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# Teaching Legal Ethics a Quarter of a Century after Watergate

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# *Ethics Panel*

# Teaching Legal Ethics a Quarter of a Century After Watergate

*by*
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I recall a poignant moment when John Dean, the former Counsel to President Nixon, testified before the Senate Watergate Committee over a quarter of a century ago. He had earlier made a list of the people that he thought could be involved in a conspiracy to obstruct justice. Next to many of the names was an asterisk. One of the Senators questioning him asked what the asterisks represented. John Dean indicated that they were the lawyers.[1]

Lawyers and the general public responded to that comment. The American Bar Association ("ABA") soon decided that law schools must offer, and law students must take, a required course in Legal Ethics, or what is more often called Professional Responsibility. Because the ABA is usually the accrediting agency for law schools, universities around the country complied. Thus, since the late 1970s, it is the unusual lawyer who, as a law student, would not have taken a required course in Legal Ethics followed by a bar examination on that same subject.

This bar examination is different than the rest of the examination. Students must pass the general bar examination, but a low score in one area, the torts section for example, can be compensated by a high score in the contracts section. In contrast, there is a completely separate bar examination on legal ethics and students must pass this examination separately. A higher score elsewhere cannot compensate for a lower score on this test. The bar examiners were worried that students might see this extra

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1. *See Presidential Campaign Activities of 1972: Hearings Before the Select Comm. on the Presidential Campaign Activities*, 93rd Cong. 1054 (1978).

examination as another barrier to entry, so they offer it several times a year, allow applicants to take the ethics bar examination while they are still law students, and offer it on a different day than the rest of the bar so that preparation for that examination will not interfere with preparation for the other bar examination.

The ethics bar examination is objective, multiple choice. That format was chosen for several reasons. First, the purpose of the examination is not to separate the A students from the B+ students. The purpose is only to separate the sheep from the goats, the people who really are clueless. Objective examinations serve that purpose quite well.[2]

It was not always so. When I started teaching at the University of Illinois, my law school did not even offer the course, and the Legal Ethics casebooks that existed focused on the intricacies of unauthorized practice. In those days, it was easy for law students to learn the Golden Rule: Thou shalt not lie, cheat, steal, . . . or advertise. In 1974 the dean asked me to teach legal ethics because I was the new boy on the block, and it was assumed that I must know something about the subject since I had just left a position as assistant majority counsel to the Senate Watergate Committee.[3]

Times have changed. The emphasis on legal ethics began as part of what Spiro Agnew referred to as our "post-Watergate morality." Some ridicule this movement as based on a false assumption that more study of ethics will make us more ethical. These people often think that ethics can be taught only at mother's knee.[4]

I recall a story I heard a long time ago. Two third-year law students married each other. A year later, when both had graduated, they took a belated honeymoon in Scotland. There, at a picturesque country inn, the proprietress asked how long they had been married. "It's been a year," they said. "What! A year, and no wee little ones yet?" "Well," they responded, "we had to finish school." "You mean

2. In addition, in essay questions on legal ethics, students may seek to avoid difficult questions by writing, "Well, I would not come close to the line; I would tell the client to hire a different lawyer." It is easier to reject prospective clients on essay examinations than it is in the real world. Also, an objective examination assures at least that there are some questions where the answer is yes or no. Not everything is black or white, but some things are. Unless one knows the rules, one will not know when a problem falls between the cracks.

3. I was Assistant Majority Counsel to the Senate Watergate Committee from 1973 to 1974. Later, I was a Special Consultant to the Office of the Independent Counsel from 1997 to 1999.

4. *See* SPECIAL COMM. ON PROFESSIONALISM, ILL. STATE BAR ASS'N, THE BAR, THE BENCH AND PROFESSIONALISM IN ILLINOIS: PROUD TRADITIONS, TOUGH NEW PROBLEMS, CURRENT CHOICES 8 (1987) ("Heard more than once was the opinion that one cannot teach another to be ethical.").

in America you have to go to school for that too?"

Well, in America, we lawyers also go to school to study ethics. A quarter of a century ago, when I started teaching legal ethics, one of my law school colleagues asked (not in jest), "What do you do? Teach them not to steal?" It's a little more complicated than that. Those who think of ethics as intuition learned at their mothers' knees are often the same people whom courts routinely disqualify because they do not appreciate the complexities of conflicts-of-interest rules.

