ed. 1995); ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (3d ed. 1989); MORGAN & ROTUNDA, *supra* note 5; NORMAN REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (2d ed. 1983); MORTIMER D. SCHWARTZ, PROBLEMS IN

This Symposium challenged us to take a fresh look at each of the possible strategies for teaching professional responsibility. The request was timely. Legal ethics teaching is no longer in its infancy. Some students still may not like to be required to take the legal ethics course, but few students deny its importance.[12] I count about thirty sets of teaching materials available today, each claiming to embody the best way to teach legal ethics.[13] This number may suggest a great dispersion among the ways the subject is taught or at least dissatisfaction with the materials others have prepared, but I conclude that, although our rea-

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LEGAL ETHICS (4th ed. 1997).

12. A recent article, however, described legal ethics as "an unloved orphan of legal education" and reported that many believe "the subject is unteachable or . . . not worth teaching." Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 146-47 (1996).

13. *See* ARONSON, *supra* note 11; BURNS, *supra* note 11; ROBERT F. COCHRAN, JR. & TERESA S. COLLETT, CASES & MATERIALS ON THE RULES OF THE LEGAL PROFESSION (1996); DANIEL R. COQUILLETTE, LAWYERS AND FUNDAMENTAL MORAL RESPONSIBILITY (1995); VERN COUNTRYMAN ET AL., THE LAWYER IN MODERN SOCIETY (2d ed. 1976); CRYSTAL, *supra* note 11; ELIZABETH DVORKIN ET AL., BECOMING A LAWYER: A HUMANISTIC PERSPECTIVE ON LEGAL EDUCATION AND PROFESSIONALISM (1981); GILLERS, *supra* note 11; GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING (2d ed. 1994); GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION (3d ed. 1994); PHILIP B. HEYMANN & LANCE LIEBMAN, THE SOCIAL RESPONSIBILITIES OF LAWYERS: CASE STUDIES (1988); KAUFMAN, *supra* note 11; MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE (1994); HOWARD LESNICK, BEING A LAWYER: INDIVIDUAL CHOICE AND RESPONSIBILITY IN THE PRACTICE OF LAW (1992); DAVID MELLINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE (1976); JAMES E. MOLITERNO & JOHN M. LEVY, ETHICS OF THE LAWYER'S WORK (1993); MORGAN & ROTUNDA, *supra* note 5; L. RAY PATTERSON & THOMAS B. METZLOFF, LEGAL ETHICS: THE LAW OF PROFESSIONAL RESPONSIBILITY (3d ed. 1989); MAYNARD E. PIRSIG & KENNETH E. KIRWIN, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY (4th ed. 1984); PROFESSIONAL RESPONSIBILITY ANTHOLOGY (Thomas B. Metzloff ed., 1994); REDLICH, *supra* note 11; DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS (2d ed. 1995); SCHWARTZ, *supra* note 11; THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS & DISCUSSION TOPICS (1985); THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY (1994); ROY D. SIMON, JR. & MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION: CASES AND MATERIALS (3d ed. 1994); JOHN FLOYD SUTTON, JR. & JOHN S. DZIENKOWSKI, CASES AND MATERIALS ON THE PROFESSIONAL RESPONSIBILITY OF LAWYERS (1989); RICHARD C. WYDICK & REX R. PERSCHBACHER, CALIFORNIA LEGAL ETHICS (2d ed. 1997); RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW (1995).

sons for selecting the problem method were initially unsophisticated, the use of problems remains the best single method for effectively teaching professional responsibility.

