

When and how should legal ethics be learned?

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Clark Cunningham, Nigel Duncan,
Tony King and Paul Maharg.

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Legal Services Board

Has prompted the Regulators to conduct a review of Legal Education.

This involves:

Solicitors' Regulation Authority
Bar Standards Board
ILEX Professional Standards

David Edmonds, chairman of Legal Services Board has expressed his views in Lord Upjohn Lecture. Following quotes come from that.

(to be published in (2011) 45.1 *Law Teacher*)

Nigel Duncan, City Law School

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As a minimum, I think that we will be looking at a changed and earlier emphasis on the teaching of professional ethics and wider responsibilities to the client, a point I hear repeatedly from practitioners.

Priorities for education and training

Ethics – first and foremost

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The strategic objective is clear: to equip the workforce to deliver for consumers at a time of heightened change and expectations, whilst also maintaining the intellectual integrity, the ethical strength and the global competitiveness of our legal qualifications. I don't apologise for mixing morality and economics in that sentence. The strength of the legal profession and the legal services sector relies on precisely that admixture – and I'd argue that the strength of legal education ought to lie in precisely the same mix.

...

Whilst ethics teaching cannot instil integrity in and of itself, the education stage needs to expose students to some of the complex ethical scenarios they are likely to encounter in practice.

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USA

- 1973
 - Hearings on the Watergate scandal (leading to resignation of President Nixon)
 - “How could in God's name could so many lawyers get involved in something like this?” (John Dean testimony to Congress)
 - ABA adds to accreditation requirements: law schools shall require of all students “instruction in the duties and responsibilities of the legal profession.”
- Current ABA Standard 302(a)(5):
 - “A law school shall require that each student receive ... substantial instruction in the history, goals, structure, values, rules and responsibilities of the legal profession and its members.”

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USA

- Now over 1100 law professors who teach professional responsibility
- Typically a required 2 or 3 credit hour course in 2nd or 3rd year
 - New trend of making it a core course in the first year: see Cunningham & Alexander, “Developing Professional Judgment,” ETHICS PROJECT IN LEGAL EDUCATION (pre publication draft available: www.teachinglegalethics.org)

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USA

- 2007 report on US legal education by Carnegie Foundation for Advancement of Teaching
- Criticized dominant approach as “Law of Lawyering”
 - No measurable improvement in moral reasoning or professional identity formation
 - May do more harm than good by limiting “ethical conduct” to self-interested avoidance of discipline and malpractice liability

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USA

Forces to modify the approach to teaching legal ethics

- Clinical education
- Professionalism movement
 - State Commissions
 - Nat’l Consortium of Professionalism Initiatives
 - ABA Standing Committee on Professionalism
 - 4 endowed “professionalism” chairs in Georgia (2000)
 - National Institute for Teaching Ethics & Professionalism (NIFTEP) (2005)

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USA – ABA STANDARDS REVIEW COMMITTEE –
JAN 11 DRAFT

- 301 Objectives
 - “A law school shall maintain a rigorous educational program that prepares students for ... effective, ethical and responsible participation in the legal profession.”

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USA – ABA STANDARDS REVIEW COMMITTEE –
JAN 11 DRAFT

302 (b)(2)(ii) Learning Outcomes

- “shall include competency as an entry-level practitioner in ... the exercise of professional judgment
 - Consistent with the values of the legal profession and
 - Professional duties to society
 - Including recognizing and resolving ethical and other professional dilemmas.”

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302 (b)(3) Learning Outcomes

- shall include ... a depth and breadth of other professional skills
 - Sufficient for effective, responsible, self-reflective and ethical participation in the legal profession

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302 (b)(4) Learning Outcomes

- shall include ... knowledge and understanding of the following values:
 - Ethical responsibilities as representatives of clients, officers of the courts, and public citizens responsible for the quality and availability of justice
 - The legal profession’s value of justice, fairness, candor, honesty, integrity
 - And ...

