

Chapter Five

A SURVEY OF LEGAL ETHICS EDUCATION IN LAW SCHOOLS

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INTRODUCTION

This chapter provides an overview of legal ethics education in U.S. law schools. Since 1974, legal ethics instruction has been required in law schools by the major accrediting entity for law schools. The methods by which this requirement has been satisfied vary, but the result is a much richer ethics literature than existed previously and a variety of approaches to the topic.

DISCUSSION

An Overview of the Regulation of U.S. Lawyers

In order to understand the teaching of legal ethics in U.S. law schools, it is helpful to have an understanding of how U.S. lawyers are regulated. In order to practice law in the United States, individuals need a law license. This license is granted by the states rather than the federal government. Generally speaking, the requirements for licensure include successful completion of law school, passing the state bar exam, and that the applicant be of good moral character. A lawyer licensed in one state does not have the automatic right to practice in other states; in other words, the license a state issues is for statewide practice, rather than national practice. (Some states, however, have reciprocity provisions in which they recognize licenses from certain other states; moreover, all courts permit lawyers who are not licensed in their state to appear in a particular case on a temporary basis.)

Because of constitutional “separation of powers” concerns, lawyers generally are regulated by a state’s supreme court, rather than by the legislature. The regulations generally consist of disciplinary provisions, rather than criminal provisions. In other words, the ultimate penalty is revocation of the law license. (Of course ordinary criminal statutes such as obstruction of justice statutes also apply to lawyers.)

In adopting disciplinary regulations, a state supreme court often relies heavily upon recommendations made by a state bar association. U.S. lawyers often refer to these state supreme court disciplinary provisions as involving “legal ethics”, “ethical regulation”, “professional responsibility provisions” or, more recently, refer to them as part of the “law of lawyering.” This terminology also is used in this chapter.

Forty-nine states base their “legal ethics” provisions on one of two ‘model’ regulations issued by the American Bar Association (ABA). The ABA is a voluntary association of lawyers. It is the only national organization with significant lawyer membership from all areas of practice; its membership in recent decades has averaged 45 to 55 percent of the nation’s licensed lawyers.¹

The ABA’s original effort to codify legal ethics rules was the 1908 Canons of Ethics. The Canons have been described as follows:

The 1908 Canons originally consisted of thirty-two hortatory statements that insisted that a lawyer pursue the high road in every endeavor mentioned. They did not attract a great deal of meaningful professional or public attention at the time. The Canons were not originally adopted in order to serve as a regulatory blueprint for enforcement through disbarment and suspension actions. Instead they seem to have been a statement of professional solidarity - an assertion by elite lawyers of the ABA of the legitimacy of their claim to professional stature. The fact that the Code was copied from much earlier documents, and in verbiage and conceptualization that even in 1908 must have appeared terribly dated, was hardly objectionable in a document whose drafters intended primarily² to celebrate the ancient lineage of the bar’s professional stature.

Despite these origins, the 1908 Canons of Ethics acquired an authoritative effect as they were adopted by states as court rules, as legislation, or cited in court opinions after adoption by a state bar association. The 1908 Canons of Ethics remained in effect until the 1970’s and often provided the only guidance, such as it was, to lawyers practicing law.

In 1964, Lewis Powell – then ABA President, later Supreme Court Justice – appointed a committee to study the Canons of Ethics and suggest revisions. The

¹See Wolfram, Charles W., *Modern Legal Ethics* 34-35 (West Prac. ed. 1986).

²*Id.* at 54 (footnotes omitted).

Wright committee presented a draft document in January 1969; it was adopted by the ABA House of Delegates in August 1969 to become effective January 1, 1970. The document was the ABA Code of Professional Responsibility. The ABA Code of Professional Responsibility was divided into nine chapters; each chapter contained "Disciplinary Rules" or "DR's" and "Ethical Considerations" or "EC's". The DR's were intended to provide the minimal threshold standards with which a lawyer must comply or be subject to discipline. EC's were intended to state the aspirations of the legal profession; they were not intended to be enforced through disciplinary proceedings. Many of the DR's were not "ethics" provisions in the sense an ethicist would use the term; for example, they included pages of detailed requirements concerning how a lawyer could advertise to the public. Many other rules in the Code were matters of etiquette rather than ethics.

Because the ABA is a voluntary organization with no power to regulate lawyers, the ABA Code of Professional Responsibility was not binding upon lawyers when adopted by the ABA; it was simply a "model code" available to states. By 1972, however, all but three states had adopted the ABA Model Code to govern its lawyers. By 1974, forty-nine states had adopted the ABA Model Code. Thus, the ABA Code of Professional Responsibility represented a significant achievement for the ABA in promoting its "model regulation." Except for California, which had adopted its own code regulating lawyers, the ABA had created virtual uniformity among the states with respect to their regulation of lawyers.