The problem method, of course, did not originate in the rush to produce books on legal ethics. Over a half-century ago, Legal Realists seized upon the use of problems as a way to help break the hold that case study had upon legal education. In the early 1940s, the Association of American Law Schools (AALS) reported on the use of the problem method,[14] and Professor David Cavers separately advocated its use.[15] In advocating the problem method, Cavers wrote: "[W]hat the problem method can do is to give the student an opportunity to learn law by using it."[16] The problem method's idea of "using" law while studying law addresses concerns about the dangers of an overly theoretical education that neglects the more practical elements of law practice.[17] The early Realists attempted to use their method as a complement to the casebook system, one that could take students beyond mere adherence to legal authorities.[18]

The Legal Realists were right. The problem method, like the case method, helps put a human face on legal issues. Both cases and problems are concrete and open to more nuanced discussion than a discussion of rules in the abstract. Unlike cases, however, problems do not come with authoritative answers.[19] Students,

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14. *See* COMMITTEE ON TEACHING AND EXAMINATION METHODS, ASS'N OF AM. L. SCHS., *Report on Suggested Procedures for Small Classes, in* HANDBOOK OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 86, 86-90 (1942).

15. *See* David F. Cavers, *In Advocacy of the Problem Method*, 43 COLUM. L. REV. 449 (1943).

16. *Id.* at 455.

17. *See, e.g.*, Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 921 (1933) (arguing that law schools should do more to integrate law teaching with law practice). Although Judge Frank did not directly embrace the problem method, he did promote "first-hand observations of the ways in which the ethical problems of the lawyer arise." *Id.* at 922. For a more recent discussion of the need for less theory and more practical skills training, see William R. Trail & William D. Underwood, *The Decline of Professional Legal Training and a Proposal for its Revitalization in Professional Law Schools*, 48 BAYLOR L. REV. 201, 222-23 (1996).

18. *See, e.g.*, Cavers, *supra* note 15, at 453 (discussing Realists' tactic of working their material into the existing casebook system and adding references to nonlegal authorities).

19. Karl Llewellyn saw the similarity between the problem method and the case method:

thus, are not passive receptors of the wisdom of the past. They can be participants in determining both what the law is and what a well-functioning justice system would dictate the result should be.

Last year in this *Review*, Professors Roger Cramton and Susan Koniak considered the case and problem methods of teaching legal ethics and argued that the use of anything other than cases would "reinforce students' perception of legal ethics as a marginal, ghettoized subject. . . . [Students] are less likely to take seriously instruction that does not use rigorous and familiar teaching methods."[20] In my view, that argument is nonsense. Courses in business planning and estate planning have been around for years. Such courses use the problem method to cut across traditional subject matter divisions. Professors ask students to apply diverse legal and nonlegal materials to devise a practical solution to a hypothetical client's problem. Problems in this setting are a classic way to teach sophisticated principles of substantive law to our most advanced students.

The use of problems to teach legal ethics arises out of this same tradition. Teachers using the problem method focus as much on the context in which issues arise as those who use the case method. The problem method does not ignore cases, statutes, or lawyer codes; it calls upon them all. It does not give one set of sources a higher place than another. For example, it does not privilege the language of the ABA Model Rules over legislation or court decisions. The problem method requires students to think about the law and ethics of lawyering using whatever sources may be relevant. In short, it teaches law by using problems as a means of integrating diverse materials in exactly the way any practicing lawyer must do.

> [I]t is not the judicial decision which is the essence of the "case"; it is instead the concrete problem-raising situation—so that, as I see it, any introduction of the so-called "problem method" into law teaching is really but an expansion of the essential merits of case-teaching, an expansion obscured only by a current mis-emphasis upon the idea of a "case" as being at best the official report of a judicially decided cause.

Karl N. Llewellyn, *The Current Crisis in Legal Education*, *in* EDUCATION FOR PROFESSIONAL RESPONSIBILITY 101, 109-10 (1948), *quoted in* Benjamin J. Naitove, *Medicolegal Education and the Crisis in Interpersonal Relations*, 8 AM. J.L. & MED. 293, 311-12 (1982).

