# TEACHING LAWYERS ETHICS

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## INTRODUCTION

While there is ever-growing academic and professional literature concerning how legal ethics is taught, it focuses almost entirely on teaching in law school,[1] and it essentially ignores how practicing lawyers are taught the subject.[2] That is unfortunate because effective instruction in legal ethics is no less valuable for practitioners than for students. Law schools are only a brief, early stage in what the MacCrate Report identifies as lawyers' "educational continuum."[3] Law schools cannot endow their students with all the skill and understanding needed to practice law competently in the succeeding years. Nor can even the best law school courses and curricula do a complete job of

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1. *See, e.g.*, Roger C. Cramton, *Teaching Legal Ethics: A Symposium—Introduction*, 41 J. LEGAL EDUC. 1, 1 (1991); Steven H. Hobbs, *Symposium Introduction: Sharing Stories About Our Commitment to Teaching Ethics*, 26 J. LEGAL PROF. 101, 105 (2002); Thomas G. Krattenmaker, *Introduction to the Keck Forum on the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 1, 4 (1997); Thomas B. Metzloff & David B. Wilkins, *Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 1, 1 (1995); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 312, 315 (1998); *see also* Marjorie L. Girth, *Facing Ethical Issues With Law Students in an Adversary Context*, 21 GA. ST. U. L. REV. 593, 595 (2005) (surveying approaches to teaching legal ethics).

2. For a critical appraisal of Continuing Legal Education (CLE) programs in legal ethics, see Ernest G. Mayo, *Speaking Out: A Forum for Members to Express Their Personal Viewpoints on Issues of Interest: Hollow Legal Ethics Education*, 49 R.I. B.J. 11 (2001). Mayo observes that:

> Many jurisdictions attempt to insure, or at least foster, ethical professional behavior through mandatory continuing legal education. Yet, the ethics education offered by bar associations and private providers of educational seminars is little more than instruction in office procedure and client relations calculated to protect the attorney from liability. While it is undeniably useful and prudent to protect one's practice from assault, it is a misnomer to label such as ethics education.

*Id*. at 11; *see also* Leslie C. Levin, *The Ethical World of Sole And Small Law Firm Practioners*, 41 HOUS. L. REV. 309, 332–33, 369 (2004); *infra* note 22 and accompanying text.

3. AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 334 (1992).

ensuring that students have the capacity to practice ethically as lawyers,[4] especially given the changes in the profession and in professional expectations likely to occur over the course of lawyers' professional lives. It is therefore important to consider how practicing lawyers are taught ethics, whether informally in the course of their practice or through formal programs. This essay focuses on the latter.[5]

Drawing on personal experience, this essay begins with some initial observations about the differences in teaching students and practitioners. It then discusses the use of the problem method to promote conversation among lawyers attending mandatory Continuing Legal Education (CLE) programs in legal ethics, offers an illustration of such a dialogue, and uses the dialogue as a point of departure for some further reflections.

## I. TEACHING LEGAL ETHICS—STUDENTS VS. PRACTITIONERS

The literature on teaching legal ethics includes a healthy debate about precisely what law schools should be trying to achieve—e.g., whether the principal goal is to develop students' familiarity with a body of knowledge about the law and legal processes relating to lawyer regulation, to develop their ability to recognize and resolve ethical dilemmas when they arise, or to

4. Few, if any, law schools provide such ideal training, in any event. On the contrary, there is substantial room for criticism of the inadequate resources and attention that most law schools devote to legal ethics. *See, e.g.*, Robert Granfield & Thomas Koenig, *"It's Hard to Be a Human Being and a Lawyer": Young Attorneys and the Confrontation With Ethical Ambiguity in Legal Practice*, 105 W. VA. L. REV. 495, 508–12, 521 (2003) (describing academic critiques of, and empirical study documenting, perceived inadequacy of law school instruction in legal ethics, and criticizing failure of traditional courses to explore "broader questions regarding morality, power, social context, team loyalty, or community responsibilities"); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 720 (1998) (maintaining that "[d]espite lip service given to the importance of legal ethics, most law schools (with a few notable exceptions) fail to give legal ethics the same respect and attention given to most other courses, let alone a central role in the curriculum").

5. For purposes of this essay, I would distinguish between legal ethics, on one hand, and professionalism, on the other. Some CLE requirements make a similar distinction. For example, Louisiana lawyers require instruction in both. *See* Elizabeth A. Alston, *Fundamentalism in the Legal Education Curriculum*, 26 J. LEGAL PROF. 123, 126 (2002) (noting that Louisiana's "professionalism continuing legal education (CLE) requirement is distinct from, and in addition to, the legal ethics CLE requirement"); Pascal F. Calogero, Jr., *Supreme Court Order: MCLE Requirement in Professionalism*, 45 LA. B.J. 25 (1997) (setting forth Louisiana's Mandatory Continuing Legal Education professionalism requirement); Frank X. Neuner, Jr., *Mandatory Professionalism: A Cure for an Infectious Disease*, 45 LA. B.J. 18, 19–20 (1997) (describing and justifying separate requirement prior to its adoption). For criticisms of instruction in professionalism, see, for example, Jordan W. Lorence et al., *No Official High or Petty: The Unnecessary, Unwise, and Unconstitutional Trend of Prescribing Viewpoint Orthodoxy in Mandatory Continuing Legal Education*, 44 S. TEX. L. REV. 263, 275 (2003); Deborah L. Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 462–63 (2001).

influence their commitment to ethical and professional norms.[6] Regardless of one's objectives, the conventional wisdom is that it is hard to teach legal ethics effectively, especially in the ordinary classroom setting[7] as distinguished from the clinical or seminar setting.[8] The challenges include students' natural

6. *See, e.g.*, Colin Croft, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberative Moral Community*, 67 N.Y.U. L. REV. 1256, 1341 (1992) (maintaining that a legal ethics course should "impart three overriding skills: (1) an ability to recognize the ethical considerations generated in various legal practice scenarios; (2) an ability to analyze such scenarios within a conceptual framework of ethical, jurisprudential, as well as legal, considerations; and (3) a 'capacity for and willingness to engage in reflective judgment'"); Jonathan M. Freiman, *Steps Toward a Pedagogy of Improvisation in Legal Ethics*, 31 J. MARSHALL L. REV. 1279, 1295–96 (1998) (arguing that legal ethics should be taught in small classes in a method designed to develop students' commitment to professional norms and to develop their moral judgment); Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 362–65 (1998) (describing the MacCrate Report's conception that legal ethics includes a body of knowledge, the skill of recognizing and resolving ethical dilemmas, and the fundamental values of the legal profession); Alan M. Lerner, *Using Our Brains: What Cognitive Science and Social Psychology Teach Us About Teaching Law Students to Make Ethical, Professionally Responsible, Choices*, 23 QUINNIPIAC L. REV. 643, 655 (2004) (arguing that students should be trained to act ethically and responsibly, and that teaching them ethics rules and training them in legal analysis will not necessarily influence their conduct); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409, 409 (1998) (maintaining that students should be taught "the law governing their professional practice," should be taught to "think more clearly about ethical decisions," and should be sensitized "to broader issues of law and justice"); E. Michelle Rabouin, *Walking the Talk: Transforming Law Students Into Ethical Transactional Lawyers*, 9 DEPAUL BUS. L.J. 1, 3–8 (1996) (maintaining that law schools should train future practitioners to practice more ethically, that "traditional legal ethics courses do not foster moral or ethical development in law students," and that "[p]roducing ethical practitioners requires *pervasive* ethical training").

7. Green, *supra* note 6, at 357–59 ("The subtext, if not the text, of virtually all the writings on professional responsibility pedagogy argues that it is difficult to teach the basic material in a manner that is cost-effective and that achieves a reasonable level of student satisfaction."); Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 459 (1998) (observing that the "conversation about how to solve the terrible problems in the teaching of professional responsibility is an old and rich dialogue"); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 53–58 (1995); William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 65–66 (1991) (criticizing predominant methods of teaching legal ethics).

