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Legal Ethics in Preparation for Law Practice

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Robert P. Burns*

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I. INTRODUCTION

This Article first examines the different ways in which the MacCrate Report\(^1\) demonstrates the pervasiveness of legal ethics in the practice of law. Second, this Article describes a set of basic principles that strongly suggest that the study of legal ethics ought to be integrated with the study of fundamental lawyering skills. Finally, this Article gives a brief account of two exercises from Northwestern University School of Law's integrated program to demonstrate the importance of a contextual introduction to legal ethics.

II. THE MACCRATE REPORT AND THE Pervasiveness of Legal Ethics in Competent Practice

An examination of the MacCrate Report's "Statement of Fundamental Lawyering Skills and Professional Values" reveals the differ-

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\(^1\) SECTION ON LEGAL EDUC. AND ADMISSION TO THE BAR, AMERICAN BAR ASS'N, LEGAL EDUC. AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap, 1992) [hereinafter MACCRATE REPORT or REPORT].
ent ways in which ethics pervade the competent practice of law. Upon
close inspection, the statement shows that the Report's division of
what is fundamental to the practice of law into skills, on the one hand,
and values, on the other, can only be deemed tentative and provi-
sional. Ironically, it is the skills section, and not the values section,
that demonstrates the importance of legal ethics in the practice of law,
something that is true for at least three reasons.

First, the exercise of many of the skills identified by the MacCrate
Report are, in fact, controlled by the ethical rules, although the Report
itself does not explicitly advert to them. Generally, the notion that a
new lawyer should have a basic level of competence in a number of
essential skills merely expresses the ethical duty of competence.2 The
"skills and concepts involved in developing a plan of action with the
client...including...[e]valuating the comparative efficacy and desir-
ability of the alternative possible plans of action, comparing and rank-
ing them on the basis of...[t]he extent to which each plan of action is
likely to achieve the client's objectives and satisfy his or her priorities
and preferences...[and][t]he extent to which each plan of action is
consistent with the financial resources which the client is able and
willing to devote"3 parallels the Model Rules' provision regarding the
client's control over the objectives of the representation4 and the Com-
ment's explicit suggestion that the client should make the decision re-
garding the amount of resources to be devoted to representation.5
Furthermore, the "skills and concepts involved in implementing a
plan of action, including...[a]ssessing whether the matter should be
referred (in whole or in part) to another lawyer,"6 recalls the Comment
to the Model Rules' competency requirement.7

Moreover, the various skills of counseling the client about the ad-
vantages and disadvantages of a given course of action involve the
Model Rules' duty of communication8 and the demanding notion of
consultation that is required in various contexts under the Rules.9
The skill of "[a]ssessing whether some aspects of the plan may appro-
priately be delegated to law clerks, paralegals, investigators, or sup-

Rules]
4. Model Rules, supra note 2, Rule 1.2.
5. Model Rules, supra note 2, Rule 1.2 cmt.
7. Model Rules, supra note 2, Rule 1.1 cmt. 1.
8. Model Rules, supra note 2, Rule 1.4.
9. "'Consult' or 'Consultation' denotes communication of information reasonably suf-
ficient to permit the client to appreciate the significance of the matter in ques-
tion." Model Rules, supra note 2, Preamble, tit. Terminology § 2. See, e.g.,
Model Rules, supra note 2, Rule 1.7 (requirement of consultation before waiver
of conflicts).
port staff\textsuperscript{10} recalls the Model Rules' provision that a lawyer with "direct supervisory authority over the nonlawyer shall make reason-\vspace{-3pt}\textsuperscript{able efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer."\textsuperscript{11} (This provision then defines those circumstances in which the lawyer is answerable in a disciplinary proceeding for actions of the assistant.)\textsuperscript{12}

Another example in which a MacCrate Report skill mirrors an ethical obligation is the Report’s skill concerning timeliness,\textsuperscript{13} which parallels the Model Rules’ requirement of diligence: “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”\textsuperscript{14} The skills of legal research and argument\textsuperscript{15} are limited by the ethical duty to “disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”\textsuperscript{16} Conversely, the skills of legal analysis are also necessary to judge whether or not authority is directly adverse to the client’s position. Further, the skill of document analysis\textsuperscript{17} is necessary to fulfill the ethical requirement “to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party.”\textsuperscript{18}

Negotiation\textsuperscript{19} is controlled by the ethical requirement of truthfulness in statements to others.\textsuperscript{20} The Comment only hints at the difficulties embedded in this ethical requirement.

