

Using Ethical Problems in First-Year Skills Courses

By Philip M. Frost

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Can instructors effectively introduce ethics in a first-year research, reasoning, and writing course without sacrificing other course priorities? I believe they can not only do so, but they can even enhance writing instruction through a writing assignment involving an issue under the rules of professional conduct.¹ This article describes my experience in using such an assignment, its advantages for writing and ethics instruction, and some concerns.

The Assignment

The ethics and writing assignment that I have most often used is a brief on a motion to disqualify a law firm from representing a party in a lawsuit. The fact scenario involves a new attorney in a firm who previously did work for a client now being sued by a party represented by the new firm. In such a situation the new attorney has a conflict of interest and would be disqualified from representing the new firm's client if the previous work involved confidential information related to the case and the former client did not consent.² The disqualification would normally extend or be "imputed" to all attorneys in the new firm.³

However, the rules of professional conduct in several states allow a firm to avoid disqualification if it creates a timely "ethical screen" to isolate the

disqualified attorney from those working on the case.⁴ Such a screen generally includes segregation of firm files and instructions to the screened attorney and firm personnel to avoid communication about the case.⁵ It must be implemented as soon as practical.⁶ The main issue I have generally asked students to consider is whether the screen was timely if it was implemented after some brief delay. Additional or alternative issues can be the sufficiency of the screen or the relation of the prior work to the current litigation. An alternative fact pattern can be used in a state that only permits screening of attorneys moving from government to private practice.

Advantages

Such an assignment has a number of advantages for teaching ethics as well as research, analysis, and writing. One advantage is that it involves an interesting combination of rules, ethical principles, and the realities of practice. The facts and authorities engage students' interest because they deal with lawyers' actions, mistakes, and the consequences of those mistakes. The consequences can include a disqualified law firm, a dissatisfied client who must change lawyers, a new lawyer who is partly responsible for the firm losing a representation, and even a judge publicly criticizing a firm.⁷ Students can also easily relate to the new

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¹ I have used state rules based on the American Bar Association Model Rules of Professional Conduct rather than the former Model Code of Professional Responsibility. As of 2004 43 states and the District of Columbia used some version of the Model Rules. Steven Gillers & Roy D. Simon, *Regulation of Lawyers: Statutes and Standards* 3 (2005 ed.).

² Model Rules of Prof'l Conduct R. 1.9 (1983) (amended 2003).

³ Model Rules of Prof'l Conduct R. 1.10.

⁴ See Gillers & Simon, *supra* note 1, at 124–25, 132. For example, the rules in Michigan and Illinois permit such screens. *Id.*; Mich. Rules of Prof'l Conduct R. 1.10 (1988); ILCS S. Ct. Rules of Prof'l Conduct R. 1.10 (1990). The Model Rules do not expressly permit such screens except as to attorneys moving from government employment. Model Rules of Prof'l Conduct R. 1.9, R. 1.10, R. 1.11.

⁵ Model Rules of Prof'l Conduct R. 1.0 (k) and cmt. [9].

⁶ *Id.*; Mich. Rules of Prof'l Conduct R. 1.10.

⁷ See, e.g., *Cobb Publishing, Inc. v. Hearst Corp.*, 907 F. Supp. 1038 (E.D. Mich. 1995).

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lawyer, which facilitates persuasive writing. Finally, the brief gives students an opportunity to organize and present a combination of rule and case analysis and policy arguments.

The substantive issues are also interesting and important for the study of ethics. They include such fundamental concepts as confidential client information, attorney loyalty, and conflicts of interest in a law firm.⁸ These are all issues that would be difficult to introduce in an abstract way. To complete the assignment students must deal in depth with these concepts using rules, rule comments, cases, and opinions from state ethics regulatory bodies or the ABA.

They cannot treat such concepts as mere abstractions. Rather, they must focus on what they mean in practice, apply them to a concrete fact situation, and write about them. This is a much more intensive and effective way to teach ethics than simply citing or discussing rules and cases, or doing a class exercise.

Concerns

The main concern with such an assignment is that it can be complex. As noted, students must consider rule text and comment, cases, nonjudicial ethics opinions, and the underlying rule principles. The rules and principles will generally be new to students, and there are some cross-references within rules that must be sorted out.⁹ However, the complexity can be reduced by limiting the issues, and the Model Rules Preamble and Comments give good short introductions and summaries of rule principles.¹⁰ The authorities can also be reasonably limited by focusing on one jurisdiction.

While the complexity of the problem is a challenge for a shorter assignment, it can be an advantage for

a longer one. It gives instructors an opportunity to teach students how to analyze ethics rules, opinions, and policies, and how to organize and persuasively present this analysis in writing. It gives students the opportunity to apply this instruction in depth. A larger version of the assignment can also use authority from other jurisdictions with similar rules, and address more of the issues noted above. And the underlying rule principles are certainly significant enough to merit deep analysis and discussion.