Attorneys are often their own worst lawyers. They know the law affecting their clients because it is their business to know that. But too frequently they know little about the law affecting themselves, the law governing lawyers. The Administrator of the Illinois Attorney Registration and Disciplinary Commission once told me that a large percentage of lawyers pay their annual mandatory fee to support the Disciplinary Commission with checks drawn on client trust fund accounts. These attorneys apparently are unaware of the commingling rules.[5]

Many lawyers today are also ignorant of recent developments regarding ethics subjects, such as conflicts of interest and attorney disqualification. I have chatted with lawyers who did not appreciate the distinction between a client's "confidences" and her "secrets" and did not realize that they were not supposed to volunteer either.[6] In one particular situation, the lawyer displayed his ignorance at an inopportune and inauspicious time—in the course of his deposition, when he was being sued for malpractice. In another instance—which occurred within the last few months—a lawyer was asked, during her

5. *See generally* Clark v. State Bar, 246 P.2d 1, 4 (1952) ("[C]ommingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors.").

6. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1980) ("'Confidence' refers to information protected by the attorney-client privilege . . . and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.").

The Model Rules do not distinguish between "confidences" and "secrets." Rather, they protect all information "relating to representation of a client" as confidential. The drafters of the Model Rules intended to eliminate any need for the client to specify whether information may be disclosed, and to forbid the lawyer to speculate on whether the information might be embarrassing or detrimental if disclosed. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) cmt. (1998) (Model Code Comparison).

Both the Model Code and the Model Rules provide that even information not protected as an evidentiary privilege must be kept confidential (unless an exception applies, such as a court ordering the lawyer to testify). *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a).

deposition, as to whether she had secured her client's waiver of a conflict. Her response: "I don't even know what a conflict waiver is, if you want to know the truth."[7]

Several years ago, one of my former academic colleagues, who also practiced law, was asked whether she bought malpractice insurance, and whether it was expensive to obtain for a part-time practitioner. She responded that she did not have to buy insurance because her contract with her clients required them to waive any malpractice claims against her. Her listeners nodded knowingly until I mentioned that her standard waiver agreement violated state ethics rules, was not enforceable, and could cause her to lose her license.[8]

One need not rely on anecdotal analysis. The few empirical studies show that lawyers often are unaware of even basic information about the law governing lawyers.[9] While most new entrants to the legal profession must pass a professional responsibility examination, older lawyers, who draw a disproportionate number of malpractice suits,[10] either have never formally studied ethics or have not kept up with the developments in the law. Many of these malpractice suits arise out of violations of professional ethics.[11]

Please reread the preceding two sentences:

While most new entrants to the legal profession must pass a professional responsibility examination, older lawyers, who draw a disproportionate number of malpractice suits, either have never

7. This is an exact quotation from her deposition.

8. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(h) ("A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement.").

Illinois then, and now, has a similar rule derived from the ABA model. *Compare* ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(a) (1987), *with* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-102(A).

9. *See, e.g.*, Special Project, *The Attorney-Client Privilege in Multiple Party Situations*, 8 COLUM. J.L. & SOC. PROBS. 179, 180 (1972) (reporting that its "survey revealed a general lack of awareness among attorneys as to when the attorney-client privilege will apply to inter-attorney exchanges of information").

10. *See* COMMISSION ON PROFESSIONALISM, AMERICAN BAR ASSOCIATION, "... IN THE SPIRIT OF PUBLIC SERVICE": A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 24 n.83 (1986), *reprinted in* 112 F.R.D. 243 n.83 (1987). *See also* Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987).

11. *See, e.g.*, William H. Gates, *The Newest Data on Lawyers' Malpractice Claims*, A.B.A. J., Apr. 1984, at 78, 80 (a significant proportion of malpractice claims arise from violations of professional responsibility, including 9.35% from failure to obtain a client's consent or to inform a client, 4.79% from failure to follow a client's instructions, and 3.39% from conflicts of interest).

formally studied ethics or have not kept up with the developments in the law. Many of these malpractice suits arise out of violations of professional ethics.

Does teaching ethics matter? Have the last twenty-five years made any difference? People still miss a statute of limitations filing deadline, but many malpractice suits now arise out of legal ethics violations. And the people who commit these legal ethics violations are disproportionately older lawyers who have not studied legal ethics in law school.

