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Education In Professional Responsibility

*David B. Goshien**

THE PROBLEMS, INDEED THE INADEQUACIES, OF PRESENT LEGAL EDUCATION in ethics and professional responsibility are well known. The traditional methods of preparing law students for the avoidance of ethical and even criminal complaints against them in their future practice of law have been, in the main, divisible into two general categories: the "pervasive" method, through which understanding is supposed to be gained by students as if by osmosis through all courses and general law school contract, and the "specific" method which offers a course in the subject. Both methods are commonly used but neither seems to have achieved an acceptable measure of success.

The pervasive method of preparing law students to recognize and to escape difficulties depends upon individual instructors in each course area pointing out to their students, at appropriate points in both substantive and adjectival law courses, the possibilities of ethical problems in the practice of law. It should be apparent that the sharing of responsibility for insuring basic student understandings among an entire faculty will and usually does result in the task remaining undone. The student's introduction to the Code of Professional Responsibility is at best perfunctory, with his understanding of its application to fact situations in the practice of law probably nonexistent. This sorry result may be exemplified by the young attorney who graduated from a top-flight law school which purported to employ the pervasive method of communicating ethics. After some years in practice he accepted an offer to begin teaching. In his first year of instruction he happened to prepare a course in ethics and professional responsibility: only at that time did he discover that the "selling" of his practice to another attorney violated the then Canons of Professional Ethics. The usual custom in the community provided common precedent for such action, and the "pervasive" method demonstrated another failure to educate.

The specific course in legal ethics and professional responsibility often fares no better in bringing law students to a thorough grounding in the harsh practicalities of the subject. Although one may learn to avoid neon signs and to refrain from following too closely upon the tracks of emergency vehicles, such courses seem to be squeezed into the curriculum too early in law school, while students are being introduced for the first time to the bramble bush (see the introductory text for beginning law students of the same name by Karl Nickerson Llewellyn) of law study and the horrendous weight of substantive law courses. Often the subject is slighted as a part of a scatter-gun course in legal history, methods, elements, philosophy or

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some combination of the above. Beginning students have their concentration set upon seemingly unrelated basic courses (and their basic fears of being unable to remain in law school) and have not yet reached that degree of maturity and proximity to professionalism which would provide the base on which to build a serious, in-depth understanding of problems which are not very remote. When the first real case and client are easily foreseeable in the near future, especially after some clinical direct contact, students' concentration quotients in this subject rise surprisingly.

Too often students appear to assume conclusively that problems in ethics and professional responsibility occur only to the ubiquitous, proverbial "other guy" and that they themselves are above any possibility of trouble. It is precisely this attitude, of being "too good" for the subject which may account for some of our present difficulties. The attorney about whom one sometimes reads in the local newspaper, and more often hears only whispered rumors, are not the only one who run afoul of the bar association's Ethics and Grievance Committee because of his use of clients' funds; the sweet innocent who paid no attention to that uninteresting sidelight subject in law school finds that he has commingled funds without even realizing it by the use of a single trust account for the interests of numerous small clients or by "generously" leaving unwithdrawn his earned fees in that same account! Usually such minor indiscretions and small peccadilloes are disregarded without even a slap on the wrist, perhaps because of the universal ignorance of a local bar which condones such a practice as common. Should the attorney find himself the object of a charge by an irate client, he may discover that his ignorance or misunderstanding has set him on shaky or even untenable legal ground.

Why does a hearse horse snicker when it carries a lawyer away? The lay public has been little moved by the public relations campaigns of the ABA and local bar associations. Without going into all the reasons therefor, the sentiments and attitudes of the public toward lawyers do not include the deep and abiding respect held for the physicians whose concern is for the corporal. Perhaps this is in part due to the fact that the public is not impressed with the manner in which too many attorneys treat the property and the interests of clients. Probably the most important factor contributing to the slight esteem in which lawyers are held is the well-known dilatory attitude of those lawyers who always plan to *implement* something tomorrow instead of *doing* it today. The propensity for procrastination in our profession is so often indulged that the public despairs of completing within a reasonable time such common causes for seeking an attorney's help as the probate of a small estate or the trial of a simple contract action. Yet how can education in professional responsibility and legal ethics help when the few cases studied on the subject of sloth involve such exaggerated standards that only the most

foolhardy or those long since deceased would fail to move for so long. Emphasis should be laid upon the importance of economic office practices aimed at accomplishing results which are timely and not just successful. As far as the client is concerned, a result delayed is a result denied. By the time it is accomplished, if it may still be done, it is often so late that the client's feeling of frustration must result in disrespect. Has our system of apprising law students of their professional duties yet stressed this most simple and apparent fact of public relations?

