TEACHING THE BASIC ETHICS CLASS THROUGH SIMULATION: THE NORTHWESTERN PROGRAM IN ADVOCACY AND PROFESSIONALISM

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I

INTRODUCTION

The generous grant that we received from the W.M. Keck Foundation allowed the Northwestern University School of Law to create and publish a set of materials[1] for teaching the basic ethics course principally through the simulation method. The course is now one of the best received classes in the law school, something especially gratifying given the demanding nature of the class, and it brings back a fine group of participating faculty from the local bar year after year. In this short article, I will try to do three things: (1) provide a very compressed summary of the underlying principles of the Northwestern program; (2) describe the classes themselves and the mix of teaching methods we employ; and (3) briefly describe the program materials.

II

EIGHT THESES ON THE LEARNING OF LEGAL ETHICS

Eight philosophical and educational principles underlie the simulation method of legal ethics instruction. I can do little more here than assert them, and so assert them I shall.

1. *Perception and blindness are important metaphors in ethics.*[2] Much unethical and deeply destructive behavior results from a failure to see the moral significance of human situations. Simulation exposes students to the kinds of complex concrete situations in which moral issues can arise quickly and without red flags. It can enhance moral vision.

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1. ROBERT P. BURNS ET AL., EXERCISES AND PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1994) (and its teacher's manual). As explained in the text, the ethics materials may be used in an integrated program in ethics, evidence, and trial advocacy by using ROBERT P. BURNS ET AL., PROBLEMS AND MATERIALS IN EVIDENCE AND TRIAL ADVOCACY: CASES (1994); ROBERT P. BURNS & STEVEN LUBET, PROBLEMS AND MATERIALS IN EVIDENCE AND TRIAL ADVOCACY: PROBLEMS (1994) (and its teacher's manual).

2. *See* TROELS ENGBERG-PEDERSEEN, ARISTOTLE'S THEORY OF MORAL INSIGHT (1983); IRIS MURDOCH, THE SOVEREIGNTY OF GOOD (1970).

2. *Much of ethics has to do with self-imposed restrictions on the way in which legitimate goals are pursued.*[3] Simulation places students in competitive situations that illuminate the tensions between the restrictions and the goals. Simulation allows students to feel the pressures on moral norms imposed by their competitiveness and the legitimate drive for effectiveness in an atmosphere where they can become conscious of those pressures.

3. *Students master the skills and bodies of doctrine necessary for competent performances.* This is one of the reasons why discussions of legal ethics in good continuing legal education programs are often the most animated events in the programs, while students in traditional law school legal ethics class are notoriously disengaged.[4] Active learning is especially appropriate where rules embodied in doctrine are themselves a "mere abridgement of the activity itself; they do not exist in advance of the activity."[5] Many of the rules of professional conduct are attempts in the language of law to enforce an envisioned form of "good practice." Although the rules are comprehensible to a student who can imagine the practice they seek to require, it is extremely difficult to move effectively from the bare rule to the appropriate practice. Simulation greatly elevates the level of student involvement and attention by allowing students to understand rules in context.

4. *Meaning is use: Knowing that and knowing how are deeply intertwined.*[6] For example, a lawyer understands the "critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity"[7] only if he or she knows concretely how to advise a client who may be considering criminal behavior. The lawyer understands the difference between providing legal advice to a nonclient witness who has a possible conflict with a client and simply interviewing that witness only if the lawyer can actually perform the interview. One understands a rule if one can go forward under it. Simulation develops both proficiency and understanding of how to operate under the rules.

5. *Dramatizing concrete situations illustrates the dense complexity of legal ethics.* When students are placed in plausible human situations and asked to perform, the different dimensions of those situations become palpable. Students do not require convincing of the need to understand that situation other than doctrinally because the other aspects are powerfully apparent. (They see, for

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3. This is at the heart of Kantian ethics, which focuses on the imperatives generated by practical reason that limit the pursuit of goals dictated by our natural desire for happiness. *See, e.g.*, MARY GREGOR, LAWS OF FREEDOM: A STUDY OF KANT'S METHOD OF APPLYING THE CATEGORICAL IMPERATIVE (1963).