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302 Learning Outcomes – Knowledge and
Understanding of

- The legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity and respect for the rule of law
- Responsibility to ensure that adequate legal services are provided to those who cannot afford to pay for them.

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303 (a)(1) Curriculum

A law school shall offer a curriculum that ... requires every student to complete satisfactorily at least:

One course in professional responsibility that includes substantial instruction in the history, goals, structure, values, rules and responsibilities of the legal profession and its members

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303 (a)(3) Curriculum (and at least ...)

One faculty-supervised, rigorous course after the first year

that integrates doctrine, theory and skills and ethics

And engages students in performance of one or more professional skills identified in Standard 302 (b)(3)

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303(b)(1) Curriculum

... [and] shall provide substantial opportunities to students for live-client clinics or other real-life experiences

appropriately supervised and designed to encourage reflection by students

on their experiences

and on the values and responsibilities of the legal profession ...

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AUSTRALIA

- National government
 - Is establishing a Tertiary Education Quality and Standards Agency
 - Awarded grant to Australian Learning & Teaching Council (ALTC) to develop Learning and Teaching Standards
- ALTC appointed Sally Kift and Mark Israel as Discipline Scholars in Law to develop Threshold Learning Outcomes (TLOs)
 - Expert Advisory Group

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AUSTRALIA

Threshold Learning Outcomes as approved by Council of Australian Law Deans on 22 Nov 2010

TLO 1 Knowledge

Graduates of the Bachelor of Laws will demonstrate an understanding of ...

- The principles and values of justice and of ethical practice in lawyers' roles

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AUSTRALIA

TLO 2: Ethics & Professional Responsibility

Graduates of the Bachelor of Laws will demonstrate:

- an understanding of approaches to ethical decision-making
- an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts
- an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and
- a developing ability to exercise professional judgement

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AUSTRALIA

Head of Law School commenting on TLO 2:

“we will for the first time have a clear statement not only about the importance of **knowledge** of ethical principles and values ... but also some commitment to the development of students’ **skills and abilities** in the vitally important area of ethical reasoning.”
[emphasis added]

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CANADA

- Federation of Law Societies: 2009 Task Force Report on the Common Law Degree
- Effective 2015 the “Federation will accept an LLB or JD degree from a Canadian law school as meeting the competency requirements if the law school ... meets the following criteria ...
 - The academic program includes instruction in ethics and professionalism in a course dedicated to those subjects and addressing the required competencies.”

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CANADA

- Ethics & Professionalism. The applicant must have demonstrated an awareness and understanding of the ethical requirements for the practice of law in Canada, including
 - The duty to communicate with civility
 - The ability to identify and address ethical dilemmas in a legal context
 - And

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CANADA

Familiarity with the general principles of ethics and professionalism ... including

- Circumstances that give rise to ethical problems
- The fiduciary nature of the lawyer’s relationship with the client
- Conflicts of interest
- Duties to the administration of justice

And

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CANADA

- An awareness of the importance of professionalism in dealing with clients, other counsel, judges, court staff and members of the public
- The importance and value of serving and promoting the public interest in the administration of justice.

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Scottish legal education: the social philosophical dimension

'Individuals will always be the centre and consummation of experience, but what the individual actually *is* in his life experience depends upon the nature and movement of *associated life*'.

John Dewey, *LW* 14,

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mid-level theory: civic professionalism

William Sullivan contrasts *technocratic professionalism* (concerned with technical self-interested practices and motivations driven by profit only) with *civic professionalism*, that invests professional practice with moral meaning and with democratic value.

Sullivan, W. (1995) *Work and Integrity. The Crisis and Promise of Professionalism in America*, second edition, New York, John Wiley & Sons

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technocratic professionalism vs democratic professionalism

'If the ideal of democratic professionalism is so beneficial, then why is it losing to the technocratic model? An obvious reply is that the latter fits neatly into the rationalized procedures and needs for predictability and control found in modern economic and political organization. Further, those trained for professions currently have minimal instruction in the democratic consequences of their professional domains.'