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this cate-

\begin{thebibliography}{99}
  \bibitem{10} MacCrate Report, supra note 1, at 146.
  \bibitem{11} Model Rules, supra note 2, Rule 5.3(b).
  \bibitem{12} Id., Rule 5.3(c).
  \bibitem{13} MacCrate Report, supra note 1, at 147.
  \bibitem{14} Model Rules, supra note 2, Rule 1.3.
  \bibitem{15} MacCrate Report, supra note 1, at 157-63.
  \bibitem{16} Model Rules, supra note 2, Rule 3.3(a)(3).
  \bibitem{17} MacCrate Report, supra note 1, at 168-69.
  \bibitem{18} Model Rules, supra note 2, Rule 3.4(d).
  \bibitem{19} MacCrate Report, supra note 1, at 185-90.
  \bibitem{20} Model Rules, supra note 2, Rule 4.1 provides:
    \begin{itemize}
      \item In the course of representing a client a lawyer shall not knowingly:
        \begin{itemize}
          \item make a false statement of material fact or law to a third person; or
          \item fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.
        \end{itemize}
    \end{itemize}
\end{thebibliography}
To complicate matters further, lawyers have been severely disciplined for failures to disclose during negotiation certain aspects of their clients' situations. In addition, the laws affecting lawyering beyond the disciplinary rules, in particular the law of fraud, have important effects on lawyer statements in negotiation.

Of course, the effective acquisition of information for purposes of preparing a case for trial requires interviewing witnesses, some of whom are or may become opposing parties or are the present or past employees of opposing parties. Some of those witnesses are not represented by counsel and may misunderstand the lawyer's role. Others have retained counsel to represent them “in the matter,” thereby precluding direct communication. Moreover, the rules that control contacts with present and past employees of represented corporations are by no means intuitively obvious. These rules have some important variations by jurisdiction and can have a potentially devastating effect on the representation. Finally, ethical rules control the “setting [of] fees and [the] obtaining [of] retainers from clients” and other aspects of the business side of law practice, such as advertising and soliciting.

A second reason why the skills section of the Report demonstrates the centrality of ethics to the practice of law is that some important skills require the consideration of ethical limitations on tactically attractive courses of action. Thus, the most basic skill, identifying and diagnosing the problem, requires an “accurate and complete understanding of the client's situation and objectives, including . . . [t]he optimal timetable for resolving the problem, taking into account . . .

21. Model Rules, supra note 2, Rule 4.1 cmt. 2.
25. Model Rules, supra note 2, Rule 4.3 provides:
   In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
26. Model Rules, supra note 2, Rule 4.2.
28. Model Rules, supra note 2, Rule 1.5.
The ethical limitations upon the use of delay tactics when delay is in the client’s interest. In addition, “effective counseling requires ... an understanding of the various ethical rules and professional values that shape the nature and bounds of a counseling relationship between lawyer and client, including ... the division of authority between lawyer and client in making decisions that affect the resolution of a client’s legal problem ...” Further, skillful counseling requires an understanding of the “extent to which it is proper for a lawyer ... to attempt to persuade the client to take certain courses of action that the client is not inclined to take ... because the lawyer believes these measures are necessary to safeguard the client’s welfare or best interests.”

Moreover, counseling a client requires an appreciation of the “extent to which it is proper for a lawyer ... to attempt to persuade the client to modify his or her decisions or actions to accommodate the interests of justice, fairness, or morality.” Unfortunately, effective counseling, broadly understood, also includes the contingency that the client may refuse to “modify his or her decisions or actions to accommodate the interests of justice, fairness, or morality,” in which case the lawyer must consider whether to take “action to safeguard the interests of third parties or the general public” or whether to “withdraw[] from the representation of the client.” If withdrawal is the chosen course of action, such action will accordingly implicate the difficult ethical rules surrounding withdrawal from representation, revelation of confidential information, and action in the face of client misconduct.

31. MacCratae Report, supra note 1, at 142-43. See Model Rules, supra note 2, Rule 3.2, which provides that “[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.” The Comment to Rule 3-2 adds:

Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party’s attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

Model Rules, supra note 2, Rule 3.2 cmt.

32. MacCratae Report, supra note 1, at 176-77 (citation omitted).

33. Id. at 177. This latter is, of course, the problem of paternalism.

34. Id. (citation omitted).

35. Id. (citation omitted).

36. Model Rules, supra note 2, Rule 1.16.

37. Id. Rule 1.6(b).

38. Id. Rule 4.1(b).
Third, finally and most broadly, many of the lawyering "skills" which the Report identifies have traditionally been considered "virtues."39 For example, sensitivity to the limitations of one's experience or competence and to the limitations of one's knowledge of the facts of a particular case requires the virtue of humility. "Obtaining an accurate and complete understanding of the client's situation and objectives, including . . . [t]he precise circumstances and needs that make the situation a problem for the client"40 requires more than "interviewing skills" that are conceived of as purely technical proficiencies. Real "active listening" requires the virtue of empathy.

A respect for the client's autonomy embodied in the "skill" of continually consulting with the client about developments in the case and the expenditure of the client's funds is closely akin to the virtue of selflessness. Suggesting to the client that his account of the facts may be incomplete requires courtesy and tact. Generating a broad range of solutions, including those that may require a lower-level employment of the lawyer's services, requires integrity and imagination. Trying cases requires patience, diligence, and often courage. Further, to determine fairly "the probabilities of successful implementation" of a plan of action requires a realistic and moral clarity of vision, the opposite of sentimentality and wishful thinking.41

The distinctively rhetorical or "political" skill of communication42 comes into play when a lawyer addresses an audience with quite divergent interests from those of the client. Here it is crucial to view situations from the point of view of the various audiences, something that requires a kind of imaginative self-transcendence that Kant called the "enlargement of mind."43 In addition, it has been suggested that persuasive story-telling, most fully employed in opening statements at trial,44 but invoked informally in dozens of different contexts, requires a moral quality.45 Some "skills" really are virtues.

