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James E. Moliterno

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## Experience and Legal Ethics Teaching

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*James E Moliterno\**

Teaching about legal ethics<sup>1</sup> is just like teaching about any other area of law. And teaching about legal ethics is different from teaching about any other area of law.

Teaching about legal ethics is harder than teaching about any other area of law. And teaching about legal ethics is easier than teaching about any other area of law.

Legal ethics was once thought to be among the least important things about which American legal educators teach. Today, legal ethics is regarded as a quite important thing about which to teach. Someday soon, I expect, legal ethics will be regarded as the most important thing about which American law schools teach.

Where does this odd mix of observations lead? And what do they have to do with experience?

### What is Teaching about Legal Ethics Like?

Legal ethics, or the law governing lawyers, is law. As such, teaching about legal ethics is in an important way like teaching about any other area of law. It was not always seen in this way. Once it was thought that legal ethics was more etiquette than law, more manners than enforceable rules.<sup>2</sup> Once legal ethics was taught in the USA by the preaching method, and students in such courses were known to “chant

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\* Professor of Law and Director of the Legal Skills Programme, College of William & Mary School of Law. For a description of the ethics and skills teaching programme at William & Mary, see J Moliterno, Teaching Legal Ethics in a Programme of Comprehensive Skills Development (1991) 15 *J of the Legal Prof* 145 or J Moliterno, Legal Education, Experiential Education, and Professional Responsibility (1996) 38 *Wm & Mary L Rev* 71, 106-110.  
©2001. (2001) 12 *Legal Educ Rev* 3.

1 It is common to see this subject matter referred to variously as legal ethics, the law governing lawyers, professional ethics, and professional responsibility. I use these terms interchangeably in this essay, the differences among them being irrelevant in this context.

2 J Bond, Present Instruction in Professional Ethics in Law Schools (1915) 4 *Am L Sch Rev* 40.

the Canons.”<sup>3</sup> No longer. Law, at least law as seen as inclusive of the social policies and moral principles embodied in the positive rules of law, is now central to what we teach about in a legal ethics course.<sup>4</sup> None of the leading teaching materials treats the subject as anything but law. Legal ethics, or the law governing lawyers, is a body of enforceable understandings and mandates no different in this respect from the law of tort or contract. And in some respects, teaching it is just like teaching contracts or torts or evidence. Analysis of rules, discussion of cases, exploration of policy, proposals for change, and an understanding of consequences are all as much a part of teaching the law governing lawyers as they are of teaching other areas of law. That was far less the case as little as 25 or so years ago when teaching legal ethics was sometimes more preaching than policy discussion, more morals than mandates. A close friend of mine tells the story of the first day of his late 1970s legal ethics course. The Canons in the United States had been replaced by the Model Code less than a decade before, and the professor, an adjunct, addressed the class something like this: “In this course we’ll learn some right from wrong and we’ll learn how to keep clear of bar discipline. When you look at the Model Code, you’ll see mostly things called **Disciplinary Rules** and **Ethical Considerations**. To remember what they’re about, remember this: Follow the **EC’s** only if you want to be **Extra Careful** – Follow the **DR’s** or there’ll be a **Durned Ruckus**.” (Rough translation of Durned Ruckus for the uninitiated – “lots of trouble.”) Until about that same time, when Tom Morgan, Ron Rotunda, and other mid-70s beginning law teachers charted the modern course, it was largely true to say that American legal education behaved in a professionally irresponsible way in the teaching of professional responsibility. At that time, materials for teaching the course were few, and aside from early casebooks such as Costigan’s<sup>5</sup> and Cheatham’s,<sup>6</sup> most were recent developments

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3 L. Dubin, *Professionalism Among Lawyers: The Law School’s Role* (1989) 68 *Mich B J* 850.

4 J. Baron & R. Greenstein, *Constructing the Field of Professional Responsibility* (2001) 15 *Notre Dame J of Law, Ethics & Pub Pol* 37, 39; R. Cramton & S. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics* (1996) 38 *Wm & Mary L Rev* 145.

