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## On Trying to Teach Judgment

Douglas N. Frenkel

*University of Pennsylvania Law School*

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## On Trying to Teach Judgment

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DOUGLAS N FRENKEL\*

*The class of 120 first-year professional responsibility students had been divided into 60 pairs of negotiating partners with each student assigned to transact a simple purchase or sale of a commodity in the course of a thirty-minute in-class role-play. The problem had been structured in typical simulation fashion, with each side given secret information and instructions to get the “best” deal possible within the time limits. As each principal was desperate to reach agreement, a large range of overlapping settlement authority existed, and decisions as to issues of disclosure and concealment of information were key to the success of the bargaining. All negotiated simultaneously. During the in-class debriefing after the exercise, one student who had obtained an exceptionally high price as a “seller” disclosed that, during his opponent’s bathroom break, he had turned over that student’s confidential instructions and read them. This admission was met with a loud chorus of sneers mixed with some laughter. Thereafter, his act was repeatedly referred to in class discussion on related topics, was discussed on several students’ final exams, and reportedly followed him in his student career for some time.*

Several years after he was graduated, I received a call from a former student. He had just finished advising a client concerning a difficult estate planning decision. His purpose in calling was to tell me that, all during the advising session, he had envisioned the lawyer depicted in a controversial videotape<sup>1</sup> that had been shown in my course. The young lawyer reported that, going through the process with his client, he had vacillated between the varying counseling approaches available to him<sup>2</sup> in assisting the client and had found himself consciously resisting the temptation to mimic the

lawyer whose style portrayed in the classroom videotape had remained with him all of those years.

What is unique about these moments? Taken as isolated and unrelated events, they may simply reflect the residue of two classroom experiences – one the product of a student’s actions, the other of his reactions. After a decade and a half of teaching professional responsibility in classes of 100 or so students, however, I have come to see these as more: at least on the surface they represent a level of student engagement and longitudinal learning which, for many teachers in this field (myself included), is hard to come by. And, in recent years, this has led me to rethink my goals for this course in order to create such moments. This essay is about that shift in emphasis. Before this is unpacked, however, it may be useful to step back in order to describe and understand the challenge to which this approach may be a response.

#### THE CLASSIC INSTRUCTIONAL MODEL: THE RULES, THE PROFESSION, AND ISSUES OF VALUES

Teaching professional responsibility is difficult. It is the only nationally required subject for all US law students, but there is no mandate as to its format, duration, or teaching methodology.<sup>3</sup> Most institutions offer a survey course that is elected by large numbers of students. Many, if not most instructors in such courses, aided or guided by the growing wealth of commercially-published course texts,<sup>4</sup> approach the course as encompassing: (i) a large dose of teaching the “law of lawyering”<sup>5</sup> (ie a combination of the legal profession’s rules for regulating the conduct of its members, the burgeoning body of decisional law reflecting both traditional<sup>6</sup> and emerging<sup>7</sup> ways in which courts are asked to rule on the subject of lawyers’ conduct, together with other statutory, regulatory law on the subject); (ii) certain instruction about the adversary system and the structure, history, composition, and service delivery systems of the legal profession;<sup>8</sup> and (iii) some discussion of dominant professional norms and their relationship to students’ personal values. This prevailing approach has much to recommend it on a number of levels.

First, the subject matter itself warrants it. The field has seen an explosion of law and scholarship in the last two decades, coming

into its own as a sophisticated and complex substantive area. As US legal education centres mainly on teaching the legal doctrine underlying societal regulation, it would be odd if the few (and, in some schools, only) courses devoted to the regulation of lawyers did not devote a fair bit of attention to the doctrine here. With law as a graduate course of study and the overwhelming majority of students aiming to become practising lawyers upon graduation,<sup>9</sup> many teachers view it crucial to equip students with the basics of the black-letter regulation they will face in order equip them to practise, in the words of one scholar, “safe law.”<sup>10</sup> Although few institutions will admit, much less embrace “teaching to the bar exam,” students’ need to know the rules for the required black-letter Multi-State Professional Responsibility Examination (“MPRE”) may influence some instructors’ choice to emphasise law.<sup>11</sup> Finally, for faculty who are interested in, but who have not inhabited the world of law practice or its many settings, a law-based approach may be simplest to master in order to teach.<sup>12</sup>

Given the growing importance of the subject matter, the guaranteed audience of students with a need to know, and an expanding choice of quality commercially-available teaching materials, the conditions would appear to be right for a successful course. Yet this is hardly the case. Over a quarter of a century after the introduction of this requirement, many, if not most find this a difficult, if not undesirable course to teach. And schools view the area as a curricular problem. There are many reasons for this.

Institutions themselves contribute to the problem directly via curricular planning and resource allocation decisions. Some schools devote only enough resources to ensure that the courses that satisfy this curricular requirement end up being large group instruction in discussion-deadening lecture halls. Many schools allow this requirement to be deferred to the last year (and, in many cases, final semester) of the three-year programme, producing classrooms filled with many jaded near-graduates who have avoided this course as long as possible.<sup>13</sup> Indirect institutional messages also abound. Schools may cheapen the subject when they permit the requirement to be satisfied by completion of courses meeting for few credit hours, in greatly compressed formats,<sup>14</sup> by courses which fail to assure even minimal attention to key professional norms or when they have no permanent or even full-time faculty member involved in the area at all. And to the extent schools engage in

marginalising clinical education and hiring faculty steeped only in theory and who disdain law practice, the value of studying about the role of lawyers and lawyering is undermined in the institution generally.<sup>15</sup>

Resistance on the part of the typical upper-level student-enrollee is legendary. There is resentment at the requirement, a factor not unrelated to undercutting institutional messages. Many have the impression that this is soft, easy stuff, a few rules to be memorised coupled with student opinion as to the “right thing” to do in situations pitting professional role demands against personal or lay concepts of morality. Others chafe at being forced to attend what they view as “compulsory chapel.” Few feel much urgency in mastering this area, believing that, as subordinates in law practices, they will not have much say in, not to mention control over, ethical decision-making early on in their careers. And in any case, many students assume that, like so much else related to practice, acculturation, if not specific instruction and mentoring at the workplace, will ensure that they learn this material. At schools like mine with graduates going overwhelmingly to very large private law firms, those who see the field as focused in the main on behaviour that can lead to lawyer discipline are of the view that they need not concern themselves with such statistically unlikely events. Finally, given all of the media and popular culture attention to lawyers and their ethics in recent years,<sup>16</sup> it is not surprising that some students feel they have studied this subject already.

For reasons I will discuss later, I find such student reasoning both ironic and flawed. To the extent this resistance is related to the pedagogy of legal ethics-as-code compliance, however, it is both understandable and, to some extent, justified. Focusing only on professional codes tends to produce a stultifying classroom. Unambiguous rules, however important, are hardly the stuff of scintillating academic inquiry. Parsing those rules that may be unclear, poorly drafted, and/or incompatible with others can provide interesting moments but can also appear to be dealing with minutiae that will likely soon be fixed.<sup>17</sup> While those rules that, in reality, amount to broad statements of the profession’s norms can produce lively discussion of the lawyer’s role in the US adversary system or in specific settings, it is not the standards themselves that are interesting.