4. Steven Lubet, *I Teach Legal Ethics*, 13 J. LEGAL PROF. 133 (1988). Practicing lawyers understand the context of the practice in which ethical issues arise and are themselves deeply involved in that practice. Legal education is usually disengaged from that practice. Thus students have neither the imagination nor the incentives to appreciate the importance of ethical issues.

5. MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 62, 101 (1962).

6. HANNA FEICHEL PITKIN, WITTGENSTEIN AND JUSTICE: ON THE SIGNIFICANCE OF LUDWIG WITTGENSTEIN FOR SOCIAL AND POLITICAL THOUGHT 47-49 (1972).

7. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 6 (1992).

example, that their practice is shaping their selves.) Legal education has long been criticized for being neither sufficiently practical nor sufficiently theoretical. Ironically, those are closely related failings. Philosophical questions, such as the tension between benevolence (or "paternalism") and respect for client autonomy, emerge naturally from dramatization.

6. *Rules are important; practices are more important.*[8] Some issues in legal ethics are tightly controlled by rules. In many situations, however, the sole criterion of ethical performance is the judgment of the good lawyer himself.[9] Realistic dramatizations in demonstrations and simulations model such performances and begin the process of developing good practice.

7. *A contextual and concrete appreciation of what the law of the profession either requires or allows is a prerequisite for mature criticism of that law.*[10] A focus on "good practice" as judged by good lawyers does not preclude criticism of prevailing norms. This focus is, rather, an indispensable prerequisite for such criticism. Dramatization in demonstrations and simulations puts student lawyers in a position to criticize the law of professional responsibility. In simulations, students must perform subject to the discipline of doing something definite in a complex situation. Choosing a definite resolution of a problematic situation heightens student attention to the precise demands of the law of professional responsibility and thus to the range of lawyer ethical discretion. Students may then understand precisely what (possibly attractive) courses of action are precluded by the ethical rules and may consider reforms to make such alternative courses mandatory or at least legally permissible.

8. *Many of the most important decisions that lawyers make are effectively immune from the disciplinary process.* For example, lawyers control the flow of information to clients and have great flexibility in following up or avoiding options that arise in negotiations independent of communication with and input from their client. Whether a lawyer actually pursues a client's objectives rather than his or her own in the negotiating process is usually beyond review. Simulation allows a lawyer to understand this and make a reflective decision to embrace ethical norms as an element of his or her professional identity, integrating them into practice regardless of the threat of sanction.

III

THE CLASSES

Critical to the success of professional ethics instruction by the simulation method are format, organization, personnel, materials, and the manner in which

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8. *See* ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2d ed. 1981).

9. ARISTOTLE, NICOMACHEAN ETHICS 1113a-b (Terence Irwin trans. 1985) (the judgment of the good man is a kind of ultimate standard in ethics).

10. *See* JOHN RAWLS, A THEORY OF JUSTICE 57 (1971) ("In designing and reforming social arrangements one must, of course, examine the schemes and tactics it [sic] allows and the forms of behavior which it tends to encourage.").

the classes are conducted. There is no denying that the effective use of this method requires a somewhat higher level of planning and administration than that of the standard casebook class, effort that is, in our experience, very well justified. Proper planning and administration aid in the achievement of the philosophical principles outlined above.

A. Class Size and Format

Law schools have offered courses on professional ethics by the simulation method in large class, small class, and mixed formats including both large class sessions and small group workshops. The teacher has the discretion to combine the formats in whatever proportion he or she wishes. That is, any of the exercises found in our materials[11] can be used in a large class or in smaller workshops.[12] At Northwestern, we teach about ten of the exercises in the small workshop format and use the rest with the entire class present. Although the small workshop format increases participation and engagement, a rhythm between smaller and large classes is helpful to keep the class centered and to talk through any disagreements that may have arisen in the smaller sessions.

