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Teaching Law Students about Ethics

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While teaching a professional responsibility course at DePaul University College of Law, Howard M. Rubin uses a recent case to demonstrate tricky ethical dilemmas.

The case involves Alton Logan, who was released from prison in 2008, after more than 25 years. Two former Cook County assistant public defenders kept silent for 26 years about Logan's wrongful conviction in a murder case to protect the confidences of their client.

"It really gets them to focus on things thinking as a lawyer, not as members of the public," said Rubin, who also serves as DePaul's associate dean for lawyering skills.

The students' immediate reaction is that they would never keep such a secret, Rubin said.

"It's a matter of working so that they understand we have obligations in our profession," Rubin said. "They're going to have to do things as a member of the profession that are contrary to what their friends and members of the public will tell them is the right thing to do."

The Alton Logan case is an extreme example of professional obligation, but for legal educators, bridging that gap of understanding is growing into a significant piece of the work of law schools. Despite the growth of clinical education, law schools remain, to a marked degree, aloof from the daily demands of the profession.

But a book published two years ago by the Carnegie Foundation for the Advancement of Teaching, "Educating Lawyers: Preparation for the Profession of Law," has created a buzz about improving legal education, including the teaching of ethics.

The premise of the report is that American law schools are good at teaching students to become smart problem solvers, but are not doing enough to develop "the capacity for judgment guided by a sense of professional responsibility."

"This is a pretty powerful critique of American legal education," Clark D. Cunningham, director of

the National Institute for Teaching Ethics and Professionalism, a consortium of ethics centers at five universities, said of “Educating Lawyers: Preparation for the Profession of Law,” commonly called the Carnegie report.

That report recommends an integrated program of legal education that would begin in the first year with “well-designed lawyering courses … taught as intentional complements to doctrinal instruction. Ideally, this experience of complementarity would continue in the second and third years as a gradual development of practical knowledge and skill, beginning in simulation and moving into actual responsibility for clients.”

Many law professors say the teaching of legal ethics to law students is undergoing an evolution at some law schools in the wake of the Carnegie report, and another book, “Best Practices for Legal Education: A Vision and a Road Map,” also published in 2007.

“There has been an increased focus both internationally and in the United States on teaching legal ethics and developing professionalism,” said Cunningham, a professor at the Georgia State University College of Law. “In the last three years, I’ve seen dramatically more interest and more across-the-board reform than I’ve seen in my prior 20 years of teaching, especially related to legal ethics issues.”

Cunningham said the reforms include the Carnegie report recommendation about an integrated legal education program.

“I think the Carnegie report said the right thing at the right time and has had a catalytic effect,” Cunningham said. “That book has been very, very widely discussed, both in law schools and the legal profession. I think it’s an incredible development.”

William M. Sullivan, a senior scholar at the Carnegie Foundation and one of the book’s authors, said he is gratified that legal educators and others have taken the concerns outlined in the book seriously.

“Part of our intent was to engender deeper, wider conversations” about teaching legal education, including ethics, Sullivan said. “This, I think, has begun to happen.”

Ethics should be a part of the full law school education, Sullivan said.

Professional responsibility classes tended to be a single, stand-alone class that the book’s authors believed was a way of teaching ethics in a defensive way, according to Sullivan.

Change afoot

“I think there is a movement toward change, toward, most importantly, some increased integration,” said Lawrence C. Marshall, a professor at Stanford Law School.

Marshall added, however, that ethics courses at some law schools count for two credit hours and are taught by adjunct professors, which can signal to students that the class is less significant than the rest of the course work.

“It’s problematic because, more than any other subject that law students study, the law of

professional responsibility and the ethical/ moral principles of the lawyers role will affect students as lawyers on a daily basis," Marshall said.

"To me, it's always just been so strange that we'll spend weeks on some doctrine of tort law that students likely will never see, yet we'll give short shrift to critical rules of the profession that will pervade their professional careers," he said.

Marshall believes that, for some reason, legal ethics tends to be a subject that isn't necessarily the main scholarship area of those who teach that subject.

"At some level it has developed a reputation as a more pedestrian, practical-oriented course," Marshall said.

Law schools that provide professional responsibility classes in the first year's curriculum include the Indiana University Maurer School of Law and Mercer University School of Law in Macon, Ga.

In the wake of the Carnegie report, Indiana University's law school launched a first-year class called "The Legal Profession,'' which in part promotes and informs debate about ethical issues.

Gerald Hess, a professor at Gonzaga University School of Law in Spokane, Wash., cited another book in addition to the Carnegie report as helping to stimulate discussion about legal education — "Best Practices for Legal Education: A Vision and a Road Map,'' published by Roy T. Stuckey, an emeritus professor at the University of South Carolina Law School, and others.

"Both those books concluded that successful lawyers need things that the traditional legal education provides and also need a wide variety of practical lawyer skills and professionalism," Hess said.

"In the last two years, lots of law schools had been looking at their current curriculums and their current educating of law students," said Hess, a co-director of the Institute for Law Teaching and Learning. "Some schools have made curricular changes and others are considering making changes in response to the challenge in both books."