An ethics-as-law approach triggers problematic student stances.

If they are near graduation, most students have had their fill of Socratic teaching and are at best passive in case method instruction. Attempts at policy discussion can be fruitful, but there tends to be a holding back on the part of those who view the profession's self-regulating scheme with a certain suspicion or derision as either not worthy of being taken as seriously as other positive law,<sup>18</sup> a product of politics of the bar,<sup>19</sup> or both. Other students, socialised in the ways of "thinking like a lawyer" (which can be any time after first semester), begin seeing ethical problems as any other set of legal issues in which a premium is placed on being able to argue around or otherwise "game" the rules in order to justify or reach a desired result. Finally, areas of lawyer regulation which, as applied, most often pit personal codes against professional rules, tend to foster an unfortunate classroom split and tone. Discussion is either too "hard" or too "soft" depending on whether the student (if he or she is listening) is more interested in questions of personal morality or the rules or other law that might "answer" a particular issue. As a result, a substantial number of students opt out of the discussion at any moment.

Having said all of this, I believe that much of it is beside the point. I do not think that a responsible course in this area can avoid teaching a substantial part of the basic law of lawyering. The subject is simply too important. And while, like all teachers, I want my classroom to be filled with engaged students, my evolving goals for this teaching are based on something else. In addition to teaching professional responsibility, I am also a clinician, a "pracademic" who continues to practise and study in the world of lawyers and to think about the best way to prepare graduates to be effective and thoughtful practitioners.<sup>20</sup> My overall orientation to the study of law is to examine it "in action" and to identify the external and internal forces that impact and can thus help us understand and evaluate the actors' decisions and conduct. While the law on the books is always the starting point, clinical education's testing of theory against the reality of practice often tells us that law as administered, even when decided by courts, is far from that which we might predict from a "scientific" study of law. This applies with special force to that vast majority of lawyering situations that end in the advising lawyer's office or in private transactions or dispute resolutions where it is the decisions of lawyers and clients, rather than external regulators or umpires,

that matter. Legal ethics, consumed as often it is with lawyer conduct that takes place when no one is looking, which may be undetectable, yet which may have great implications for our justice system, seems to cry out for this analysis. My general predisposition coupled with the nature of this field thus propels me to examine how and why lawyers make decisions in areas of ethical uncertainty and to share this with my students so that they can begin to learn to make their own good choices. In short, here as in my (overtly) clinical teaching, I aim to study and to teach judgment.

Such an approach is completely compatible with and, in my view, integral to, teaching the law governing lawyers. Despite, or perhaps because of, the movement in the profession's codes from aspirational norms to black-letter rules for the potential discipline of lawyers, some of the most significant areas of purported regulation remain rather indeterminate standards which neither require nor prohibit specific conduct but rather amount to broad grants of discretion to individual lawyers. Under the current rules<sup>21</sup> in force in most American jurisdictions,<sup>22</sup> for example, lawyers "may" (and thus need not) reveal all manner of confidential information that would greatly benefit others who are in the dark<sup>23</sup> and "should" act with zeal in advocacy on a client's behalf (to the potential disregard and detriment of the interests of others) but "need not press for every advantage that might be realised."<sup>24</sup> In short, in these important areas and others, the law of lawyering is written in ways that presume, and thus require, the ability to make sound moral judgments while providing little or no guidance for those decisions.<sup>25</sup>

My desire to teach the process of ethical judgment is based on one other consideration: I feel we owe it to our students. While still in school, students tend to underestimate the importance of this material and its daily role in their future lives. Once out of school, there is troubling evidence that young lawyers, including those working as subordinates in large hierarchical settings, are asked to engage in ethically problematic conduct and are in fact making ethical judgments of significance under conditions antithetical to reasoned analysis. Overworked associates are making decisions about whether to produce documents or disclose potentially-important information in the litigation discovery process, sometimes working alone in the middle of the night.<sup>26</sup> For

immediate guidance they may turn to colleagues not much older than they and whose insecurities may weigh more heavily than wisdom in the mix of advice. They sit by and observe senior lawyers, increasingly economically dependent on their disloyal clients, tell those clients what they think they will want to hear and take part in charades with respect to truth finding, provided the stakes are high enough. Technological advances lead to information bombardment which, together with heavy workloads, cut down on time for reflection about hard decisions. Workplace cultures that once provided mentoring and training in this area are weakening. Large practices are becoming geographically-dispersed collections of increasingly mobile lawyers with little sense of loyalty and with reward systems based on production. Moreover, where structures are in place for junior lawyers to seek ethical guidance, there are indications that seeking such assistance too often may be discouraged by the tacit messages of the workplace and that at least some supervisory lawyers, even in the most prestigious practices, model poor judgment or lack the wisdom that is sought.<sup>27</sup> Those graduates who go directly into their own practices, small offices, or understaffed high volume public interest practices have an even greater need to hit the ground running in terms of being able to negotiate the conflict-ridden moral landscape that they will face early on. I view my course as giving students a safe place, and perhaps for some their last chance, to begin to develop the ability to make good ethical judgments.

## THE NATURE OF ETHICAL JUDGMENT AND HOW IT CAN BE TAUGHT

Much has been written about good judgment as that quality that separates the really good and, possibly the most satisfied lawyers from the rest of the field.<sup>28</sup> Sound judgment has been described as a process of “deliberating about and deciding personal, moral, and political problems”<sup>29</sup> that involves the “compassionate survey of alternatives viewed simultaneously from a distance,”<sup>30</sup> in which “general principles and values and the particularities of the case both play important roles.”<sup>31</sup> Such a process has both cognitive and affective dimensions, requiring a mastery and synthesis of the intellectual and emotional tugs of a problem, and ability to engage in “sympathy and detachment” simultaneously.<sup>32</sup> Developing a



facility with a process that harnesses both aspects is particularly crucial in a case of moral conflict. While it can be argued that some aspect of good judgment is a product of intuition or gift,<sup>33</sup> there is much here in the nature of a skill that can be learned given the right conditions.<sup>34</sup>

As applied to the area of legal ethics we are talking about a lawyering ability to make decisions among competing principles or values, personal and/or professional. For teaching purposes, it may be useful to think of such judgments as falling into two main categories: law compliance decisions and process choices. By the former, I refer to decisions about discrete “go/no go” actions: electing to maintain a confidence; cross-examine a truth-telling witness; undertake a representation; object to an interrogatory. Process choices refer to decisions as to *how* the lawyer will conduct herself in a range of (often private) settings: advising about a client’s proposed course of action with which the lawyer disagrees; seeking client consent to a problematic multiple representation; preparing a potentially untruthful witness for testifying, avoiding disclosure in negotiations. While these are somewhat related, each may call for a different pedagogical approach.