8. On the advantages and benefits of teaching legal ethics in the law school clinic, see, for example, Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684, 692–95 (1996); Neil Gold, *Legal Education, Law and Justice: The Clinical Experience*, 44 SASK. L. REV. 97, 109 (1979). *See also* Angela McCaffrey, *Hamline University School of Law Clinics: Teaching Students to Become Ethical and Competent Lawyers for Twenty-Five Years*, 24 HAMLINE J. PUB. L. & POL'Y 1, 1, 28–33 (2002); Thomas L. Shaffer, *On Teaching Legal Ethics in the Law Office*, 71 NOTRE DAME L. REV. 605, 606 (1996). *See generally* Peter A. Joy, *The Law School Clinic as a Modern Ethical Law Office*, 30 WM. MITCHELL L. REV. 35 (2004); Joan

resistance to the subject matter,[9] the discomfort created by the tension between the law of lawyering and ordinary moral discourse,[10] and students' lack of relevant background in legal practice and the law.[11] The literature describes innovative efforts to overcome challenges such as these.[12]

Given the perceived importance of ongoing formal education in legal ethics, both to compensate for the limitations of law school education[13] and to assist lawyers in keeping up with developments in the field,[14] one might expect

L. O'Sullivan et al., *Ethical Decisionmaking and Ethics Instruction in Clinical Law Practice*, 3 CLINICAL L. REV. 109 (1996).

9. *See, e.g.*, Lois R. Lupica, *Professional Responsibility Redesigned: Sparking a Dialogue Between Students and the Bar*, 29 J. LEGAL PROF. 71, 71–73 (2005).

> Students' central and consistent complaint is that it is boring and unnecessary. They are in law school "to learn to practice law, not to learn this professional responsibility stuff." Students are not yet in proximity to the context in which the professional responsibility issues arise, and often it is difficult for them to relate to the conflicting tensions faced by the hypothetical lawyers; thus, they fail to see the course's relevance. The fact is that the context of lawyering is too foreign for students to have fully developed a moral sensitivity (which is the foundation of moral decision-making) to the issues of professional responsibility.

*Id.* at 71–72 (citations omitted); *see also* Green, *supra* note 6, at 387–88.

10. *See, e.g.*, James R. Elkins, *An Argument Against Reticence in the Teaching of Virtue*, 21 LEGAL STUD. F. 221, 223–24 (1997).

11. *See* Green, *supra* note 6, at 386.

12. *See supra* note 1.

13. *See supra* text accompanying notes 3 & 8; *see also* Martin P. Moltz, *Viewpoint: Debate Over MCLE Continues: Mandatory CLE—A Better Idea Now Than Ever Before*, 11 CBA REC. 44 (1997). Moltz opines that:

> When one objectively analyzes the number and variety of [disciplinary] findings yearly against individual practitioners, it becomes exceedingly clear that a yearly "refresher" seminar on ethics is highly desirable. No matter our area or areas of practice, we all need to be acutely aware of the ethical pitfalls prevalent in those areas of the profession.

*Id.* at 44.

14. *See* Levin, *supra* note 2, at 369. Levin observes that in response to her survey of New York lawyers:

> Many freely admitted that they did not keep up-to-date on changes in the New York Code and that they had not consulted it since law school. In answer to my question about whether they kept up with changes in the Code, more than one lawyer laughingly responded, "they change"? For some lawyers, New York's recent requirement that lawyers take four hours of CLE related to legal ethics and professionalism every two years is the only time they are forced to look at or think about rules of professional conduct. Some of them expressly attributed their ability to stay up-to-date on changes in the New York Code to the mandatory CLE.

*Id*. *Cf.* Ronald D. Rotunda, *Teaching Legal Ethics of a Quarter Century After Watergate*, 51 HASTINGS L.J. 661, 663 (2000) (observing that "too frequently [lawyers] know little about the law affecting themselves, the law governing lawyers," and that "[m]any lawyers today are . . . ignorant of recent developments regarding ethics subjects, such as conflicts of interest and attorney disqualification").

similar attention to be paid to the pedagogy of legal ethics CLE.[15] Formal instruction in the subject is plentiful, since most states with mandatory CLE rules require ongoing education on legal ethics.[16] In my own state of New York, for example, practicing lawyers must acquire at least twenty-four CLE credits biannually,[17] including at least four relating to legal ethics.[18] Lawyers may satisfy the requirement in a host of ways, including by viewing videotapes or reading specially-created materials,[19] but most lawyers do so by attending or

15. There is no reason to assume that CLE courses in legal ethics are of generally high quality. *See* Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1703 (1994) (opining that "the CLE courses in legal ethics are probably no better than the professional responsibility courses taken in law school"). And there may be cause to doubt the effectiveness of these courses even at their best, since practitioners' understandings of ethics and professionalism—for better or worse—are primarily influenced by their practice settings and the lawyers with whom they interact rather than by formal instruction. *Cf.* M. Neil Browne et al., *The Purported Rigidity of an Attorney's Personality: Can Legal Ethics Be Acquired?*, 30 J. LEGAL PROF. 55, 78 (2006) (concluding that "[l]awyers are part of a community, and when that community encourages ethical behavior, there is no reason to believe that lawyers would be any less responsive to that encouragement than would any other responsible profession."); Eleanor W. Myers, *"Simple Truths" About Moral Education*, 45 AM. U. L. REV. 823, 831–32 (1996) (arguing that the workplace has the dominant influence on practitioners' ethical conduct). *See generally* Patrick J. Schiltz, *Legal Ethics in Decline: The Elite Law Firm, the Elite Law School, and the Moral Formation of the Novice Attorney*, 82 MINN. L. REV. 705 (1998) (discussing the significance, and decline, of mentoring in large law firms).

16. *See* Jack W. Lawson, *Mandatory Continuing Legal Education and the Indiana Practicing Attorney*, 40 VAL. U. L. REV. 401, 403 (2006).

17. N.Y. COMP. CODES R. & REGS. tit. 22 § 1500.22(a) (2000). In the first two years after admission to the bar, the requirement for "transitional" CLE is thirty-two credits, with at least six in the area of legal ethics. *Id.* § 1500.12(a). Each credit hour requires fifty minutes of instruction or the equivalent. *Id.* § 1500.4(b)(1).

18. *Id*. § 1500.22(a). The New York CLE rules provide the following definition:

> Ethics and Professionalism may include, among other things, the following: the norms relating to lawyers' professional obligations to clients (including the obligation to provide legal assistance to those in need, confidentiality, competence, conflicts of interest, the allocation of decision making, and zealous advocacy and its limits); the norms relating to lawyers' professional relations with prospective clients, courts and other legal institutions, and third parties (including the lawyers' fiduciary, accounting and record-keeping obligations when entrusted with law client and escrow monies, as well as the norms relating to civility); the sources of lawyers' professional obligations (including disciplinary rules, judicial decisions, and relevant constitutional and statutory provisions); recognition and resolution of ethical dilemmas; the mechanisms for enforcing professional norms; and professional values (including professional development, improving the profession, and the promotion of fairness, justice, and morality).

*Id*. § 1500.2(c).

19. The New York rules provide: "Continuing legal education courses or programs may include traditional live classroom or audience settings; teleconferences; video conferences; satellite transmissions; videotapes; audiotapes; motion picture presentations; interactive video instruction; activities electronically transmitted from another location; self-study; correspondence work; and on-line computer courses." *Id*. § 1500.22(d). Lawyers may also earn CLE credit in

listening to live programs.[20] The organized bar, which expresses perennial concern about law schools' ethics courses and curricula,[21] has not systematically studied the effectiveness of existing CLE ethics programs or proposed how to improve them, notwithstanding that many of such ethics programs are offered by bar associations.[22]

My experience[23] is that it is no less challenging to teach legal ethics to practitioners than to law students. Some challenges are the same, some different. The most significant shared challenge is that most practitioners, like most students, do not take legal ethics classes by choice because they perceive that training in legal ethics is not worth their time. They believe that they already know whatever they need to know to avoid disciplinary trouble and civil liability. Law students, unfamiliar with the subject, are likely to assume that legal ethics is intuitive or that it is learned "at our mothers' knees."[24]

other ways, for example, through speaking, teaching, and publishing activities. *Id*. §§ 1500.22(e), (f), (i).

20. *See* Karl Brevitz & Mary I. Hiniker, *CLE in the Information Age*, 77 MICH. B.J. 670, 670–71 (1998).

21. *See generally* Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 LAW & CONTEMP. PROBS. 139 (1995).