Making an oblique reference to these broader ethical considerations, the MacCrate Report provides that a lawyer ought to be familiar

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40. MacCrate Report, supra note 1, at 142-43.
42. MacCrate Report, supra note 1, at 173.
44. MacCrate Report, supra note 1, at 194.
with the "[n]ature and [s]ources of [e]thical [s]tandards, including . . . [t]he basic concept of law as an ethical profession, which . . . [i]mposes upon each member of the profession certain ethical obligations to cli-
ents, the legal system, the profession, and the general public; and . . . [d]efines those obligations in terms which involve their interpretation both by individual attorneys at the level of conscience and by author-
ized organs of the profession . . . ."46 The Report urges familiarity as well with "[a]spects of ethical philosophy bearing upon the propriety of particular practices or conduct (such as, for example, general ethical precepts calling for honesty, integrity, courtesy and respect for others [and] [a] lawyer's personal sense of morality). . . ."47

These sorts of virtues or dispositions are even more closely inter-
twined with the actual practices described by the skills than is the broad obligation described under "Values" of "acting in conformance with considerations of justice, fairness, and morality when making dec-
isions or acting on behalf of a client" and, "[t]o the extent required or permitted by the ethical rules of the profession, counseling clients to take considerations of justice, fairness, and morality into account when the client makes decisions or engages in conduct that may have an adverse effect on other individuals or on society."48 On the other hand, no one who fails to shape his daily practice (the skills) by the dispositions generally called moral is going to be capable of recognizing and discerning what the "considerations of justice, fairness, and morality" are.

Moral knowledge is not technical knowledge.49 It is available only to those who have allowed themselves to be shaped by the demands of morality in their own practices. Moral virtues not only pervade the skills, but are also the basis of a lawyer's commitment to the values recommended by the Task Force. Both "skills" and "values" require "those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility that have, throughout the centuries, been compendiously described as 'moral character.'"50 Effectively exercising the skills identified by the MacCrate Report requires exercise of the virtues.

46. MACCRATE REPORT, supra note 1, at 203 (emphasis added).
47. Id. at 204.
48. Id. at 213.
49. HANS-GEORG GADAMER, TRUTH AND METHOD (W. Glen-Doepel trans., 1975).
50. MACCRATE REPORT, supra note 1, at 213-14 (commentary to Value 2, quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957)(Frankfurter, J. concurring)).
Can virtue be taught? That is one of the oldest questions. \footnote{51. Plato, Meno (W.K.C. Guthrie trans., 1956) in The Collected Dialogues of Plato (Edith Hamilton & Huntington Cairns eds., 1961).} I broadly follow David Luban \footnote{52. David Luban, Epistemology and Moral Education, 33 J. LEGAL EDUC. 636 (1983). See also infra text accompanying note 63.} (himself following Aristotle) in suggesting that virtues can be taught through a program that compels students to \textit{act} in contexts that require the ethical exercise of lawyering skills and to receive critiques by experienced practitioners who are masters of the virtuous exercise of those skills and are willing to demonstrate and recommend that exercise (Socrates would say "exhort" it) \footnote{53. 2 Werner Jaeger, Paideia: The Ideals of Greek Culture 37 (Gilbert Highet trans., 1948).} to their students.

My sole purpose in this long introduction was to demonstrate that the ethical obligations of a lawyer and the fundamental skills of law practice are deeply intertwined in many \textit{different} ways. From the skills side, it is hard to argue that a lawyer may competently practice unless he does so in light of his ethical obligations. Some obligations actually constitute the skills themselves. To the extent that the skills are purely technical (something that is quite rare given the interpersonal context of virtually all lawyering tasks), other obligations control or limit the exercise of those skills. From the narrowest perspective, unethical practice continually places the lawyer's reputation, livelihood, and sometimes freedom \footnote{54. It surprises our students to understand that lawyers are fully capable of criminal accountability for the crimes of their clients if they provide advice with the intent to further the criminal enterprise. This is a lesson no law student should graduate without learning.} in jeopardy. But more broadly, unethical practice is usually ineffectual practice. It is the nature of a decent culture and society to create the background practices and institutions which, as far as humanly possible, make unethical behavior self-defeating without resorting to disciplinary mechanisms. One cannot be skilled unless one is also ethical, at least in some sense.

