

## The Changing Legal Profession: Pedagogy (The Challenges of Teaching)

By:  
Paul R. Tremblay  
Boston College Law School

The comments I type here, for inclusion in the program materials for the June, 2005 workshop, are likely to change, and perhaps considerably, as I attend the conference and listen to others describe their work and their teaching. We have to admit that it's an interesting mission to comment on teaching ethics. If I were commenting on trends in legal ethics scholarship, or on emerging substantive law doctrine, I could spend a few hours in the law library or on Westlaw and arrive at some potentially reliable insights and conclusions. But when it comes to teaching, I have to admit that I haven't sat in on very many of my national colleagues' classes. Actually, I've never sat in on any of their classes. So whatever I offer here as observations have to come from my own idiosyncratic vision about how we are teaching, and perhaps ought to be teaching, legal ethics to law students given the changing face of the profession. I suppose that if I'm wildly wrong in my observations here, that probably only serves to stimulate more lively discussion in small groups and among the listeners generally. So it seems like maybe I can't lose here.

I do have three somewhat related observations about the teaching of legal ethics to share here. I write from the perspective of a clinical teacher who has also taught a traditional classroom course for many years. My observations, though, tend to arise from my clinical perspective, and not only because my two co-panelists do not (from what I understand) teach in a clinic setting. These comments that follow arise from the following phenomena: (1) the increasing role of doctrine, and the substantive law of lawyering, in the professional responsibility world; (2) the accompanying decrease in attention to moral deliberation as an art in the professional responsibility world; and (3) the increasing popularity of interdisciplinary teaching in law school clinics, and the resulting need for more innovative ethical analysis of those settings. Let me offer a few words about each. I think, as odd as it might seem, that all three relate in some ways.

**(1) The Increasing Sophistication of Doctrine:** Let me just note this obvious fact here, and move on. I assume that the rest of the workshop will cover this trend with great insight and depth. With the exciting development of multijurisdictional practice, multidisciplinary practice, third-party liability exposures, malpractice trends, Sarbanes-Oxley, and so on, a standard course in Professional Responsibility or The Legal Profession is likely to be far more doctrinal and filled with "hard law" than it used to be in those olden days. This is, all in all, a good and a fun thing, and it ought to earn legal ethics courses more respect among our students. The challenge for me is to see what this means for teaching legal ethics in a clinical setting.

**(2) "Clinical Ethics":** When I first taught a legal ethics classroom course some 20 years ago, I relished the idea of exploring with students the rich, tough questions surrounding how lawyers make the right moral choices amidst the ambiguities of their practices. While I don't think I realized it at the time, there were two kinds of moral reflection questions that I wanted to

teach students about back then. The first was best represented, in my files, by a many-times-photocopied draft monograph someone gave me written by David Luban, and called "The Adversary System Excuse." (This monograph later served as the lead chapter in Luban's edited book of essays called *The Good Lawyer* (1984).) Luban introduced to us what's now known as the "moral activism" challenge—what should a lawyer do if her role requires her to (i.e., some law says she must) take an action for her client's benefit when fairness or justice requires her not to take that action. It was a great question, and Luban presented it in such a witty and provocative way. The second kind of issue that fit this category was this: How might lawyers make the *best* ethical choices when the law or rules give the lawyer some discretion among several actions? This was the issue of teaching moral reasoning. I knew from my practice that these questions, like the activist ones, were also hard and very interesting.

I learned quickly that neither of these moral reflection topics worked as well in the classroom as I hoped they would. (Of course it could be just me—I certainly do not discount that explanation.) But I also, along with others, came to believe that the best way to teach legal ethics was in the clinic, and not in a classroom course. It seemed pretty obvious that teaching both of the moral reflection items just described would be far more successful in a clinic setting, where students would face painful moral choices which were quite real, and whose resolution was both time-sensitive and often irrevocable. But some argued that clinics were also better places to teach the more established fodder of professional responsibility: conflicts of interest, confidentiality, Rules 4.2 and 4.3, etc. This also made some good sense. It is one thing to read and analyze, say, *Fiandaca v. Cunningham* (about conflicts of interest) or *Messing v. Fellows of Harvard College* (about Rule 4.2) out of a dense casebook, and then write about it on an exam. It is another thing entirely to allow a student to stumble into a real conflict of interest involving an ongoing clinic case, or to observe the student wanting desperately to talk to the manager of a company which has sued your client, but wondering whether the ethics rules bar his calling her.

If this is accurate, then maybe clinics are the place where the richest ethics instruction takes place. I still believe there is much truth in that assertion, but things are complicated in two ways.

a) *That Doctrine Development Again:* When the world of legal ethics was simpler, we might be able to teach the basics within a clinic's semester or year. But the very emergence of the rich, sophisticated and usually business-focused legal ethics doctrine noted above leaves us clinical teachers in a bit of a bind. The richness of learning in the clinic arises, of course, from the actual cases students handle. And while every student in a client-based clinic will almost without exception face some intense ethical issues, those interactions will be deep, but not broad. We simply can't arrange for students to encounter the range of doctrinal topics that we believe students need to understand as part of their professional responsibility education. And this is not simply because most clinics (as I assume to be the case) are poverty-law based in some way. Even if we focused on economic development clinics, or tax clinics, or bankruptcy clinics, the problem of gaining depth at the expense of breadth will always remain.

b) *The "Clinical Ethics" Methodology Problem:* The difficulty just described is a real one. But, that aside, surely we can agree that clinics are still great places to teach the "moral

reflection" topics I noted at the beginning of those thoughts, right? Well, sure, but we have to acknowledge some interesting difficulties, and the possibilities for doing better.