The matter of fees belongs not just in a course on client counseling or clinical exposure: how many law students understand that the normal, usual current sharing of fees for referral of a client's cause to another attorney is improper under DR 2-107 unless responsibility or work is also shared? Yet the practice of taking one-fourth or one-third of the fee charged the client continues commonly with the result that the cost to the client is unnecessarily and unfairly increased, and proper referral to a certified specialist remains impossible. If charges and procedures for proper referral were understood, our profession could perhaps begin to move in the direction of specialization so badly needed. Then too, we should be able to inculcate in law students a comprehension of the need to supervise the profession from within, (one of the definitions of a profession) as required by Canon I, through the disclosures of attorneys instead of a closed system of protecting unethical attorneys by a code of silence. Some professional restraint in criticizing colleagues is of course necessary, but too often it seems attorneys fail or refuse to disclose the known sins of their fellows, due to misguided professional loyalty or more likely a sort of "there but for the grace of God go I" reluctance. Error allowed to go unchallenged is error encouraged, until it becomes so common as to create a norm, as in the matters of fee sharing and sale of law practice already noted.

If we look at just some of the commonly encountered difficulties, we may get some idea of the importance and present ineffectiveness of legal education in professional responsibility. Perhaps the matter of requirements for admission to the bar may be left to the self-interest of law students and in the schools with a particular state bias to the law school administration which provides registration forms, information on filing requirements, etc. But in such matters as the fee schedules of local bar associations, it is necessary for students to be thoroughly introduced to the subject of minimum fees, fee cutting (especially as a function of advertising), the influence of retainers and continuing association with clients, etc. These harsh realities cannot, it seems, be left to the imagination or the haphazard and disorganized attempts of students; during law school they are more concerned with the exigencies of substantive study and perhaps the siren call of political activism and public service than such grubby,

mundane matters as money, office economics, management of a law practice and last, least and finally, the ethics of billing.

The possibilities for breach of the attorney client privilege, prohibited by Canon 4 of the 1969 Code of Professional Responsibility, are as subtle, numerous and varied as human conduct. It should be readily apparent that detailed study and discussion of this Canon are necessary in an academic setting, to bring out the parade of horrors which can result from the least laxity in luncheon conversations, cocktail-party chatter or even frank family dialogue. Too many attorneys have only vague notions of the limits of their discourse, and, as so often happens, ignorance of boundaries results in their transgression.

With the spread of no-fault insurance and the public emphasis on skyrocketing insurance premiums, the subject of contingent fees stands to lose little of its ability to engender debate. Surely the area is worthy of concentrated study and classroom discussion in the context of a course designed to discover the limits of its utility and the possible pitfalls of its use by lawyers. Worth mentioning are the problems of protecting the interests of physicians and others who render service to a client in connection with his claim: how far can an attorney go in seeing that creditors are paid out of the funds of the client which come into his lawyer's hands? Must the interests of succeeding clients, who will need physicians' reports and automobile repairs, be disregarded completely? On the other hand, may an attorney refuse to turn over intact funds which, without doubt, belong legally only to the client? These and other issues attendant upon the general question of contingent fees ought to be understood by students in an academic context, lest they be forced in their ignorance to just ask around the local bar for the prevailing custom. In exactly that manner certain questionable practices have tended toward self-perpetuation without ethical scrutiny.

Conclusion

The pervasive method of educating law students in ethics and the responsibility of the profession has not worked, and in the opinion of this writer cannot. The specific course in the subject, which should be offered in the last year of law schooling, is the only vehicle to avoid the insufficiencies and errors of the past. This course can be made exciting and innovative with ideas of public interest law firms, representation of indigents, consumer class actions and *pro bono* environmental law suits in addition to thorough coverage of the practicalities of legal ethics and professional responsibility.