B. Teachers and Other Personnel

One faculty member may teach the class in the large class format, though we would recommend team-teaching the course with at least one lawyer of substantial practice experience. This may be another member of the academic faculty, a clinical professor, or a member of the local bar whose judgment the teacher respects. This allows for a division of function in the demonstrations to be given before the class by the professors[13] or in the exercises in which the faculty member has a role; the other teacher may observe the entire demonstration or exercise and focus on leading the ensuing discussion or otherwise organizing the class.

Three or so faculty members and approximately eight practicing lawyers participate in the teaching at Northwestern, where more than eighty students take the class.[14] We are blessed with the continuing participation of lawyers from private and public-interest practice of differing ages and ranges of experience. Some have taught ethics either in law school classes or in

11. *Supra* note 1.

12. We find that about 20 students is a good number for the workshops; it allows for a reasonable distribution among the various roles, including that of the disciplinary committee.

13. *Supra* note 1.

14. Most of our students take the program in the first semester of their second year, though a few take it in the third year. We believe that the first semester of the second year is an ideal time for students to focus on the world of the trial court and to experience pedagogical methods quite different from the analysis of appellate cases in a Socratic classroom. It does much, we think, to give students a sense of progression in their legal educations and to dissipate the ennui that can come from a feeling of running in place.

Northwestern also offers several sections of the basic course taught in a more traditional "problem method format" and more specialized seminars for students who have taken the basic course.

continuing legal education courses, others are the "ethics experts" in their firms, while others have been generous in devoting their time to continuing legal education enterprises such as the National Institute for Trial Advocacy. Most law schools should be able to recruit such people, often from their own alumni. Their range of experience and perspective, and their ability to translate ethical requirements into credible performances, greatly enrich this course. Bringing practicing lawyers into the classroom also shows that respected and competent members of the bar take ethical requirements very seriously and that "good practice" need not be "slick practice." Indeed, it seems to me that the participation of such people demonstrates to students, in a way that a hundred sermons could not, that effective practice almost always is fully consistent with ethical practice.[15]

Our witness and client roles are played by actors or drama students. This is not necessary; teachers, students in the class, or other law students could play the nonlawyer roles. However, actors or drama students will play these parts for very reasonable stipends. They can usually play the parts more realistically and are especially able to dramatize the human dimension of the situations.[16]

C. The Structure of the Course

As mentioned previously, the course can be taught exclusively in a large class or in small workshops, or in any balance of large classes and small workshops. The professional responsibility materials are constructed so that they may be used independently of any other courses, and law schools have effectively used the materials without linking the ethics course to other courses. The two cases from which most of the problems are taken are summarized at the beginning of the student materials and portions of the case files, such as previous testimony in the client perjury and witness contact problems, are included in the student workbook. Even without integration with other law school classes, the materials still provide a marked advance in complexity and level of student involvement over "problem method" materials (themselves an advance over exclusively black-letter and case law methods of instruction).

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15. Participation of practicing lawyers also keeps academic lawyers honest. *Compare* Murray L Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (July 1978) *with* Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 WIS. L. REV. 1529 (1984). Academics, whether moral philosophers or doctrinalists, may, in working with the practicing bar, be tempted to adopt the stance of an "[i]ntellectual peace corp" to a "morally underdeveloped country"—as a distinguished philosopher once put it in a closely related context. *See* Alasdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 PHILOSOPHICAL EXCHANGE 37 (1978). Practitioners may be so immersed in institutionally embedded values that they are tempted not to envision alternatives. There is no once-and-for-all resolution of the question of which perspective has comparative strength. Criticism that does not appreciate the complexity of values and interests embedded in current practice can be abstract and unhelpful. Practices can become distorted by their institutional embodiments. A sustained dialogue among positions that are well represented is what we owe our students, and that is what our program attempts.

16. We have asked one of the actors to serve as the coordinator and to ensure that actors of the appropriate gender are present and receive their scripts on time. This has worked well.

