

1-2000

## Transcription of Legal Ethics Panel Q & (and) A Period

UC Hastings College of the Law

Follow this and additional works at: [https://repository.uchastings.edu/hastings\\_law\\_journal](https://repository.uchastings.edu/hastings_law_journal)



Part of the [Law Commons](#)

---

### Recommended Citation

UC Hastings College of the Law, *Transcription of Legal Ethics Panel Q & (and) A Period*, 51 HASTINGS L.J. 683 (2000).

Available at: [https://repository.uchastings.edu/hastings\\_law\\_journal/vol51/iss4/5](https://repository.uchastings.edu/hastings_law_journal/vol51/iss4/5)

This Comment is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.

## Transcription of Legal Ethics Panel Q & A Period

**Richard Zitrin:** We'll take some comments in a minute. I just wanted to make a couple of comments of my own.

Has teaching ethics in law school made a difference? I think the answer is yes and no. I think the image of lawyers is worse today than it was at the time of Watergate, at least among the public. When Watergate happened, the public saw that as a bunch of politicians committing crimes more than a bunch of lawyers committing crimes. And although we as lawyers and law students saw them as lawyers, and John Dean stared at that list of lawyers, we saw people who were acting in their political roles—Erichman, Haldeman, and even the President, who was acting not as a lawyer but as the President. Today I think that the Whitewater scandal and the Lewinsky scandal have more to do with lawyers. And we have the famous expression about knowing what “is” is. That’s a legal technicality. The public doesn’t like that.

I do a lot of speaking in various venues, as do these folks, on legal ethics. I remember I was down in Los Angeles not long ago. And I had to get from the airport to down town, and I got in the cab. And the cabby was one of these loquacious guys, and he’s asking me a lot of questions. And he said, “what do you do?” And I said, “I’m a lawyer.” And he said, “where are you going?” And I said, “I’m going to give a talk.” And he said, “what is the talk about?” and I said well, “it’s about the law.” And he said, “well, what about the law exactly?” And I’m trying not to say it, and I said, “well actually, I’m going to give a talk on legal ethics.” And he pauses for a beat or two and says “. . . short talk, huh?”

So, I’m really worried about the image of lawyers today. I don’t have any statistics about whether it’s the old lawyers who didn’t take the MPRE that Ron was talking about, like me, who are getting sued more than the young ones, but I consult with them. Since I am a private practitioner most of my practice is consulting on legal ethics issues, and that means a lot of legal malpractice cases, and I’ve seen probably about a thousand or more during the course of my consultations and think most of those lawyers are young ones. I don’t see that the MPRE has diminished the filing of malpractice suits or substantially increased ethical behavior.

I think that Mr. Dean made a point that is telling to me, and Kathleen commented on this as well. Mr. Dean went and he read the criminal statute and said that that made a big difference to him when he saw the black letter law. That gives me new respect for the idea that simply learning the black letter law and taking a short answer MPRE examination can make some kind of difference. But I have to agree with Kathleen, that when it comes down to the actual practice of law--and I get calls all the time from lawyers who want to know what's ethical and what's not ethical--I never have multiple choice answers for them. It's not that easy.

Where are we going with this? I think that teaching ethics has provided opportunity for innovative scholarship. But too often the results of the opportunity have not made that much difference, and students at too many schools, perhaps even the majority of law schools in this country, see their ethics courses as necessary, but boring, requirements that one suffers through in order to get a degree. That's the reality, and we have to change that reality because if that's the reality, what we're teaching is not enough. It may be something but it's not enough. Teaching ten percent more than we did before Watergate, or fifteen or twenty percent more than we did before Watergate, simply isn't enough. But it doesn't have to be that way.

I think some solutions have been suggested by all three of the panelists. Let me just suggest a couple. Learning what the rules of ethics say is not going to teach you what they mean. Teaching what the rules say is not teaching ethics; it's just teaching what a bunch of rules say on a piece of paper. We have to teach the concepts behind the rules. We have to teach them in context, as both Bill Simon and Kathleen Clark said. We have to make the teaching accessible so that the students are enjoying what they're learning, so that they want to sit down and engage in a discussion about the issues. We have to have a dialogue, as professors, with the students so that it's not a front of the room kind of thing where I'm telling you how to be ethical. That's what your parents do--not what I'm going to do. So we have to have a dialogue.