Although much effort had been devoted to the development of the ABA Model Code, it was not long before deficiencies began to be noted. In 1977, the ABA leadership appointed another committee, called the Kutak Commission, to study the desirability of revisions to the ABA Model Code. The Kutak Commission worked for six years; especially during the last four years after the draft was leaked, numerous drafts were circulated, numerous rules were revised, public debates were held, and a significant amount of legal literature emerged. Finally, in August, 1983, the ABA House of Delegates approved a new model legal ethics code entitled the ABA Model Rules of Professional Conduct.

The 1983 ABA Model Rules differed from the earlier ABA Model Code in both form and substance. With respect to form, the 1983 Model Rules abandoned the Model Code's distinction between DR's and EC's. Instead, the Model Rules substituted an approach in which it listed a "black letter" rule stating the minimal requirements, followed by an explanatory comment.

With respect to substance, many key provisions, especially those concerning confidentiality issues, differed significantly from the earlier Model Code. Moreover, numerous specific provisions had been the subject of vigorous disagreement and debate. Several provisions were amended on the floor of the House of Delegates, rather than being approved in the final form submitted by the Kutak Commission.

The ABA Model Rules of Professional Conduct were much less successful as a "model rules" project than the earlier ABA Model Code had been. By spring 1998, forty-three states had ethics codes based on the 1983 ABA Model Rules,

although many states were quite slow to adopt the ABA Model Rules. Moreover, almost every state that adopted the 1983 Model Rules included significant amendments to the ABA Model Rules. Some states adopted the Model Rules, but chose to retain the substance of one or more Model Code provisions for one or more rules. Some states also chose to adopt rules from early Kutak Commission drafts, rather than the final version adopted in August 1993. Thus, to the extent that the ABA intended to provide uniformity concerning the regulation of lawyers, its goal has not been met. There currently is significant variation among the states with respect to their regulation of lawyers.

More recently, there has again been significant energy devoted to the issue of these lawyer regulation provisions. In Spring 1997, the ABA appointed a ten-person Special Committee on the Evaluation of the Rules of Professional Conduct, commonly called the Ethics 2000 Committee. The committee's mandate is to examine the ABA Model Rules of Professional Conduct to determine whether amendments are necessary.

In 1986, the American Law Institute began a project to develop a Restatement of the Law Governing Lawyers. (The American Law Institute (ALI) is an influential advisory group, consisting of lawyers, judges and professors. The ALI drafts "Restatements" of various substantive areas of the law; these Restatements often are cited by judges when deciding cases.) The drafters hope to complete the Restatement of the Law Governing Lawyers by 1999; the scope of this project is to include law beyond the ethics codes, including court decisions and relevant statutes.

Legal ethics provisions have had a much higher profile among lawyers in recent years than they did in past years. Some of the factors that contribute to this higher profile include:

- Legal Ethics subjects are now covered in the essay questions on the bar examinations; passage of the bar exam is a condition of licensure in almost every state;
- Many states now require lawyers to pass the Multistate Professional Responsibility Exam (MPRE) as a condition of licensure;
- Many states now have mandatory continuing legal education requirements for lawyers which include a legal ethics component; and
- Many courts now permit legal malpractice plaintiffs to use evidence of a legal ethics violation to help prove their malpractice case; as a result, practicing lawyers have begun to pay much more attention to the ethics rules than they might have when the likelihood of disciplinary enforcement was small.

Thus, it is against this regulatory background that legal ethics instruction in law schools must be understood.

The History of the Legal Ethics Course Requirement

This chapter previously stated that in order to become licensed as a lawyer, most states require an applicant to have successfully completed law school. In fact, most states now require an applicant to have graduated from an ABA-accredited law school. This requirement evolved during the first half of the twentieth-century. In 1929, the ABA approved a 1921 committee report and adopted Standards for Legal Education; the standards were contained in a pamphlet approximately one and one-half pages long.³ During the 1920's and through the 1940's, the ABA lobbied to have states follow the ABA Standards when setting licensing requirements; it was largely successful in these efforts.

Although modified, the 1921 Standards remained in effect until 1973. At that time, the ABA House of Delegates approved the *Standards for Approval at Law Schools*.

