The Challenges and Rewards of Teaching Legal Ethics (May 31, 2018)

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By Bruce Green

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Thank you. I cannot adequately express how grateful I am to Lucian Pera for such kind and generous words; to the ABA Center for Professional Responsibility for selecting me to receive an award whose prior recipients are among the lawyers and teachers in the field of legal ethics whom I have most admired over the years; to my friends who nominated me; and to all of you for honoring me with your presence here.

Thirty-one years ago, Fordham Law School’s associate dean said to me, “You have to teach legal ethics because you’re new and no one else wants to.” That was a bit of good fortune, which I did not appreciate at the time. I did not imagine then or in my early years of teaching that legal ethics would become the focus of my academic and professional life. If I imagined anything in those first few years, it was that eventually, hopefully, someone even newer would come along to take over the course. And I certainly never dreamed that one day I would be recognized with an ABA award named for one of the giants in the field, Michael Franck, who, among other things, was instrumental in promoting the improvement of state disciplinary processes and in establishing the ABA Center.
One reason I never imagined any of this is that teaching legal ethics had so many challenges. In fact, there was a growing body of academic literature, to which my Fordham colleagues and I ended up contributing, about the challenges of teaching legal ethics.\textsuperscript{1} I would like to use my brief time to reflect on some of the challenges and, more importantly, the reciprocal awards of teaching legal ethics.

One challenge, to paraphrase Rodney Dangerfield, is that “we don’t get no respect.” This is a century-old problem. George Costigan, a Northwestern University law professor who authored the first legal ethics casebook in 1917\textsuperscript{2}, wrote that law schools failed to teach the subject “in any except a brief and perfunctory way” because the faculty “stigmatized the subject as relatively unimportant.”\textsuperscript{3} In 2010, in his dissenting opinion in Holland v. Florida,\textsuperscript{4} Justice Scalia demonstrated that, generations later, legal ethics was still stigmatized, calling it the “least analytically rigorous and hence most subjective of law-school subjects.”\textsuperscript{5} The mistaken attitude that legal ethics is not a serious scholarly pursuit discourages new and would-be law professors from pursuing legal ethics as teachers and scholars, regardless of how interesting and important they regard the subject to be.

Another challenge for legal ethics teachers is that the organized bar has an unrealistic ambition for us. This has always been true as well. An Indiana law professor wrote in 1932 that what “the leaders of the movement for the teaching of Legal Ethics . . . really want is not that the law schools devote more time to the teaching of the rules of Professional Ethics, but that they make some intelligent and whole-
hearted attempt to develop Professional Character.”6 In the 1970s, when, in response to the Watergate scandal, the ABA required accredited law schools to teach legal ethics, the ambition was not simply that we would graduate future lawyers who knew the ethics rules, but that we would create ethical lawyers. Then-retired Justice Tom Clark, who helped lead the charge, acknowledged at the time that professors considered it impossible to teach integrity, but he responded: “Our law schools . . . must shoulder the burden of ‘teaching’ honesty because there is simply no one else to do the job.”7

A third challenge is that honesty barely scratches the surface of what we are expected to teach. The subject of legal ethics is hard to define but covers a huge expanse. Legal ethics is said to include not just the rules and law governing lawyers’ conduct, but the profession’s guiding beliefs, standards and ideals, including a commitment to legal reform, improving the administration of the law, and governing society through the rule of law8 – an ambitious agenda for several dozen hours of classroom instruction.

Thankfully, my colleagues teaching legal ethics throughout this country have not shied away from these challenges. The result is that, over the past three decades, teaching legal ethics has offered rewards commensurate with the challenges.

First, because teaching legal ethics is hard, it encourages creativity. My colleagues around the country are among the most innovative teachers, and the course materials developed to teach legal ethics offer a wide array of approaches.9

Also, because legal ethics was neglected by scholars for so long, to say nothing of
the fact that law practice is constantly changing, the legal profession is a fertile area for scholarship. To illuminate and better understand the legal profession, scholars in the field look, for example, to history and philosophy, they conduct empirical research, and they draw on teachings of psychology, sociology, economics, and neuroscience, among others.  

Third, because we sometimes feel beleaguered, the community of legal ethics professors is strongly supportive. Many seek opportunities to come together at this conference and elsewhere. We have also sought to engage with the professional community through work with the ABA and other bar associations, as well as to welcome practitioners into our community of legal ethics professors.  

Fourth, while it is unrealistic to think that we will inoculate our students against ethical impropriety, it is a privilege to engage explicitly in professional socialization – to invite our students to think deeply about what it means to be a legal professional and what kind of professional they want to be. The legal ethics course has more than a pedagogic mission. It is a significant piece of the lawyer regulatory process. What do I mean?  