However, the materials are also designed so that they may be used in a fully integrated program in advocacy and professionalism. Before the Keck grant allowed us to develop the ethics materials, we had already constructed a program that integrated the study of trial advocacy and the law of evidence. This program became the foundation for integration of ethics instruction. In teaching young trial lawyers for the National Institute for Trial Advocacy, we found that lawyers who undoubtedly had done quite well in standard evidence classes had virtually no contextual grasp of the law of evidence. They found it very difficult to identify evidentiary problems as they arose in the trial context or to structure witness examinations so as to avoid those problems. It was like knowing all the grammatical rules of a language they could neither speak nor write. On the other hand, in our teaching of trial advocacy in law school, we often found that, given our other tasks, we were unable adequately to address the inevitable evidentiary issues that students found pressing during the simulated trial advocacy exercises. We concluded that our young lawyers' limitations were in major part the result of the way in which evidence law had been separated in law school from the linguistic practice, the trial, for which it provided the grammar. In this context, meaning was use; knowing that and knowing how were intimately related.

We were extremely pleased with our program that integrates trial advocacy and evidence. Students seemed to have a firmer grasp of the law of evidence, were more articulate about evidentiary issues in the courtroom, and were in a better position critically to assess the wisdom of contemporary evidence law. Student reviews were excellent, the American College of Trial Lawyers honored the program with its Emil Gumpert award for excellence in the teaching of trial advocacy, and our students won the National Trial competition.

The texts in evidence and trial advocacy[17] allowed for the integrated study of those analytically distinct subjects. One volume contained two sets of case files, one civil and one criminal, from which virtually all of the problems in evidence and exercises in trial advocacy could be taken. It was important that they were long files, approximating the complexity of actual fact patterns in cases that go to trial. This would allow students to see important interrelations among doctrines and theories and to assess those doctrines and theories in a rich factual context, not merely in freestanding snippets, as in previous "problem method" approaches to evidence. The subjects of the two courses were interrelated, so the lectures and problems addressed in evidence were immediately relevant to the trial advocacy exercises the students were doing in trial practice: evidentiary relevancy with theory of the case, the law of expert witness testimony with the rhetoric of effective presentations of experts, the law governing impeachment with cross-examination of witnesses, and so forth. The second volume contained about 250 evidence problems and sixty trial advocacy

17. *See supra* note 1.

exercises drawn from the files. They were accompanied by a very complete teacher's manual.

We had realized that we were still only studying some of the constitutive rules of the important social practice that is the common law trial. We understood that the rules of ethics, just as surely as the law of evidence, trial procedure, and the rhetorical canons of effective trial advocacy, structure the kind of truth that is allowed to appear in the trial court.[18] The Keck grant allowed us to complete the picture by creating materials that could be further integrated into a concrete appreciation of the trial. The topics in ethics, as in evidence, could be sequenced to provide students with insight into the ethical dimension of a subject at the very time when they were most focused on that subject in the other courses. Thus, for example, issues of client perjury are considered in Ethics while direct examination is considered in Trial Advocacy; confidentiality is considered in Ethics while the attorney-client privilege is considered in Evidence; the ethics of closing argument are considered in Ethics while students are drafting and delivering closing arguments in Trial Advocacy. Virtually all of the exercises in ethics come from the same two files from which all of the evidence and trial advocacy problems come.

At Northwestern approximately 40 percent of the student body takes the integrated program, to which ten credits are devoted.[19] The integrated teaching of the three subjects is consistent with our views as to the primacy of practice and the importance of understanding doctrine in context. Quite candidly, we think that integrating Ethics as a coequal partner with the basic "hard law" doctrinal class and perhaps the most basic "skills courses"[20] sends