An important initial question must be addressed: can judgment be taught in a large classroom in thirteen weeks? My answer depends on the goals for that enterprise. For most of us, the capacity for ethical wisdom will not be developed fully in the first thirteen *years* of experience as lawyers. And the “commitments” a student makes in the classroom – to an opinion or even a statement of what he *would* do in a given situation – is not necessarily the same as a real world action.<sup>35</sup> But the process of deliberating, which, if finely developed, will produce good decisions over time, can be modeled and launched in a structured setting if the conditions are right.

What are the desirable classroom conditions for developing a capacity for sound ethical deliberation? In my experience, the exclusive use of decided case law with its result-justifying facts already “established” and “legally-irrelevant” client interests omitted will not work to represent the messy, factually-ambiguous, and contingent setting of most ethical dilemmas.<sup>36</sup> Simplified or skeletal hypothetical issue-spotting problems will fail for similar reasons. Lecture shares these limitations and adds a dimension of promoting student passivity, a trait arguably antithetical to the

active cultivation of a capacity for reflective deliberation. Instead, such goals are best carried out by trying to create an environment in which students can experience a situation on both intellectual and emotional planes. This means attempting to place students in unresolved situations that are complex in terms of the variables internal and external to the lawyer, with current facts unclear, future consequences undefined, and resolutions susceptible to several choices. It means locating the stimuli in situations not answered by a clear rule, where the rules vest great discretion in the practitioner, or where the application of a clear rule would work a gross injustice and/or violation of commonly-held lay or personal morality.<sup>37</sup> It means showing and critiquing lawyers in action, not simply on paper. Ideally, it means introducing the people (including the “others”) affected and ensuring the presence of a mentor who will both demonstrate a process for students to consider and then provide feedback as they attempt and adapt it themselves.<sup>38</sup> But can this be done in a 100-student classroom?

#### A DISCLAIMER

The balance of this article describes my efforts to meet the goals and create the conditions just summarised. What I describe is merely a shift in emphasis rather than a wholesale revamping of the classic survey course. As will become apparent, it is informed by my experience at teaching clinically.<sup>39</sup> This essay should not be mistaken for an endorsement of the large class instructional format that is described. Were I given *carte blanche* to design a programme of instruction in this field, it would preclude large group instruction and would include first-year instruction given parity with other courses, and upper-level clinical and contextualised courses designed to teach specialised areas in depth. The goal of teaching judgment, including the elements that follow, would be part of any such offering.

### **1 Teaching the Law, Treating Students as Lawyers, Accepting Reality**

I begin the course<sup>40</sup> by acknowledging students’ need to know (and my desire for them to learn) the law in this area. I assure them that, if they invest themselves in the enterprise, they will learn it and that, as prior students have reported, the course will be helpful

in passing the MPRE. I announce, however, that I will devote only part of the class time to direct doctrinal discussion, and that such discussion or lecture will focus on only the most important, complex, or novel legal and policy issues. I tell them that I will expect them, as almost-graduates, to read and teach themselves most of the law in order to prepare for the lawyering situations to be encountered in class, just as lawyers must do every day in practice.<sup>41</sup> I try to reserve five minutes at the end of each class to highlight the main legal and policy issues raised by the day's assignment, raising questions for students to ponder that go beyond the readings they (presumably) have done. Teaching the law, at least in this way, is thus both compatible with, and necessary for, the decision-making objectives of the course. Making good judgments depends on many factors, including an awareness of the rules, their theoretical underpinnings, purposes, and problems.<sup>42</sup>

I assign one-fourth of the class to be prepared to be called on for each class and invite voluntary participation as well. The latter is particularly forthcoming on material devoted to making judgments, sometimes to the point of having to limit student discussion. This approach generally attracts the active involvement of better than half of the class, more some days, less on others.

I have no delusions or unrealistic goals. I know that some students will not prepare and will cram for the final. Some will attend only sporadically. Some would prefer to be called on or to be spoon-fed the material. Overall, however, this approach to the class has surpassed other alternatives that I have tried.<sup>43</sup>

## **2 Becoming a Participant-Mentor: Dispelling the Myths of Right Answers**

Early in the initial session, I tell my students about my background as a practitioner and clinical educator, explaining my goals for the course and my interest in lawyers and their behaviour. I underscore the fact that this course is about "us" and that practitioners use the material of this course more than that of any other course in the curriculum. I inform them that some of the discussion problems in the course materials are derived from my own practice experience<sup>44</sup> or that of colleagues or friends and that some come from situations that, as much as a quarter of a century later, are difficult for me. I tell them I have made many judgments over the years, that I have come to regret some, and that I might

apply a somewhat different decisional process today than at the beginning of my career.<sup>45</sup> I invite them to ask me, if I have not already volunteered, to share my judgment or opinion about each problem with which the class has wrestled. Overall, however, I underscore the notion that it is their process of ethical deliberation, rather than the answers, that is our goal.

This introduction is the first of many occasions in which I emphasise, explicitly or implicitly, the importance of collaboration, deliberation, seeking assistance, and open process as lubricants of good ethical decisions. At numbers of points, illustrations of formal and informal bar guidance are included in the course materials. And one videotaped case study<sup>46</sup> is used squarely to develop the young lawyer's competence at obtaining the guidance he or she needs in this area.

I do not aim to produce a single mindset as to the "right" kind of ethics for students to adopt. Even if I thought I could define a "good lawyer" with respect to the decisions she made (as opposed to her process of deliberation) in morally ambiguous waters, such a stance would be greeted with derision by a substantial number of students at any given point and would serve as a conversation-stopper for those inclined to passivity.<sup>47</sup> Moreover, it would risk conveying a message of personal clarity that is at odds with my own evolving notion of this field. That said, I will not hesitate to raise the "What if?" questions concerning contingencies or consequences that students fail to anticipate,<sup>48</sup> to criticise constructively, and offer alternatives to what the class has produced, point out clearly wrong thinking or other weaknesses in students' own process of analysis, offer an opinion on a policy issue, and, at the end, explain my own decisional approach.<sup>49</sup> But this is very different from proselytising.<sup>50</sup>

I have no delusions about how this is received by some students. I am still the professor who will occasionally call on students, decide what problems to discuss, prepare, and grade the examination. Many, understandably, still try to divine the "answers" embedded in what I say or, at the end, prefer to retreat to the comfort of rules. Students, however, have been specific in their positive regard for the openness that this stance attempts to convey and the experience it seeks to share. The real question is the extent to which one must have a familiarity and a currency as a practitioner in order to enjoy this legitimacy in students' eyes and,

more importantly, to teach in this way. While I cannot answer this question, I would only note that there are several ways of bringing such a mentoring role into the classroom. In my experience, inviting thoughtful, academically-oriented practitioners to be co-teachers or even discussion leaders for a limited set of problems can work extremely well.<sup>51</sup>

### **3 Contextualising Ethics: Marrying Affect to Intellect by Replicating the Stakes**

Having relegated straight discussion of the law to a manageable component, I then devote much, if not most of the class time, to working on discussion problems in varying formats. Seeking to have students experience the multiplicity of forces that impact ethical deliberations, I try to present situations that, together, pose as many of the contextual factors at work in practitioners' ethical decision points – the client, the concerns of other players, the uncertainties, the type of lawyering role, personal interests, the work setting, the foreseeable consequences of any particular choice – as possible. In short, I seek to replicate the stakes involved in real world decision-making. I will discuss several of the teaching variables in no particular order.