We have to make it practical, as Kathleen pointed out, and the more practice-based we can make it the better people can learn legal ethics. In the last month a bunch of Silicon Valley and San Francisco firms have raised their starting salaries to one hundred and fifty thousand dollars or more. A lot of those firms have lock step bonus increases that go up to as high as 2400 hours so that if you hit the magic 2400 hour button you get one hundred fifty or even as much as one hundred sixty thousand dollars. In order for me and a law student who is about to go into one of those firms to have a dialogue about how that student can bill 2400 hours and avoid being unethical,

we have to sit down and talk. We can't take a multiple-choice exam. We can't look at a rule, because the rule is going to say you can't double-bill your clients. You can't cheat. You can't lie. But that doesn't solve the reality of a partner coming to your door at five o'clock on a Friday night, throwing a bunch of papers on your desk when you're already exhausted and saying "here." And you're thinking to yourself: "Gee, I'm already one hundred hours behind the proportional rate to hit the 2400 hour bonus." It just doesn't work that way. We have to put teaching ethics in context.

Finally, we have to teach students to look at the link between legal ethics as a discipline they learn and law school. And this goes back to something that Bill Simon said, and their own moral code, and how the two of them can fit together in a cohesive whole so that we can have ethical and moral lawyers who combine to present a better kind of lawyer to the American public. I think only if we do those things can we really turn the image of lawyers around.

If there are comments, questions raise your hand and make them and I will repeat them for the benefit of the tape and the panelists

**Zitrin (rephrasing comment):** I'll try to summarize, I may not do justice to it. His first comment was that the MPRE is such that if you don't meet it on time you just have to re-take the MPRE. And his second point is that, in his view, the most worthwhile ethics educational programs are faith-based programs that, I believe you said, use no textbook more recent than two thousand years old.

**Ron Rotunda:** Maybe just a few comments here. We talk a lot about empirical assumptions in a lot of the comments of the panel. I'll just take a minute on this. For a brief word from my sponsor, you'll find more of this in a book that the ABA and West Publishing will co-publish. It will be out this May or June. It's called *Legal Ethics*. It's a treatise for lawyers, and it's by me.

Just a couple things. Teaching from Deuteronomy, which I would prefer over Leviticus, which is a little too tough for my taste. The fact is, I have been teaching ethics for a quarter century. I've talked to a lot of professors about the way they teach legal ethics, and I know of none that teaches by rote rule. It's not the way I teach it. I know that the Model Code had ethical considerations. You don't find something labeled ethical considerations in the Model Rules. There is something called comments, and they use words like should and preferably. In fact some of the black letter rules use words like should and preferably. I think you find a lot of aspiration in the Model Code, the Model Rules, and particularly the way it's presented in any of the casebooks, not just mine.

We do use objective questions in the professional responsibility exam. I think part of that is just the fact of numbers. You're talking about 30,000 people taking that every year. And we find that in

essays people say things like: "Well, I'm not sure, but I would not do that. I would tell the client that I don't want your business." It's a lot easier to resign employment in an essay exam than it is in real life.

I certainly can't make people ethical. If they want to steal, I can't stop them. If they want to engage in a conflict of interest, I can't stop them. But, I can make sure they have scienter. I can make sure that if they are going to do something bad, they will know it is bad, and it won't be because of ignorance.

As for the image of lawyers, it has varied over time. There is a recent ABA study showing that it was about the worst at about the time of Watergate. It has gotten better since we have had advertising, which is, by the way, contrary to what lawyers say that don't want to advertise.

Most people's image of lawyers comes not from advertising and not from newspapers but from television shows. The general public was asked in this ABA study that came out a couple of months ago, who were the lawyers they respected most. Matlock, a fictional character, was respected much more than Hillary Rodham Clinton. A lot of people did not realize that Matlock does not exist. If we want to improve the image of lawyers, let's have more *Matlock* TV shows and less *The Practice*.