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18. The very first class contains a faculty demonstration that seeks to underscore exactly this point. The demonstration consists of two interviews with a client whose liquor license is threatened with suspension for knowingly selling liquor to an intoxicated person. In the first interview, conducted by an "associate" of the law firm, the client explains that he does not believe that he sold anything to the man whom liquor investigators stopped after leaving the store. The investigators found him carrying a bottle of wine in a paper bag (without a receipt) and administered a field sobriety test that he failed miserably. The investigators also claimed to have observed this same person standing across the counter from the clerk in the store for a minute or so and moving in a way that was consistent with making a purchase. In the first interview, the clerk relies on a statement, made to him by another patron, that the man whom the investigators detained had actually stolen the bottle. The interview ends with the associate reassuring the owner that it looks like he has a solid defense. In the second interview, a "senior partner" informs the owner that the statement of the patron is inadmissible hearsay and that he will surely lose the "swearing context" with the officer that the "no sale" theory of the case involves. The partner goes further and leads the client to "remember" selling the liquor to the person the investigators detained, but to describe him in a way that suggests that the owner could not know he was intoxicated. Instead of "reconstructing" the facts, the partner "constructs" facts to support a theory of the case that he believes is rhetorically superior. The dramatization demonstrates the rhetorical importance of the choice of theory of the case and the ways in which both evidentiary and ethical norms control that choice. Evidence and ethics are the constitutive rules of the trial: They determine the kind of truth that is allowed to appear in this important forum. They must be evaluated in light of the rhetorical practices they allow and proscribe.

19. Trial Advocacy receives 3.5 credits, as does the ethics class. Evidence receives 3 credits.

20. Students who elect to take this ethics class at Northwestern must take the coordinated trial advocacy class. The latter is also the corequisite for the Evidence class with which it is coordinated. However, a student who elects to take the trial advocacy class is not required to take either of the coordinated classes. The overwhelming majority do.

a message as to the importance of the subject to legal practice and legal education.

Though this ethics course is coordinated with trial advocacy and evidence courses at Northwestern, the subject matter reflects the reality that most lawyers, even those who can fairly be called litigators, spend only the minority of their time at trial.[21] Some of the exercises require the student-lawyers to interview and counsel clients contemplating problematic transactions. Many of the exercises focus on the relationship of attorney and client as it works itself out in the law office. There is a major exercise that requires a student to conduct a negotiation with opposing counsel while engaging in several interviewing and counseling sessions with his or her client. Another exercise casts the students in the role of the management committee of a law firm deciding whether to hire a new lawyer whose presence may require the firm to "dump" a sympathetic client. Many of the exercises require students to discuss ethical issues with peers and with superiors in their law firms before they stand trial for their decisions before simulated disciplinary hearings, providing some experience with both the collegial as well as the adversarial contexts within which ethical problems may be addressed. There are also two character and fitness exercises that require students to counsel an applicant with a problem and adjudicate the fitness of a range of applicants. Problem sessions on such matters as fees and client property, advertising, solicitation, press relations, and the duty to report misconduct ensure that the coverage of the course is equivalent to that of a more traditional basic course.

On the other hand, it is fair to say that most of the students who choose this course are at least contemplating professional lives in which litigation will play a role. For them, we believe, litigation-related simulations increase the level of interest even in doctrinal areas that are not necessarily related to litigation. Further, a one-sided devotion to the widest possible coverage surrenders some of the distinctive advantages and responsibilities of law school treatment of legal ethics. After all, most students will gain at least a relatively superficial exposure to the range of professional responsibility doctrines in preparation for the Multistate Professional Responsibility Exam. Law schools have the ability and responsibility to explore legal ethics in greater depth. But no course can explore all areas in depth. It makes sense, for many reasons, to explore in depth those areas in which students believe they are likely to practice.

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21. On the other hand, the possibility of trial, though unlikely in percentage terms, can cast a very long shadow over the other "modes of social ordering," as Lon Fuller called them. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978). Competent planning and the structuring of transactions must take account of the forums that provide the methods of dispute resolution of last resort, whether arbitration or the civil trial. And when a problematic situation has become a "case," interviewing, counseling, negotiation, and mediation are conducted even more directly with an eye toward the trial.

D. The Classes

At Northwestern, the class meets for two hours twice a week for each week of the fourteen-week semester. A good number of the simulations profit from these relatively long class periods.

Although the exercises are at the heart of the course, we use other methods as well. At the beginning of the semester, one of us gives a lecture on the pervasive questions in legal ethics. This attempts to alert the students to the more philosophical questions that pervade legal ethics and that will arise in the simulations. We discuss the question of the moral status of legal ethics and its relationship to ordinary morality and the other sources of a lawyer's own moral commitments. We discuss the complex interrelationship among moral principles, the law of professional responsibility as law, moral virtues or dispositions, institutions, moral practices, and the political power of the organized bar as a source of most lawyer codes. We discuss the possible moral attitudes a lawyer may have toward the law of professional responsibility.