#### *Using Reality*

In my experience, nothing works as powerfully as material derived from real case experiences. When told that a discussion problem, videotape, or other teaching vehicle depicts actual events, students instantly demonstrate a heightened level of attention and show little of the cynicism that sometimes greets hypotheticals or the slavish gravitating to the “rule” or result that accompanies the use of court decisions. Problems “based on” real events work well but not with quite the same punch. Textured real accounts can capture not only the events but also the people involved and the human dimensions of the moral challenges presented. The benefit of using real material is even greater when the professor-mentor has drawn the material from his or her own experience and can relate his or her own process of judgment after the class has considered the problem. While there is a danger that the actual history of the matter or dilemma (assuming it has been resolved) will colour an otherwise open-ended exploration of decisional options, this can be

controlled by exclusive focus on the point(s) at which the matter remained unresolved. Rich sources of reality-based material include journalistic accounts of lawyers in print and on television and published case studies of lawyers.<sup>52</sup>

Documents from actual case files can also be used to great advantage. Instead of merely discussing problematic conduct or writings, students can be shown actual file excerpts which can bring to life such important but hard-to-dramatise areas as, for example discovery abuse, improper threats, “undignified” advertising. Such material can sometimes be obtained from courts in the case of matters of record or from practitioners provided there is reaction appropriate to the circumstances.

### *The Power of the Visual Image*

My experience tells me that videotape presents the optimal classroom medium for contextualising ethical dilemmas. Presenting students with an entertaining medium in which they have been reared is relevant and helpful to creating a vibrant class atmosphere but is not enough of a reason to teach using video.<sup>53</sup> The key instead comes from the power of the visual image. The literature in this area<sup>54</sup> explains what those who use videotape know intuitively: visual images enhance attention, learning, and retention and engage students on an emotional level. For purposes of professional responsibility teaching, a well-done videotape is the most effective and efficient means of portraying in a textured way the atmospherics and personalities, the economics of practices, and nuances of communication that conspire to create classic ethical dilemmas. Moreover, dilemmas can be portrayed in “real time,” replicating the all-too-frequent situation in which a lawyer (or the student in class) must respond to a challenge and reach a decision with little, if any, time to prepare. Finally, a well-done tape can illustrate the important intersection of skills or interpersonal dynamics and ethical norms. Especially in informal arenas (eg advising, negotiation), it is often the style, tone, sequencing, or other psychologically important features of a communication that determine its ethical propriety.

There surely are downsides to this pedagogical tool in terms of the goal of instilling a capacity for reflection. The power of this medium is also its greatest risk. As illustrated by the example of my

student in the telephone anecdote at the start of this article, a video image can be almost indelible. Fortunately, the student I described was a thoughtful and reflective person who had grown while working as a practitioner. Unless properly harnessed and balanced in discussion, however, a teacher can unwittingly unleash an image of a lawyer that may remain “unedited” or unfiltered in the student’s mind and which can produce an automatic or categorical response in the form of mechanical mimicry or overcompensating rejection – the very antithesis of reflective judgment. This is of particular concern in situations, exceedingly common in classroom use of videotape, in which tapes are designed and used to portray provocative if not altogether negative examples of lawyering conduct.

The contributions videotape can make to teaching judgment may best be captured by a description of three of the tapes I often use in my course. Each is of a different genre and tends to develop a separate component of the quality being taught.

*Professional Responsibility in Pretrial Litigation: The Morgantown Civic Centre Collapse*<sup>55</sup> is a tightly-scripted story consisting of a series of connected short vignettes, each containing arguably unethical conduct, set in the defense of a major personal injury claim. The protagonist, an experienced corporate litigator retained by a major corporate client for the defense of the matter, is seen instructing a potential expert witness to avoid creating any writings and to destroy “unhelpful” (and possibly, discoverable) earlier draft reports, using tortured legal reasoning to direct a subordinate not to produce a document that has been properly requested by the plaintiff’s counsel, “coaching” a witness for an upcoming deposition in ways that strongly suggest conforming his testimony to what will be necessary to avoid legal liability, and then watching as that witness exceeds his lawyer’s expectations by giving deceptive testimony at the deposition.

These compressed lawyer interactions set up discussion of the legal issues (“Was that statement/silence/question ethical?”) in each scene and evoke the emotional tension of each situation very efficiently. At certain designated “stop tape” discussion points in the unfolding drama they can also set up the question “What should the lawyer do now?” Such junctures replicate the uncertainty of those moments at which there are several choices, and the future is unclear. In terms of developing judgment, such questions require

more active and comprehensive student engagement than issue-spotting or evaluating the already-committed act of another lawyer. On the other hand, such compact, stylised dramas cannot portray the subtle, mundane, and sometimes lengthy human processes that characterise most real lawyering, and are thus not fully internalised by the audience. They leave students without accessible realistic models to critique and adapt, embrace, or reject.

By contrast, *Lawyer-Client: Who's In Charge?*<sup>56</sup> is a twenty-one minute tape that depicts what appears to be a complete advising session between a lawyer and his client. On the eve of trial, a prominent lawyer is shown using very forceful language in an attempt to discourage his indigent client from giving in to her temptation to accept what he feels is a wholly inadequate offer of settlement of her personal injury claim. Based loosely on a real case and performed by lawyer-actors in a way that leaves many students convinced it is real, the tape's contribution to the construction of judgment stems from its verisimilitude, its focus on the significance of the stance or role definition adopted by the lawyer, how his/her skill execution can determine whether ethical norms have actually been honoured and in its calling up student powers of critique. While rules (the client is to decide, the lawyer should render candid advice, etc) lurk in the background, the always-lively and often heated classroom discussion of the tape is evaluative in nature, with students lining up to praise or excoriate the lawyer, pushed to support their comments with data from the tape. Evaluation of others' (or, for that matter, of one's own) conduct and having to justify such critique and compare it to classmates' conclusions can make a major contribution to developing reflective judgment. A stored-up bank of well-founded and serious reactions thus registered will, over time, be recalled in appropriate situations and will help form one's own approach to difficult choices. (Indeed, this is a large part of the dominant pedagogical model used in clinical legal education.) While evaluation tends to require less pressured thinking or assumption of responsibility than immediate decision-making in the short run, it can, as the tale of the student phone call at the outset of this essay illustrates, be the start of a long-lasting process of learning.