As important as the disciplinary process is, it is essentially about failure – the failure of individual lawyers who violate the professional norms, and the legal profession’s failure to prevent them. While a profession that aspires to be self-regulating must enforce its norms through discipline, it has an equal responsibility to try to encourage professional and ethical conduct. That is the objective of CLE
programs, ethics hotlines, ethics opinions and other professional writings on legal ethics, and of in-house law firm ethicists, lawyer assistance programs, and many other features of our robust professional regulatory process. The law school’s legal ethics course is part of that process, and so it has a mission like no other course in the law school curriculum – a mission that includes teaching rules, teaching students to identify and resolve ethics problems, and inculcating professional values. That makes teaching the course, though difficult, so meaningful. Legal ethics professors stand with one foot in the legal academy and one foot in the legal profession, with a responsibility to both.

One additional reward comes from looking at the legal profession through the eyes of students who are new to it. If those of you working in the field of lawyer regulation ever stop questioning what we do, consider becoming adjunct professors. Let me offer several examples of the kinds of basic questions about professional regulation that law students might encourage you to think about.

First: In my state, fewer than 2% of disciplinary complaints result in public discipline, and virtually all of the rest end with a letter to the complainant advising that the disciplinary authority is not pursuing the matter, accompanied by the most perfunctory, pro forma explanation. While the outcomes themselves may be justified, how would you feel if you received one of these letters? Does the process inspire public confidence in law as a self-regulating profession?

Second: There are many ethics rules, but discipline is imposed only for serious violations of important ones. Not every rule violation deserves a sanction. For
example, ethics rules forbid trial lawyers from alluding to irrelevant considerations at trial, but trial lawyers are virtually never disciplined for asking irrelevant questions or making irrelevant arguments on summation. Why should rules like this one be included in a code that is intended principally for professional discipline? Lawyers are subject to the stigma of being labeled “unethical” for violating the rule. At the same time, disciplinary authorities’ non-enforcement of this rule and others like it undermines respect for the disciplinary code. Should some of the disciplinary rules be codified somewhere else? Alternatively, should disciplinary rules be separated into categories equivalent to felonies, misdemeanors and infractions, to convey that they aren’t all equally serious?

*And, third:* When the resolution of an ethics question is unclear, we have a rule saying that subordinate lawyers may rely on a supervisory lawyer’s reasonable resolution of the question. Should we have another rule freeing *all* lawyers from discipline if they rely on a reasonable resolution of an arguable question? As law, society and technology change, lawyers face arguable questions of professional conduct pretty often. We want them to identify the questions and try in a good faith way to resolve them – to call an ethics hotline, to consult a mentor or an in-house or outside ethics expert, or to conduct their own research. If disciplinary authorities don’t pursue discipline in such cases, shouldn’t lawyers be told that, both to reduce anxiety and to encourage reasonable measures? If disciplinary authorities do sanction lawyers who resolve arguable questions reasonably but, in hindsight, incorrectly, is that fair?
And, finally, let me offer you a question that your students may pose that is relevant to all of us lawyers and to the organized bar. Our professional conduct rules recognize that, over time, we have developed a legal system whose “proper functioning” depends on lawyers.\textsuperscript{13} As a consequence, we are told, a “critical need for legal services . . . exists among persons of limited means,”\textsuperscript{14} and the lack of available lawyers is a problem that we, as lawyers, are responsible individually and collectively to address.\textsuperscript{15} We know that no amount of pro bono work, as important as that is, will erase the fact that there are too few lawyers available at no fee to serve more than a fraction of the legal need. People have to deal on their own, often unsuccessfully, with legal problems threatening their housing, jobs, health, safety, finances, ability to live in this country, sometimes even their liberty, and more that is basic and essential. Since there will never be enough lawyers for most of the people who need them, and given that self-help materials will never adequately substitute for lawyers, isn’t the better strategy to change the legal system so that it does not depend so heavily on lawyers? In a profession of over one million lawyers, whose professional associations are dedicated to civil justice reform, are there not the resources and imagination to come up with alternatives?

I hope these reflections and questions leave you something to think about. I had initially thought to use my time, like an Academy Awards acceptance speech, to thank some or all of the family members, teachers and lawyers who have supported me on my path, and who have served as role models. But time and your patience would not
permit: there are just too many people to whom I am so very grateful.\textsuperscript{16}

But, in closing, I do want to thank my parents – my mom, who passed away in January of this year at age 90, and my dad, who passed away in his 80s twelve years earlier. They would have taken pride and pleasure, though perhaps also have been bemused, to see me receive an ethics award from the ABA. My dad was a businessman. My parents encouraged their four children not to follow in his footsteps but to become professionals, as we did, three of us as lawyers. My parents knew the answer to the question that others have posed over the past century, of whether law is a business or a profession.\textsuperscript{17} They wanted their children to have the satisfactions that a profession offers, including pride in professional service, in striving for professional excellence, and in undertaking professional challenges. And that’s what I want for my students. I am grateful to my parents for encouraging me on the path to the legal profession, and for good fortune which has allowed me to dwell in a special corner of the legal profession where professional challenges and rewards abound in equal measure.