22. Although CLE providers are generally required to evaluate their course offerings to determine their effectiveness and the extent to which they meet the needs of lawyers, their efforts are typically limited to distributing and reviewing course evaluation forms completed by a percentage of the lawyers who attend their programs. One might be skeptical whether this is an effective means of evaluating the effectiveness of CLE programs. More systematic studies have cast doubt on the effectiveness of CLE courses generally. *See* Lisa A. Grigg, Note, *The Mandatory Continuing Legal Education (MCLE) Debate: Is It Improving Lawyer Competence or Just Busy Work?*, 12 BYU J. PUB. L. 417, 425 (1998). Outside the United States, the value of CLE courses in legal ethics has been subject to debate. *See, e.g.*, Colleen G. Segall, *Ethics in Mandatory CLE: An Overlooked Means for Improving the Standard of the Profession*, 6 J. PROF. LEGAL EDUC. 22 (1988). So too has the value of mandatory CLE in general. Neil Gold, *Beyond Competence: The Case for Mandatory Continuing Learning in Law*, 4 J. PROF. LEGAL EDUC. 17, 19 (1986). *See generally* Christopher Roper, *Mandatory Continuing Education for Professionals, Particularly Lawyers: A Literature Review*, 2 J. PROF. LEGAL EDUC. 76 (1984).

23. Since the advent of the CLE requirement, New York legal ethics professors have been in hot demand from legal ethics providers, which include bar associations, law schools, and other not-for-profit entities, as well as private law firms and other law offices, each of which may be certified as CLE providers to train their own lawyers in-house. In recent years, I have presented or participated in dozens of ethics programs sponsored by, among others, my own and other law schools, legal aid and legal services offices, private law firms, bar associations, and the not-for-profit providers such as the Practising Law Institute.

24. Robert L. Brown, *A Tribute to Justice Richard Sheppard Arnold*, 58 ARK. L. REV. 491, 491 (2005). It is not only students who may take this view. A recent tribute to the late Arkansas Judge Richard Arnold began with a vignette about the judge's opposition to required CLE courses in legal ethics:

> He was against the requirement, because, by golly, we all should know what is ethical behavior. He espoused the principle that in a civilized society we should not have to write down rules of ethical behavior, much less take courses to teach us what is right. We all

Lawyers may recognize that legal ethics includes a body of regulatory law that is distinct from common morality[25] but assume that they have already learned what is necessary in the course of practice or that they function within structures, such as large law firms or government law offices, in which ethics problems are avoided or are resolved by others. Few lawyers would attend CLE programs in legal ethics if doing so were not a licensing requirement, just as few law students would enroll in a legal ethics course if doing so were not required for graduation.[26] Lawyers and law students alike may be indifferent, if not resentful, as a consequence of being compelled.

Other challenges to teaching ethics are peculiar to CLE programs. Lawyers attending CLE courses ordinarily cannot be assumed to have a common base of knowledge about the subject. CLE programs on legal ethics are typically no longer than three hours and are often shorter. The programs are typically self-contained. Although CLE rules generally require the distribution of written material, participants rarely have the opportunity to read the material in advance of the program. Therefore, one ordinarily cannot build on what lawyers in attendance have learned in prior programs or from assigned readings in the way that law school courses develop sequentially over the course of a semester and take advantage of students' preparation for class.

A further challenge is that lawyers attending CLE programs often have no incentive to participate in discussions or otherwise pay attention. Lawyers are not graded, and they receive the required credits as long as they are physically in attendance.[27] Lawyers cannot be pressured to speak in a CLE class. Unless a program interests them or appears to be useful, lawyers will not be engaged.

At the same time, the fact that those attending CLE classes in legal ethics are practitioners, not students, presents opportunities that can be exploited. To begin with, practicing lawyers do have considerable knowledge about legal ethics. However, their knowledge is not always correct, comprehensive, or current. Sometimes, their knowledge of professional norms is intuited from their experience and observations, not from readings of rules and opinions. Individually, lawyers attending a CLE program may know different things in

> should have learned that at our mothers' knees, and the governing standard should be don't do anything you would not want your mother to read on the front page of the Arkansas Democrat-Gazette.

*Id*.

25. *See* Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comprehensive Hermeneutic Framework*, 77 TUL. L. REV. 527, 530–34 (2003) (describing the rise of ethics rules as a form of positive law).

26. *See* Rhode, *supra* note 21, at 145–46 (noting that students would probably not take professional responsibility classes if they were not required). *Cf.* Randall T. Shepard, *The "L" in "CLE" Stands for "Legal"*, 40 VAL. U. L. REV. 311, 315 (2006) (stating that many lawyers complain about mandatory participation in CLE courses).

27. Richard A. Matasar, *Skills and Values Education: Debate About the Continuum Continues*, 46 N.Y.L. SCH. L. REV. 395, 422 (2003).

different amounts. But collectively, lawyers start with a significant base of knowledge about legal ethics standards and how to deal practically with legal ethics problems. While this poses the risk that those in attendance think they know it all, this also means that, regarding any given question, someone in the room is likely to have an answer or a relevant experience. The breadth of collective knowledge is a resource. The varied perspectives on a given question can make for lively discussion and, ultimately, more nuanced understandings on everyone's part if the lawyers' resistance to participating can be overcome. The know-it-alls in particular may be induced to display their knowledge.

Likewise, lawyers attending CLE programs start with knowledge about law and with experience in law practice generally. Depending on the program, the knowledge among lawyers may differ significantly or include much in common. There are particular opportunities when all the lawyers in attendance work in the same area of law, because the ethics issues which lawyers face and the mechanisms for resolution differ depending on the area of practice.[28] Whether a contextual discussion of ethics is integrated into a broader program on the practice area[29] or stands alone, it can focus on the legal ethics issues that arise in that particular field without the need to explain the background law, participants may perceive the program to be more relevant to their work than one that looks at ethics issues across the range of practice, and the discussion

28. *See* Chenise S. Kanemoto, *Bushido in the Courtroom: A Case for Virtue-Oriented Lawyering*, 57 S.C. L. REV. 357, 385 (2005):

> Bar associations make a few ethics CLE courses available every year . . . . The weakness of most of these courses is that the content is too general. CLE courses could be of more practical import by emphasizing ethics issues in specific areas of practice. Lawyers come from different practice areas, including prosecutors, public defenders, and attorneys general; large and small private practice attorneys and in-house counsel; and judges, law clerks, and law professors. All lawyers, depending on their practice area, face very different moral issues. Thus, an effective CLE program would tailor ethics courses in ways that are relevant to each lawyer's practice.

*Id. Cf.* Green, *supra* note 6, at 359 (discussing advantage of contextual law school courses in legal ethics); James E. Moliterno, *Practice Setting as an Organizing Theme for a Law and Ethics of Lawyering Curriculum*, 39 WM. & MARY L. REV. 393, 394 (1998) (proposing "that practice setting become the primary organizing factor for curricular development in the law of lawyering area"). Of course, CLE rules do not require lawyers to take ethics classes that are most relevant to their practice, and many lawyers do not do so. *See* Peter D. Ehrenhaft, *Comments of a Commissioner*, 34 VAND. J. TRANSNAT'L L. 1211, 1216 (2001) (observing that CLE ethics requirements "are haphazard in their scope and may be met by attending CLE programs wholly outside the state of admission and the areas of the lawyer's actual practice").

29. On analogous efforts to teach legal ethics in the context of substantive law school courses, see, for example, Peter A. Joy, *Teaching Ethics in the Criminal Law Course*, 48 ST. LOUIS U. L.J. 1239 (2004); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992); Thomas L. Shaffer, *Using the Pervasive Method of Teaching Legal Ethics in a Property Course*, 46 ST. LOUIS U. L.J. 655 (2002).

can be more concrete than it might otherwise be.[30] On the other hand, when the lawyers work in different areas of law, a discussion of cross-cutting ethics issues can benefit from the vastly different perspectives.[31]

Because participants are in law practice, there is potential for giving the subject greater relevance and immediacy. The risks of professional discipline and civil liability are less remote for practitioners than for students. Therefore, there is a potential for engaging them by convincing them that the risk is realistic. When the program is taught in-house in a law firm or law office, the importance of the subject can be reinforced by the firm's senior or managing lawyers.

Further, the expectations for CLE programs are necessarily different, and less daunting, than for a semester-long law school course. The legal profession's unrealistic wish that law schools will all but guarantee that their students will go on to practice in accordance with the highest ethical and professional standards could never be attached to a two-hour CLE program in legal ethics. At best, the CLE program can achieve a small amount—e.g., advance some aspect of attendees' knowledge, sensitize them to particular problems, or increase their practical understanding. There is certainly no imperative to march through a curriculum in an orderly way. As long as the class accomplishes something of value, it may be regarded as a success.