*Ethics on Trial: The Criminal Defense Lawyer*<sup>57</sup> is a public broadcasting documentary that derives its power and contribution to the mission by being brutally real. The fifteen-minute tape is a



journalistic account of the famous Lake Pleasant “Two Bodies” case in which two court-appointed criminal defense lawyers kept confidential (and tried to bargain with) their knowledge of the location of the bodies of two girls who had been killed by their client. The tape includes interviews with one of the lawyers (years after the case was over) and several members of the victims’ families. The impact of the tape lies in its ability to portray the “others” in a very gripping way and to show, via the lawyer’s views in retrospect, his lingering anguish and the reputation, financial, and health price he paid. Such immediate and, importantly, longer-term human consequences of difficult ethical judgments cannot be portrayed in more effective fashion and are crucial factors for students to confront. The reality of the material leaves many students troubled long after the class ends. In contrast, my experience tells me that the use of popular dramatisations from film or television,<sup>58</sup> however useful, cannot compare in terms of the goal of teaching judgment.

Finally, videotape can be the vehicle for an effective final examination or essay assignment that continues the theme of teaching judgment through to the very end of the course. An engaging last learning experience can be created by requiring students to view a video and then asking them to critique the lawyering depicted and to elaborate on their own process of deliberation at ethical decision points.

### *Role-Plays*

Let us return to the instruction-stealing student in the anecdote at the start of this article. This student and his classmates, if they took the experience seriously, learned a great deal about the significance of reputation in a small community and the role that this factor might play in exercising ethical judgment. Some, perhaps many, learned how easily they could lie or at least take part in misleading. Others may have learned by being overly trusting. But I rather doubt, despite the fallout that followed the incident, that this event had as powerful a long-term impact on the individual or the group as the video in the second anecdote.

In theory, simulations present the greatest classroom opportunity for students to experience and learn from taking responsibility for ethical choices. Some professors make extensive

use of them. In my experience, however, students tend to fight role-plays on numbers of levels. Many have done them in prior school settings and see this as a game with the goal of trying to figure out what secret instructions the other person has been given. Those who act out, as the student in the anecdote, claim that their conduct in the game is no indication of how they will behave “in a real situation.” No matter how the teacher may try to point out the similarities between such a game (complete with secret instructions) and the daily, role-based life of a practising lawyer or how real stakes might impact on their potential competitiveness, students resist.

I have found that using actors or practising lawyers to play appropriate roles can cut down on the problems discussed above. Moreover, carefully designed and debriefed exercises that focus on one or a few specific, powerful points<sup>59</sup> can make very useful teaching moments in a course aimed at helping students understand or at least examine what baggage they may be bringing to the development of their own capacity for ethical judgment.

### *Varying the Contexts and Roles*

The exercise of judgment, like proficiency in other skill areas, calls for the ability to adapt to and to consider the effect, if any, of differing lawyering settings. Notwithstanding the notion that all American lawyers are part of a unitary profession, lawyers’ diverse roles may be significant determinants of their professional responsibilities.<sup>60</sup> The litigation lawyer, engaged in an adversary marshaling of disputed historical facts may, for example, adhere (and be held) to a different degree of moral concern or potential liability than, for example, the planning lawyer who assists a client at the outset of a securities offering. Big city lawyers may feel different pressures than their suburban or small town counterparts. It may be significant that the other party is a private entity rather than a government regulatory authority. The law firm associate may feel different pressures from different sources than the sole practitioner or the legal aid lawyer.

The goal of building students’ reflective capacity is enhanced by varying the role and workplace settings in which the class discussions are situated in order to trigger the adaptive ability to reason across contexts. It is thus important to locate the problems in

the course in as many different contexts as possible – private and public interest offices, criminal and varied civil law matters, litigation and transactional practices, individual, entity, and the government clients, lawyers engaged in representing clients and in performing other roles (eg serving on boards).

#### **4 The Discussion: Identifying Alternatives, Predicting Consequences, Weighing It All, Stepping Back**

The classroom process of attempting to form judgments involves the use of a deliberate model of open consideration of all relevant factors at each choice point. This borrows heavily from clinical writings on practical judgment in lawyering and on lawyers' roles in assisting clients in decision-making<sup>61</sup> and is designed to make the students appreciate ethical judgment as a conscious structured process in which all considerations are brought to bear (and considered through multiple lenses) before intuitive weighing is applied.

The first and perhaps most important step in that process is to identify a particular moment as a decision point at all. Whether it takes the form of a clear fork in a road not yet traveled or a completed transaction being analysed in retrospect, my goal is to have students appreciate the notion that ethical judgments are simply a series of choices and that even acts sanctioned as conventional lawyer operations (eg invoking a lawful but technical defense to defeat a just claim, accepting or declining an engagement, deciding which arguments to raise on appeal) can have moral consequences.

The conversation then proceeds by asking something along the lines of, "What are/were all of the choices or options available to the lawyer at that (decision) point?" This takes the form of a brainstorming exercise in which the goal is to identify the complete range of alternatives without, at least at first, evaluating or censoring any. For problems with deep moral dilemmas, the first few responses are usually efforts to avoid the problem through creative lawyering approaches. While crediting such efforts, the teacher then must bring the class back to the possibility that avoidance will not work. After the listing of choices is resumed and completed, a process of (sympathetic and detached) evaluation is launched, asking for all of the benefits and disadvantages of each possible choice of action. It is in the identification of possible

consequences<sup>62</sup> of various decisions that the teacher must take the most active role; students have a hard time with this. They often lack the experience to do more than speculate about the “big picture.” Since these are not their own real case experiences, students cannot discuss the actual repercussions (to themselves, others, or the matter) of actual decisions. And because the ethical scenarios we examine are by their nature unlikely to become public much less reach the courts or disciplinary authorities, many of the usual formal legal consequences (civil, criminal, or disciplinary exposure) are more remote and less important than other factors to be considered.

In order to equip students a bit here, I assign (balanced) readings about the human consequences of a life of adversary advocacy, of the satisfactions and lows of representing the unpopular, about what clients, large and small, want from their lawyers. I include information about claims against as well as differing market responses to lawyers and firms that are involved in publicised ethical scandal or that acted as ethical “heroes.” Cases and text demonstrate the courts’ unpredictability in this sphere.

The culmination of this process is a weighing of all that has been unearthed in order to reach a decision. Situations presenting deep clashes between student values and the relevant professional norms produce predictable reluctance to choose a course of action or commit to a firm opinion. I will sometimes ask the “on call” students to articulate their decisions and reasons, inviting them to be open and honest (in this safe classroom) about all of their reasoning. When I sense widespread indecision, I may list a range of possible decisions with accompanying reasons and then ask for a show-of-hands vote for each option. Students are less reluctant to expose their leanings when they have company.

Finally, I will discuss my own approach to the decision including, as noted, what I actually did if the problem is one that has been taken from my own practice.