**Bill Simon:** Let me just agree with the speaker's point about faith-based education providing some of the most interesting, thicker discussions of professional responsibility. I've given a variety of talks at law schools around the country, and some of the most interesting discussions have been at the religious law schools. It's clear that the reason for that is that the people at those schools have both a rhetorical and philosophical tradition to draw on to supplement the rules, and that makes for a much thicker form of discussion. Now, I would prefer a secular rhetorical infrastructure based on norms of justice, but the current level of doctrine I don't think helps us get there. So I think it is completely understandable that people have drawn on their religious training.

As a counter example to Ron, I may be exaggerating the extent to which the current doctrine is mechanical black letter and not aspirational, but let me give you what I regard as telling example. The current rule of confidentiality in the Model Rules is a black letter rule that is designed to restrict discretion to make disclosures without consent as much as possible and is so rigid that it results in a duty of non-disclosure in situations where probably almost all lawyers and probably all lay people regard that justice would require it. For example, if an innocent person is about to be executed and you have information from the client that would exonerate and the client doesn't allow you to reveal, the rule prohibits you.

**Rotunda:** I don't think so, but we can debate that later. In fact

that is incorrect.

**Simon:** Well, many people believe the rule would prohibit, and certainly there is a strong argument based on the literal language of the rule that you are prohibited in that situation. When the ALI was debating what the confidentiality rule for the restatement of the law governing lawyers was going to be, it was suggested that they create an explicit exception for this situation when an innocent life was at stake and could be saved by a disclosure, and this exception was voted down precisely on the theory that this was a slippery slope that would deprive the confidentiality rule of its mechanical black letter quality.

**Rotunda:** There was another vote later on, by the way, and what happened is the ALI took out the example referring to the case called *McUmbert*, and I don't think approved it. There is an example under 1.6 for evidence, or revealing in order to save somebody's life. I don't know why it wouldn't cover the innocent third party.

**Zitrin:** The interesting thing though is that in California, where we are at the moment, there is under Business and Profession Code 6068 an absolute bar on revealing anything that goes well beyond . . .

**Rotunda:** California is way off.

**Zitrin:** You risked yourself by traveling out here from the Midwest. So here we are. And in fact, in California—which has one-sixth of the nation's lawyers—there is a rule which says that you cannot reveal anything. And there is an Evidence Code privilege exception that says that, however, when it gets to testifying in court that back then when you didn't reveal anything about your client about to go and kill somebody, you can now, when having to testify in court, obviate the privilege and testify. The two code sections are inherently inconsistent, and yet they exist in black letter law. Although I think there is enormous value to black letter law, clearly I think if you want to talk about an example that doesn't work and you take the California confidentiality rule, Bill's point is very strong.

And I know, when I was chair of the State Bar ethics committee, we debated—a debate which I lost—whether we could revise that rule. And the slippery slope argument was what was used. And so we have this mechanical absolute rule that says that at every peril to your self you may not reveal the confidence and secrets of your client. And the argument that is given to me is that no lawyer is going to follow that if the client is about to go kill somebody. Well I'm worried someone might, and it's a problem.

**Simon:** Can I say a sentence about 1.6. The ABA rule, not the California rule, permits disclosure to save an innocent life from an illegal act of the client, but if, in the hypothetical I'm talking about, the information from the client is not about something the client is going to do but is information that will clear somebody, that will

prevent somebody from being wrongfully put to death by somebody other than the client.

**Kathleen Clark:** I just wanted to add to your comment another datum of information. Thinking about your comment about faith-based ethics educators, another bit of supporting information is this: When I think about law schools in general and legal ethics, I think in most law schools, in many law schools, they give lip service to the importance of training ethical lawyers, but in fact there is little institutional commitment to it. Several of the key exceptions, when I think nationally, are the faith-based or religious schools. I think your comment is worth exploring a little bit more about whether it is the holistic connection, not necessarily doctrinal religion, but the spiritual component to the training. For whatever reason I think there is something that needs to be more pondered and thought of along the lines that you've raised.

**Zitrin (rephrasing question):** The question is: whether the panelists have any comment on legal ethics whistleblowing, particularly in light of the problem confronted by the whistleblower Mr. Dean described by quoting Whitaker Chambers earlier this morning?

