

Teaching Ethics in and Outside of Law Schools: What Works and What Doesn't

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I started teaching law school courses in Professional Responsibility in 1984. I taught my first ethics CLE program in 1985. Right from the beginning, I noticed that navigating the classroom in Professional Responsibility was a much trickier business than teaching the other courses I taught. In 1988 I went to a conference at which David Luban gave a talk called “12 ways to fail as a PR teacher.” I was astonished to learn that it wasn't just me, and that even David Luban (who, like Deborah Rhode,² is one of my permanent role models) was finding it difficult to teach legal ethics. Luban inventoried some of what I have since learned are “the usual problems” that legal ethics teachers encounter. For example, how do you overcome the disengagement or hostility of cynical students who think the class is a bunch of hooley? How can a teacher avoid being regarded as a touchy-feely Pollyanna? How is one supposed to teach an increasingly voluminous and complex body of law without becoming a doctrinal spoon-feeding machine? How might one teach about lawyer misconduct and its disastrous consequences without demoralizing law students just about to join the profession? Eighteen years later, I don't think we've solved these and other problems, but perhaps we've made a little headway.

Most of those who attend the National Conference on Professional Responsibility teach legal ethics in some capacity, as full-time or part-time law professors or as presenters at continuing legal education programs. Most who teach legal ethics report that the task usually is challenging and that they encounter various obstacles and challenges. Whether the classes include law students or licensed professionals, some students in any ethics class usually are

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1. This essay is adapted from an issue outline prepared for the 32nd National Conference on Professional Responsibility, June 2006, Vancouver, Canada. The other participants on the panel were Lucian Pera, of Adams & Reese LLP in Memphis, Tennessee; Robert Rubinson, Professor of Law and Director of Clinical Education at the University of Baltimore; and Jerome D. Ziskrout, of Epstein Wood in Vancouver, British Columbia, an adjunct professor at the University of British Columbia. Ziskrout is former Law Society counsel and Deputy Secretary of the Law Society. I have incorporated some of the ideas presented by the other panelists.

2. At the 32nd ABA National Conference on Professional Responsibility, Deborah Rhode received the Michael Franck Professional Responsibility Award.

unprepared, unmotivated, and/or cynical. At many schools, professional responsibility is the only required upper-level course, which causes some resentment and resistance. Similarly, many states require every member of the bar to enroll in continuing education programs in ethics annually, so CLE teachers also face captive and sometimes skeptical audiences. Both law students and lawyers tend to expect the law that governs lawyers to be simpler and more commonsensical than it is. This makes it difficult for teachers to elicit careful advance preparation or rigorous analysis during class sessions. Some students of legal ethics fail to do the necessary studying because they don't believe that ethics rules are "real" law. Others resist engagement in discussion of legal ethics issues because so many topics involve lawyers whose conduct resulted in civil, criminal or disciplinary liability; the stories can be threatening to law students and to lawyers. A final set of difficulties relates to the rules themselves—many take the form of broad standards whose meaning is murky and whose application seems indeterminate. Often there are no answers, only arguments. This leaves many students uneasy or frustrated.

No matter the setting or the audience, certain approaches are more likely than others to engage the students in learning the relevant law and exploring the array of dilemmas that lawyers encounter in practice. Some methods are more likely than others to help students to increase their ability to recognize ethical dilemmas and to understand the institutional dynamics and economic pressures that lead some lawyers to rationalize unethical conduct. On the other hand, some approaches to teaching ethics are almost certain to fail, to produce boredom, animosity, cynicism or alienation among participants. What follows is a short inventory of some ethics teaching methods that work, and some that tend to fail, with brief discussion of why each may succeed or fail.

Setting Teaching Goals

What works: Explicit consideration of teaching goals and focus on teaching critical thinking and analysis.

What doesn't: Rote teaching of rules, case law or statutes.

Some teachers assume that the main objective of a CLE session or a law school class is to transmit information about the law. Such teachers might spend most of their teaching prep time organizing the substance of what is to be presented. While one important goal of ethics teaching is to convey information about the law governing lawyers, there are many other worthy objectives. Ethics teachers tend to be more successful and better received if they aspire also to cultivate the critical thinking skills of participants and to provide training in analysis of ethical dilemmas. Learning a rule is worthwhile, but gaining practice in applying a rule is more useful. The rule may be forgotten, or rewritten, or may become irrelevant to a lawyer who moves to a jurisdiction that has adopted a different rule. But a lawyer who hones the skill of finding the relevant law, applying it to particular facts, and identifying and exploring the relevant strategic, practical and moral considerations can use those skills in addressing a wide range of problems.