After several iterations of this process of unearthing legal, strategic, and moral or other personal concerns and then, after a detached weighing process, forming judgments from situation to situation, I try to get students to step back from these problems to see the value of attempting to articulate for themselves some broader principles as an overall guide to such decision-making. The discussion, supported by earlier reading, turns to such issues as

whether adherence to certain professional tenets (for example confidentiality) should be affected by research casting doubt on the assumptions underlying these norms; whether systemic justifications for conduct (for example adversary system notions of procedural justice) are convincing when considering actions that would work a grave individual injustice; whether civil disobedience vis-à-vis the lawyering codes is different from other law violation; whether the professional norms in question comport with most peoples' moral codes or whether the concerned student's moral concerns are somehow out of line with prevailing social views. Finally, of course, there is the individual compass: What kind of person do I want to be?<sup>63</sup> Overall, difficult as it may be to generalise from ten or twelve such exercises over the course of a term, I remind students that the goal of this process is for them to examine how they deliberate here and whether any decisional "anchors" may be emerging for them as guides to good judgment in the future.

### *Offering Students a Positive Model*

Students often view legal ethics courses as concerned, in the main, with what lawyers ought not or may not do. Lawyering codes are partly couched in terms of prohibition; case law frequently centres on whether a lawyer's conduct violated a prohibition, fell short-of a norm, or was otherwise actionable. Examinations that reward the successful identification of lawyering transgressions reinforce this view. As noted above, classroom videos tend to focus on negative depictions of lawyers in action. Overall, positive modeling<sup>64</sup> of ethical judgment is largely absent from our courses. Inspiring examples are even more rare. And this is problematic for those students struggling with the search for an approach to deliberate and resolve ethical dilemmas. Those who seek to teach judgment must offer positive models.

One possible solution to this has already been noted: practitioners, including the teacher, can share their process of deliberation with the class.<sup>65</sup> When videotapes or films portray problematic lawyering, the instructor can demonstrate or have the class role play a better approach. Depictions of positive images of lawyers in films or in print can be formative inspirations.<sup>66</sup>

## CONCLUSION

The anecdotes at the start of this article may be aberrational moments in an enterprise that does not meet its goals. I recognise that no amount of classroom “reality” can really replicate the stakes involved in actual practice. I have no sweeping proof of having affected my students’ ethical and moral judgment. What data I do have consist of sporadic feedback from students, some still in school and some long graduated, about classroom moments they remember. My intuitive sense is that these moments helped shape their *process* of deliberating in difficult situations and gave them a few moments of quiet classroom time to at least think about those principles that, in a pinch, might serve as anchors in making choices. While this is far from conclusive, anecdotal evidence is evidence nonetheless.

On a less ambitious but equally important note, students’ evaluations of my course and my teaching have grown significantly and consistently positive since incorporating the approach described in this article. Something about this goal and teaching method has brought this important subject to life for this tough audience without a noticeable difference in their mastery of the law. And that is no small encouragement in facing the difficult task of teaching professional responsibility. In fact, it’s enough to keep me going back for more.

\* Practice Professor of Law and Clinical Director, University of Pennsylvania Law School.

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1 The tape depicts a personal injury lawyer taking an arguably domineering stance in advising an inexperienced litigant about a settlement offer. Douglas N Frenkel, *Lawyer-Client: Who’s in Charge? Process and Ethical Dimensions* (Philadelphia: University of Pennsylvania Law School Centre on Professionalism, 1989).

2 The debate over the limits of client autonomy and the extent to which a lawyer should intervene with respect to a client’s decisions is a classic in the moral philosophy literature often assigned to professional responsibility students. See, eg Stephen L Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities* (1986) *Amer Bar F Res J* 613; David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper* (1986) *Amer Bar F Res J* 638. The profession’s rules for the self-regulation of the profession echo this debate in the sense of being hospitable to a range of approaches and in providing little if any guidance for specific conduct within that range. See ABA Model Rule of Professional Conduct 1.2, 2.1 and related Comments.

3 The accrediting American Bar Association states that each law school must “require of all candidates for the first professional degree, instruction in the duties and responsibilities of the legal profession. Such required instruction need not be limited to any pedagogical method as long as the history, goals, structure,

- and responsibilities of the legal profession and its members, including the ABA Model Rules of Professional Conduct, are all covered.” Standard 302(a)(iv), Standards for the Approval of Law Schools.
- 4 There are currently at least twelve different law school “casebooks” published by the major American law book publishers, most of which contain, in addition to leading court decisions, selected textual material in fields from moral philosophy to sociology to history.
- 5 This term has been used in the title of two leading works in the field. See G Hazard & W Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* (New York: Prentiss Hall Law & Business, 1987); G Hazard, S Koniak & R Cramton, *The Law and Ethics of Lawyering* (3rd ed) (New York: Foundation Press, 1999).
- 6 Courts, having to rule on matters in ongoing litigation, have created the bulk of US law in areas such as conflicts of interest, attorney-client privilege, and sanctions for discovery abuse and have long had occasion to decide questions of professional responsibility in reviewing attorney discipline cases.
- 7 It is now common for professional responsibility courses to focus on developments in such areas as legal malpractice, the scope of lawyers’ duties to non-clients, and constitutional limits on the regulation of lawyers.
- 8 While this characterises the basic survey course offered at many schools, the subject is taught in many alternative ways at institutions that support and award credit for diverse approaches. History, philosophy, and real case clinical courses are sometimes approved to satisfy the requirement; in other schools an ambitious menu of options is offered which includes specific study of the ethical duties of, for example, tax lawyers, criminal practitioners, public interest lawyers, etc. See, eg Mary Daly, Bruce Green & Russell Pearce, *Contextualising Professional Responsibility: A New Curriculum for a New Century* (1995) 58 *Law & Contemp Problems* 193.
- 9 Although national statistics may be somewhat different, well over 90 per cent of the graduates of my own institution are engaged in the practice of law within two years of finishing law school.
- 10 Judith L Maute, Allocation of Decisionmaking Authority Under the Model Rules of Professional Conduct (1984) 17 *U C Davis L Rev* 1049, 1066-1067.
- 11 On a related note, “hard law” may be more examinable, especially in the short answer or multiple-choice format that some instructors favour, than alternative “softer” material.
- 12 Some faculty already oriented to the case method of teaching find that approach particularly useful in the sense that they find reported court decisions to be a rich source of stories about lawyering scenarios from which to launch textured class discussion. They also feel that it enhances student respect for the subject. See, eg R Cramton & S Koniak, Rule, Story, and Commitment in the Teaching of Legal Ethics (1996) 38 *Wm & Mary L Rev* 145. For reasons that I will address in this essay, these are views I do not share.
- 13 Many schools support this curricular arrangement on the theory that students are better equipped to master the material in this course with two years of substantive courses and possibly two summer jobs’ worth of experience under their belts.
- 14 For several years, my own institution required all first-year students to take a compressed two-week course out of a desire to place the subject in a prominent and formative place in the curriculum. For two weeks between semesters, all 250 students took the course to the exclusion of all other studies. Having participated in team teaching of that course, I have concluded, after a great deal of initial optimism and investment of energy, that the experiment failed because, in contrast to students’ other full-length courses, the compressed format precluded the thorough preparation and reflection over time warranted by the material.
- 15 On the growing cleavage between what is taught and what students need to learn, and on law schools’ growing emphasis on legal theory at the expense of attention