Thank you again.

\textsuperscript{1} See, e.g., Mary C. Daly et al., Contextualizing Professional Responsibility: A New Curriculum for a New Age, 58 LAW & CONTEMP. PROBS. 193 (1995).
\textsuperscript{2} GEORGE P. COSTIGAN, JR., CASES ON LEGAL ETHICS (West Publ. 1917).
\textsuperscript{3} George P. Costigan, Jr., The Teaching of Legal Ethics, 4 AM. L. SCH. REV. 290, 290-91 (1915-22).
\textsuperscript{4} 560 U.S. 631 (2010).
\textsuperscript{5} Id. at 670 (Scalia, J., dissenting). In my contribution to a festschrift in honor of Ted Schneyer, I argued that Schneyer’s scholarship belied Justice Scalia’s characterization. See Bruce A. Green, The Legal Ethics Scholarship of Ted Schneyer: The Importance of Being Rigorous, 53 ARIZ. L. REV. 365, 371-72 (2011).
\textsuperscript{6} Bernard C. Gavit, Legal Ethics and the Law Schools, 18 A.B.A. J. 326, 326 (1932).
\textsuperscript{7} Hon. Tom C. Clark, Teaching Professional Ethics, 12 SAN DIEGO L. REV. 249, 252-53 (1974-75).
\textsuperscript{8} Commenting on the significance of legal ethics in this broad sense, Judge (then-Professor) Jack Weinstein, wrote: “The way in which members of the bar perceive their roles in the legal structure and in society affects not only the development of the law, but also the moral and intellectual climate of American society.” Jack B. Weinstein, On the Teaching of Legal Ethics, 72 COLUM. L. REV. 452, 455 (1972)
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is is the point where my casebook co-authors (Russell Pearce, Renee Knake, Peter Joy, Sung Hui Kim, Ellen Murphy and Laurel Terry) may hope that I will plug our casebook, PEARCE ET AL., PROFESSIONAL CONDUCT: A CONTEMPORARY APPROACH (West 3d ed. 2017). But the truth is that there are so many terrific casebooks and other educational materials. We’ve come a long way since 1917.

I am grateful for the tutorials that I have received from those with whom I have had the privilege of co-authoring law review articles, including Annette Appell, Karen Bergreen, Alafair Burke, Elizabeth Chambliss, Nancy Coleman, Bernardine Dohrn, Peter Joy, Sam Levine, Jane Moriarty, Russell Pearce, Ellen Podgor, and Dan Richman. I am particularly grateful to those who have been willing to work with me on multiple occasions – Rebecca Roiphe, Ellen Yaroshefsky, and, before his untimely death, Fred Zacharias, with whom I collaborated for a decade.

I am endlessly grateful to the bar associations with which I have had the privilege of working: the ABA, the New York State Bar Association, the New York City Bar, the New York County Lawyers’ Association, and the Federal Bar Council.

See MODEL RULES OF PROF’L CONDUCT R. 5.2(b).

See id., Rule 4.2, cmt. [1].

Id., Rule 6.1, cmt. [2].

Id., Rule 6.1, cmt. [1].

In addition to those acknowledged in other footnotes, I do want to thank members of my Fordham family. First, my thanks to two extraordinary role models who were great influences and supporters early in my academic career. Mary Daly, who received the Michael Franck Award posthumously, was Fordham Law School’s leading legal ethics professor when I joined the faculty and continued in that role until 1997, when she became the law school Dean of St. John’s University, handing me the reins of the Stein Center for Law and Ethics. Mary introduced me to the ABA National Conference on Professional Responsibility, where she nurtured the growing community of scholars who participated in the Conference. See Bruce A. Green, Remembering Mary Daly: A Legal Ethicist Par Excellence, 83 ST. JOHN’S L. REV. 23 (2009). John Feerick, the 2017 recipient of the ABA Medal, was the Fordham law school Dean when I began teaching and for many years thereafter, and is now a cherished friend and colleague. He strongly supported my engagement in the ABA and other bar associations and supported my collaborations with the bar on ethics conferences and other projects. See Bruce A. Green, John D. Feerick: The Dean of Ethics and Public Service, 70 FORDHAM L. REV. 2165 (2002). Additionally, I want to thank my Fordham colleagues who served with me over the years as co-directors of the Stein Center: Matthew Diller (who is now my Dean), Sheila Foster, Jennifer Gordon, Kimani Paul-Emile and Russ Pearce. Finally, my gratitude to the late Louis Stein (Fordham Law class of 1926), his granddaughter Sally Bellet (Fordham Law class of 1976) and the other members of the Stein family who have supported my various work through the law school’s Stein Center.