Usually then, practice cannot be effective unless it is in some sense ethical. It is just as fruitful, however, to examine the relationship between teaching lawyering skills and teaching ethics from the point of view of teaching ethics. I argue that an effective way of teaching legal ethics is through a program that closely integrates the learning of ethics with the learning of the basic lawyering skills that are identified in the MacCrate Report. Furthermore, I argue that such an integration is the best way of learning certain fundamental aspects of legal ethics. I argue, as I have elsewhere, \footnote{55. Robert P. Burns, Teaching the Basic Ethics Course Through Simulation, 58 LAW & CONTEMP. PROBS. 37 (1995).} from philosophical and educational principles and from our experience of teaching such a program at
Northwestern, an experience that has proven successful. The integration of teaching lawyering skills with professional responsibility makes such patent good sense that in twenty years law teachers will wonder how the subjects could ever have been taught in isolation from one another.

III. TEACHING ETHICS AND LAWYERING

Simply by describing the basic proficiencies that a young lawyer ought to learn, the MacCrate Report demonstrates the ethical dimension of good lawyering. Many of us had realized this already and have taken steps to teach lawyering in a way that is respectful of its ethical dimensions. From one point of view, this is simply another example of the need to understand rules contextually and is part of a broad movement in legal education to understand doctrine and theory in light of the practices from which they may be abstracted.

I have identified "eight theses on the learning of legal ethics" that underlie our "program in advocacy and professionalism" at Northwestern. In our program, the required ethics course is taught through simulation and as part of a coordinated introduction to the litigation program. We think this is ideal, but we have designed a set of materials that can be taught in a free-standing ethics class which is not formally coordinated with other courses. In our program, students are required to perform basic lawyering tasks, such as interviewing and counseling clients, negotiating controversies, and performing trial exercises, all of which raise important ethical issues. The intimacy of the relationship between ethics and competent performance is expressed by the very fact that the rudiments of the skills of interviewing and negotiating, for example, are being taught at the same time as the ethical considerations that structure and limit the use of those skills. An important dimension of our program, described at greater length below, is the active participation of practicing lawyers in the simulations.

Underlying our program are certain fundamental principles. First, many of the most serious ethical problems emerge for lawyers because they do not see the ethical significance of concrete situations in which they find themselves. When I was teaching trial advocacy to young lawyers in continuing legal education programs, I was often struck by the inability of our student-lawyers to see and navigate through evidentiary problems as they arose in the simulated trial exercises we were doing. Many of these lawyers were not far from their law school evidence courses and had, no doubt, done quite well in them. But they had learned their evidence law in abstraction from the practice, the trial, of which the law of evidence provides the grammar. They could, perhaps, perform some of the informal logical exercises that are demanded by an appellate treatment of the law of evidence. However,
they could not recognize and solve evidentiary issues where they were the most important, at the trial level.

Based on this experience, I concluded that they did not really understand the law of evidence and that it was, in part, the fault of law schools. This is not an overstatement because of another underlying principle. Meaning is use. Knowing how and knowing what are intimately related. A lawyer really understands a rule if he can perform the task that the rule controls.

Our solution to the decontextualized learning of the law of evidence was to create a set of materials that allowed the integrated teaching of the practice, trial advocacy, and the rules which controlled it, the law of evidence. It became one of the most highly rated courses in the school. Our evidence teacher received the school's Robert Childress Memorial Award for Excellence in Teaching. The program received the Emil Gumpert Award for Excellence from the American College of Trial Lawyers and our students won the National Trial Competition. Because of the success of the program, we concluded that at least some of a lawyer's inability to see serious issues of legal ethics could be cured by learning those ethical principles as they emerged in context. As all skills teachers know, the amount and subtlety of knowledge and the range of considerations that can be woven into a good simulated problem far exceed highly abstract narratives that form appellate court statements of facts.

Another principle is that students master those skills and doctrines that are necessary for competent performances. Students facing a well-constructed simulated problem have the important benefit of active learning, which provides for a more confident grasp of exactly what a given rule requires. We believe that learning legal ethics through simulated exercises, which requires students to perform important lawyering tasks, improves a student's ability to see ethical problems as they emerge and permits a richer understanding of a lawyer's ethical obligations. It enriches the legal context for the learning of the basic lawyering skills in the same way that studying evidence together with trial advocacy enriches both the contextual grasp of the evidentiary rules and the deftness of the student-lawyer's trial performance on the evidentiary terrain.

In some ways, the considerations that counsel studying evidence in the context of a simulated course on trial advocacy apply with even greater force to the learning of legal ethics. Both in and out of the

specific context of professional responsibility, ethical behavior requires self-imposed limitations on the exercise of purposeful behavior. In the broadest sense, ethics requires that a person not make himself "an exception"\footnote{HANNAH ARENDT, THINKING 188 (1st ed., 1978) (interpreting Kant's categorical imperative).}—that he pursue his goals subject to the limitations that express an equal respect for others to pursue their own goals. Competitive situations place the greatest psychological strain on such self-imposed constraints: anyone who has practiced understands how great the temptation is to gain some tactical advantage in negotiation or litigation by ignoring ethical considerations. It is hard to give up small advantages on what is often a hard-fought battlefield just because ethical principles say you should. This is doubly difficult when a lawyer has no absolute guarantee that his opponent is respecting the same norms.\footnote{Game theory views this sort of quandary as the "prisoner's dilemma." R.D. LUCE & HOWARD RAIFFA, GAMES AND DECISIONS 94-102 (1957). Though both lawyers may generally be better off if both observe certain norms, the tactical disadvantage of one lawyer "free-riding" the other lawyer's observance of constraints threatens a race to the ethical bottom. On the pressures on the moral psychology of litigation practice, see generally Burns, supra note 55.}