After this big-picture introduction, we give a second lecture that tries in a limited time to provide the outline of the law of professional responsibility as a subject. Our experience is that students will master an area more completely if they have a definite idea of what the outer limits of that subject are. Once they know that they are unlikely to fall off the edge of the ethical world for want of a sense of its boundaries, they can more confidently work inwards to understand its various continents.

As I mentioned above, we do about five faculty demonstrations in the big class, and a good number in problem sessions, either to fill out a subject on which the students have done an exercise or to address a subject that does not lend itself very well to simulation.

The exercises, however, form the heart of the class. On those days when we are doing the simulations, I meet for about one half hour with the actors who are to play the client or witness roles beginning about an hour and fifteen minutes before the class. Though the actors tend to be quick studies and quite adept at assimilating even fairly detailed and precise instructions, it is helpful to make sure they understand the major point of the exercise and the elements of their performances that are absolutely crucial to the exercise working well. The meeting also gives them an opportunity to ask any questions they may have. In the three years we have been teaching the program at Northwestern, I do not recall a single instance where an actor bungled a role.

After the meeting with the actors, the faculty meets for about forty-five minutes. The participating faculty will have read the problem, the scripts, and the fairly extensive teaching notes. This meeting allows us to share perspectives on the exercises, describe unanticipated situations that have arisen, and work through any disagreements we might have about the proper resolution of the ethical issues. We often discuss more obviously pedagogical questions. The discussions are always interesting and helpful.

The most formal of the simulations lasts two or even three classes. Generally, they involve a role-playing performance of a lawyering task by two or so students,[22] followed by a disciplinary hearing in which one student plays the prosecutor, another the defense counsel, and the rest of the class the disciplinary committee. The latter, with the faculty members participating actively, first question the prosecutor and defense counsel during their presentations, in much the way an appellate panel would, then deliberate and make a judgment as to the propriety of the student-lawyers' conduct and, if a violation has been found, assess the appropriate penalty. (Of course, the disciplinary committee has the benefit of omniscience, in that the lawyering task has been performed in their presence.[23]) After the deliberation and judgment, we have a more general discussion of the issues and focus more directly on broader perspectives on the law of professional responsibility. Most of the exercises are performed over the course of two classes, which gives the prosecutors and defense counsel an opportunity to prepare, meet briefly with a teacher, and provide each other with fair notice of their expected arguments. A few of the shorter exercises are done in a single class, with the evaluation of the performances following immediately. Of course, the prosecutor and the defense counsel do not, in those cases, have much opportunity to prepare, so we tend to run the class more as a barely adversarial discussion, with the faculty member taking a more active role.

The negotiation simulation is the only exercise that stretches over three classes. The student lawyers first meet with teachers playing the part of senior partners to make sure they have thought through their negotiation positions and strategies. They then interview and counsel their clients as to the clients' goals for the negotiation and the best means of effecting them. The first day's class ends with a preliminary negotiation in which unanticipated problems and possibilities emerge, requiring yet another interview with the client, which usually takes the rest of the time in the first class. The second class begins with the lawyers negotiating in earnest, usually with frequent meetings with the client for further consultation. Students are required to complete their negotiation during the second class, and, in fact, it usually takes all of the second class. The negotiation exercise is unique in that each workshop divides into two halves, each of which contains the prosecutor and defense counsel for each negotiating team plus half the disciplinary committee, which "shadows" counsel throughout the client counseling sessions. The third class on negotiation ethics is devoted to mock disciplinary hearings and discussion of the issues that arose in the course of the hearings.

The negotiation exercise involves challenging issues of disclosure and confidentiality, paternalism and respect for client autonomy, deference to client

22. Often a period for collegial consultation between the lawyers is built into the exercise.

23. We discuss throughout the significance of the fact that actual disciplinary proceedings often involve disputed issues of fact subject to the usual methods of adversary presentation. Students in the integrated program have an added insight into what that means.

objectives and avoidance of fraud, the relationship of civil litigation to possible criminal litigation, and the inevitable conflicts between lawyer and client financial interests, to name just a few. I do not believe we could teach these issues as well using other methods.