Dzur, A.W. (2002) *Civic Participation in Professional Domains*, Paper delivered at the Annual Meeting of the American Political Science Association, Boston, August-Sept 2002.
http://muse.jhu.edu/login?uri=/journals/good_society/v013/13.1dzur01.html

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Scottish professional legal education: structure

- Law Society of Scotland consulted 2004-10 on new structure & outcomes for
 1. 2, 3, 4 yr Foundation Programme (LLB)
 2. c.30 weeks primary educational programme, Professional Education and Training: PEAT 1 (Diploma in Legal Practice)
 3. Two-year traineeship + flexible work-based elective programme: PEAT 2 (old Professional Competence Course)
 4. New CPD requirements
 5. Work-based route still to be developed

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Scottish legal education: new developments in ethics

Embedding of ethics at Foundation level:

'Outcomes and standards in the Foundation Programme should be used by Providers as *design guides for performance*, and by students as guides to what Outcomes must be achieved prior to full qualification. Performance thus becomes a benchmark of competence. However, checklists, competences and outcomes lists can only determine general adequate performance. The programme design, and providers operating within it, should encourage *students' individual voices and interests*, and the development of *personal responsibility* for engaging with legal practice, with ethics and justice, and undertaking legal education and training.'

Paul Maharg, Northumbria University

Scottish professional legal education: new developments in ethics

- New PEAT curriculum structure
 - based around active learning principles, eg transactional learning.
 - with the concept of professionalism at the core, &
 - based on the values of ethical practice as:
 - defined by the profession
 - analysed by profession and schools

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transactional learning...

Transactional learning:

active learning
through **performance in authentic transactions**
involving **reflection in & on learning**,
deep **collaborative learning**, and
holistic or **process learning**,
with **relevant professional assessment**
that includes **ethical standards**

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professionalism values as outcomes

- Professionalism
- Professional relationships
- Professional communications

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professionalism outcomes in Scottish legal education

Throughout the programme a student should demonstrate a commitment to:

1. The interests of justice and democracy in society
2. Effective and competent legal services on behalf of a client
3. Continuing professional education and personal development
4. Diversity and public service
5. **Personal integrity and civility towards colleagues, clients and the courts**

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professionalism

Outcome	Positive indicator	Negative indicator
5. Personal integrity and civility towards colleagues, clients and the courts	Is honest with all others on the course; relates to colleagues on the programme with civility; treats tutors, administrative staff and others with respect.	Exhibits traits of arrogance, intemperate behaviour, mismanagement of own affairs; lies to colleagues or programme personnel; plagiarises work; adopts the work of others as own work; is abusive or contemptuous towards colleagues or programme personnel.

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what difference can legal education make?

- Legal education has a weak socialising affect, much weaker than the centripetal power of the job market.
A. Sherr, A., Webb, J. (1989). Law students, the external market, and socialisation: do we make them turn to the City? *Journal of Law and Society* 16, 2, 225.
- Legal subjects studied affect career ambitions, but had a neutral, short term or negative impact on the public service orientation of law students.
Boon, A. (2005). From public service to service industry: the impact of socialisation and work on the motivation and values of lawyers. *International Journal of the Legal Profession*, 12, 2, 229-260.
- A study on socio-economic & ethnic diversity in Scotland found similar results.
Anderson, S., Maharg, P., Murray, L. (2003) *Minority and Social Diversity in Legal Education*, Scottish Government Official Publication.

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professionalism: education & practice...?

"We found that UCSF School of Medicine students who received comments regarding unprofessional behavior were more than twice as likely to be disciplined by the Medical Board of California when they become practicing physicians than were students without such comments. The more traditional measures of medical school performance, such as grades and passing scores on national standardized tests, did not identify students who later had disciplinary problems as practicing physicians.
[...] we can now advocate from an evidence-based position that professionalism is an essential competency that must be demonstrated for a student to graduate from medical school.
Papadakis, M.A., Hodgson, C.S., Teherani, A., Kohatsu, N.D., (2004) Unprofessional behavior in medical school is associated with subsequent disciplinary action by a State Medical Board, *Academic Medicine*, 79, 244-249.