## II. TEACHING LAWYERS INTERACTIVELY VIA THE PROBLEM METHOD

Over the years, I have participated in CLE ethics programs employing a wide range of formats, but my preference is to engage participating lawyers in discussion through the use of short problems that are either wholly fabricated or, better yet, based on actual cases. The problem method, which is probably the prevalent one in law school ethics classes,[32] may be employed with lawyers in various ways. Sometimes I run through a series of separate short problems that raise different issues; other times, I present a long scenario with different issues raised by each short subpart. Sometimes I am solely responsible for presenting the problem, leading the discussion, commenting on participants' responses, and offering my own views; other times, I am joined by one or more other lawyers who also respond to the problems or, like a Greek chorus, comment on the attendees' responses. Sometimes the program is presented to

30. For example, a discussion of conflicts of interest in real estate transactions is likely to be more focused, relevant, and engaging to lawyers from different firms who engage in that type of practice than one on conflicts of interest in business transactions or on conflicts of interest generally.

31. For example, transactional lawyers often take a more casual approach to ethics issues such as conflicts of interest and communications with represented parties, since they do not face a risk that the opposing party's complaint will lead to a judicial disqualification order or sanction.

32. *See generally* Morgan, *supra* note 6, at 409 (discussing "the use of hypothetical fact situations as the centerpiece for student analysis and discussion").

a small group of lawyers in a law firm or legal services office who sit around a conference table; other times, the program is sponsored by a bar association and presented in an auditorium to lawyers who work in different settings. For the most part, my use of problems to engage lawyers in a discussion of ethics issues reflects a personal preference, but it can be rationalized.

The most prevalent alternative is a lecture or panel discussion in which the instructors monopolize the conversation, while perhaps leaving some opportunity for questions from the audience.[33] This has its benefits. Lectures and panel discussions can impart more information and maintain greater control over what is covered. But information can be imparted even more efficiently in writing, and interactive programs can attempt to achieve other important objectives for which writings are not as well suited. In particular, interactive programs may undertake to sharpen participants' ability to identify ethics issues and develop their facility for resolving such issues. Asking lawyers to imagine themselves in a situation that raises ethics dilemmas, challenging them to identify the issues and to propose how to resolve them, and inviting them to assess each others' proposed resolutions are better tailored to further these goals. Plus, interactive learning is generally considered to be more effective pedagogically than a lecture, and lawyers often prefer talking with each other to attending a lecture.[34] Engaging the audience in conversation also enables the instructor to tailor the program to the attendees' level of knowledge and to their specific interests, as well as to identify and correct some of their misunderstandings.

If one seeks to engage lawyers in a discussion of ethics issues, there are alternatives to the use of short problems. One might present more fleshed-out case studies. Academics have discussed the virtue of this approach in the law school setting,[35] but in a short CLE program, there may be insufficient time to present a long story and those in attendance, who have not read or heard the story in advance, may have difficulty assimilating its details on first telling. There are a few videotapes that present lawyers in ethical quandaries and that may be used, like written problems, to elicit discussion. Unfortunately, there are too few in circulation and they are expensive to produce.[36] At the other

33. Harry J. Haynsworth, *Post-Graduate Legal Education in the United States*, 43 S. TEX. L. REV. 403, 406–07 (2002).

34. *Id*. at 407.

35. *See, e.g.*, Carrie Menkel-Meadow, *Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics*, 69 FORDHAM L. REV. 787 (2000); Thomas L. Shaffer, *On Teaching Legal Ethics With Stories About Clients*, 39 WM. & MARY L. REV. 421 (1998). On casuistry as a method of resolving legal ethics dilemmas, see Paul R. Tremblay, *The New Casuistry*, 12 GEO. J. LEGAL ETHICS 489 (1999).

36. Others have provoked discussion by presenting dramatic performances or rock and roll songs whose lyrics present ethics vignettes. *See, e.g.*, *Continuing Legal Education Update: CLE*

end of the spectrum, one might simply ask questions independent of any factual scenario. But problems confronting imagined lawyers make the discussion more concrete, and the need to solve a concrete problem makes the discussion more engaging.

## III. AN ILLUSTRATION

Imagine that you have been asked to present a CLE program in legal ethics for lawyers in the New York office of a national law firm. About thirty-five lawyers will attend. Some will be partners, some will be associates. Some will be litigators, some will be transactional lawyers. Most will attend solely for the purpose of satisfying the CLE requirement, which means that this may be the only ethics program they attend this year. I face this situation a number of times each year, when I am invited to present an ethics program at the New York office of any of various law firms. Because the lawyers do not have to travel and can eat lunch while attending, law firms consider this to be a very efficient way to enable their lawyers to satisfy the CLE requirement.

I find this situation more challenging than teaching ethics to lawyers from legal aid and legal services offices or to groups of lawyers in private practice who work in the same field, both of which I also do with some frequency. What can you do that will be useful to all of the firm's lawyers? Whatever problems you describe must be quickly comprehensible to all the lawyers in the room, regardless of their areas of practice and level of experience, otherwise too much time will be spent explaining the relevant legal background. The program must be engaging in some way—for example, it must be intellectually or emotionally interesting, or address situations in which the lawyers can imagine finding themselves, or appear to dispense practical wisdom—otherwise the lawyers will not turn their attention from eating, checking their Blackberries, reviewing papers, or daydreaming. And, given the limited amount of time, the program cannot be overambitious. Unlike in a law school course, there will be limited opportunity for discussions of public policy, and perhaps none for theory.

Recently, a law firm taped the ethics program that I presented, and I arranged for a transcript to be prepared on which I could base an illustration (hardly a model) of a discussion of a legal ethics problem. The entire program was scheduled for 1.5 hours, but ran slightly over. Four problems were available for discussion, but most of the time was devoted to the first. The second problem, which is the basis of the following dialogue, took up the

*Calender*, 53 R.I. B.J. 23, 23–24 (2004) (describing CLE program titled "Ethics Rock!"). Such innovations are beyond the abilities of most ethics instructors, and certainly beyond mine.

remainder of the time.[37] (The transcript has been revised so liberally that the dialogue cannot fairly be characterized as an edited transcript of the actual program.[38] But the dialogue, which has also been lightly annotated, is realistic and true to the actual program.)

In the dialogue, the instructor is referred to as "BG." Two partners, whose responsibilities at the law firm include advising its lawyers about how to resolve ethics issues, agreed to serve as panelists in the program.[39] They are referred to as "P1" and "P2." Prior to the program, the ethics partners received the problems and other written materials consisting of relevant ethics opinions and rules. The other lawyers who spoke during the program (referred to as "L1," "L2," etc.) were attendees.[40] They did not receive the problems and other materials in advance.

BG: Dick and Jane are recent law school graduates. They were law school classmates and they are very good friends. They are now working as first-year associates at two different law firms in the city. Some time within their first year after graduation, they actually find time to get together for a nice lunch at which they can compare notes about life as a young lawyer.

Dick and Jane meet for lunch. What is there to talk about, since almost all their waking hours are spent working? Obviously, they are going to talk about their work. Dick says that he's working on an antitrust lawsuit filed by a company that his firm represents. He is one of

37. The problem was as follows:

Two former classmates who are associates at different law firms meet for lunch. Associate #1 says that he is working on an antitrust case and that the plaintiff, the firm's client, has hired a particular Nobel Prize-winning economist from the University of Chicago as an expert. Associate #1 says that he has been learning about the relevant economics principles and meeting with the expert to help prepare the expert disclosure, which is very heady stuff! Associate #2 knows about the case, because—unbeknownst to her friend—her firm is working in the background, assisting the firm that is serving as the defendant's trial counsel. Since expert disclosure has not yet been made yet, Associate #2 suspects that the lawyers at her firm who are working on the case do not know that the opposing party has hired the Nobel laureate as an expert. She suspects these lawyers would like to know anything else they could about the expert's prospective testimony. May Associate #2 keep her friend talking? After lunch, may she (or must she) report what she has learned to the lawyers at her firm who are working on the case?

38. For example, portions of the discussion that were not caught distinctly on tape had to be reconstructed, and references to particular individuals and to lawyers' own experiences were deleted to preserve confidentiality.

39. For discussions of law firms' increasing use of in-house ethics advisors, see generally Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); Margaret Raymond, *The Professionalization of Ethics*, 33 FORDHAM URB. L.J. 153 (2005).

40. It was often difficult to tell from the tape which of the speakers had previously spoken, so the designations have been assigned somewhat arbitrarily. Other liberties were taken as well.

thirty-seven lawyers on the case; maybe he's the thirty-sixth lawyer. But he's really involved in something interesting, because one of his client's experts is a Nobel Prize-winning University of Chicago economics professor. Dick is learning about all the relevant economics principles and meeting with the expert to help to prepare the Expert Disclosure. It's really cool.