In recent years, several major, well-respected law firms have settled various malpractice claims based on ethical violations for substantial sums:

New York's Rogers & Wells settled, for $40 million, a case in which it continued to represent a client after it should have known that the client was perpetrating a fraud.[12]

Baltimore's Venable, Baetjer & Howard settled, for $27 million, a lawsuit involving conflicts of interests.[13]

New York's Milberg Weiss settled, for $50 million, a malicious prosecution case brought against a lawyer. The law firm, after losing a jury verdict for $45 million for malicious prosecution, settled by wiring a check for $50 million before the jury could deliberate on punitive damages.[14]

The ramifications of ethical violations are not limited to malpractice or discipline. Courts have imposed other sanctions, such as a loss of fees.[15] That serves to get the lawyer's attention.

Malpractice insurers understand what is happening. Such insurers are imposing risk management on the law firms that they insure by conducting courses on matters such as conflict of interests. The insurers know that many malpractice claims now arise from such

12. *See* Mary A. Galante, *After a $40M Payment, It's Not Over Yet for Rogers & Wells*, NAT'L L.J., Apr. 14, 1986, at 1.

13. *See* Kirk Victor, *Venable Agrees to $27M Accord*, NAT'L L.J., May 25, 1987, at 3.

14. *See* Richard B. Schmitt, *Milberg Weiss Agrees to Pay $50 Million to Settle Lexecon Case*, WALL ST. J., Apr. 14, 1999, at B17; Karen Donovan, *Milberg Weiss' $50M Mistake*, NAT'L L.J., Apr. 26, 1999, at A1.

15. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6 (Proposed Final Draft No. 2, April 6, 1998) ("Judicial Remedies Available to Client and Nonclient for Lawyer Wrongs"); United States v. Strawser, 800 F.2d 704, 708 (7th Cir. 1986), *cert. denied*, 480 U.S. 906 (1987) (where the court ordered the lawyer to disgorge excessive fees under the guidelines found in both the Illinois Code of Professional Responsibility DR 2-106 and Model Code of Professional Responsibility DR 2-106). *Cf. In re* Futuronics Corp., 655 F.2d 463, 468-71 (2d Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) (where the court denied a law firm over one million dollars in fees under the Bankruptcy Code because of a prohibited fee-splitting arrangement and failure to comply with disclosure provisions for joint representation).

topics, and the risks are reduced when the lawyers know the applicable law of ethics.

One accomplished lawyer told me that, about fifteen years ago, when he began working for a well-known malpractice insurer, the head lawyer told him to read, first, the ABA Model Rules, cover-to-cover. He was, at first, surprised: What does this have to do with insuring law firms? After a short time on the job, he learned that a major risk with blue chip law firms is not that they are likely to miss a statute of limitations; it is that they will be involved in a conflict. And for that, one has to know and understand the conflicts rules and how the courts apply and interpret them.

What we call "lawyer's ethics" is law, not a suggestion. Just like Securities Regulation, or Antitrust Law, it can be taught and must be learned. A lawyer who knows Antitrust Law is more likely to keep his client out of trouble than one who has not studied it. Similarly, a lawyer who knows the law governing the practice of law, the Law of Lawyering,[16] is more likely to keep himself out of trouble than the lawyer who has not studied it.

The ethics rules are not merely trendy lip service to our better selves. Most jurisdictions have adopted, as court rules, both the ABA's Model Rules of Professional Conduct and Model Code of Judicial Conduct.[17] These model codes have thus become law in the same way that the Rules of Civil Procedure have become law. These ethics rules, which impose substantive requirements on lawyers and judges, are also just as complex as the rules of civil practice or the rules of evidence. Many of the ethics rules cannot be known through some sort of innate or hereditary awareness automatically infused in ordinary human beings once they are admitted to the bar. Nor can they be learned at mother's knee. Unless a lawyer is risk-prone, he or she will need to understand the Law of Legal Ethics.

The complexities of this subject has led to the publication of several important books on this subject, all created to offer lawyers and judges an analysis of, and an initiation to, this complex topic.[18] In

16. *See* GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1990).

17. Few of us are, or will become, judges, but many of the issues that concern judges also concern the lawyers who practice before them, such as when a judge must disqualify herself; when a judge may be disciplined; and when judges may receive gifts or loans. Lawyers, after all, cannot give to the judge that which the judge may not receive. In addition, a lawyer cannot know when to move to disqualify a judge if she does not know when the judicial rules provide that the judge should be disqualified.