Another concern with such an assignment is that students must research in new sources, including ethics rules and nonjudicial opinions interpreting the rules. However, additional research experience is always useful, and once the relevant materials or computer libraries are located, the research techniques are not new.¹¹ This is also a good area to compare print and computer research. Online research in ethics sources is more efficient and effective than print research in light of the difficulty in locating current print sources of state ethics rules and opinions. State ethics rules can be found in rule “deskbooks,”¹² but these are generally published only once a year, and may become outdated in light of ongoing state rule amendments following ABA ethics rules changes.¹³ Many state ethics opinions are published only in bar journals and are difficult to find in print. But online sources for state ethics rules and opinions are current and relatively easy to locate.¹⁴

⁸ See Model Rules of Prof'l Conduct R. 1.6, R. 1.9, R. 1.10.

⁹ See Model Rules of Prof'l Conduct R. 1.10 (disqualifying firm if one of its lawyers practicing alone would be disqualified under Rules 1.7 or 1.9); Mich. Rules of Prof'l Conduct R. 1.10 (allowing screen to avoid firm disqualification where one of its lawyers is disqualified under Mich. Rules of Prof'l Conduct 1.7, 1.8, 1.9, or 2.2).

¹⁰ See Model Rules of Prof'l Conduct Preamble: A Lawyer's Responsibilities, R. 1.9 cmt, R. 1.10 cmt.

¹¹ See Christina L. Kunz et al., *The Process of Legal Research* 350–63 (6th ed. 2004).

¹² *Id.* at 352.

¹³ See Gillers & Simon, *supra* note 1, at 3 et seq. (noting frequent amendments to ABA Model Rules of Professional Conduct and containing text of Model Rules with amendments through August 2004); See also <courts.michigan.gov/supremecourt/Resources/Administrative/2003-62.pdf> (last visited July 13, 2005) (containing proposed revisions to Michigan Rules of Professional Conduct).

¹⁴ See Kunz, *supra* note 11, at 353. A good online source to locate current state rules of professional conduct is the American Bar Association Center for Professional Responsibility Web site, which contains links to state rules of professional conduct and ethics opinions. See <www.abanet.org/cpr/links.html> (last visited July 13, 2005).

Conclusion

A writing assignment involving ethical issues is an effective way to teach ethics as well as research, analysis, and writing. It involves interesting rules, cases, and policy issues that challenge students' organizational, analytical, and writing skills. It is an effective way to teach ethics because students must engage deeply with ethics principles and apply them to an interesting fact setting to complete the

assignment. The inclusion of ethics issues in a major writing assignment also signals the importance of such issues early in students' law school careers. In sum, for those looking for a way to integrate ethics and writing instruction, the ethical problem can be the answer.

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Selected Resources for Ethics Research Assignments

(Descriptions provided by the publishers)

Monroe H. Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 3d ed. (2004) [Newark, NJ : LexisNexis].

“This Understanding treatise presents a systematic position on lawyers' ethics. The authors argue that lawyers' ethics is rooted in the Bill of Rights and in the autonomy and the dignity of the individual. This traditionalist, client-centered view of the lawyer's role in an adversary system corresponds to the ethical standards that are held by a large proportion of the practicing bar.”

James L. Kelley, *Lawyers Crossing Lines: Nine Stories* (2001) [Durham, NC: Carolina Academic Press, 190 p.]

“This book is a collection of true stories about lawyers who broke the rules ended up being sued for malpractice, disbarred, or prosecuted. Intended as supplemental reading for students in professional responsibility, ethics, or lawyering classes, it contains stories that come directly from the courtroom, revealing the gritty realities of lawyers in trouble.”

Deborah L. Rhode, editor, *Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (2000) [New York: Oxford University Press, 294 p.]

“Lawyers' ethics have been condemned for centuries, but they received little scholarly scrutiny until the last few decades. *Ethics in Practice* brings together leading experts in the emerging field of legal ethics to discuss the central dilemmas of practicing law.”

Ronald D. Rotunda and John S. Dzienkowski, editors, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility*, 2005–2006 edition; the Center for Professional Responsibility, American Bar Association (2005) [St. Paul, MN: Thomson/West, 1973 p.]

“This [deskbook] combines Rotunda and Dzienkowski's thorough understanding of the current ethical climate, with the authors' all-encompassing commentary and discussions, and references to the American Law Institute's new Restatement of the Law, 3d—Law Governing Lawyers.”

American Bar Association: Center for Professional Responsibility <www.abanet.org/cpr/ethics.html>

“Since 1978, the Center for Professional Responsibility has provided national leadership and vision in developing and interpreting standards and scholarly resources in legal ethics, professional regulation, competence, professionalism and client protection mechanisms.”

American Legal Ethics Library, Cornell Legal Information Institute <www.law.cornell.edu/ethics>

“This digital library contains both the codes or rules setting standards for the professional conduct of lawyers and commentary on the law governing lawyers, organized on a state by state basis.”

Legalethics.com <www.legalethics.com/index.law>

“LegalEthics.com currently provides users with access to a collection of Internet resources relating to ethics and the law, including articles and links to Internet resources.”