The class is graded mainly on the basis of student journals kept during the class,[24] somewhat qualified by excellent or poor student performance in the exercises. Each journal is to contain analyses of five of the exercises, which should carefully describe the important events of the student performance, evaluate the student-lawyers' conduct in light of the disciplinary rules, and evaluate the rules themselves in light of some broader source of moral norms the student finds compelling. It may seem paradoxical, but it is the very concrete dramatization of the exercises that often raises the most theoretically demanding questions.

IV

THE MATERIALS

Each semester I revise the syllabus, which contains for each class the readings in the text[25] and in the additional copied materials, as well as the assignments for the preparation of the exercises or the problems that will occupy the class itself. As soon as the class list stabilizes and then again about halfway through the semester, I distribute the list of actual student assignments, so that students have adequate notice of the exercises for which they will bear especially heavy responsibility. The syllabus assigns handouts in addition to the primary source for the substantive law.[26] These are of several sorts. For some of our students, this course will be the first encounter with actual lawyering tasks, such as interviewing, counseling, and negotiation. Thus, a few of the handouts are brief summaries of some of the best of the professional skills literature on these topics. This material, combined with faculty demonstrations of the relevant skills, allows the students to begin. Other handouts are (usually) edited cases of special importance (for example, *Nix v. Whiteside*[27]) or interest (for example, *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*[28]), ethics opinions, other lawyer codes, and excerpts from the secondary literature in ethics.[29]

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24. Examples of student journal entries are available from the author upon request.

25. We are currently using the ABA's annotated rules, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (1992), but we previously used a text by Charles Wolfram, MODERN LEGAL ETHICS (1986).

26. *See supra* note 25. When we use Wolfram's text, we also assign one of the collections of rules or codes.

27. 475 U.S. 157 (1986) (holding that the right to effective assistance of counsel was not violated by attorney who refused to cooperate with client in presenting perjured testimony).

28. 571 F. Supp. 507 (E.D. Mich. 1983) (setting aside settlement because plaintiff's counsel's failure to inform court and opposing counsel of death of client).

29. We would be pleased to provide a copy to anyone interested, though we suspect that law professors may have rather definite ideas about what additional material students ought to see. One

The teacher's manual is quite extensive. Our goal was to make this style of teaching as user-friendly as possible for teachers who had not previously employed simulation. The manual contains more material than we can use in a course to which Northwestern devotes three and one-half credit hours, thus allowing for considerable discretion in emphasis.

There are three sorts of materials in the teacher's manual. First, there are five faculty (or guest-lawyer) demonstration-discussions. The demonstration we use in the first or second class is on the ethical dimension of theory choice,[30] which, in the integrated program we provide, coordinates with issues of relevancy in evidence and theory of the case in trial advocacy.[31] The demonstration-discussions dramatize events that have important ethical significance and particularly allow the tensions in ethical lawyering to come alive. They inevitably pose questions of the ethics of legal ethics, that is, the moral status of the behavior that the rules require. Moreover, they do so in a context, where students, who do not themselves have to perform, may assume a more critical or reflective perspective.[32] They can be used effectively to provide some variety of method in some of the longer problem sessions, which in our syllabus may run to two hours. We find that the demonstration-discussions always elevate the level of student focus and attention.

Second, each of the exercises[33] contains one or more scripts for the person or persons playing the parts of the witnesses, clients, or other characters in the exercise. (The scripts are available from the publisher of the materials in a separate packet, or they can be copied from the teacher's manual.) For each of the exercises, there are also teaching notes in which we describe the logistics and time distribution for the exercise and then offer an analysis of the issues that are likely to arise in the course of the exercise.

Third, the teacher's manual contains additional material for some of the exercises. For example, the negotiation exercise contains confidential

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of the advantages of the simulation method we employ is that the exercises are compatible with virtually any sources of the substantive law and criticism thereof.

30. *See supra* note 18.