It turns out, however, that unbeknownst to Dick, Jane's law firm is representing the defendant in that antitrust case. Dick has no way to know that, because Jane's firm is not counsel of record for the other side; it is helping out in the background. The defendant hasn't gotten the Expert Disclosure yet, and it sure would like to know in advance that the plaintiff's firm is using this University of Chicago professor as its economics expert. Not only that, but Jane's firm would love to know a little bit more about how the preparation is going and what the other side's expert is going to say.

First of all, was it okay for Dick to talk about his work over lunch?

L1: No.

BG: You can't talk about work over lunch?

L1: You can't talk about confidential work that has not been disclosed to your adversary.

BG: Why not? This information wasn't attorney-client privileged, was it? The attorney-client privilege protects only what your client tells you in confidential settings, isn't that right?[41]

L1: Until the expert is disclosed, he is a non-testifying expert. A non-testifying expert need not be disclosed to the other side under the federal rules of civil procedure.[42] So this expert's existence and whatever he has told the firm is protected under the work product doctrine.

BG: Even if information about the expert is not protected from disclosure by the attorney-client privilege or the work product doctrine, Dick cannot disclose it on his own initiative, can he? Subject to exceptions, the confidentiality rule protects any information learned in the course of the representation.[43]

So, how do you talk about work? If you're an associate, what do you talk about with a former classmate?

L2: "You should have seen what that partner was wearing yesterday."

L3: The associate can say that he or she is working on a case and working with a very well-known professor of economics who is interesting.

41. *See* United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950) (listing elements of the attorney-client privilege).

42. *See* FED. R. CIV. P. 26(b)(4)(B).

43. For example, ABA Model Rule 1.6 describes the protected information as "information relating to the representation of a client." MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

BG: Why isn't even that a breach of confidentiality? Because a "well known professor" doesn't narrow it down so much? Is the idea that if you don't name the expert, you haven't crossed the line?[44]

L3: I think so.

BG: What about if you're a paralegal or a secretary. Would it then be okay for you to talk with friends in more detail about the cases on which you work, since you're not subject to the rules of ethics?

L4: No.

BG: Why not?

L4: Because we lawyers are responsible for what they do and say.

BG: I'll buy that. There's even a rule that requires the lawyers in a firm to have responsibility for non-lawyer employees.[45] You have to make sure that they don't violate your ethical obligations—including, in particular, your confidentiality obligations. So do you actually train everybody here, lawyers and non-lawyers alike, to know what they can and cannot say? Everyone is going to talk about their work, it's very natural. Do you train people to know where the line is, that maybe you could say, "This guy who's a really famous economics professor walked in the door the other day," but you can't name him? How do you explain where the lines are drawn?

L5: I would disagree with my colleague that it's even permissible to say, "I am working with a very well known professor of economics." If you're in a big antitrust lawsuit and preparing your witnesses, it may make a difference to the other side to know that one of the witnesses may be an economics professor as opposed to someone else. I think you're getting too close to the line.

L3: You can't even say that?

L5: No, no, with great respect, no. . . . It strikes me that this is information that's really proprietary to the firm. . . . I just don't think you can say that, because you don't have the firm's authorization to be communicating proprietary information to third parties.

BG: So that would be a quick lunchtime conversation between Dick and Jane. Besides talking about what the partner is wearing, what else does this leave you to talk about, really?

L2: What you're having for lunch.

BG: Could you talk to your spouse about this?

L1: No.

44. *See generally* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 718 (1999) (discussing the disclosure of information relating to clients for compilation of a statistical summary).

45. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2007).

BG: Not to your spouse either? So, when Dick, the associate, talked about the economics professor, did he violate a disclosure obligation? Did he violate a rule about keeping clients' confidences and secrets?

L7: Yes.

BG: Did he violate a fiduciary duty?

L7: Yes, to the client.

BG: To the client. To anyone else?

L7: Well, I think, to the firm. He is jeopardizing the firm's relationship with the client to the extent that he is disclosing something that could become cause for the client to have a real grievance with the firm.

BG: So, Dick has violated the ethics rule, and he breached his fiduciary duty to the firm and to the client. After lunch, does he have to go and back and report himself to the firm?

L1: He just jumps off a bridge. . . .

BG: But before he jumps off the bridge?

L8: I have a question, is he gonna get fired now or fired later?

BG: Maybe Dick's friend, Jane, is a good enough friend that she's not going to exploit this. Let's suppose she says to Dick, "Listen, you've crossed the line here by telling me things you shouldn't have told me. I would never take advantage of that, because our friendship with each other is more important than our transient relationships with our law firms. We're going to leave our firms in another year or two anyway. But you've told me too much and in the future, not all your friends are going to be so nice." If Jane says that, does Dick nevertheless have a duty to go back to the firm or to the client and say, "I screwed up"? Do lawyers have a duty to confess their errors to clients, to their firms?

L9: Yes. I think that the consequence of Dick's disclosure could affect the client's trial strategy and other factors that could be material to the firm's representation of the client. There's an obligation on the part of the attorney to disclose this to the firm.

BG: Okay, does anyone disagree? No one? Everyone thinks you must rat yourself out? Doesn't it go against human nature?

L8: Dick doesn't think he did anything wrong. If he did, he wouldn't have done it in the first place.

BG: He didn't think he did anything wrong at the time he first talked about his work, but afterwards he knows, because Jane, who took my class in legal ethics, explains all this stuff about confidentiality that you all have been talking about for the last five minutes.

L9: But Jane can't tell him either, because her firm is involved in the antitrust case and its involvement isn't known. If she says, "Shut up, my firm is involved," she's breaching her own confidentiality duty.

BG: So she doesn't say that. She says, "Lucky for you, I'm not in a position to exploit this. But the next person you talk to may be the wrong person. Here's the rule, Disciplinary Rule 4–101."[46]

P1: Is there an obligation on Jane's part to exploit Dick's disclosure?

BG: Well, we're going to get to that in thirty seconds, but let's finish with Dick. When Dick rats himself out to his firm's partner and says, "You let me out for lunch one time in three months, and look what happened," does the partner have to tell the client? What do you think?

L7: Yes. The client could learn that three months from now and the client could say, "Why didn't you tell me that three months ago?"[47]

BG: Does the firm now have to report this poor associate to the Departmental Disciplinary Committee? Isn't there a rule requiring a lawyer to report another lawyer's misconduct if the other lawyer engaged in a serious disciplinary violation and the information is not confidential?[48] Would you report?

P2: No, I wouldn't report it to a disciplinary agency. I would try to handle it in-house and report to the client. But I think I would be violating the rule that says you have to report these events to a disciplinary agency.

BG: This is like conscientious objection? You're saying the rule makes you report, but you wouldn't report?

P2: Right.

BG: Would you choose differently?

P1: No, because it's not a substantial misconduct, it's inadvertent, and you're not there to rat out everybody for minor errors that don't matter.

BG: So the rule says that you must report another lawyer's misconduct only if it raises a substantial question about that lawyer's trustworthiness, honesty, or fitness as a lawyer. This, you think, doesn't. . . .

So now, back to Jane. Here's your friend, Dick, who did not take my ethics class. He is talking about a case on which he is working. What he has to say would be really useful to your firm's client, the defendant in the antitrust case. Can you keep Dick blabbing? Must you? As a matter of zealous trial advocacy, don't you have to try to keep him talking? "Who are the other experts in the case? What's your strategy in the case? Tell me more, I'd love to hear more about antitrust and your firm." You have to do that, right? May you do that?

P1: No.

46. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 4-101 (2002) (providing the confidentiality rule); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007).

47. *See* Conn. Bar Ass'n, Comm. On Prof'l Ethics, Informal Op. 97-8 (1997) (discussing lawyer's duty to disclose possible malpractice to the client); N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 734 (2000) (same).

48. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (2007).

BG: Why not?

P1: I think you're aiding and abetting someone else's violation of the disciplinary rules. That is something you're not allowed to do, you're aiding and abetting.

BG: Okay, so, do you just say, "Whoa, time out here, I'm on the other side"?

P1: Well, you don't want to say, "I'm on the other side," because again, that's a secret. But you may want to interrupt and order the salad course at that point. You could order a chef salad or something.

BG: You move the conversation away from Dick's work on the antitrust case. Does anyone disagree?