Implicit in this proposal is the notion that a teacher should articulate, to herself (in planning) and to her students (in class), the particular objectives of a course, a session, or a particular exercise. The process of articulating objectives leads many teachers to expand their aspirations and to pay more attention to classroom process.³ This often leads to use of more interactive teaching methods, which often is more effective in assisting students in learning substantive material and in their skill development. Likewise, when students understand what they are supposed to learn, and what they are supposed to learn how to *do*, and why it is important for them to learn those things, they are more likely to buy into the teacher's goals and to be motivated to engage in the learning process.

For example: In my professional responsibility classes, I explain that one of my personal goals is to increase the students' ability to recognize and to evaluate ethical dilemmas and thereby to reduce the likelihood that any of them will go through a professional crisis resulting from civil, criminal or disciplinary liability.

Obviously, moving to a more interactive mode in teaching drastically reduces the amount of substantive material that can be covered. But one of the most certain ways to fail as a teacher of legal ethics is to race through a large mass of material. It is better to select the most important and interesting topics for careful analysis and interactive study in class than to sacrifice quality of classroom experience in favor of glancing coverage of a lengthy substantive agenda.

Structuring a class session

What works: Discussion, role plays, anything interactive, anything that offers variety in the events of class, movie clips, skits; bringing lawyers and lawyer regulators into the classroom.

What doesn't: Lecture, unless used sparingly.

Many people become lawyers because they like to talk. Many people become legal ethics teachers (in part) because they like to talk. Being at the front of a classroom making a presentation is very interesting and challenging for the teacher, regardless of the structure of the classroom session. But for the students, sitting and listening to hours of lecture or even to some version of Socratic dialogue can be a deadly bore, even if the teachers are highly skilled.⁴ In addition, if an important goal is to teach critical thinking and analysis of ethical issues, this simply cannot be accomplished through lecture. Most people engage more active-

3. Many years ago Professor Stephen Goldberg of Georgetown University Law Center gave me one of the best pieces of teaching advice I have ever received. He urged me to spend half my preparation time mastering the material to be taught and the other half thinking about what would happen in class, about what I would do and what the students would do.

4. I commend to any teacher to spend one day as a law student, selecting a set of courses, doing the assigned reading for that day and then sitting in on several hours of classes. This may help them to understand why so many students sit in class answering email and surfing the web.

ly in thinking through conversation than through listening. In structuring any class, consider how many participants have an opportunity to converse or to write or otherwise to engage actively. Even in a traditional Socratic dialogue, the teacher converses sequentially with a small number of students. Nearly everyone in the class is in a passive role for almost the entire class. Seek to structure each class to allow many opportunities for everyone in the class to do something more active than listening and taking notes.

Interaction is one key to success in teaching ethics. Another is to use a variety of teaching modes. In a semester-long course, it is desirable to use a smorgasbord of methods and media. A teacher might devote many classes primarily to discussions of problems that were assigned as homework. But in one or two classes, a teacher might show excerpts from a lawyer movie (I sometimes use excerpts from “Class Action”) or from an ethics teaching video and invite the students to identify and analyze the ethical issues that arise. Small groups of students could be invited to prepare skits playing out particular problems. The instructor might, in one class, “become” the client or the respondent in a problem and ask the students to conduct an interview or to give advice.

Another key to success in teaching ethics is to bring lawyers and lawyer regulators into the classroom. One day, the instructor might invite representatives from the Lawyer Counseling Program, one of whom might offer a first-person narrative about the consequences of his or her alcohol or drug addiction on their professional life. Two or three classes might be devoted to guest lectures from bar counsel, disbarred lawyers, ethics counsel or others involved in the field. Students can learn a great deal about the risks to professional life posed by alcohol and drug abuse, dishonesty, disorganization and materialism from reading or hearing first-person cautionary tales.