**Rotunda:** The ABA is revising the Model Rules. I think Alex Toelfer in his book *Future Shock* said that one of things that the future brings is not only change but an increased rate of change. And that's happened with ethics rules. The original canons lasted, what, 1906 – 1969? The code from '69 to '83? There have been substantial revisions in the '83 code, and they have the so-called commission 2000 which won't get its work done until about 2001, 2002. And that's one of things they're doing; they are trying to make the ethics rules consistent with other law like Tarasoff. And there's been a big push by a lot of lawyers to open up the whistleblowing and there are others who would like to just keep their mouth shut. They would like to be able to say: "Don't blame me. I'm just taking the money, and I don't want to have to whistleblow." But that's been a big debate that's going on in the commission for the last year and a half. And we'll probably know by about 2002 how that's resolved when they come up with their product.

**Clark:** If I can add to this question of what kind of reforms are necessary. On the one hand, I think that the Model Rule with its strict confidentiality, in fact, is not the rule in most states that have adopted the Model Rules. Most states have had more sense or temperance than the ABA house delegates did in adopting the house rule. Nonetheless, it still is probably worthwhile and will be looked at again what the black letter rule is in freeing up or making whistleblowing more of an option.

But the other thing that I would throw out here is that we need

to look at not just the rule but mechanisms within organizations that can help whistleblowers or can help people who might ultimately become whistleblowers, who have information about wrongdoing within the organization. And I think that in addition to looking at the black letter rule, it makes sense for us to pay some attention to mechanisms like ombudspople who are the sounding boards within an office or within an organization or within a firm or within a corporation. So that the firm can actually get feedback without people fearing coming forward with information. It seems to me that we need to look both at the doctrinal issue you raise and the question of mechanism.

**Zitrin:** Let me just make a brief comment about whistleblowing for people who are in-house counsel. Because my understanding is, the last time we looked at this was for the publication of our trade book which was published last year, only New Jersey allowed lawyers to have protection under its whistleblowing statute. These are the judicial decisions of states. So that if an in-house counsel blows the whistle about wrongdoing within a company that in-house counsel can be fired and is not able to use any confidential information, in the traditional sense of what is confidential, in order to defend himself or herself or in order to prosecute a lawsuit for wrongful termination because he or she whistleblew. That's a very difficult issue because it brings the two issues directly in conflict that were mentioned earlier today—the good of society and the need of society and the protection of the client. And there is not really an answer for that yet in the offing, and courts have taken the lead in deciding that, yes, you can whistleblow but then you can't use any confidential information when the axe falls after you do.

**Rotunda:** Actually, Minnesota and New York give protection to the lawyer. Illinois, in this very sad respect, is similar to California in not providing much protection at all. But the majority of states that have ruled on it protect the lawyer in a wrongful termination suit, but Illinois does not, I think California does not, and most states have not ruled on it. It is particularly difficult when you're in-house counsel because you are not talking about getting rid of your client you are talking about getting rid of your pension.

**Zitrin (rephrasing question):** The question is for Professor Rotunda about malpractice and the age of the lawyer and also issues of malpractice in other professions and malpractice and geography whether there is any correlation with other professions or geography?

**Rotunda:** First, geography is easy. There is the ALIS, attorney liability insurance society, one of the big malpractice insurance providers for lawyers. There are some things they won't touch. It's really expensive to get malpractice securities insurance in New York. In New York City they sue each other at the drop of a hat. And

you'll find in the small towns in Idaho that there are a lot fewer suits. Maybe it's not worth it, or maybe lawyers have more of a Marcus Welby personality. In the big cities where people are more anonymous it's easier to sue each other.

I have not done comparative research with other disciplines. I do know that lots of disciplines talk about ethics but they are really talking about internal rules that do not have the force of law, unlike the lawyers' rules which are the rules of court and law just as much as the rules of evidence or the rules of civil procedure. I remember giving a speech once with a bunch of engineers. And, in fact, on the wall was a framed copy of the code of ethics for engineers—things like thou shalt not steal another engineer's clients. And for many professions what they call ethics we would call antitrust violations. But other than that I really don't know much about the comparative work with other disciplines.

We do know that accountants are pretty battle-scarred now, that suing accountants for malpractice is nothing, people sue all the time. It used to be that you never sued lawyers. Lots more suits now. I don't think it's because lawyers were ethical in the 1950s and now they are unethical, I think there is a lot of weariness and other things.