Suppose you didn't exploit Dick's willingness to talk, you cut it off. Now you're back from your lunch. If you are Jane, do you tell the partner on the case about what you just learned? May you *not* tell the partner what you just learned? Well, let's take a little poll. How many of you say you *must* tell the partner what you've learned from Dick? Just one of you. Who says you may *not* tell the partner? Quite a few. And who says you may, it's within your discretion? Quite a few. So the issue is joined. . . .

What's your view on this? You're out there all alone saying you must tell the partner.

L1: It will help the case.

BG: So, it's just an advocacy issue, right? What you learned from Dick is not confidential. You don't owe any confidentiality duty to your friend, right? You weren't his lawyer, you're not a spouse, you're just a friend, a soon-to-be-*former* friend. And why isn't that right?

Who says you can't do it? A lot of you said you can't do it. Why?

L8: Because what Dick said is proprietary to his firm. The recipient [Jane] should have understood that this was information that's like stolen goods.

BG: You're saying that it's as if this associate, Dick, stole the information?

L8: The information was not the associate's to disclose. So, therefore, to make use of it is making use of something that was proprietary to the opposing firm and the opposing client, but not to the associate.

BG: Does that mean that if a lawyer on the other side of a lawsuit tells you something in a moment of indiscretion that the lawyer shouldn't have said, you're supposed to cover up for that lawyer and not use that information?

Let's suppose the lawyer who got this information from Dick is actually working on that antitrust case. Is your view that she has to segregate that information in her head and not use it? She owes a duty of confidentiality now to the person on the other side of the lawsuit and she has to make a conscious effort not to use that information? What if the client says to her, "So tell me, who do you think are some of the people who might be hired as experts on the other side? Who are some of the great economists

of the world who are likely to be hired?" Do you not mention University of Chicago professor? Do you pretend you don't have that information? You owe a duty to the opposing party—isn't that the implication of what you're saying?

Some of you thought that you have a choice whether to tell the partner what Dick told you over lunch? Why do you think that?

P2: I'm thinking, actually, I'm going to change my feeling. This is sort of like when you inadvertently produce a document that you know the other side knows is privileged. The other side's obligation is to alert you to that fact and give it back to you if you want it back. So I guess you could tell your partners, but you also have to alert the other side that you know this information.

BG: Ah, so you're saying that if you're Jane, first you tell your firm's partners and then you tell Dick's former law firm—soon-to-be-*former* law firm—that you've learned this information from Dick?

P2: I think you might have to.

BG: What's the rule on inadvertent production? Suppose the other side has sent you inadvertently what it meant to remain privileged and undisclosed. Or suppose the other side just sent something that was meant for its client or for someone else, and you got it, it arrived by carrier pigeon or however, and you read it, and when you're done reading it, you realize that it wasn't meant for you.

P1: First of all, you shouldn't look at it if it's clearly a privileged document, you can't read it, you're not allowed to do that.

BG: Yes, if you know it's not meant for you and it's meant for someone else and somehow it got delivered to your firm, and you don't even have to open it to know that, then you must send it back. If you open it and then realize that it's not for you before your read it, then okay, you must stop reading it. That's the prevalent view. But, what about if you get to the bottom of the page and only then you realize it wasn't meant for you? Must you send it back and pretend you never learned what was in it?

P2: But the damage has already been done because you know the information, you can't segregate it in your brain, that's impossible, so you absolutely don't have any obligation not to use that information.

L1: Now you have to kill yourself to avoid using the information.

BG: So if you analogize what Jane learned from Dick over lunch to an inadvertently disclosed document, what's your bottom line?

L10: You use the information, but you then have to go inform the other side that you have the information.

BG: In which case, maybe it will find a different economist or do something else in response. Who has a different view?

L11: While I think it's worth pursuing the inadvertent disclosure analogy, I think someone has to speak up for the idea that the firm can simply

exploit Dick's disclosure. What Dick disclosed was not protected by the attorney-client privilege. There is no rule that says that the person who heard this at lunch can't disclose this to the lawyers on the case. I think it's worth thinking about whether it should really be treated as an inadvertent disclosure.

BG: You might say it wasn't inadvertent. It's not as if Dick pressed the wrong button on the computer.

L11: That's right. I mean, he knew that he was saying this. He thought he was saying this to someone who was completely disinterested in the case so it would surely stop there and he was wrong about that, he didn't know her firm was on the other side.

L12: What if Dick was drinking? Would it then be inadvertent, because there would be no intent to disclose?

P1: The important thing I was thinking about this hypothetical was, "Don't scream, screen." In other words, Jane comes back to the firm with privileged information which in some fashion may taint the team defending the antitrust case, because the other side may say that as soon as she heard what its associate was saying, she should have stopped the conversation as opposed to hearing a little bit more. So, instead of tainting the lawyers who are working on the antitrust case, come to the ethics partner first. The ethics partner is a great cut-out. See what she says before you taint anyone involved in the case, before coming back to the trial team and saying, "Listen to what I heard." Maybe conversations overheard in the elevator are fair game, but the disclosure over lunch is not fair game. So screen first before you scream about something, especially if it's the other side's confidential information.

BG: So, Jane comes back to you, the ethics partner, someone who is not working on the antitrust case, and you can help make a judgment about what to do. What would you decide?

P1: The written materials distributed in connection with this program contain an opinion with which I was not familiar, from the New York County Lawyers' Association dealing with inadvertent disclosures of documents.[49] I would analogize to the inadvertent disclosure. This was an inadvertent oral disclosure—inadvertent in the sense that the associate didn't know that the other person was at the firm on the other side of the case. The New York County opinion would say that when a document is

49. N.Y. County Lawyers' Ass'n, Comm. on Prof'l Ethics, Formal Op. No. 730 (2002). The opinion might be read to say that once a lawyer recognizes that he has been sent a privileged document through the opposing party's inadvertence, the lawyer shall not continue to review it and shall make "no other use" of it. *Id.* However, it does not analyze why the lawyer should make no use of information learned prior to realizing that the document was sent inadvertently and, in fact, does not recognize the difficulty and possible unfairness in requiring the innocent recipient to avoid employing that information.

inadvertently given to you, ordinarily you have to give it back and you can't use the information it contained.[50] If that's the case, then in the hypothetical, Jane has to be careful about taking a nugget of information and giving it to someone else in the firm, or else some bad things will happen. It's like getting attorney-client privileged information on your law firm's website. You hope the firm has a very good disclaimer. But if someone goes to a law firm and discloses privileged information, that law firm may be tainted a little bit because it has received information even though it didn't want to. So, the receipt of privileged or confidential information is in itself a danger even if you are not complicit in obtaining that information.

BG: On the other hand, as you know, the City Bar issued an opinion on the subject, also in the materials, that reached a slightly different conclusion.[51] It says that if you read the document first before realizing it was inadvertently disclosed, you may have to give it back, but you're not ethically barred from using the information that you learned.[52]

P1: Although the opinion came down this way, I'm not sure every court would agree. Some judges might say, "Look, you were negligent in getting that information; you should have shut up the associate." So, I don't know if you can rely 100% on that. I think, again, you have to go to the ethicist, and the ethicist needs to rely on the authorities and probably would come out that way, but I don't think it's for certain.

BG: What do you do, by the way, if you're in New York and there are dueling ethics opinions? Suppose the County Lawyers' opinion says you *can't* use the information and the City Bar says you *can* use the information. I take it that the firm's position on this is likely to be, "The associate has to tell us so we can decide whether to use the information."

P1: Yes, I think the rule should be, as I said before, that a younger associate should never decide for himself or herself what the answer is; he or she should come back to the firm and call the ethics partner or call someone else.

BG: Some of you in the room indicated that if you were in Jane's place, you wouldn't disclose what Dick told you. Suppose Jane's notion is, "I have a friendship with this person, Dick. There are kinds of morality other than professional morality. I think the right thing to do is not put this in the hands of my law firm, which may decide to exploit this information. I just don't want to ruin the career of a friend. I have different loyalties, and one loyalty is to this friend who helped get me through law school

50. *Id*.

51. Ass'n of the Bar of the City of N.Y., Comm. on Prof'l and Judicial Ethics, Formal Op. 2003-04.

52. *Id*.

with professors who were picking on me." Isn't it okay for lawyers to do the morally right thing as opposed to what legal ethics rules say?