Selecting reading materials to assign

What works: Concise materials that tell stories and invite analysis. Problems, hypos, narratives that convey contextual detail.

What doesn’t: Court opinions, law review articles, anything verbose.

Engaging students in class begins with assigning reading that is accessible and relevant to the work that will be done in class. Traditional teachers tend to assign an endless stream of appellate opinions as reading. In teaching legal ethics, leading a discussion of court opinions often goes over like a lead balloon. A student who reads an opinion is in a passive role, reviewing the judge’s view of the facts, the law, and the analysis of how the law applies. In legal ethics problems, as elsewhere, what rules apply and how those rules apply depends on interpretation of ambiguous facts. Court opinions often emphasize factual conclusions rather than ambiguities, which makes the analysis of the problems seem simple and determinate. If a class is given “raw” facts, complete with ambiguities, the students’ analysis will differ depending on their respective perceptions. If an

instructor elicits an array of conflicting arguments about which rules might apply, how they apply, and why, students come to understand the relationship of facts and law and the importance of fact investigation and factual presentation.

Another deficiency in using cases to teach legal ethics is that many of the most serious and interesting ethical dilemmas that lawyers encounter seldom lead to litigation. Consequently, focus on litigated matters will lead a teacher to spend a disproportionate amount of time on issues that have been litigated. Law students studying legal ethics need most urgently to study problems encountered by lawyers in their first several years of practice, such as ethical questions relating to billing practices, responding to supervisory instructions to act in a way a lawyer regards as unethical, or what to do if a lawyer is asked to take on a type or quantity of work that he cannot handle in a competent manner. One can find examples of some of these issues in published opinions, but often the better examples may be found in other sources.

Leading a class discussion

What works: Asking questions that ask for thoughtful analysis, questions that can be answered by thinking.

What doesn't: Asking questions that ask for recitation of information learned from the reading.

Teachers ask three types of questions: those that ask for information (What is the relationship of Rule 1.6 to the law of attorney-client privilege?); those that can be answered by thinking about them (Rule 1.6 allows a lawyer to reveal confidences if such revelation is necessary to carry out the representation. Do you think that [in a posited hypo] the revelation could be justified on that basis?); and those that ask for both information and ideas. Asking questions that call for information certainly has its place in teaching, and can be used to review important doctrine or to reinforce key elements that the teacher wants the students to remember. But there are two problems. One is that some legal ethics students tend not to study hard enough to be able to answer such questions very well. The more important problem is that such questions tend to call for memorization rather than critical analysis. Consequently, a teacher may succeed better by limiting the amount of classroom time devoted to regurgitation of facts or law, focusing instead on questions that call for application of law or other analytical thinking.

If discussion of a case or a problem is best introduced by a review of the facts, the teacher usually can accomplish that review better and more quickly through lecture than through asking a student to summarize the facts. Students are more responsive to questions that invite thoughtful analysis than to those that demand information. Thinking questions are more interesting and do not involve a risk of humiliation through public error.

Using the problem method

What works: Teaching important cases by providing an account of the facts and

inviting students to evaluate the case from the perspective of a lawyer in the situation.

What doesn't: Studying ethical dilemmas only by reading post-hoc judicial opinions.

One way to use cases in teaching legal ethics is to place the students in the role of one of the lawyers in a story and to provide an account of the facts as they occurred before the matter was litigated. The students may be asked to consider what law or ethics rules are relevant, how they apply, and what they (in the role as one of the lawyers) would actually do. This gives each student, and the class, a well-defined task, decisions to make, law to apply. Arms-length, cerebral analysis of the application of relevant law is not nearly as engaging as asking the students to step into the shoes of a lawyer in the problem and asking: "What will you do now?" Answering this question will require application of law, but also will require consideration of strategic, practical, professional and personal issues that might inform the judgment of a lawyer confronting a situation.

After the students have evaluated the problem, the teacher can tell the students what happened in the real case. This allows them to compare their analysis to that of the judge. Telling the real story at the end of the discussion of a "hypothetical" problem also serves as a continual reminder that the situations presented as problems are real and may arise in law practice.