These pressures should not be allowed to come as a surprise to a young lawyer. It is important that these difficulties be experienced and resolved in the relatively more reflective atmosphere of law school. This suggests another reason for teaching ethics in the context of a simulation-based lawyering program. Ethical norms are more likely to hold when they are "dyed in the wool," that is, when they have been integrated into a young lawyer's understanding of and habituation into the very practices those norms are meant to control. A young lawyer must learn how to practice ethically and not just learn that he should observe ethical norms.

This is another place where the participation of respected practitioners (including clinicians and skills teachers with substantial practice background) can make an important contribution to the law school program. They can show in the full-scale demonstrations and in the mini-demonstrations that form part of the critique of student performances precisely what ethical practice looks like and why it is fully compatible with the demands of competence. Their participation ensures that the ethics course does not appear as an exercise that "merely punctuates an otherwise ruthlessly professional course with occasional encouragements to moral uneasiness, like a weekly address at military camp by a pacifist minister."\footnote{Bernard Williams, Professional Morality and Its Dispositions in THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 266 (David Luban ed., 1983).} Moreover, their participation ensures that the course maintains an informed dialogue between what good lawyers actually do when faced

\begin{footnotesize}
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\item \footnote{HANNAH ARENDT, THINKING 188 (1st ed., 1978) (interpreting Kant's categorical imperative).}
\item \footnote{Game theory views this sort of quandary as the "prisoner's dilemma." R.D. LUCE & HOWARD RAIFFA, GAMES AND DECISIONS 94-102 (1957). Though both lawyers may generally be better off if both observe certain norms, the tactical disadvantage of one lawyer "free-riding" the other lawyer's observance of constraints threatens a race to the ethical bottom. On the pressures on the moral psychology of litigation practice, see generally Burns, supra note 55.}
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\end{footnotesize}
with recurring situations and what the criticism might be of that habitual response. Practicing lawyers, including clinicians and experienced skills teachers, will prevent purely academic lawyers from setting up straw people in the service of overgeneralized theorizing.\footnote{See, e.g., Ted Schneyer, \textit{Moral Philosophy's Standard Misconception of Legal Ethics}, 1984 Wis. L. Rev. 1529.} As I have stated elsewhere while addressing an audience of teachers of professional responsibility:

Academics, whether moral philosophers or doctrinalists may, in their stance toward the practicing bar, be tempted to adopt the stance of an intellectual peace corps to a morally undeveloped country—as a distinguished philosopher once put it in a closely related context. . . . Practitioners may be so immersed in institutionally embedded values that they are tempted not to envision alternatives. There is no once-and-for-all resolution for the question of which perspective has comparative strength. Criticism that does not appreciate the complexity of values and interests embedded in current practice can be abstract and unhelpful. Practices can become distorted by their institutional embodiments. A sustained dialogue among positions is what we owe our students and that is what our program attempts.\footnote{Burns, supra note 55, at n.14. The reference to a “distinguished philosopher” is to Alasdair MacIntyre, \textit{What Has Legal Ethics to Learn from Medical Ethics?}, 2 \textit{PHILOSOPHICAL EXCHANGE} 37 (1978). I use “abstract” in its Hegelian sense, roughly equivalent to “overgeneral and insufficiently sensitive to the complexity of considerations and values embedded in concrete practices and institutions.” \textit{GEORG WILHELM FRIEDRICH, HEGEL'S PHILOSOPHY OF RIGHT} 75-104 (T.M. Knox trans., 1952).}

Even this probably understates the importance of the participation of practitioners, who are often the most reflective critics of the status quo.

Academics (in particular) are sometimes tempted to feel superior to such professional laborers. They should not do so. Those laborers serve our needs, which are often the deepest we have—the need for a social order, among others. If those needs are essentially served by some activity or institution, such as a profession, then there is nowhere to go to be superior to that institution, except by climbing out of oneself. The only decent direction in which to move is into thought about how things might be otherwise, thoughts in which one is quite likely to be joined, indeed led, by members of the profession itself.\footnote{\textit{WILLIAMS}, supra note 60, at 269.}

Teaching ethics in the context of a simulation-based lawyering skills program can provide students with a sense of the dense complexity of legal ethics and the subtle ways in which hard-law rules control some aspects of practice, while in others, the good judgment of the experienced practitioner rules. It provides a young lawyer with a more confident sense of what is mandatory and what is permissible and how personal morality and the demands of a public professional identity may function within the area of the permissible. Finally, teaching ethics within the context of a lawyering skills program in which admirable lawyers of substantial experience participate is
likely to encourage students to embrace ethical norms as an aspect of professional identity in the vast areas of law practice which the disciplinary process will never touch.