31. There are also demonstrations entitled "Disclosure and the Limits of Confidentiality," "The Client with the Possibly True and Certainly Implausible Story," "Preparing a Police Witness (by a prosecutor)," and "A Witness's Conversation with a Prosecutor."

32. The course allows students to see the world of legal ethics from quite a number of perspectives. Students must make concrete ethical decisions in roles as counselors, negotiators, and trial lawyers. They must give advice to student lawyers contemplating such decisions. They will both prosecute and defend student-lawyers who have made ethical choices. They will deliberate about the decisions made and perhaps seek to determine an appropriate penalty. They will observe faculty performances in a less adversarial context and discuss more basic issues concerning the *ethos* of law practice. And they may reflect on their own performances in all these roles, both in class discussion and in their journals.

33. The exercises are entitled: (1) "Participation in Client Wrongdoing"; (2) "Counseling: Moral Considerations and Assisting Illegality"; (3) "Client Perjury"; (4) "Distribution of Authority"; (5)"Investigation, Discovery, and Contacts with Witnesses"; (6) "Fruits and Instrumentalities and Other Problems of Discovery"; (7) "Negotiation"; (8) "Cross Examination: Impeachment"; (9) "Cross Examination: The Truthful Witness"; (10) "Character and Fitness"; (11) "Character and Fitness Deliberations"; (12) "The Ethics and Law of Closing Argument"; (13) "Conflicts of Interest: Civil"; and (14) "Conflicts of Interest: Criminal."

instructions for plaintiff's and defendant's counsel, while the exercise on ethical issues in discovery contains an excerpt from a client diary that raises difficult issues. The additional materials are distributed well before the class so that the student lawyers have an opportunity to evaluate the case and develop a negotiating strategy. Again, in the exercise concerning the law and ethics of closing argument, where student lawyers are required to make appropriate objections during a deeply objectionable prosecutor's rebuttal, the teacher's manual contains a very complete argument that the teacher can edit or vary at will. The teacher's manual also contains our suggested solutions to the problems.[34]

The student workbook contains two sorts of materials, exercises, and problems. Fourteen exercises form the heart of the course. Each exercise contains different sorts of background information, sometimes factual and sometimes legal. The instructions attempt to place the student in somewhat the same position as would be a practicing lawyer who was about to perform the lawyering task that the student faces. Each of the fourteen exercises also contains the student assignments for that exercise. For example, a pair of students will be assigned to perform the lawyering task, another may be assigned a senior partner role to consult with the front-line student-lawyers about the appropriate course of conduct, another will be assigned to prosecute the student lawyers and/or the partner for any ethical violations that occur in the course of the simulation, another to defend the students, and the rest of the class will serve as the disciplinary panel.

V

CONCLUSION

We have found simulation, supplemented by other methods, to be a flexible and powerful way by which to teach legal ethics. We believe that it is the *most* powerful way to teach certain fundamental aspects of the subject. It can enhance moral vision into the kinds of concrete situations in which ethical issues actually arise. It alerts students to the strong pressures on ethical practice that stem from the adversary system. Pedagogically, it has all the advantages of active learning and offers the promise that ethical norms can become "dyed in the wool," deeply integrated with basic lawyering practices from the start. By focusing on the performances that would or would not be consistent with ethical norms, it enhances an understanding of the real meanings of those norms. It dramatizes the philosophical, legal, psychological, and political tensions that constitute the rich complexity of legal ethics. It illuminates the ethical issues that pervade law practice and that ethical rules only partially address. It can make criticism of prevailing norms more incisive and serious. And it offers the

34. In addition to the topics for the exercises, each of which is accompanied by a set of problems, there are problem sets covering fees and client property, confidentiality, advertising and solicitation, speaking to the press, the duty to report misconduct, and judicial ethics.

students an opportunity to integrate ethical norms into their practice in those areas that the disciplinary process will never touch. Finally, it is a *method* that is fully compatible with virtually any legal, doctrinal, social scientific, and philosophical literature that the teacher believes important. Our conviction is that this method will sharpen and deepen student (and often teacher) understanding of the important issues and increasingly rich literature in legal ethics.