20. Cramton & Koniak, *supra* note 12, at 177.

Furthermore, problems help students see issues that might not be obvious at first glance or that cases may not have raised. Law schools sometimes help students develop moral calluses—analytic barriers to students' reliance on personal moral reactions to situations.[21] Even persons who retain moral sensibilities often find those sensibilities inadequate to predict what conduct professionals will find objectionable. Problems put students in new hypothetical situations in the hope that students will develop sensitivity to ethical ambiguity and discover the resources for confronting the unknown situations they inevitably will face later in their careers.

The term "problem method," though, does not describe a unitary phenomenon or even a single teaching strategy. One use of problems—a very helpful use, but one easily caricatured—is to pose quandaries from which students must extricate themselves. Often a problem presents multiple options, none of which is wholly satisfactory. The prospective client puts the still-loaded murder weapon on the lawyer's desk, for example. May she take it and hide it? Must she tell the client to take it back? If she gives it back, must she tell the client not to throw it in the river? May she take the gun so that the client finds it harder to make her his next victim? If she does take possession of the gun, must she then take it to the police?[22]

Such questions are fun to discuss, and the answers are not easy. They help students learn to integrate what the law and their conscience require of them. In addition, they prompt students to come up with a practical plan for dealing with the situation posed in the problem. Even though solving concrete problems may not be the only useful approach to thinking about moral philosophy,[23] the ability to exercise practical judgment clearly should be one of the objectives of a course in professional responsibility.

Dramatic issues of life and death, however, do not walk into

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21. *See, e.g.*, Andrew S. Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441, 442 (1974).

22. *See* MORGAN & ROTUNDA, *supra* note 5, at 347.

23. Michael Kelly, for example, writes: "This way of thinking about ethics as discrete decision making based on concepts and rules has come under attack by such modern Aristotelians as Alasdair MacIntyre (1984)." KELLY, *supra* note 13, at 224.

most lawyers' offices every day. If the problem method only consisted of bizarre quandaries, its critics would be justified in criticizing it for dealing in peripheral issues.[24] Most professional responsibility questions are far more mundane, and if students believe ethical issues arise only in extreme forms, then they might well overlook common, significant, but wholly undramatic events.

Furthermore, hypothetical problems inevitably abstract from real life some important aspects of any lawyer's decision-making process. Michael Kelly argues that problems "leave[] out a crucial component of all decisions: the constraint or guide of what could be called ambition, or a life plan or career concept. A person's sense of place and future in a practice organization is enormously influential in decision making by lawyers."[25] I agree that many concrete realities affect any real lawyer's decisions, realities that tend to be abstracted out of reported cases as well. An experienced professor using the problem method, however, can vary the facts of the problem to introduce as many additional issues as the class has time to address.

Professor James Moliterno has criticized the problem method for being incapable of providing a balanced picture of law practice. In addition to raising legal issues, he says, good ethics teaching

> must be balanced by at least equal treatment of a truer picture of what ethics mean to lawyers day in and day out. Failure to balance will lead students to the conclusion that the ethics of a lawyer's life involve either a technical skill of identifying the problem and locating its proper resolution in the rules or a hopeless daily diet of unresolvable dilemmas to which every possible answer is as harmful as every other. . . . [M]ost of the relevance of ethics to lawyers lies in the an-

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24. The lawyer's life is not a series of dilemmas that present themselves by way of short vignettes. Presenting the ethics course as such a series of problems misleads the student into thinking that ethics are a set of rules for resolving a finite list of the problems that lawyers face.

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, 107-08 (1991).

25. KELLY, *supra* note 13, at 224.

> swers to day-to-day questions of how to live life—apparently small things that are really the biggest things, like, "how will I treat my clients?", or "where do 'honesty' and 'care' fit in my daily dealings with others?" The answers to these questions can only be developed by students when they deal with the lawyer-experiential aspects of the ethics-legal profession field, little of which can be treated effectively by the abstract problem method.[26]

Again, in large part, I agree. I do not assert that clinics should be closed or that no method other than the use of problems should be used to teach professional responsibility. The use of nontraditional teaching materials in law school classes in recent years, however, has given us richly nuanced problems for analysis and discussion, which has enriched greatly the reality of the problem method. Movies, television programs, filmed vignettes, short stories, biographies, and novels have all been sources of insight for the ethics teachers and their classes.[27] Much as I would like everyone to use the Morgan and Rotunda teaching materials, I have to acknowledge that we have not written all the good problems for class discussion. But I must protest if, as others evaluate the problem method, they ignore the wealth of rich and complex stories available and thereby assign the problem method a marginal role in the teaching of legal ethics.