IV. WHEN ONLY KNOWING HOW IS KNOWING THAT: TWO EXAMPLES

This Article ends by briefly describing the integrated Introduction to Litigation Program we have developed at Northwestern. Such an introduction aims to provide a concrete example of what a program would look like that took seriously the close relationship between ethics and lawyering skills that emerges so clearly from the MacCrate Report. It is, of course, not the only possible program. For example, our program is oriented towards approximately half the class who express an expectation that litigation will be important to their practices.64 The Professional Responsibility course is closely integrated with two other courses, Trial Advocacy and Evidence. It may not be immediately possible, given institutional constraints and the "captain of my own ship" attitude that prevails among many law teachers, for other teachers to achieve this level of integration. Anticipating such problems, though confident in an idea whose time has come, we have created professional responsibility materials that can be and have been used in a free-standing professional responsibility course that respects the close relationship between lawyering skills and professional responsibility and can be taught in either a large- or small-class format.

Our program is designed to serve as the basic course in professional responsibility. It certainly does not preclude a student from taking other courses in legal ethics. At Northwestern, for example, students who have completed the basic course may take a seminar in Criminal Defense Ethics and may choose from a series of professional responsibility externships that involve the law student in a range of practice settings, accompanied by classroom components which are focused on the ethical dimensions of practice in those settings.

We often take a critical perspective on the norms of the profession in the course. The dramatic context of the exercises makes it more difficult for students to view legal ethics in purely causative terms, as one more opportunity to hone analytical skills. This critical perspective naturally raises deeper questions about the "ethics of legal ethics." Students are required to maintain journals that give an account of the simulations and are encouraged to engage in a "metalevel" critique of current professional norms from their own moral perspectives.

64. For an argument in favor of law schools teaching a number of ethics courses, each somewhat oriented towards an anticipated practice area, see Burns, supra note 55.
Indeed, this kind of contextual grasp of legal ethics is a prerequisite to informed critique from any number of perspectives.

This course is a basic course. Law schools can certainly offer advanced courses that explicitly take a more critical perspective on law practice, using the growing literature in the humanities and social sciences on law practice. In fact, a law student who has studied legal ethics contextually is in a better position to understand that literature and, turnabout being fair play, to assume a critical perspective on the critique it offers.

As I mentioned above, David Luban has offered a powerful argument for the superiority of clinical methods for the learning of legal ethics. He seems to have had in mind the live-case clinic rather than the simulated program. Our experience has been that a simulated program has certain advantages, while the live-case clinic has others. Needless to say, the ideal program would provide both. (Many of the students who take the simulated professional responsibility course go on to take either the live-client, in-house clinic or one of the professional responsibility practica which the school offers.) Simulation is, of course, less resource-intensive than is the live-case method and, for most schools, allows a larger number of students to participate. It also allows a more structured sequencing of issues, concepts, and situations. The exercises can be constructed with the real world's persistent indifference to easy subsumption under preexistent conceptual grids, even those provided by the law of professional responsibility. It is, as mentioned above, a good basic course to have even if the particular student can benefit from further work in the live-client clinic or in the more traditional advanced academic course.

The course we teach meets twice a week, each time for two hours. Although the fourteen simulations form the heart of the course, we supplement those exercises with other teaching methods. For example, at the beginning of the course, we give two lectures. One provides the students with a sense of the outer limits of the subject by providing a doctrinal overview of the law of professional responsibility. The other is a more theoretical survey of the range of issues that constitutes (or plagues) legal ethics as a subject for intellectual inquiry.

Much as in a good trial advocacy class, we also conduct demonstrations on how to solve ethical issues “on the ground.” This is an important expression of our “Aristotelian” view that competent performances will solve ethical problems that remain on a conceptual or doctrinal level only dilemmas. Confounding students with conceptual dilemmas can yield a kind of cynicism about the very possibility of better concrete resolutions of ethical problems, while plausible performances can convince students that ethical issues can yield to intel-

65. Luban, supra note 52.
ligence, decency, and competence. Finally, the simulations are supplemented with problems in order to expand the range of situations that students should consider. The following sections will provide two examples of the major kinds of exercises that constitute the course.

A. A Faculty Demonstration

Early in the course, faculty members with substantial practice experience demonstrate two client interviews. The case is a modified version of an old favorite of the National Institute for Trial Advocacy, Nita Liquor Commission v. Jones. An associate of the law firm does the first interview of Dan Jones. In this first interview, Jones tells the associate that he is in big trouble: he has two college-age children and his only source of livelihood, the liquor store he owns and operates, is threatened.

Several days ago, just before closing time, an investigator from the Nita Liquor Commission walked into the store and handed him a citation for selling liquor to an intoxicated person. Jones tells his lawyer that he knows of several instances where a liquor license has been revoked for a single violation of this nature. Jones protests that he is innocent, claiming that he did not sell alcohol to anyone who looked intoxicated that night and, in particular, did not sell alcohol to the person whom the investigator arrested for public intoxication, Walter Watkins.