Although legal ethics often was the subject of discussion, neither the original standards nor the 1973 replacement standards mandated the teaching of legal ethics. For example, in 1931 the ABA section responsible for legal education concluded that it did not want to mandate a definite curriculum for a mandatory course, but did report as follows:

We are not critical, but it does seem to us, and it seems to most practicing lawyers, that Harvard, Yale, Columbia, etc., were not taking the responsibility which is apparently necessarily imposed upon the law schools for doing something for the instruction of those who are coming to the bar in the basic principles of professional conduct. They are not doing it at Yale.⁴

Despite the lack of a legal ethics requirement from the ABA, in 1931 seventy-nine percent of AALS-accredited schools and eighty-five percent of non-AALS accredited schools offered some sort of ethics course and fifty-nine percent of AALS schools and sixty-eight percent of non-AALS schools offered professional ethics as a formal course.⁵ Although law schools were offering these legal ethics courses, conventional wisdom is that they were rarely taught by full-time faculty and rarely taken seriously by students. Then came Watergate.

Because so many lawyers were involved in the Watergate scandal, calls came for greater legal ethics instruction in the law schools. In summer 1974, the ABA amended its recently-adopted Standards for the Approval of Law Schools by adding Standard 302(a) (iv) (as amended August 1974). This provision mandated the teaching of legal ethics in law schools, although it left to the school's

³Boyd, Susan K., *The ABA's First Section 21*, 71 (American Bar Association 1993).

⁴*Id.* at 41.

⁵*Id.* (AALS is an acronym for Association of American Law School. AALS membership requirements overlap many ABA accreditation requirements; the two entities historically have conducted joint inspections.)

discretion the decision whether to offer a specific course in legal ethics or to satisfy the requirement through a "pervasive" method of instruction in which legal ethics issues are inserted throughout the curriculum.

The ABA Standards were amended again in 1996 in the wake of the settlement of an antitrust suit against the ABA brought by the U.S. Department of Justice. The current ABA standard on the teaching of legal ethics is Standard 302(b); it states:

A law school shall require of all students in the J.D. degree program instruction in the history, goals, structure, duties, values, and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association. A law school should involve members of the bench and bar in this instruction.

This accreditation requirement thus mandates the teaching of legal ethics in U.S. law schools.

Various sections of the American Bar Association have issued reports documenting the teaching of legal ethics in law schools. In 1986, for example, the ABA Center for Professional Responsibility issued *A Survey on the Teaching of Professional Responsibility*. The survey was sponsored by the ABA Special Committee on Implementation of the Model Rules of Professional Conduct. Among other things, this survey reported on the administration of professional responsibility education; the substance of professional responsibility education; methods of teaching professional responsibility; and perception of students' knowledge and interest.

One decade later, in 1996, the American Bar Association Section of Legal Education and Admissions to the Bar issued the *Report of the Professionalism Committee: Teaching and Learning Professionalism*. This report was based, among other things, on a 1994 survey to which seventy four percent of the ABA-accredited law schools responded. This report contained information on legal ethics education in ABA-approved law schools, although this aspect of the report was much narrower than the 1985 survey.

These surveys show that the percentage of schools requiring a specific legal ethics course remained relatively stable from 1985 to 1994; only five to six percent of schools satisfy Standard 302(a) (iv) through the pervasive method of legal ethics instruction rather than a required course:

1985 Survey Results Showing Schools Requiring
a Legal Ethics Course

- Required - 95%
- Not required - 5%

1994 Survey Results Showing Schools Requiring
a Legal Ethics Course

- Required - 94%
- Not required - 6%

With respect to credit hours, however, the 1994 survey showed a significant increase in credit hours devoted to legal ethics instruction:

1985 Survey Results Regarding Credit Hours

- 1 Credit - 7%
- 2 Credits - 75%
- 3 Credits - 16%
- Other- 2% [Variable credit allocation]

1994 Survey Results Regarding Credit Hours

- 2 Credits - 44%
- 3 Credits - 23%
- Other - 5% [Variable credit allocation for the course]

- Other - 6% [Students pick one of several courses]
- Additional - 6% required upper-level course

(The reason the 1994 survey results do not add up to 100% is probably because the survey showed a wide variety of ethics courses which were difficult to quantify in chart form, such as Duke's one week intensive course taught between the first and second semesters of law school. Indeed, the 1994 data was presented in narrative rather than chart form)

In 1985, only ten percent of schools offered legal ethics during the first year of law school; the remaining schools offered it in the second or third year or in both years. By 1994, fourteen percent of schools offered a legal ethics or professionalism component during the first year of law school. In short, one of the things the 1994 survey makes clear is the dramatic variety in legal ethics courses in 1994 as compared to 1985.