**Zitrin (rephrasing question):** O.K. the question is: he is referring to Mr. Dean talking about the emotional feeling that he had that he was doing something wrong and the countervailing feeling that he could get in a lot of trouble if he didn't do what he was asked to do and the fact that he had a boss, Richard Nixon, who was not going to be very easily assuaged, and how do you replicate that in the class room?

Let me just take a stab at it. I think you can't do it entirely, and I can't do a very good Nixon impersonation. But I can imitate a partner at a law firm that's expecting you to bill 2400 hours and doesn't care how you get it done. I think if you role play with students I think you can successfully get them out of saying, "well I would do this" or "I would do that" into "ok, tell me what you would do." You just got off a plane. You're in California. I'm sitting in the Western White House. You're coming in here. Talk to me. And basically, put students in the position that they will actually be in, either that Mr. Dean was in or more likely that you would be in your law firm.

And I agree with Kathleen that the best way to do it is have clinical programs. I would require that every law student take a clinical program. I would require that every law student take a course in client relations, and I would require every law student to take a course in interviewing and investigating. My own view is that we are emphasizing the wrong things in our law schools or, at least, some of the wrong things to the denigration of others. And if we put those in

the larger context of those kinds of empathic interactive courses then that would go a long way to solving some of the problems.

**Clark:** If I could add. I think you did a fabulous job of making explicit, explaining why it is so difficult to teach, not the law of lawyering, that's not that different than teaching antitrust law, in fact, there are some connections there, as Professor Rotunda pointed out, but why it is so difficult to teach that other aspect of the ethical, not legal, but ethical or moral aspect and, frankly, the interpersonal aspect.

Let me throw out a couple of responses. One, in my experience it's just about impossible to do in a large lecture hall type of classroom, even with Socratic method. I've done it in classes large and small and it's really impossible if the students are conscripts, if they're there because it's required, and it's probably the only required course in the upper class curriculum. It's a disaster for the student and, in my experience, for the teacher. So, giving students some choice, putting it in context, having smaller classes so that you can do effectively the kinds of role plays that Richard talked about I think are absolutely vital.

And then the other thing I'd mentioned here is one thing I have found to be more effective, rather than less effective, is using non-traditional materials, that is certainly not appellate cases because appellate courts are not very articulate about these emotional interpersonal issues, that I think are absolutely key, and instead using video clips using excerpts from novels. Probably now I will start using excerpts from *Blind Ambition*. That kind of thing can be effective in making sure students learn to recognize these issues in context because that's when they arise, in practice, not between three and four on Wednesday when you take the class. Learning to spot the issue and then learning the skills to know how to deal with it are the key things, which is again coming back to my hobby horse of context, of doing it in context and integrating it into other substantive classes.

**Rotunda:** One brief comment. I agree with the two speakers. I don't think you can recreate it in the class in any realistic sense. Take what John Dean did in retrospect. He's a whistleblower that we respect. He did something courageous. He told the truth and so on. I don't think any of us, except John Dean himself, can fully appreciate the tension of the time. Because at the time he does it, he doesn't know how it's going to come out. And if you read some of the cases, and over the years I've occasionally represented whistleblowers, it often doesn't come out. The whistleblower takes the stand. There is a lot of pressure put on the whistleblower. There are lawsuits. There are threats of trial. There may be trial, ambiguous jury verdicts. This thing goes on for years. It gets expensive. And then they all settle. And that when you decide to take this step you don't know if you are

going to be successful, and that makes it even more difficult.

And, in fact, Richard Nixon almost succeeded, and had he succeeded we would have found a different world. We would have found that somebody like L. Patrick Gray would have been on the Second Circuit. That was where he was headed, instead of the fired FBI director. He was the one left to twist slowly, slowly in the wind. I don't think you can do it realistically in the class room, only in real life, and in real life you don't know if you're going to be successful, and that makes it a lot harder.

The whistleblower in Illinois who was the in-house corporate counsel. He discovers that the company was shipping out kidney dialysis machines that were illegal, that don't function, and that people will die. He tells the company and they refuse to do anything about it. He then discloses, and they fire him. He sues for wrongful termination. The appellate court agrees with him. The Illinois Supreme Court rejects it, and he's now lost his job and has got no cause of action. He did something that was really great, and he paid for it, and most people don't even know his name.