18. Useful sources include: ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 1999); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT

addition, the American Law Institute has recently completed its massive project on this subject—*Restatement (Third) of the Law Governing Lawyers*.[19]

The ABA has proposed Model Rules for lawyers and for judges, and almost all jurisdictions base their ethics rules on these ABA products. Even when a jurisdiction, such as California, uses a different format, the substantive rules reflect the substantial ABA influence. But the source of legal ethics requirements is not limited to these rules. They are much more numerous, which makes legal research more difficult for the uninitiated. Many jurisdictions supplement the ABA rules that they adopt with their own rules dealing with special subjects, such as family law, or contingency fees, or sanctions for frivolous motions.[20] There is also the case law, the commentators, and advisory ethics opinions of various bar associations as well as the opinions of the ABA Ethics Committee, which have become particularly influential. Those lawyers unfamiliar with legal ethics find it difficult to access these numerous and diverse sources.

And so, there has grown up a substantial, relatively, new area of expertise, lawyers representing lawyers. It has been said that eighteenth century England was a nation of shopkeepers: The people became prosperous simply by everybody selling retail goods to each other. Perhaps some day we won't need any clients; we'll just sue each other.

Part of the legacy of Watergate has been this creation of a new legal speciality: the speciality of legal ethics. The old bon mot that one should be careful for what one wishes, because it may become true, applies to this legacy. The ABA successfully required law schools to teach legal ethics. And, one of the results has been the

(looseleaf, multivolume, periodically updated); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS (1986); GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1990). On judicial ethics, see JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS (1995); RICHARD H. UNDERWOOD & WILLIAM H. FORTUNE, TRIAL ETHICS (1988). On the tort of legal malpractice, see RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (4th ed. 1996).

The ABA and the West Group, a division of Thompson Publishing International, will publish, later this year, my book on the subject, covering both legal ethics and judicial ethics, RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY (forthcoming).

19. While this Restatement is titled, "Restatement (Third)," there was no "Restatement (First)," or "Restatement (Second)," resulting in confusion for all but the cognoscenti.

20. Rule 11 of the Federal Rules of Civil Procedure deals with sanctions for frivolous motions. Many states have similar rules. *See, e.g.*, 22 N.Y.C.R.R. Pt. 130.

lawyers and law professors, when they turned to the legal rules, discovered that they did not often like what they saw. What followed from that relevation has been a series of law suits successfully challenging ethics rules and invalidating them on constitutional or statutory grounds. For example, antitrust laws served to invalidate the ethics rules that mandated minimum fees.[21] And the First Amendment has served to invalidate a host of other restrictions, ranging from advertising to direct mail.[22]

Thus, the development of legal ethics as a special body of law has become part of the legacy of Watergate.

21. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 793 (1975).

22. *See generally* Bates v. State Bar of Ariz., 433 U.S. 350 (1977) (advertising); Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988) (direct mail advertising). *See* Ronald D. Rotunda, *Reporting Sensational Trials: Free Press, a Responsible Press, and Cameras in the Courts*, 3 COMM. L. & POL'Y 295 (No. 2, Spring 1998); Ronald D. Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of* Florida Bar v. Went For It, Inc., 49 ARK. L. REV. 703 (1997).

# "Conceptions of Legality"

*transcribed remarks of*
WILLIAM H. SIMON*

One difficulty in assessing the influence and impact of Watergate arises from the ambiguity of the legal and ethical stakes in that episode. The lesson that we took from Watergate was that lawyers owe respect for law. But there are many different conceptions of respect for law. In particular, in American culture, there are two quite different ones that often compete with each other.

In the first conception, law is seen in relatively categorical and authoritarian terms. Law is identified with explicit rules formally promulgated by the state. Compliance seems to be largely a matter of relatively mechanical decision-making. Stopping at the traffic light if it's red and not driving over sixty-five exemplify this conception of law.

But there is another conception which sees law as an expression of basic values that are only partially codified in the enactments of the State. In this conception, compliance calls for more complex and contextual judgment. Norms like due process, reasonable care, and privacy exemplify this conception of law.

Often these two conceptions are complementary, but sometimes they are in conflict, and some of the most interesting debates about legal ethics arise from situations when they conflict. For example, consider the series of legal ethics dilemmas, the classic ones that arise from situations when pursuing the client's interests conflicts with some value that is fundamental but not fully codified in a formally enacted rule. Examples of this include cross-examining the truthful witness, and non-disclosure of a material fact when there is no specific rule that requires disclosure of the fact.