The Growth of Interest in Legal Ethics as a Subject Matter

Interestingly, neither the 1985 survey nor the 1994 survey reported on the number of schools in which legal ethics is taught exclusively by an adjunct faculty member, rather than a member of the full-time faculty. Employment of a full-time faculty member to teach legal ethics is often used as a benchmark to measure a law school's commitment to the subject. Anecdotal evidence suggests

a dramatic increase in the number of schools that now have full-time faculty members teaching legal ethics courses. Moreover, a number of these professors now research and write in the area of legal ethics. Not surprisingly, there has been a blossoming of conferences and institutes devoted to this subject. To give just a few examples, Fordham University School of Law has the Stein Institute of Legal Ethics and Hofstra University School of Law recently started the Institute for the Study of Legal Ethics. The AALS has now sponsored three conferences devoted to the teaching of legal ethics. The ABA recently presented its 25th National Conference on Professional Responsibility. The W.M. Keck Foundation recently concluded several years in which it provided significant grants to improve the teaching of legal ethics and sponsored several conferences on this topic.

The dramatic growth in scholarly interest in legal ethics is of relatively recent origin and no doubt is at least partially a result of the two developments described above: 1) the addition of legal ethics as a required course in 1974 led to additional professors who taught the course; and 2) the ABA's efforts during the 1970's to develop the ABA Model Code of Professional Responsibility and during the 1980's to develop the ABA Model Rules of Professional Conduct resulted in intensive discussion about the proper parameters of legal ethics rules. The leading law review literature on legal ethics seriously emerged during the late 1970's and the 1980's. The 1980's also saw an explosive growth in the non-law review academic literature and practitioner-oriented literature concerning legal ethics. For example, the leading one-volume legal ethics treatise was published in 1986.⁶ Several other treatises emerged shortly thereafter. The first journal of legal ethics was started by Georgetown University in 1987; several other journals now publish papers from legal ethics conferences.

This growth in the academic interest in legal ethics should be added to those factors listed in the prior section as contributing to increased practitioner interest in, and awareness of, legal ethics standards. Moreover, the increased richness, sophistication and complexity of the debate over legal ethics is now reflected in the variety of legal ethics provisions throughout the country and number of additional efforts to refine these provisions.

Interestingly, the treatment of legal ethics education in U.S. law schools appears to be substantially more advanced than that found in law schools outside the U.S. In many countries, legal ethics education is not even an elective part of the law school curriculum. Instead, the assumption is made that the student/lawyer will acquire these principles during the required practical training period. Since the topic of legal ethics is not included in the law school curriculum, few academics and/or lawyers outside the U.S. are interested in the topic. As a result, there seems to be much less discussion of these issues outside the U.S.

⁶ Wolfram, Charles W., *Modern Legal Ethics* 34-35 (West Prac. ed. 1986).

The Variety of Approaches Used to Satisfy the Legal Ethics Course Requirement

Up to this point, this chapter has referred to “legal ethics” in a manner that may seem incongruous. When lawyers or legal academics speak of “legal ethics”, they generally are not speaking about “ethics” in the sense of moral philosophy, but about the body of regulations which subject a lawyer to the disciplinary system. And even if a law professor wants to teach about true “ethics”, he or she is constrained to some degree by the ABA-accreditation requirements which require instruction concerning the ABA Model Rules of Professional Conduct. Moreover, the fact that many law students will take both an essay bar examination in which they must address disciplinary regulation issues and also the day-long multiple choice Multistate Professional Responsibility Exam (MPRE) means that there is a certain consumer demand for courses different than a traditional moral philosophy ethics course. Thus, as a general rule, the “legal ethics” courses one finds in U.S. law schools are quite different from the “ethics” courses one would find in a college curriculum or perhaps even in other graduate departments.

As the 1994 survey confirmed, however, there are a variety of methods that are used to teach legal ethics and a variety of approaches, including some approaches that view the course from a moral philosophy perspective. This section will briefly touch on some of the choices that face legal ethics teachers and provide a sampling of the variety of approaches to the course. This section will also touch on some of the common teaching methodologies. Some of the choices are mutually exclusive and some are not.