In short, the problem method places students, at least hypothetically, in the role of a lawyer. Clinical courses do that as well, of course, but even clinical training, like most of the rest of a law student's education, necessarily tends to focus on the concerns of clients. A problem-based course can shift the focus to the student and reinforce the fact that legal ethics is about the kind of person the student will become.

A lawyer lives and acts within a web of relationships—with

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26. Moliterno, *supra* note 24, at 108 (footnotes omitted).

27. For a bibliography of such materials, see Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 361. For an unusually rich recent collection of short stories that might be used in legal ethics classes, see LAWRENCE J. FOX, LEGAL TENDER: A LAWYER'S GUIDE TO HANDLING PROFESSIONAL DILEMMAS (1995).

clients certainly, but also with partners, judges, family, support staff, and friends. Problems let students see themselves as having responsibilities to persons in each of these groups. Problems let students explore alternative ways of acting in a setting that is more flexible than the case method, yet one that permits them to make fundamental mistakes without the consequences such exploration could have in a clinical setting.

The problem method of teaching legal ethics has as its counterpart the use of simulation in skills training. Clinical teachers have disputed at length the relative merits of simulation and live-client clinics.[28] I will not take up that debate here. We have long known, however, that simulation allows us to place students in sophisticated situations that only occasionally occur in real clinics. Problems give students a similar chance to put their hearts and souls into what seems a good approach to a matter and then to review what they have done and start over if their first approach proves ineffective. The problem method gives both professors and students the freedom to raise complex issues and the freedom to explore what may turn out to be blind alleys.

To me, the most serious difficulty in using the problem method is that issues of broad importance can get lost in the details of a problem. The professor must make a special effort to help students see issues in a wider public context than their own experiences or the facts that a given problem reveals. The Morgan and Rotunda materials use a problem based on what we understand to be a real incident in which a lawyer working on settlement of a disability insurance claim learned that the victim of a rape had unintentionally—but almost certainly—accused the wrong African American man of the crime.[29] The man was serving a long prison term, and the lawyer could not get the prosecutor, defense counsel, or trial judge to reopen the case.[30] Relatively few technical rules are raised by this problem, but the facts can be the basis for a discussion of racism in general, the problem of the disinclination of some to believe

28. *See, e.g.*, Frank, *supra* note 17, at 907 (arguing that simulations are inferior to clinics).

29. *See* MORGAN & ROTUNDA, *supra* note 5, at 408.

30. *See id.* at 409.

rape victims, and the anguish of dealing with a system that cannot or will not respond to a concrete case of injustice. My point is not that other teaching methodology could not address such issues well. It is simply that the problem method is another approach to create a context in which to discuss some of society's toughest issues.[31]

Returning to the purposes of the course identified at the outset of this Article, I believe the use of problems can be an excellent way to teach the law of lawyering. It can help students see the impact of law and lawyers on social issues and help them develop a sense of what it means to be a moral person who is accountable to others. That accomplishment is not bad for a two- or three-credit course! Indeed, I do not know any other teaching methodology that can teach as much about professional responsibility so well.

31. If a professor's objective is to get students to reflect on principles of moral philosophy writ large, however, then the problem method may not be an effective teaching methodology. Problems are typically too concrete for abstract philosophical analysis. Although some professors may find this fact bothersome, I simply have concluded that the teaching of moral philosophy in general—as opposed to in the professional context—is not the central purpose of the legal ethics course.