- to the world of practice, see, eg Harry Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession* (1992) 91 *Michigan L Rev* 34.
- <sup>16</sup> See Stephen Gillers, *Taking LA Law Seriously* (1989) 98 *Yale L J* 1607.
- <sup>17</sup> The American Bar Association has enacted two sweeping and several lesser amendments to its proposed codes in the last three decades. It is presently in the final stages of the work of its Ethics 2000 Commission, another formal review and likely modification of its recommended scheme for lawyer regulation.
- <sup>18</sup> One scholar described the American Bar Association's proposed or model codes as "an unusual source of law ... something between the Ten Commandments and a press release." He goes on to note that as a private organisation, the ABA's "pronouncements have no legal force" unless adopted by governing authorities. Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School Curriculum* (1990) 37 *UCLA L Rev* 1157, 1166.
- <sup>19</sup> For an exposition of this view see Deborah L Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes* (1981) 59 *Texas L Rev* 689.
- <sup>20</sup> In my twenty-three years of real case clinical teaching, I have taught both litigation and mediation. The programme that I direct also includes real case courses in transactional (business, nonprofit) planning and legislative lawyering.
- <sup>21</sup> For a discussion of the US evolution from "standards" to "rules" for professional self-regulation, see Mary Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by US and Foreign Lawyers* (1999) 32 *Vanderbilt J of Transnational L* 117.
- <sup>22</sup> At least four-fifths of the 51 US jurisdictions (including the District of Columbia) have adopted some version of the ABA Model Rules of Professional Conduct originally promulgated in 1983.
- <sup>23</sup> See ABA Model Rule 1.6.
- <sup>24</sup> See ABA Model Rule 1.3 and related Comment.
- <sup>25</sup> The preamble to the Model Rules says as much: "Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules."
- <sup>26</sup> A recent qualitative research study of large law firm litigators suggests that junior lawyers make these and other significant decisions under trying conditions and tend to default to the adversary norm when in doubt. See *Ethics: Beyond the Rules* (1998) 67 *Fordham L Rev* 697 *et seq.* One early study indicated a startling incidence of law firm associates being asked to do ethically-problematic tasks. Leonard Gross, *Ethical Problems of Law Firm Associates* (1985) 26 *Wm & Mary L Rev* 259. For discussions of the influence of workplace features on the quality of ethical conduct see Eleanor Myers, "Simple Truths" about Moral Education (1996) 45 *American U L Rev* 823; Deborah Rhode, *Ethics by the Pervasive Method* (1992) 42 *J of Leg Educ* 31.
- <sup>27</sup> *Ethics: Beyond the Rules*, *supra* note 26. Some question whether senior lawyers even have as much knowledge of professional norms as recent graduates. See Carrie Menkel-Meadow, *Lying to Clients for Economic Gain or Paternalistic Judgment: A Proposal for a Golden Rule of Candour* (1990) 138 *U of Penn L Rev* 761, note 9. A recent American Bar Foundation survey found that law firm hiring partners expected new lawyers to bring "sensitivity to professional ethical concerns" with them upon being hired rather than learning this from the employer. Bryant Garth & Joanne Martin, *Law Schools and the Construction of Competence* (1993) 43 *J of Leg Educ* 469, 490.
- <sup>28</sup> See, eg Anthony Kronman, *Living in the Law* (1987) 54 *U Chicago L Rev* 835; Gerald Postema, *Moral Responsibility in Professional Ethics* (1980) 55 *NYU L Rev* 63; David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times* (1995) 9 *Georgetown J of Leg Ethics* 31.



- 29 Kronman, *supra* note 28, at 846.
- 30 *Id* at 853.
- 31 Postema, *supra* note 28 at 68.
- 32 Kronman, *supra* note 28, at 854.
- 33 Kronman, *supra* note 28, at 848.
- 34 Postema, *supra* note 28, at 68.
- 35 There may, of course, be a difference between what one says one should do, what one says one would do, and what one actually does in an ethically charged situation. For a discussion of the difference between what lawyers and other professionals say they “should” do and “would” do in such situations, see Susan Daicoff, (Oxymoron?) Ethical Decision-Making by Attorneys: An Empirical Study (1996) 48 *Florida L Rev* 197. For the possible contrast between such classroom responses and actual decisions, see the description of the Milgram experiments in Luban & Millemann, *supra* note 28, at 86.
- 36 In a seminal article about clinical teaching, the case method for training lawyers was likened to limiting future dog breeders to the study of stuffed dogs. Jerome Frank, Why Not a Clinical Lawyer-School? (1933) 81 *U of Penn L Rev* 907. On a different yet related note, reported cases also depict clients who, if not unrealistic, are at least atypical in that they have elected to pursue a dispute to a fully-litigated outcome.
- 37 For a discussion of such tensions see Bruce Green, The Role of Personal Values in Professional Decision-Making (1997) 11 *Georgetown J of Leg Ethics* 19.
- 38 The process of learning by imitation and then trial-and-error is known as learning by habituation. See Luban & Millemann, *supra* note 28, at 59.
- 39 That background has convinced me that the richest way to accomplish the goal of cultivating a capacity for good judgment is to teach professional responsibility through real case clinical courses that feature careful mentoring and structured reflection. Indeed, this has long been advocated. See, eg David Barnhizer, The Clinical Method of Legal Instruction: Its Theory and Implementation (1979) 30 *J of Leg Educ* 67; Luban & Millemann (1979), *supra* note 28, at 40.
- Teaching ethics clinically, however, is not without its problems and limitations. First, as a matter of resource allocation, universal real case clinical experience is not currently a real possibility at many, if not most, schools. Second, the use of the real case has its teaching downsides. The drama and immediacy and, often, the press of time and responsibility for a real client’s matter, especially in litigation, may overwhelm the student and preclude the reasoned analysis that one might desire. The issues that arise are, almost by definition, not controllable; the subject matter is too important to be taught on a hit-or-miss basis. To the extent that law school clinics are organised around one role, skill set, or client type, the limits on the issues covered may disserve the subject. And as most clinics serve only those who cannot otherwise afford counsel, the pressures that are created by the need to charge fees, the demands of economically powerful clients, or the expectations and incentives of private law firm employers will be excluded from the mix. Finally, clinical faculty, while generally excellent at what they teach, are not by training professional responsibility teachers or, necessarily the mentors of choice about these themes. See Robert Conklin, The Moral Failure of Clinical Legal Education in David Luban (ed), *The Good Lawyer: Lawyers’ Roles and Lawyers’ Ethics* 317 (Totowa: Rowman & Allanheld, 1983).
- 40 In recent years, I have compressed the semester-long course into nine weeks of lengthened classes with the closed-book final exam shortly after the last class. I do this in order to avoid the late semester crush of exam anxiety, to discourage potential exam cramming, to facilitate the use of videotape, and to foster a sense of continuity between classes.
- 41 To facilitate this, I assign a course book that contains a rich mix of textual material in addition to the standard menu of court decisions, bar opinions, law review excerpts, and authors’ questions.