Here's my concern: Neither of the two moral reflection agendas I listed above get adequate treatment in the clinics of our law schools. Now that's a pretty broad assertion, and made on rather scant evidence, I'll admit. But let's take the moral reasoning topic first. It is true that students in clinics, like lawyers in practice every day, encounter "discretionary ethics" moments where they need to make the best moral choice in a setting when the law doesn't direct an answer. What the legal ethics profession hasn't developed adequately is a common language to assist students (and lawyers) to evaluate the quality of the resulting decisions, or a discernable method to get there.

Other disciplines do so much more. Consider, especially, bioethics. There are three books in my university's research library alone with the title "Clinical Ethics." (They are, Peter Horn, *Clinical Ethics Casebook* (2003); Albert R. Jonsen, Mark Siegler, William J. Winslade, *Clinical Ethics: A Practical Approach to Ethical Decisions in Clinical Medicine* (2002); and *Clinical Ethics: Theory and Practice* (Barry Hoffmaster, Benjamin Freedman, and Gwen Fraser, eds., 1989).) Indeed, there is a journal in the bioethics field addressed entirely to clinical ethics, known, aptly enough, as *The Journal of Clinical Ethics* (see [www.clinicalethics.com](http://www.clinicalethics.com)). The clinical ethicists in bioethics and health care recognize that practitioners must make hard, discretionary moral decisions all the time, and have developed sophisticated but, at the same time, reasonably accessible methods of moral deliberation to assist those practitioners.

I think it is evident that the legal profession offers nothing like this attention to a systematic methodology by which to assess the quality and the correctness of discretionary ethics decisions. A cursory review of the leading legal ethics textbooks (which, of course, are intended for classroom use, but still ...) shows almost no discussion of this topic—at best, 3-4 pages, and that length is rare. Some of us have begun to explore the idea of casuistry as one example of such a method of doing "clinical ethics," but those explorations are in their early stages (he says, optimistically).

What is more common in the legal ethics textbooks, but still a modest part of the legal ethics teaching agenda, is some attention to the moral activism question, which we'll remember is different from the moral reasoning question. Many textbooks use, say, Spaulding v. Zimmerman and Wasserstrom's early piece on moral activism to introduce the concept. A few other texts offer a wider choice of readings. Beyond the textbooks, though, there is surely no shortage of scholarship about moral activism, spurred by David Luban, Deborah Rhode, Bill Simon, Steven Pepper, and so many others, and now perhaps concluding with the brilliant critiques offered by Bradley Wendell. So maybe we can at least admit that there is a basis for teaching that prong of the moral reflection agenda in clinics?

Well, here again I'm becoming more skeptical. As I've written in a couple of places, my growing sense is that, while we have great interest in addressing the moral activism question in clinics, the practice of students in the clinics, influenced by the powerful heuristics and biases that frequently interfere with disinterested analysis, is to resist the activist invitations. They do

so mostly because they are convinced that their clients are right or (at a minimum) they cannot be sure that they're clients are *not* right. So, while it's hard to imagine a setting better than a law school clinic (or at least a civil clinic) for nurturing moral activism, the results thus far seem less than promising.

**(4) The Benefits of the Social Workers in the Clinics to Developing Legal Ethics**

**Thinking:** My third observation is far less discouraging about the role of clinics in the legal ethics pedagogy than the last set of thoughts. It seems, if my observations are reliable, that many more law school clinics have become "interdisciplinary" in a very real and vibrant way. A few are terrifically innovative (for instance, Syracuse University College of Law is establishing a law school clinic within a hospital, applying the model of Boston's Family Advocacy Project to a law school setting). Many others are otherwise conventional clinics but with a social worker and, often, social work students on staff. This development has inspired some promising scholarship and teaching about interdisciplinary practice in ways which seem qualitatively different from the accountant/insurance adjuster-type MDP debates that we might teach about in a classroom ethics course.

These interdisciplinary clinics offer rich opportunities for students to explore the implications of MDP in very tangible ways. The questions presented can be entirely *doctrinal*, and (as we are learning) in very challenging ways. (The questions about confidentiality, about mandatory reporting laws, and about conflicts seem to be quite tricky to resolve.) These clinics also, by highlighting the differing perspectives of social workers as helping professionals with a more holistic view of "helping," challenge students and their teachers to question many of the prevailing assumptions about lawyer professionalism, including its commitment to autonomy as an ideal, the primacy of client-centeredness, and the tendency not to view a client as connected to a larger "moral community." These lessons for students can be unsettling, but in quite salutary ways, as are the broader implications for how we teach lawyers about their role with clients. It is hard to imagine such rich exploration occurring outside of those clinics where the students can work, each day, with social workers offering a different perspective from that offered in law school.