L13: Yes, I want to speak in favor of the idea that this information was learned in the course of your friendship and this is not something you have to share with your law firm. I have a friend who I went to law school with, who wants to tell me about the economist at the University of Chicago, not because she wants to tell me about her cases, but because of how close we are after going through law school for three years, and it's a part of sharing our experience. There's absolutely nothing that would cause me to tell my law firm that I was having a conversation with my friend about our common experiences. I don't know that that's ethical, but I know that I wouldn't do it.

L14: This is an easy one for me. I voted for the view that you don't have to disclose if you don't want to, because in this case, the friendship is more important than the information. But the harder problem is when Dick tells Jane something really serious or really important about the case, such as, "My most important witness just died," or "I just found out the doctor we were relying on is a fake." You've got to report in those circumstances. To me, if that person was silly enough and unethical enough and not careful enough to tell you something that is critical about the case, I think you have to disclose it to the client.

BG: So you'd follow personal morality when doing so doesn't matter to the case but not when it does?

L14: I don't think the first one raises a moral issue. It's a silly piece of information that Dick shouldn't have disclosed. If he thought it was an important piece of information, he wouldn't have disclosed it. He was excited about the fact that he was working with a famous economist, blah, blah, blah. And so, my going back there and taking advantage of that, I'm saying, you know what, I'm not going to take advantage of that because life's too short, and I'm a good person. But, when he or she says something that is self-evidently, from a lawyer's point of view, something they shouldn't be saying, and it's critical to my client, then I have an obligation to go and tell the firm's ethicist, I guess. The part of this that makes it a silly question is that what's disclosed seems so unimportant in the greater scheme of life. We're talking about a technicality.

P2: Although from the firm's point of view, the information may or may not be so unimportant. It may be that in this case, the parties are two days away from expert disclosure and this guy is going to be disclosed as the testifying expert. If the associate called the ethics partner and said, "Oh my gosh, I heard so much before I could stop this guy and here's what he said before I could stop him," the partner may be able to go to people working on that case, ask some very neutral questions, and find out very quickly that this is no big deal. I've had quite a few associates call me

over the years saying, "Something happened and I'm really troubled by it," and it was nothing. I could read them the rule right on the phone, great, they felt so much better. On the other hand, if this is a consulting expert in the early stages of the case, and he never shows up because once he studies the other side's case he rejects their theory, this could be a big blockbuster piece of information. You might want to hire him on your own side if you suspect that is what happened. And I don't think that that is something the associate should decide on his or her own. That's one of the beauties of working in a firm like this. I mean, it has its burdens, but it has its real joys, too. I don't think any one of us ought to walk around deciding all by ourselves, especially if our factual information is limited, whether this is a blockbuster piece of information or a really innocuous piece of information. You can get help in figuring that out in a way that protects the client and protects the firm.

On another point, I do think that when we become lawyers we sign on to a set of rules that is different from personal morality. Maybe this is a controversial viewpoint, but it really dictates how I feel about a lot of these other questions. There's a lot of stuff in the rules of ethics—for example, the duty to avoid conflicts of interest—that don't tug at the heart at all. There are others that conflict with our personal morality in some cases. But we sign on to those rules, and I think we do need to follow those rules and I think if you talk to clients about what they expect of lawyers in a firm like this, they expect that we're all following those rules, and that if something happens that implicates their case in any way, that it is getting brought to the surface.

L15: What's the rule in this case?

P2: I think the rule is clear. You have to disclose the information to the firm, because you have information that is not privileged that is of advantage to the client and it may well be decided that it has to be used for the client's benefit.

L15: What if there's no law firm ethicist? What if you're a solo practitioner? There's gotta be a different answer.

P1: I think that at some point someone might well say, "We don't have to do everything to the advantage of the client. We may not go to the ends of the earth to exploit a particular situation." But these are tough questions.

L15: What if your client is about to go to trial. You're at lunch. The lawyer on the other side, not knowing that your firm is involved in the case, tells you, "Our key document just turned out to be fraudulent."

BG: That's easy.

L15: Can you use that information?

BG: Absolutely.

P1: Yes, in fact, the other side should disclose the fraud to the court.

L15: What if you learn just something factual—a key fact, not a fraud. Can't you use it?

BG: Good question. If you can, why is the principle different here? There's a New York disciplinary rule, DR 7-101(A)(1), saying that a lawyer shall not intentionally fail to seek the lawful objectives of the client through reasonably available means permitted by law and the disciplinary rules.[53] If it would help achieve the client's objective of winning the antitrust case to exploit the other side's disclosure, don't you have to do so?

P1: I think you have to take advantage of it. I think if the senior lawyer on the other side is ranting about his or her case, "We're gonna do this, we're gonna do that," maybe that is a mistake on his part, but you must take advantage of it. You haven't induced him, you haven't put sodium pentathol in his wine glass. You should take advantage of it.

BG: Why is it different when it's the associate who's disclosing this at lunch?

P1: Again, that may be inadvertent. But where the trial lawyer is talking out of turn and he knows he's dealing with the enemy on the other side, it's fair game and welcome to war.

BG: Additionally, isn't there a requirement that as a general matter, you have to tell the client things that would be important for the client to know relating to the representation?[54] The exception is where your source of information is privileged[55]—for example, if it's another client's confidence. Otherwise, if you know there are important facts in a litigation or transactional representation that the client would expect to know, as a general rule mustn't you tell the client?

P1: Yes.

BG: So, how can you get away with not telling your client that you learned that the other side is using this economist?

P1: You have to tell unless the information comes to you in circumstances where you shouldn't have it, and then you should not tell the client.[56] For example, the inadvertent disclosure from the other side: You open the package, if it's something that you have to give back, I think the rule may well be that you can't tell the client that.

BG: So, here on the one hand, we have a rule that, unless it's trumped, you'd have to exploit the information and tell the client the information. The question is, is it trumped by some notion about what you do with advertently disclosed documents? The ABA Model Rules of Professional

53. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (2002).

54. *See, e.g.*, Baker v. Humphrey, 101 U.S. 494, 500 (1879) ("It is the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.").

55. N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 4-101 (2002).

56. *See* N.Y. County Lawyers' Ass'n, Comm. on Prof'l Ethics, Formal Op. No. 730 (2002).

> Conduct have a rule about that, Rule 4.4(b), which says, if you get a document that you know isn't meant for you, you give notice to the other side and let the other side litigate over it.[57] New York hasn't adopted that yet. The state bar is in the process of reviewing our disciplinary rules and proposing that they be changed to the Model Rule format, but we haven't done that yet. So we have no specific rule on what you do when you receive inadvertent production of documents. Then you have some bar association opinions that are interpreting the vague rules about dishonesty and deceit and applying them in the context of inadvertent production. Two ethics committees in New York come out two different ways.[58] Ethics committees' opinions are not final authorities in any event;[59] the committee is just a group of lawyers who are trying to do their best to get the right answers. Outside New York, other committees have read the same rules differently. Some ethics committees have said you have to use the document that's inadvertently produced.[60] Other bars say you must return documents as a matter of professional courtesy or by analogy to property law.[61] The ABA said one thing in an ethics opinion—that you can't use the document[62]—then changed its mind by adopting a rule saying you only have to give the other side notice.[63] So, don't you have to be pretty sure about the rule on inadvertent production of documents, and how it applies to inadvertent oral disclosures, and whether this disclosure would even be considered inadvertent, before you say you're not going to exploit this associate's disclosure? To me, in the end, this is a tough question.

57. *See* MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2007).

58. *Compare supra* text accompanying note 49 *with supra* text accompanying notes 51, 52.

59. *See* Snider v. Superior Court, 7 Cal. Rptr. 3d 119, 126 n.4 (Cal. Dist. Ct. App. 2003).

60. *See, e.g.*, Colo. Bar Ass'n Ethics Comm., Formal Op. 108: Inadvertent Disclosure of Privileged or Confidential Documents (Sept. 2000); Maine Board of Overseers of the Bar, Prof'l Ethics Comm., Op. No. 146 (1994). Maine has since withdrawn (and reversed) Advisory Opinion No. 146 with Advisory Opinion No. 172. Maine Board of Overseers of the Bar, Prof'l Ethics Comm., Op. No. 172 (2000). *See generally* Trina Jones, *Inadvertent Disclosure of Privileged Information and the Law of Mistake: Using Substantive Legal Principles to Guide Ethical Decision Making*, 48 EMORY L.J. 1255, 1284 (1999); Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767, 784–85 (2005).

61. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92–368 (1992), *reprinted in* ABA HOUSE OF DELEGATES, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 532 (Jeanne P. Gray ed., American Bar Association 2006); N.Y. County Lawyers' Ass'n, Comm. on Prof'l Ethics, Formal Op. No. 730 (2002).

62. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992), *reprinted in* ABA HOUSE OF DELEGATES, *supra* note 61, at 531–40.

63. MODEL RULES OF PROF'L CONDUCT R. 4.4(b) (2007).

## IV. SOME REFLECTIONS

The dialogue offered in this essay is not necessarily representative of the use of the problems to generate discussion in CLE programs on legal ethics, and it is unlikely that any one dialogue could be. Different instructors use different types of problems, ask different questions, and inject their own views to greater and lesser degrees. Discussions unfold differently. Indeed, having used this same problem in different settings on different occasions, I know that the same instructor using the same problem can instigate unexpectedly different conversations, depending on the audience, their experience and philosophies, and the dynamics in the room.[64] Even so, the dialogue is illustrative and can serve as the occasion and point of departure for some reflections about teaching lawyers ethics interactively through the problem method.

One thing that the dialogue illustrates is that, given the limited time available, choices must be made between breadth and depth of coverage. In this case, breadth won out. The discussion covered a lot of ground. Among the issues raised were: what can lawyers say to friends and other third parties about their work; when must lawyers report their errors and misconduct to their supervising lawyers, clients, or disciplinary authorities and when must they report others' errors and misconduct; and what may or must a lawyer do upon receiving another party's confidential information? The issues, in turn, implicated a variety of ethics standards and concepts—e.g., confidentiality and the distinction between the disciplinary obligation, fiduciary duty, and evidentiary rules; the fiduciary duty of candor to the client; the profession's obligation to self-police; and the duty of zealous advocacy and its limits. Any of these issues and concepts alone could become the subject of a lengthy discussion.

Reading the dialogue with the eyes of a law school teacher, I am critical of how superficially many issues were touched and how many opportunities were therefore missed to explore interesting and important issues more deeply,[65] or

64. I have found, for example, that at law firm programs, associates are reluctant to speak, and even more reluctant to take a position contrary to that of a partner. In general, there is a risk of "group think"—that lawyers who are uncertain about their own views will be unduly influenced by prior speakers who speak with an air of certainty and authority. To combat that, I often adopt the role (all-too-comfortable for a law professor) of devil's advocate, but I try to confine my challenges to senior lawyers. I try to encourage the young associates by suggesting that, having recently taken a legal ethics course in law school and taken the Multistate Professional Responsibility Examination, they are the ones in the room who are most familiar with the ethics rules.

65. From a scholarly perspective, of course, the dialogue may be even more disappointing. Interesting and incisive scholarship has been devoted to the subject of legal ethics, but this particular discussion referred to none of it. In part, this may be a reflection of the disjunction identified by Judge Edwards some years ago between the bar and the legal academy. A law

even simply to pause and give a slightly fuller explanation to ensure that participants were understanding the applicable professional standards. For example, the early discussion lightly touched on the important difference between the protection of the attorney-client privilege and the much broader protection of the duty of confidentiality. I have found that practicing lawyers sometimes do not grasp the distinction and wrongly assume that as long as information is not privileged, they may freely talk about it. It is questionable whether the quick discussion of this issue adequately impressed the distinction and its implications on those attending. Similarly, the discussion addressed another important point: that even if one takes pains not to name the client, one can violate the confidentiality duty because the listener (or someone to whom the listener in turn conveys the information) can often figure out the client's identity. This point is important because lawyers often have the misconception that if they speak about their work hypothetically or otherwise avoid identifying the client, they are not disclosing client confidences. Again, it is unclear whether this point was hammered home. At the time of the program, my disinclination to exploit these teaching opportunities reflected, in part, a preference to keep the conversation flowing, preserve continuity, keep participants engaged, and cover most of the issues raised by the problem in the limited time left. In a law school class at least, this would ordinarily be considered a mistake.

In the end, the principal value of discussions such as the one portrayed here may not be to impart superficial knowledge of some ethics standards and their application, but to convey some broader points about the identification, resolution and significance of ethics issues. Most of these concern the ethics process, not the substance of ethics standards. For the most part they were made, at best, implicitly in the dialogue. Perhaps the overarching message was that ethics should matter to all lawyers—enough for them even to educate themselves beyond the context of a couple of annual CLE classes. One might ask whether the message was delivered too subtly, and even if not, whether anyone would be persuaded or influenced.

To begin with, the program suggested, ethics problems can arise in simple and familiar settings (here, lunch with a friend), and these problems are not entirely avoidable even by the most cautious lawyer. While it is fun for CLE instructors to use less quotidian problems—for example, the situation of the criminal defense lawyer in a homicide case whose client discloses where he

professor need pause only a moment to imagine or recall an academic workshop on legal ethics (or any other subject) to realize the potentially stark difference between CLE programs and scholarly presentations. On the other hand, scholarship of the subject of legal ethics, more than most, has the potential to be practical; after all, the subject is, at its heart, about how lawyers practice. Therefore, CLE programs on legal ethics can be better designed to bridge the gap between the profession and law schools by finding ways to take advantage of scholarly perspectives.

buried his victims—a steady diet of these runs the risk of reinforcing the misconception that ethics concerns arise rarely in lawyers' lives and that the lawyers in the room are personally immune to them. Ideally, this problem also conveyed that ethics issues do not announce themselves; a lawyer must be sensitive and knowledgeable enough to notice them when they arise. Further, many ethics issues and norms may be implicated at once; they don't present themselves as neatly and discretely in real life as they may in casebooks.

Further, the discussion suggested, not all ethics problems can be resolved intuitively, as demonstrated when different lawyers in the room, drawing on their experience and professional intuition, offered different and sometimes conflicting responses. From the perspective of professional regulation, it was suggested, conduct is governed by professional rules and other law governing lawyers, not by the particular lawyer's intuition. The applicable law may be unexpected, vague (e.g., on the question of what a lawyer may say about his or her work), or ambiguous (e.g., on the question of whether a lawyer may or must exploit another lawyer's ethically improper disclosure of client confidences). Underlying professional values may be in tension. Professional obligations under the rules and other law of lawyering may also be at odds with some lawyers' ordinary moral intuition (as on the question of whether to exploit another lawyer's mistake, especially when that lawyer is a friend). At times, some lawyers may even be put to tough choices between their perceived moral commitments to others and their professional duties.

One risk that comes with encouraging lawyers to offer competing perspectives without attempting to resolve which are right and wrong is that participants may infer that one answer is as good as the next, and that it matters little whether one acts on one's own professional or moral intuitions or tries to discern and comport with prevailing professional expectations. An effort was made to counter that inference, particularly through the participation of the firm's ethics advisors. They helped convey that resolving ethics questions properly is important, difficult though it may sometimes be, because getting the answer wrong can have costs. In particular, getting it wrong can have costs to an individual lawyer's career and reputation (as in the case of the hapless associate who said too much about his work), to one's clients, or to one's firm; lawyers who fail to comport with their professional obligations risk professional discipline and firms risk sanctions and civil liability.

On the question of how to discern professional expectations in areas of uncertainty, the conversation illustrated that there are sources of guidance in professional writings, such as bar association ethics opinions. While the written authorities may disagree (as in the case of how to respond to inadvertent production of documents) or fail to answer the particular question directly or with clarity, there are other sources of assistance. In the law firm setting, in particular, ethics advisors and other senior lawyers can bring objectivity, experience and knowledge of professional conduct to bear on

questions brought to them. One of the objectives of the ethics partners, who invited me to present the program, was to influence other lawyers in the firm to bring ethics questions to their attention, and the program was, to a significant degree, an advertisement of their availability.

## CONCLUSION

The legal profession assumes that lawyers need formal education in legal ethics but has not adequately considered what realistically can be achieved by mandatory CLE programs in legal ethics and how to teach them effectively. In general, the profession's approach has been to stand back and say, "Let a thousand flowers bloom." The risk is that lawyers will collectively spend a great deal of time and money for little benefit. This essay does not take a position on the effectiveness of CLE ethics programs generally or of interactive programs making use of the problem method in particular. It certainly does not purport to illustrate a well-aimed and effective use of this method. On the contrary, one is welcome to conclude that although the program described in this essay was the product of a good faith effort to design and present an engaging and instructive program, it probably accomplished little. Regardless, the legal profession should have a serious discussion about the efficacy of CLE programs in legal ethics. Ideally, this essay and the illustration it contains will at least provide some fodder for that discussion.