- 42 For a discussion of the importance of providing clients with an understanding of the reasons underlying legal rules so that they may make good decisions, see Jamie Heller, *Legal Counseling in the Administrative State: How to Let the Client Decide* (1994) 103 *Yale L J* 2503.
- 43 For a discussion of these classroom management issues and the messages conveyed by not insisting on student accountability, see Lisa Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue about Goals* (1998) 39 *Wm & Mary L Rev* 457, at 482-484.
- 44 These are drawn from my experience as a litigator, clinical supervisor, and as a consultant to other lawyers on matters of professional responsibility. I make it a point to identify situations in which the problem was derived from a matter in which I served as a consultant or expert witness (with or without compensation), a disclosure rooted in my desire to remove questions concerning my objectivity in the classroom.
- 45 Examples of these questioned judgments include (rule-mandated) maintaining of confidential information in a situation where such conduct may have contributed to the death of a child in a family law matter and the use/manipulation of systemic delays to buy time for a delinquent client threatened with eviction by a low-income landlord. Both of these are set as discussion problems for the class. In revealing and discussing my actions in each matter, I take pains to talk about how my weighing of decisional factors has evolved in the twenty-five intervening years.
- 46 *Representing the Corporate Client: The Saga of Albinex*, in *Professional Responsibility for Lawyers: A Guided Course* (Philadelphia: University of Pennsylvania Centre on Professionalism, 1990).
- 47 For a fuller description of such an “agnostic” stance and alternative views, see Edmund B Spaeth, Jr, Janet G Perry & Peggy B Wachs, *Teaching Legal Ethics: Exploring the Continuum* (1995) 58 *Law & Contemp Problems* 153.
- 48 In contrast with students, experienced practitioners who are presented with some of the same problems at professional continuing education classes are both able and eager to raise such variables with no need for prompting by the instructor. This, of course, illustrates both the different level of appreciation of the subject and the increased development of the faculty of judgment with time and experience.
- 49 In other words, I try to avoid making normative pronouncements, preferring to predict or, in problems taken from my own practice, describe and explain my own conduct.
- 50 The ability to maintain this stance may be one advantage of this kind of teaching over ethics teaching that is solely grounded in real cases. In doing clinical supervision, notwithstanding a great deal of deliberate process and a professed desire to grant supervisees wide autonomy as student-practitioners, I reserve the ultimate say and, assuming disagreement after discussion with a student, am likely to be quite directive in resolving difficult ethical issues. Whether this is a good thing in terms of fostering reflection in the long term is to me an open question.
- 51 Such practitioners are eager to volunteer and will respond to being brought into the academic enterprise in a serious way. In my experience, they are keen to prepare the course materials and are always willing to be coached about their role in the discussion.
- 52 See, eg James L Kelley, *Lawyers Crossing Lines* (Durham: Carolina Academic Press, 2001); Philip Heymann & Lance Liebman, *The Social Responsibilities of Lawyers* (New York: Foundation Press, 1988); Michael Kelly, *Lives of Lawyers* (Ann Arbor: U of Michigan Press, 1996).
- 53 There are, of course, time management issues involved in teaching with videotape. If shown during class (the most immediate way to insure that the data is fresh and shared), there is an opportunity cost to the airing time. Shorter segments of tape obviate such problems and prevent boredom from setting in but

may preclude the depiction of realistic lawyering. While tapes tend to evoke lots of spontaneous student reactions, these responses are not always of uniform quality and can require deft management lest they consume excessive amounts of time.

- <sup>54</sup> See, eg Vincent Robert Johnson, Audiovisual Enhancement of Classroom Teaching: A Primer for Law Professors (1987) 37 *J of Leg Educ* 97; John Batt, Law, Science, and Narrative: Reflections on Brain Science, Electronic Media, Story, and Law Learning (1990) 40 *J of Leg Educ* 19.
- <sup>55</sup> *Professional Responsibility for Lawyers: A Guided Course* (Philadelphia: University of Pennsylvania Law School Centre for Professionalism, 1990).
- <sup>56</sup> See footnote 1, *supra*.
- <sup>57</sup> WETA-TV, Washington, DC (1986).
- <sup>58</sup> Many US academics have used excerpts from such popular television series as LA Law or popular movies involving lawyers. See Carrie Menkel-Meadow, The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film, and Television, and Ethical Choices Regarding Career and Craft (1999) 31 *McGeorge L Rev* 1. For a recent account of one teacher's extensive use of the current television series *The Practice*, see Steven Goldberg, Bringing the Practice to the Classroom: An Approach to the Professionalism Problem (2000) 50 *J of Leg Educ* 414.
- <sup>59</sup> For an example of such an exercise, see Lerman, *supra* note 43, at 467-469. For a more general description of a course making heavy use of simulation, see Robert Burns, Teaching the Basic Ethics Class through Simulation: The Northwestern Programme in Advocacy and Professionalism (1995) 58 *J of Law & Contemp Problems* 37.
- <sup>60</sup> See eg Myers, *supra* note 26.
- <sup>61</sup> The literature is voluminous in these areas. See, eg Mark Aaronson, We Ask You to Consider: Learning about Practical Judgment in Lawyering (1998) 4 *Clinical L Rev* 247. For a leading US text on client counseling, see David Binder, Paul Bergman & Susan Price, *Lawyers as Counselors* (St Paul: West Publishing, 1991).
- <sup>62</sup> On the surface the concern with consequences of moral choices might appear to be favouring an overly pragmatic stance in an area that calls out for higher ideals. My response to this is that this is not a question of a preferred approach so much an acknowledgment of many good lawyers' reality of including costs and benefits as integral parts of the calculus of practical judgment.
- <sup>63</sup> See Geoffrey Hazard, Personal Values and Professional Ethics (1992) 40 *Clev St L Rev* 133.
- <sup>64</sup> For a discussion of the value of modeling for law students in the clinical context, see Minna Kotkin, Reconsidering Role Assumption in Clinical Education (1989) 19 *New Mexico L Rev* 185.
- <sup>65</sup> As judgment tends to shift over time and with greater experience, I make it a point to underscore areas in which my own approach has shifted in light of experience or age or both. On the use of respected professionals to provide students with an "image of their professional selves" see Myers, *supra* note 26, at note 119.
- <sup>66</sup> See Menkel-Meadow, *supra* note 58. In a survey of first-year students' values on starting at my law school, a substantial number of students reported that their inspiration for seeking to become a lawyer was a lawyer-hero depicted in a film.