Since the ABA-accreditation standards require coverage of the ABA Model Rules of Professional Conduct, virtually all professors address the Model Rules in at least some respect. The first choice that the law school as an institution will have to make is whether to require a student to take a specific legal ethics course or to satisfy the accreditation standard by insuring that ethics are taught pervasively throughout the curriculum. Both approaches have had their proponents. After the legal ethics requirement was added to the ABA Standards, there was a push to incorporate a specific ethics course into the law school curriculum in order to ensure adequate treatment. As the survey results reported above demonstrate, this effort has been extremely successful. In the 1990's however, there has been increasing support for the use of the pervasive method of teaching legal ethics in order to avoid marginalizing the course or having students compartmentalize information that they should be drawing upon in all their courses. One of the leading legal ethics scholars is Professor Deborah Rhode from Stanford. With the support of the W.M. Keck Foundation, she wrote “Professional Responsibility: Ethics by the Pervasive Method”, now in its second edition. She and others are firm advocates for switching to the pervasive method of legal ethics instruction, especially as a supplement to a specific course.

If an institution requires a legal ethics course, one of the first decisions it will have to make is what kind of course that should be. As the prior section alluded to, schools are experimenting tremendously with respect to when and how legal

ethics courses are offered. Another development that has emerged in the last decade is the extent to which legal ethics issues are presented in a particular factual context. Some law schools now offer contextualized courses so that students can study "Ethics in Criminal Law" or "Ethics in Corporate Law", as opposed to taking a survey course. Some schools now offer upper-level courses in addition to the basic course. This author, for example, has taught a Comparative Legal Professions course in addition to the basic survey course; this course surveys the legal ethics rules in various countries.

Assuming that a legal ethics course is required, one of the first choices that the legal ethics professor must make, as opposed to the institution, concerns the perspective of the course. Some professors choose to present the course from a law-based perspective, whereas others focus on fostering students' moral development. Another issue facing the legal ethics professor is the issue of coverage: some believe it important to cover most, if not all, of the provisions in the ABA Model Rules since students may encounter a variety of issues in their legal practices; others may choose to provide a more in-depth treatment of particularly compelling or difficult issues.

Another choice facing the legal ethics professor is the degree to which he or she seeks to answer questions and provide guidance versus an approach in which one seeks primarily to raise the questions, but not necessarily to provide guidance to the students about how to deal with the issues in their practices.

As the 1994 survey indicated, the methods by which legal ethics is taught have greatly expanded during the last fifteen years. As I sit writing this chapter, I look up to my bookshelf and see nineteen different casebooks I might have chosen. (And I am sure there are others not on my shelf.) The philosophies, methods and approaches in these books differ dramatically. Many use the "problem method" approach in which the student is given a set of facts and asked to evaluate past conduct that occurred or to propose future conduct to respond to the facts. The book then contains reading material relevant to the problem. The type of material presented to aid the student varies radically depending on the orientation of the book; the material can range from standard philosophy excerpts to cases to newspaper articles. In addition to the casebook, the student likely has a "Statutory Supplement" which will contain the ABA Model Rules of Professional Conduct at a minimum and may contain many other actual or proposed regulatory schemes.

Many legal ethics professors use additional resources to supplement their use of the casebook and statutory supplement. It is quite common for legal ethics professors to use videotapes in the classroom. Some of the popular videotapes include documentaries; simulated problems; and excerpts from television shows or movies. A number of these videotapes have been produced by legal ethics academicians and the ABA. In a similar vein, many legal ethics professors make extensive use of current events - bringing newspaper clippings to class or lawyers who can tell their stories.

Another popular methodology is the use of role play to encourage students to better understand the issues and internalize the lessons. Computer "games" also

have been used. The nonprofit Center for Legal Academic Computing (CALI), to which most ABA-approved schools belong, produces a number of interactive computer exercises in different substantive areas. CALI has produced at least six different "games" raising legal ethics issues.

Some schools have also provided legal ethics instruction in a clinical context. At the University of Texas and Seattle University School of Law, for example, students have participated in the disciplinary system as it investigates complaints against real lawyers.

CONCLUSION

Because of the accreditation requirements for law schools and the professional nature of legal education, legal ethics instruction may be very different from the other kinds of "ethics" addressed in this book. One advantage of the current approach to legal ethics in U. S. law schools is that it has led to a richness and depth of literature concerning the role of lawyers and issues facing lawyers rarely found elsewhere in the world. And this academic interest in the role of the lawyer has led to an increasing questioning of, and change in, the provisions that regulate lawyers. One would like to presume that the regulatory changes that result from considered debate may move lawyers and society forward in moral development and consideration.

On the other hand, it is difficult to say that law schools, systemically, have made law students more ethical people or more ethical lawyers. Indeed, one could argue that the law-based approach used in many legal ethics courses merely encourages students to approach difficult issues from a legalistic perspective rather than a moral or ethical perspective. Regardless of one's perspective, however, it is clear that there currently is vigorous debate about, and interest in, the role of legal ethics education in U.S. law schools.

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