5 G. Costigan Jr., *Cases and Other Authorities on Legal Ethics* (St Paul: West, 1917).

6 E. Cheatham, *Cases and Other Materials on the Legal Profession* (Chicago: The Foundation Press 1938).

of a few near-pioneers.<sup>7</sup> The new 1970s teaching materials were mainly problem-based, still reflecting a way of teaching the material that was different, somewhat less law-like, than more traditional casebooks. As materials developed, they became more like materials used in teaching other law courses,<sup>8</sup> and the material taught did the same. The Canons became the Model Code; the Model Code became the more rule-like Model Rules; and eventually the entire range of the course broadened to include an array of materials beyond the profession's codes and control devices beyond bar discipline.<sup>9</sup>

At the same time, teaching about the law governing lawyers is different from teaching about any other area of law because it is experienced by the lawyer directly rather than vicariously. Unlike other areas, in the law governing lawyers, the lawyer is the client. When a lawyer interacts with the law generally, she does so as a once-removed expert. The client who comes to the lawyer has the direct contact with the law; the client has the tort problem or the contract problem. The lawyer's experience with the law is vicarious, through its application to the client. Not so the law governing lawyers. Here, the lawyer is the person who experiences the law and its application. Here the law is about the lawyer's relationships with clients, with other lawyers, with opposing parties, with courts, with the public, with the public interest. This simple observation means a great deal to the pedagogy.<sup>10</sup> Since the lawyer's relationships and experiences and acts are the subject matter governed by

7 T Morgan & R Rotunda, *Professional Responsibility Problems and Materials* (New York: The Foundation Press, 2000) 7th ed; R Aronson, *Problems in Professional Responsibility* (St Paul: West, 1978).

8 A few examples among many excellent casebooks: M Schwartz, R Wydick & R Perchbacher, *Problems in Legal Ethics* (St Paul: West, 2001) (5th ed); S Gillers, *Regulation of Lawyers* (New York: Aspen, 1998) (2nd ed); G Hazard, S Koniak & R Cramton, *The Law & Ethics of Lawyering* (New York: The Foundation Press, 1999) (3rd ed); N Crystal, *Professional Responsibility Problems of the Practice and Profession* (New York: Aspen, 2000) (2nd ed); D Rhode & D Luban, *Legal Ethics* (New York: The Foundation Press, 1995) (2nd ed); T Morgan & R Rotunda, *Professional Responsibility Problems and Materials* (New York: The Foundation Press, 2000) (7th ed); R Zitrin & C Langford, *Legal Ethics and the Practice of Law* (Charlottesville, VA: Lexis Law Publishing, 2000) (2nd ed); J Moliterno, *Cases and Materials on the Law Governing Lawyers* (Cincinnati, O: Anderson Publishing, 2000).

9 D Wilkins, Who Should Regulate Lawyers (1992) 105 *Harv L Rev* 799.

10 J Moliterno, An Analysis of Ethics Teaching in Law Schools: Replacing Lost Benefits of the Apprentice System in the Academic Atmosphere (1991) 60 *Cincinnati L Rev* 83, 98-99 ("Apprentice System").

the law governing lawyers, and since our students will be those governed lawyers soon, special advantages may be found in teaching the law governing lawyers through experiential learning devices such as clinics and simulations. In effect, lawyers' activities create the data on which the law governing lawyers acts. Students in experiential learning settings create data, too, and their experiences are the acts to which the law they are learning about applies. Learning to be a lawyer is not entirely unlike learning to play a complicated game. Take baseball, for example (apologies for choosing my own favourite). Reading the rules of baseball is a complicated endeavour, running as they do several dozens of pages in length. If someone learns those rules, backward and forward, and could pass a test on their knowledge of those rules, that person would still not know how to play baseball. Too many aspects of such an enterprise can be learned only by doing, the playing of the game. Judgments about which base to throw to in which situation, what pitch to throw next, when to steal a base, when to go half-way and when to tag up on a fly ball, and countless others can only be understood through repeated playing of the game; so too being a lawyer. Learning the rules of ethics is necessary, to be sure. But learning them without the accompanying experience is far from learning to be a lawyer. Experiential learning is uniquely suited to teaching legal ethics. And that makes teaching legal ethics different from teaching about any other area of law.

### How Difficult is it to Teach about Legal Ethics?

Many once thought that legal ethics was next to impossible to teach well. This position was taken, however, at a time when the goals of the course were quite different. It was common to hear the question, "If adult students have not learned right from wrong by the time we get them, how can we hope to teach it?" Legal educators do in fact have a substantial impact on their students' character development and "goodness,"<sup>11</sup> but making students better people is no longer a goal of the legal ethics course. To the modest extent that it may be, it is a goal equally shared by the entire legal education enterprise and not held exclusively by the ethics teacher.

In fact, it turns out that the subject is among the easiest and most enjoyable to teach. With a modest amount of

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11 Apprentice System, *supra* note 10, at 94-97.

direction, students soon see that this course is about them, it is about their chosen profession, it is the law that governs their own behaviour. In no other law subject is the lawyer the centre. Some lawyers may practise contract law, some tort law, some corporate law. Some lawyers litigate and have a special need to know the law of evidence while others are deal makers, never seeing a courtroom but needing a special knowledge of securities law or tax law for example. But every lawyer in every practice setting is the subject of the legal ethics course. And every student planning to be a lawyer can see that this course is about the lawyer's relationships: with clients; with other lawyers; with third parties; with the courts; with the public interest. Engaging students in the law's application to them, its attachment to their calling, makes the legal ethics course among the easiest in which to generate interest and engagement. Of course, legal ethics is hard to teach if you fall into trap of moralising or preaching. Of course, legal ethics is hard to teach if you fail to take advantage of the special ways of engaging students in the learning of this most critical material.