The associate proceeds to do a competent interview in order to demonstrate the skill of interviewing a client who is an important occurrence witness. He inquires as to the client's understanding of his problem, obtains a time-line narrative of the relevant events, tests out the most obvious factual theory of the defense, that there was no sale, and ends the interview by explaining to Jones what the next steps are. From this interview, it emerges that as Jones was closing up the store Officer Bier walked into the store and handed him a citation for knowingly selling liquor to an intoxicated person. Jones was shocked to receive the citation because he had no recollection of selling liquor to anyone who seemed intoxicated. In issuing the citation, Officer Bier only stated that Jones had “sold Thunderbird to a drunk.”

Jones tells the associate that he was busy going in and out of the storeroom restocking the shelves and had begun mopping up the floor. Several people entered the store during the period just before Officer Bier's appearance, and Jones states that he probably made one or two

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67. MacCrate Report, supra note 1, at 142-43, 166-69 (Skills 1.1 and 4.3). See also BINDER & PRICE, LEGAL INTERVIEWING AND COUNSELING (1977).
sales, though he has no specific memory of doing so. The store does stock Thunderbird wine, although Jones cannot remember selling it to anyone.

However, Jones does remember two unusual facts. First, the tape in the cash-register ran out earlier that day and so none of the customers that evening received written receipts. (The lawyer knows from the arrest report that Watkins was arrested with a bottle of Thunderbird wine in a paper bag without a receipt. She understands that the prosecution believes this to be a problem and is probably unaware of the explanation.) Second, the night after Jones received the citation a man in a postal worker's uniform came into the store. He recognized the postal worker as having been in the store the night before, but has not seen him since that night. The postal worker told Jones that "some alcoholic" reached over the counter and stole a bottle of Thunderbird while Jones was in the stockroom. The postal worker said he delayed mentioning it because he did not want to get involved.

The associate tries to reassure the anxious Jones that the case "looks good." All they have to do is to subpoena the postal worker: after all, if there were no sale, there can be no violation. The associate tells Jones that he will get an investigator on the case.

In the second interview, the firm's trial partner conducts the interview two days before the trial. Things have not gone as well as the associate had hoped. They have been unable to locate the postal worker. The interview can continue either of two ways, or better, in both ways, one after the other. In the first approach, the trial partner is a street-smart cynic who takes complete control of the interview. He has made a strategic judgment about the best theory of the case, Jones sold the wine to Watkins without knowing that he was intoxicated. He explains to Jones that Officer Bier's testimony will put Watkins across the counter from Jones moving in a manner consistent with a sale. The partner knows the judge, he tells Jones, and this judge will always resolve credibility determinations against the defendant. A "swearing contest" is a losing strategy. Jones continues to protest his innocence.

The partner then explains to Jones that his "best bet" is to admit the sale, but to describe it in a way that suggests he did not know Watkins was intoxicated. The partner explains how the details of the events and the cross-examination of Officer Bier can be coordinated to present a plausible defense on the knowledge issue. The client asks how he can describe something concretely that he cannot remember doing. The partner asks a series of leading questions that moves the client from "what must have been" to "what was" and forces the client

68. MACCRATE REPORT, supra note 1, at 168 (Skill 4.3(b)—document analysis).
69. Id. at 194 (Skill 8.1(b)(i)—process of developing a theory of the case and trial strategy).
to “remember” what must have been as what was. He reminds the witness often of the importance of being “definite and concrete” in his recollection and testimony.

The partner has made a “skilled” tactical judgment and has completely disregarded his obligation to not counsel or assist a witness to testify falsely. He has not reconstructed events, but has consciously constructed events to serve tactical purposes.

Conducting the second interview properly is much more difficult. It demonstrates how ethical constraints are intrinsic to the practice of litigation skills and how subtle (and how real) the difference is between ethical and unethical behavior. It may be, after all, that Jones has made up the postal worker story because of a mistaken belief that it would help his case or that the postal worker saw someone other than Watkins steal the wine. (It turns out that the area is frequented by alcoholic petty criminals.) It is true that “what probably happened” or “what must have happened” is a fairly reliable guide to what did happen. A witness's first recollection of events is often partial. Following the “rule of probability” is usually a reliable guide to reconstructing events. An attorney owes it to a client to help him reconstruct events, and an effective interviewer knows how to “motivate” a witness to recall helpful material. There is some resemblance between what the ethical and competent attorney does and what the unethical attorney does. There is a major difference as well.

God is in the details. There is a point at which reconstruction becomes construction, where an effective interviewing technique becomes the suborning of perjury. Demonstrations by decent and competent lawyers, followed by thorough “debriefing,” can begin the process of developing professional judgment, as to where that point is and highlighting the importance of clarity on its existence, in a way that reading rules, doing hypotheticals, and analyzing appellate case law never could.