Now, these dilemmas acquire their resonance from the fact that we have a feeling that there are important, legally relevant values at stake that are not codified in formally enacted rules. The conflict between the relatively mechanical conception of law, legal obligation, and ethics and the relatively complex and contextual conception also

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plays out in a variety of issues about compliance with law. The mechanical conception tends to support a notion of a categorical duty to comply with at least the literal terms of all laws—rules that satisfy some test of formal enactment. The more complex, contextual view suggests that there may be some situations in which the literal terms of a formal enactment are outweighed by some less formal but more fundamental value.

So, we have, for example, quite prominent in our culture the idea of virtuous non-compliance with formally enacted legal rules. There are many episodes of virtuous non-compliance in American history—think of the Underground Railroad or the Birmingham Civil Rights March. And then on a more mundane level, the contextual view seems more compatible with the everyday lawlessness of people whom we usually think of as generally law-abiding. When I drove in today, I went seventy miles an hour, which was a violation of the law. I'm guessing the majority of you violated the law as you came in today. This may regrettable in many respects, but most of us do not regard it as a serious affront to the rule of law in general. That is because in the more contextual view, legal obligation is not a binary, either/or decision. Legal duties have a spectrum of relative weights, relative importance, and relative unimportance, and we can distinguish between those that involve very substantial stakes and relatively unsubstantial stakes.

In Watergate, there was no occasion to consider the conflict between the mechanical and the contextual conceptions of law, legal obligation, and ethics. That is, the conduct involved in Watergate was inarguably, as John Dean said a little while ago, a violation of the literal terms of criminal statutes.[1] It was also, as I think he also said, an affront to less formal and fundamental values of privacy and democracy.

However, in the post-Watergate elaboration of legal ethics, I think that the relatively mechanical conception of legality has received disproportionate emphasis. The way we now tend to teach our students legal ethics in the courses that have been mandated in the wake of Watergate tends to emphasize relatively mechanical, unreflective rule-following at the expense of relatively complex contextual judgment. Think of the Model Rules, for example, that the ABA promulgated in the aftermath of Watergate and that are now the doctrinal core of all legal ethics courses or at least most of them. The Model Rules were explicitly drafted for the purpose of creating black letter rules (that is the term that the drafters used) that obviate complex judgment. The predecessor code of the ABA

1. *See* John W. Dean, III, *Watergate: What Was It?*, 51 HASTINGS L.J. 609, 619 (2000).

actually had a series of norms that were designed to inspire complex judgment—the so-called "ethical considerations"—aspirational norms that were eliminated in the Model Rules precisely to reduce legal ethics to a matter of black letter rule following. And then consider the Multistate Professional Responsibility Exam that Ron Rotunda mentioned. The multistate exam, of course, is the main test of ethical understanding of new entrants to the bar in most states. Until this year it consisted entirely of multiple choice, machine-graded questions and answers. When you are taking a bar review course designed to prepare you to take this test, the instructors will often tell you quite explicitly "Don't think too much when you're answering these questions. What is being tested is not your ability to think but your ability to regurgitate a series of rote answers."

Now, I think it is interesting to speculate whether the Clinton impeachment scandal will cause any change in our orientation toward legal ethics and in particular toward these two conceptions of legality. It may cause us to wonder whether we have emphasized the mechanical conception too much at the expense of the contextual conception. Part of this depends on your views of some of the merits of the Clinton impeachment scandal. One widely held though controversial view of the Clinton impeachment scandal implies that the two conceptions were in conflict there. In this view, the President clearly did violate the literal terms of a relevant formally enacted rule. On the other hand, other more fundamental but less formal values of democracy and privacy were jeopardized, not so much by the conduct of the President, as by the conduct of his prosecutor. Now, the President's lawyers certainly compounded, in the view that I am describing, the damage and the danger that was done by defending his conduct, not in terms of principled appeals to privacy and democracy, but in terms of legalistic nitpicking. But if you accept this interpretation of the Clinton impeachment scandal, and I want to acknowledge that it is controversial, then you will be inclined to entertain the possibility that part of the problem may have been twenty-five years of ethics education that encouraged lawyers and law students to think of ethical obligation in terms of relatively unreflective compliance with formal rules. This type of education has de-emphasized, sometimes quite consciously and deliberately, duties of complex judgment and notions of obligation to fundamental but informal values.

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