For example: Consider the infamous and often-taught case called *People v Belge*.⁵ One could assign the students to read the court opinions on the criminal and disciplinary charges against one of the criminal defense lawyers whose client had confessed to him that he had committed other murders and told the lawyer where the bodies were buried. Or one could hypothetically assign the students to be co-counsel with lawyers Belge and Armani, confront them with their client's disclosures, ask them to consider the applicable ethics and liability rules, and give them time to discuss whether they would investigate, disclose the confession, or keep the client's confidences. Although this story is uniquely riveting and memorable no matter how it is taught, students may be most productively engaged if placed in the lawyers' shoes at the time the dilemma arose.

Introducing a problem for discussion

What works: Anything that dramatizes the facts: telling the story well, a video dramatization, a skit, a diagram, a factual summary on a power point slide.

What doesn't: Relying on the students to remember complex facts from the reading, or reciting the facts in the sometimes lifeless manner of an appellate opinion.

5. 372 N.Y.S.2d 798 (County Ct., Onondaga Co. 1975), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975). During the conference session, I demonstrated an abbreviated version of a classroom discussion of this problem.

Engaging students in discussion of a problem depends on telling the story in a way that conveys the facts clearly and vividly and that makes the students care about the people in the story. Clear articulation of facts may be enhanced by a written summary of the problem projected on the wall or distributed as a handout. Even if one uses a written summary, telling the story aloud (or at least a summary of it) is helpful also. In telling the story, one can better engage the students through the use of any dramatic device. A teacher may become a character in the story and tell the story from the perspective of a participant. The teacher or the students may be enlisted to act out a scene in the story, perhaps playing out a conversation in a law firm after a conflict was discovered. Other possible dramatic options include: simply summarizing the problem dramatically, using voice inflection for emphasis or suspense; using photos, costumes, props, or diagrams. The quality of the dramatization is not important—even very bad acting is better than monotonous recitation of facts. The literature on legal education is replete with evidence that second and third year law students are bored. Especially in law school classes, a few bells and whistles tend to be appreciated.

Inviting small group discussion of problems

What works: Short, focused small-group discussions followed by a large-group discussion of the principal arguments and conclusions.

What doesn't: Confusing facts or instructions, too-lengthy small-group discussions, too thorough or plodding a large-group review of small-group discussion.

In any large class discussion, only one person can talk at a time. One way to elicit broader engagement and participation is to periodically ask participants in a large class to divide into groups of three and discuss/decide one or another question. A teacher may be able to elicit worthwhile responses to many simpler questions without small-group discussion. If an instructor poses a complex problem or question, he or she might allow a short period for small-group consultation, and then invite large-group discussion. During the small-group discussions, every student in the class has a chance to participate. This moves the students into a more active mode of thinking and will increase their engagement and comprehension. After a small-group conversation, student contributions to the large-group discussion usually are more numerous and more thoughtful.

For example: An instructor might present a problem and then direct the students to assemble small groups of three or four students from among those sitting adjacent to them. The instructor should allow some period of time (often five or ten minutes) for discussion of the problem. Then the instructor can reconvene the large group, surveying the small groups for their conclusions (how many decided to do x?), and then inviting a sample of volunteers to explain their rationales.

This structure can be used in a class of any size, even classes with over one hundred students, especially if the room is one in which the chairs can be shifted

to allow conversation. When the small groups begin to talk, the room does become noisy, but the small groups never seem bothered by it. In very large classes, many students will not participate voluntarily unless the instructor uses small groups.

This methodology is easy to implement, but there are several potential problems, all avoidable. Instructors should take care to present facts that are complex but not too complex. For example, most students can't work effectively on a problem if a three-page single-spaced hypothetical is handed out in class for immediate discussion. Instructors should provide clear guidance as to the question to be answered or the task to be accomplished. An instructor might say, for example: "You have five minutes to decide what you would do in this situation. You may choose one of the listed options or propose alternatives." Usually the small-group interactions should be brief, long enough to get the thinking process going, not so long that some students begin to digress. An instructor should not ask for a narrative report of conclusions or reasoning from each small group, unless the class is very small; this can be ponderous.

One benefit of using small-group discussion is that the more reserved students, who may hesitate to share an idea in a large class, have an opportunity to converse during class in a less intimidating setting, testing out their ideas with a couple of classmates. When the large group reconvenes, these students are more likely to raise their hands and participate. When small groups are used over time in law school classes, a higher percentage of the students participate in large-group discussion.