B. A Student Exercise

This section provides a description of one of the simpler simulated exercises which the students themselves perform. The student-lawyers represent a young woman who once served as a maid in the home of a wealthy individual. She has sued the individual for slander after he accused her of stealing jewelry from his wife. One of the allegedly slanderous statements was made to the executive director of a country club where the defendant is a prominent member and where the plaintiff had applied for a job which she did not get. The executive director’s deposition has been taken and he described the defendant’s...
remarks to him in a manner that suggested the defendant was simply reporting the facts in a straightforward and responsible manner, without malice, and, therefore, most probably within the protection of the qualified privilege that applied to such conversations. At the deposition

the executive director explained that the defendant told him that he had allowed the maid to work in his household even though he (the defendant) knew that she had a criminal record for participation in an armed robbery. Since, the executive director had explained, the club had a firm policy against the hiring of ex-felons, nothing the defendant had said about the possible theft could have actually caused the plaintiff’s failure to be hired at the club.

Subsequently, the plaintiff’s lawyers receive a call from the executive director, who wants to come into the office and have a private conversation. The lawyers then have to answer a series of difficult questions that dramatize the way in which competent lawyering skills and ethical requirements are tightly intertwined. May they speak privately to someone who is not personally represented by counsel, but who is an employee of a corporation on whose board the defendant sits? Something strange is going on here: a witness closely aligned with the opposing party who had given an unhelpful deposition now wants to speak to counsel. How should you prepare for the meeting? Who should be present? What are the dangers and what are the opportunities? What kind of warnings should be given or waivers sought?

It turns out that the executive director has had a falling out with the defendant and is now feeling quite hostile towards him. In fact, he is interested in discussing representation in a possible unfair discharge suit against the same man who is the defendant in the current suit. He tells the plaintiff’s lawyers that he told the truth “by and large” at his deposition, but he has something to add about what the defendant said. If students have prepared well for the exercise (as we find they do), then they will recall that to the question “Other than what you have said, did [the defendant] say anything more to you during the conversation at the Club on July 23?” the executive director answered, “No.” It seems that the executive director is in the process of admitting to perjury. He asks the lawyers, “Should I tell you what more [the defendant] really told me at the Club?”

How should the lawyers answer the executive director’s question? They are prohibited from giving legal advice to an unrepresented person where there is a reasonable possibility that the person’s interest may be in conflict with those of the lawyer’s client. On the other hand, there is no prohibition against interviewing an unrepresented witness. Concretely, what should they say to the executive director’s

72. Model Rules, supra note 2, Rule 4.3 cmt.
question? After a stern disclaimer of disinterestedness, urge the executive director to speak? Tell him, “It’s up to you!”? Say, “Well, I represented the plaintiff and anything you tell me will help me do my job?” Stop the executive director at mid-sentence, perhaps recommend that he get counsel, and schedule his deposition?

If the student-lawyers decide to take the statement, how should they do so? What kind of disclaimers of undue influence should it contain? Should they retain a court reporter to get a verbatim statement with follow-up questions at the risk of scaring off the executive director? Is it any more likely to be admissible as substantive evidence under Federal Rules of Evidence 801(d)(1)(A) or 804(b)(1) or 804(b)(5)? If so, is it worth the risk? What about the executive director’s interest in future representation in his unfair discharge case against the defendant—is keeping that door open “reinforcing positive motivations” or is it offering “an inducement to a witness that is prohibited by law”?

This is one of the simpler simulations that requires an integrated learning of skills and ethics. It is our conviction the solutions to the problems that the exercise presents are performances, not concepts. It is our goal that students learn “good practice,” a practice that includes both a strategic and an ethical element. We can think of no better way of learning the ethical dimension of law practice than in a course of performing well-designed exercises and with the participation of lawyers who care about the ethical dimension of their work.

V. A POSTSCRIPT ON COURSES, COURSE NAMES, AND COURSE CONTENT

I cannot resist a final word on course organization and structure. As mentioned above, our materials are designed to be used in a free-standing legal ethics or professional responsibility course. This is the inherited structure for law school study of the subject. The thrust of the first section of this Article, however, is that the MacCrate Report itself shows this structure implicitly abstracts the norms from the practices which they shape and limit. Most teachers will have to live with the free-standing professional responsibility course. Fortunately, much can be accomplished even in that context. However, other possibilities do exist.

First, the ethics course can be coordinated with Trial Advocacy and Evidence, as was done at Northwestern. Secondly, it can be coordi-
nated with a course in Lawyering Process or Pretrial Process. Third, it can be a single semester or a year-long course, ideally for a larger number of credits, and perhaps called "Professional Responsibility in Lawyering." Finally, simulations that emphasize professional responsibility, such as the ones contained in Exercises and Problems in Professional Responsibility, can be offered in an organized way, parallel to or within a number of skills courses, such as Pretrial Practice, Negotiation and Dispute Resolution, and Trial Advocacy. The various approaches have different advantages and disadvantages and local factors loom large in these matters, which should be of only secondary importance.

VI. CONCLUSION

The MacCrate Report demonstrates the different ways in which good law practice is deeply intertwined with the ethical norms that make it what it is. Such ethical norms are "constitutive rules." Learning these rules in context is an important part of a good program in lawyering skills.

76. We offer a simulated course in Pretrial Litigation which most students take after the basic ethics course. The former offers more intensive work on the pretrial practice skills which are introduced in the professional responsibility course.

77. Burns, supra note 66.