For example, Gonzaga University's law school has adopted a new required curriculum that includes skills and professionalism laboratories for first-year students and a mandatory clinical class or externship during third year, according to Hess.

A number of law schools are taking steps to focus additional energy and resources on teaching professionalism skills and values, he added.

In 1973, the American Bar Association adopted a standard requirement relating to professional responsibility for law schools.

The current version of Standard 302(a)(5) states that a law school shall require that each student receive substantial instruction in "the history, goals, structure, values and responsibilities of the legal profession and its members."

The current Multistate Professional Responsibility Examination is a 60-question, two-hour and

five-minute, multiple-choice examination that must be passed before a person receives a law license.

Teaching methods

Law students have learned about legal ethics through three major methods over the past several decades.

The dominant method for teaching professional responsibility to law students is the problem method, said Robert P. Burns, a veteran professor at Northwestern University School of Law.

Under that method, students discuss stand-alone hypothetical problems that raise legal ethics issues.

Some law professors continue to use the Socratic Method, which involves questioning students about legal ethics based on appellate court cases, Burns said.

A third version is the so-called pervasive method pioneered by Deborah L. Rhode at Stanford University School of Law and David J. Luban with the Georgetown University Law Center in which legal ethics “pervade’’ the law school’s curriculum, Burns said.

Under the pervasive method, law schools are called upon “to incorporate ethical issues into the full range of doctrinal courses,” according to the Carnegie report.

“The value of this approach is now widely acknowledged, case books and other materials for incorporating ethical concerns into many courses have been developed, and most law schools say their faculty do use the pervasive method, at least to some extent,” the Carnegie report added.

At Northwestern’s law school, students are taught professional responsibility in an integrated program that includes introduction to trial advocacy and the law of evidence classes, Burns said.

The students are immersed in the role of a trial lawyer in a simulated situation where students interview actors posing as clients, interview witnesses, prepare clients to testify, and engage in direct and cross-examination of witnesses, he said.

“We think the integration of ethics, especially using the simulation method, helps to make ethical norms dyed in the wool,” Burns said.

“As the students are becoming trial lawyers, they are also learning to become ethically responsible trial lawyers,” he said.

Stanford’s Marshall, a former Northwestern law school professor, took the simulation method a step further.

Marshall teaches professional responsibility courses to second- and third-year students who participate in Stanford’s clinical law programs. Marshall has constituted the class as an ethics committee for the clinics.

“This is not a simulation, this is real,” Marshall said. “So, in fact, they are acting as the ethics committee.”

Marshall presents an actual ethical dilemma in memorandum form from one of the clinics to the students. The students research the issue by locating the appropriate rules and must be prepared to discuss how the problem will be addressed, he said.

A recent example of a problem involved a student who worked in Washington, D.C., on regulations before he became a law student. One of the Stanford clinics was in the midst of attacking the regulations, Marshall said.

Issues arising in that situation included whether the student could work on the matter and, if the student could not, could the rest of the clinic members proceed, Marshall said.

“It strikes me as providing a really good opportunity for the students to show them how relevant and important this stuff is in the daily life of a lawyer,” Marshall said.

Rubin said he encourages his former students to call him for help with ethical quagmires. Rubin said a former student called him while wrestling with a conflict-of-interest issue. That scenario wound up as a final exam question.

Rubin told the students, “There is no right answer. You have to take a position and defend it.”

Leslie Ann Reis, assistant professor and director of the Center for Information Technology and Privacy Law at The John Marshall Law School, presents hypothetical situations or the factual basis of actual cases and has the students work through the ethical dilemmas.

“If you don’t take a very practical approach to teaching legal ethics, it’s not real to the students,” Reis said. “Rote memorization of rules or taking a philosophical approach to a class like this does not give students the tools they will need to become ethical, successful, competent, and professional attorneys.’’

Modern technology changed how lawyers communicate with clients, Reis added. The technology advances include e-mail and blogging.

“From my perspective, it’s absolutely crucial to give students an awareness of how the use of technologies intersects with the rules of professional conduct,” Reis said.

Reis said she uses real-world examples, such as whether lawyers can blog and still comply with the rules of professional conduct.

The content of a lawyer’s blog could raise various ethical issues, including whether the content could be viewed as an advertisement, Reis said.

Another issue could arise if a lawyer blogs about an ongoing case. A blog is generally accessible to the public, so content relating to an ongoing case conceivably could land in the realm of ex-parte communications with a judge, juror, or prospective juror and could violate the rules of professional conduct, she said.

“There are some advisory opinions’’ about such issues, Reis said. “But for the most part, this is an emerging interpretation of how the rules work in real life.”

Reis believes current students come into the ethics class with a good awareness of the technologies that could be used in the practice of law.

“They’re well-versed at using e-mail, instant messaging, and Twitter,” Reis said. “And it’s very interesting to see how they make connections about how they see the ethical rules applying to those tools.”