Using visual material in class

What works: Carefully selected visual material that fits with a teacher's objectives. If print slides, use large type. Photos and conceptual diagrams (at least those that make sense) are always a hit.

What doesn't: Presenting lecture notes in the form of a long series of rapid-fire power point slides; or putting too much text on a slide, or using animation or sound effects in a way that is annoying or distracting.

Nearly everyone in teaching has realized that blackboards (and even white boards) are not as helpful as document cameras, power point, and other visual media, especially when trying to communicate with a generation of students who have grown up with computers. Of course one can get wrapped around visual media to the detriment of one's teaching, but if the teacher considers carefully the goals of each class and uses images that assist in communication, student engagement and student satisfaction can rise dramatically. In using power point, an instructor should not project a whole set of class notes –there will be too many words to absorb visually. Also a teacher should consider the relationship between what is being presented orally and visually. These two presentations should be coordinated and complementary, not competing and distracting. In teaching ethics, power point or other projection may be beneficially used, for example,

- to show the language of a rule, where the teacher is trying to explain or to elicit application of the rule;
- to show a summary of the facts of a problem or hypothetical, so that students who miss a detail on the oral presentation may review the written version to clarify their understanding of the facts;
- to show photos of parties, lawyers, judges, or other images that help to tell the story of a case or a problem. (One can use “Google Images” to locate photographs of almost anyone or anything.) Photos provide interesting context and serve as a reminder that the cases and problems discussed are not just hypothetical but involve real situations.

Using simulation or role-play of problems

What works: Many varieties of simulation, including, for example, a “fishbowl” method in which the instructor and/or some students perform a role-play observed by other students and then discussed; a role-play assignment given to small groups, in which everyone plays a role and no one watches, followed by a discussion; use of video clips showing a scenario being played out; or an informal spontaneous role-play in which the instructor and a student “play out” the posited situation.

What doesn't: Devoting most of the time to role-play and leaving little time for reflection or discussion; doing a lengthy fishbowl role-play, which is usually boring for all the observers; doing anything that results in confusion or boredom.

A logical extension of the use of the problem method is to use role-plays in class to explore how the problem would be handled. Many instructors hesitate to use role-play, fearing that they have no acting or directing ability. One way to test the water is to begin to use role-play in a law school class or CLE program as part of the conversation.

For example: If an instructor asks: “What should the lawyer tell the client in this problem about the extent of your duty to protect client confidences?”, a student is likely to say “The lawyer should explain that....” This conversation can be made more interesting if the instructor shifts into role. “Wait; I'll be the client, you be the lawyer. Talk to me. Say what the lawyer should say.” Then, when the student plays out his or her advice, the instructor can respond in role. Before long, another student will volunteer to be the lawyer but give different advice. Once an instructor has had some positive experiences with such spontaneous role-play, he or she may decide to experiment with other structures.

Teaching close reading and systematic application of rules

What works: Projecting the language of a rule to be applied on the wall or directing the students to the page where the rule appears, guiding the students through the identification of each question that must be asked about the facts to apply the rule, and eliciting the varying arguments that might be made about how the rule applies

What doesn't: Assuming that all the students have read and mastered a rule;

quickly referencing only the key questions in application of the rule

Most lawyers resolve ethical questions without looking up the relevant rules in the ethics code or researching other applicable law. Teachers of legal ethics should offer students regular practice in careful and systematic analysis of the application of rules, taking time to explore the meaning of ambiguous words, relevant comments and other interpretive authority. Many second and third-year law students have not mastered these skills. Some learned to do careful rule application during the first year of law school but have sacrificed careful reading in favor of a growing array of obligations. Some who are adept at legal analysis don't realize, until they are taught, that the same degree of care and rigor is required to apply "lawyer law" as to apply other law. Eliciting careful rule application takes time. An instructor who aspires to cover a large volume of material in a class session may not be able to teach or to reinforce this critical set of skills.

This essay is just a thumbnail of some ideas about what works and what doesn't work in teaching legal ethics. The inventory is inevitably incomplete and superficial. However, interested readers can find more detailed materials in any of the sources listed in Professor Robert Rubinson's bibliography on this topic, which follows.