Using explicitly experiential learning devices (such as elaborate simulations, clinics, externships that are accompanied by seminar discussion) to teach legal ethics presents special advantages. The subject is the lawyer and her relationships. Placing students in role, allowing them firsthand experience with the experience of lawyering, gives them special insights into the law governing lawyers. The data on which this area of the law is based is generated by what lawyers do. Students, in the lawyer's role, sense the application of the law to their conduct and simply learn it more effectively. For example, a student may be studying Model Rule 4.1 and its strictures on dissembling in negotiations. Reading the rule, reading the cases gets the student to a reasonable level of understanding. But place the student in the role of lawyer, have her engage in negotiation on behalf of a client, and the student can see and sense the application of the rule in a new, much more riveting way. The rule, like all the rules of professional ethics, is about the lawyer's own conduct. What better way to internalise an understanding of such a rule than by experiencing its application, the tensions it creates, the pulls toward its violation. This is an advantage in law teaching that applies exclusively to the law governing lawyers. We should take advantage of it on behalf of our students.

In a way, even classroom teaching of the legal ethics course is experiential teaching. Students who see themselves in role as they read the cases, work through the hypotheticals and the problem materials, have a mental experience with the role of lawyer that is different from that experienced in other law courses. In Contracts, the student engages the material with analytical thinking skills, much as we hope they will learn to engage problems as a lawyer. This learning is experiential in one dimension. But when the student sees herself in the lawyer's role in studying legal ethics materials, which are about the relationships of lawyers, the student experiences a multi-dimensional activity, with the factual textures of life's experiences and emotions attaching to their engagement with the material.

### What Makes Teaching about Legal Ethics Important?

Along with professional skills courses, the legal ethics course was long a second-class subject area in American legal education. Prior to the 1960s, many schools offered either no course or a one credit course, and there were few serious scholars in the subject. Considered to be both academically light and practice and profession heavy, the subject was relegated to the edges of legal education. Along with the rise of clinical legal education during the 1960s and 70s, largely through the work of the Council on Legal Education in Professional Responsibility ("CLEPR"), and spurred by the profession's embarrassment in the Watergate scandal and the subsequent American Bar Association accreditation response, the professional responsibility course began its ascent to respectability and beyond. This connection between clinical teaching and professional responsibility has existed ever since, but it has often been submerged. In recent years, many more efforts to reinforce that connection have occurred with useful results.<sup>12</sup> Recognised or not, this connection helped spur interest in the law of professional responsibility.

Today the subject is covered at all US law schools and through multiple courses at many. The subject is taught by a wide range of creative teaching methods, supported by numerous, excellent materials. And a substantial group of

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<sup>12</sup> J Moliterno, *Live-Client, In-House Clinics: Some Ethics Issues* (1999) 67 *Fordham L Rev* 2377.

first rank scholars devote primary energy to the subject. This is as it should be. The subject about which we teach is at the soul of the profession. It is what lives with the lawyer daily. It is about the lawyer's role, and upon the lawyer's role is built the legal profession and ultimately the justice system. The subject is the profession and its place in society, its place in the justice system, its place in the maintenance of order and social good. What else in the curriculum carries greater significance?

The subject is about the professional culture. No other course in the curriculum has the charge to teach what it means to be a lawyer. We teach about the attributes that distinguish lawyering from other professions and businesses. We teach about the central principles that animate our professional role. We teach the most critical course in the curriculum. We teach the one course without which the student cannot venture to begin the first day of a law career.

### And So, Experience?

American legal education has learned by experience that teaching about the profession, and a connection to the profession, is critical. It has learned by experience that teaching legal ethics is teaching law and that teaching legal ethics presents unique challenges and opportunities.

We teachers of legal ethics have learned from experience that our subject can be taught and taught well if we take advantage of its uniqueness, its centre-of-the-legal-profession status, and its experiential attributes. We have learned that ours is a central place in the legal academy, that we represent perhaps the greatest opportunity for the legal academy to connect with the practising branch of the profession. And we have learned that this connection is critical to the future of the profession.

Our students will learn from experience what it means to be a lawyer. They can only come to understand what it means to be a lawyer by experience. We have a choice: either they can begin learning what it means to be a lawyer after admission, or they can begin learning what it means to be a lawyer while they are with us, at a time when and in a place where that learning can be guided, can be structured, can be taught rather than merely learned.