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professionalism...

'Three domains of unprofessional behavior emerged that were related significantly to later disciplinary outcome:

- poor reliability and responsibility
- lack of self-improvement and adaptability
- poor initiative and motivation.'

Teherani, A., Hodgson, C. S., Banach, M., Papadakis, M. A. (2005) Domains of Unprofessional Behavior During Medical School Associated with Future Disciplinary Action by a State Medical Board, *Academic Medicine*, 80, 517-520

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process of change

- **Law Society is now:**
 - Accrediting PEAT 1 + Foundation: matching curriculum-building process to the aims of the programme itself.
 - Working with institutions, students, staff to bring about collaborative change
- **Future possibilities:**
 - Advocacy of a space where Creative Commons resources and Open Educational Resources (OER) can be created, shared & maintained.
 - Developing with institutions key initiatives such as Standardized Clients, interactive multimedia, simulation.

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Economides/Rogers Report Preparatory ethics training for future solicitors

Published March 2009.

Contains research and analysis of all stages of legal education and training.

Contains recommendations on:

- how to approach ethics education at all levels of legal education;
- How to assess ethics and professionalism;
- How to implement policy in this field.

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Academic Phase (Undergraduate Legal Studies/Conversion Courses)

The report outlines arguments for and against mandatory teaching of ethics and professional responsibility in undergraduate legal (and other) studies. It sets out various approaches (formal, theoretical, clinical and humanistic) and options for change.

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Vocational Phase (Legal Practice Course)

The current LPC training and assessment regime, which is in transition, is reviewed from the standpoint of its impact on ethical behaviour. Criticisms are noted and questions raised about the adequacy of the assessment procedures and mechanisms. Other options are set out and the experience of modern medicine highlighted.

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Report also addresses

Vocational Phase (Training Contract/Professional Skills Course)
Professional Phase (Post-Qualification Education and Training)
And much more.

Available on:

<http://www.lawsociety.org.uk/influencinglaw/policyinresponse/view=article.law?DOCUMENTID=419357>

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Implementation of Economides/Rogers Report

The work of the Education & Training Committee of The Law Society of England & Wales

- Focussing on “ethics”, the Committee published a report titled “Preparatory Ethics Training for Future Solicitors” by Kim Economides and Justine Rogers (December 2008)
- The Report made 24 recommendations including:

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Recommendation 1

“We recommend TLS take a lead and encourage the SRA to initiate a review to consider the pros and cons of revisiting the content of the Joint Announcement in order to see whether any consensus exists, or could be constructed, to make awareness of and commitment to legal values, and the moral context of law, mandatory in undergraduate law degrees..... We would, at this stage, advise setting general, flexible guidance and specifying “outcomes” following consultation”

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Recommendation 2

“We recommend that professional bodies should together consider what support might be offered to law schools to assist them to comply with this flexible guidance”

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The Committee sought guidance from Professor Andrew Boon of Westminster University on:

- a definition of ethics
- an analysis of the most effective way of teaching ethics
- the resource implications for law schools and proposals for how TLS may be able to assist in overcoming these issues

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The definition of ethics:

“The study of the relationship between morality and Law, the values underpinning the legal system, and the regulation of the legal services market, including the institutions, professional roles and ethics of the judiciary and legal professions.”

Source:

“Legal Ethics At The Initial Stage: A Model Curriculum” by Professor Andrew Boon

<http://www.lawsociety.org.uk/new/documents/2011/Model-ethics-syllabus-Nov2010.pdf>

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Contacts

- Clark D. Cunningham
 - Georgia State University
 - <http://law.gsu.edu/ccunningham/>
- Nigel Duncan
 - City University, London
 - n.i.duncan@city.ac.uk
- Tony King
 - Chair, The Law Society's Education & Training Committee
 - tony.king@cliffordchance.com
- Paul Maharg
 - Northumbria University
 - paul.maharg@northumbria.ac.uk

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