A young field

Ronald D. Rotunda, a professor with Chapman University College of Law in California, who did not take an ethics course while attending law school in the 1960s, noted that legal ethics rules have become more complex, especially in the area of conflicts of interest.

That trend is due, at least in part, to more mega-law firms, he said.

“The great lion’s share of ethics is conflicts of interest,” Rotunda said. “There are a lot of nuances to conflicts.”

Barbara Glesner Fines, associate dean for faculty at the University of Missouri-Kansas City School of Law, has taught ethics classes there for more than 20 years.

Over that period, Glesner Fines has seen a growth in specialized ethics courses. For example, she teaches a course called “Ethical Issues in the Representation of Families.”

She also noticed an increase in the clinical portion of the law school curriculum.

“The increase in clinical and professional skills training goes hand-in-hand with an increased emphasis on professional responsibility and professional identity formation,” she said.

She explained that professional identity formation involves understanding what it means to be a lawyer and is a way of thinking that goes beyond rules and regulations.

Laurel S. Terry, a professor at Penn State University’s Dickinson School of Law, believes students are much more sensitive to ethical issues than they were 20 years ago.

“This field is relatively young and I think that the knowledge base and sophistication in thinking about issues has really increased over the years,” Terry said.

“The teaching of legal ethics has improved dramatically since it began as a specialty in the 1970s,” said Steven Lubet, a Northwestern University School of Law professor.

Lubet’s colleague, Burns, believes “the students who are in our program are enormously better prepared to recognize legal ethical issues as they arise in practice than were lawyers, who were graduating, say 20 years ago.”

Rotunda agreed.

“The multi-state bar exam on ethics does a good job of making sure the students know the rules before getting admitted to the practice of law,” Rotunda said. “The students know the reasons behind the rules.”

But Cunningham, the Georgia State University College of Law professor, doesn’t share the view that current law students are better versed in ethics.

Cunningham, however, pointed to several recent developments, including more law schools providing legal ethics classes to first-year students.

In New Hampshire a unique collaboration is underway between the state’s Supreme Court, the state bar, and the state’s only law school, The Franklin Pierce Law Center, according to Cunningham.

That school’s administration designed an honors option for second- and third-year students that closely tracks the Carnegie report recommendations and requires that students take specially designed courses, which combine learning substantive law with hands-on simulation and the teaching of ethics and professionalism, he said.

The New Hampshire Supreme Court has agreed that students who successfully complete the honors program will be licensed at the moment of graduation and won’t have to take the bar exam, according to Cunningham.

A dramatic innovation is taking place at Washington and Lee University School of Law in Virginia, where the traditional third year of law school is being abolished.

Starting this fall, about 80 students have volunteered to spend their third year working in “practicum” courses — simulated practice experiences that will integrate substantive areas with what Washington and Lee Dean Rodney Smolla calls “the craft of lawyering.”

In two years, Smolla said, the entire third-year curriculum will consist of practicum courses.

“I had been brooding for years that law school could do more for students entering the profession,” said Smolla, a one-time associate at Mayer Brown and former professor at the University of Illinois College of Law.

“When I was named dean here [two years ago], I invited the faculty to imagine they were consultants hired to create a new law school — starting from scratch, what would your model be?

“The consensus,” Smolla said, “was that we should be more serious about preparing law students for entry into the profession. We had a strong sense that we weren’t dumbing down the curriculum. The thought was to integrate the ongoing process with the development of professional judgment and professional identity.”

What Washington and Lee created is a set of courses that teaches the skills of lawyering through engagement — working in teams; understanding business meetings; understanding the needs of individuals; and developing the communication skills that matter to clients. All of this in the context of traditional substantive areas of practice.

For example, a bankruptcy practicum course would involve fictional legal files and require interaction with people playing the roles of clients.

A course in a transactional area of law, rather than being presented in a litigation context, according to the W & L website, the new third year will offer a mix of transactional experiences — including simulated real-practice experiences.

“About 75 percent of the courses will involve simulated experience and 25 percent actual client experience,” Smolla said.

“There is a lot of emphasis on the development of a lawyer’s identity — the attorney-client relationship, the relationships you have with other lawyers,” Smolla said.

Certainly a key to the new third year is the professionalism program, which will study the legal profession as a profession — with all of the challenges facing the modern legal business environment.

Washington and Lee has about 400 law students; the first 80 volunteer third-year students “are pioneers,” Smolla said. “They’re very excited. By the time they’re third-year they’re chomping at the bit to begin to do things, to learn the craft of lawyering.”

Another bold innovation occurred with the opening in August of the University of California, Irvine School of Law, according to Cunningham.

Erwin Chemerinsky is dean of the school that requires first- year students to take a year-long class in the legal profession, in which students are taught professional ethics from the onset of law school, along with the economics of the profession and the psychology of being a lawyer. The first-year students also will interview actual clients as part of a clinical class.

“We’re just beginning to make progress,” Cunningham said. “The innovations that are taking place are a drop in the bucket so far. But I’m optimistic that, 10 years from now, we’re going to see significant change in law schools throughout the country.”