Does Law School Ethics Theory Translate to the Real World?

BY RONALD M. SANDGRUND

"Ethics is knowing the difference between what you have a right to do and what is right to do."

—US Supreme Court Justice Potter Stewart[1]

"Courses in professional responsibility are about as useful to a practicing lawyer as a valentine is to a heart surgeon."

—NYU law professor Anthony Amsterdam[2]

"Learn from the mistakes of others. You can never live long enough to make them all yourself."

—Professor Quincy Adams Wagstaff, president of Huxley College[3]

This is the 11th article series by the InQuiring Lawyer addressing a topic that Colorado lawyers may discuss privately but rarely talk about publicly. The topics in this column are explored through dialogues with lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, journalists, business leaders, computer scientists, programmers, politicians, economists, sociologists, mental health professionals, ethicists, academics, children, gadflies, and know-it-alls (myself included). If you have an idea for a future column, I hope you will share it with me via email at rms.sandgrund@gmail.com.

This article asks how well law school ethics classes train lawyers to handle the dynamic ethical issues that arise in real-time legal practice.

Participants

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Professor Melanie Kay joined the University of Colorado Law School faculty in 2015. She teaches courses on legal ethics, professional responsibility, and ethical organizational and professional culture. She directs Colorado Law's Daniels Fund Ethics Initiative Collegiate Program, which helps law students develop strong, ethical professional identities through a variety of programming and hands-on opportunities. She also codirects the law school's Master of Studies in Law in Ethics and Compliance program, and currently serves as a senior fellow of the Ethics Initiative with the Silicon Flatirons Center for Law, Technology, and Entrepreneurship. She practiced environmental law with the public interest law firm Earthjustice in Denver, as well as general civil litigation at Latham & Watkins in San Francisco and Wheeler Trigg O'Donnell in Denver. After law school, she clerked for Judge Procter Hug Jr. of the Ninth Circuit Court of Appeals. She earned her JD from the University of California–Berkeley School of Law, her MS in environmental geochemistry from the University of Montana, and her AB in earth sciences from Dartmouth College.

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Learning and Applying Legal Ethics "Back Then"

When I attended law school over 40 years ago, I was taught the rules of professional responsibility and then tested on my knowledge of those rules by spotting various "issues" presented in complex and often unrealistic exam hypotheticals. Soon after starting to practice law in 1982, I learned very quickly that I was not particularly well-prepared to deal with ethical issues that arose in the moment, when thorny decisions had to be made on the spot without time to consult with more experienced (and considerably wiser) lawyers or to thumb through Colorado's Rules of Professional Responsibility.

These efforts were nerve-racking, and I was never 100% sure I had made the correct call. And, in many of those instances, the die was cast when the call was made; neither later consultation with law firm partners nor reference to the ethics rules could have made a difference.

Legal commentators have grappled with the disconnect between theory and practice. One cynic snarked, "Students are threatened enough by having their intellectual limitations revealed on an almost daily basis; having also to bare their souls strikes too close."[4] In 1991, observers were musing whether law school's Socratic emphasis on analytic thinking was failing at teaching legal ethics, a subject matter better nurtured by discussion, not lectures, and through role-playing (even if such role-playing requires professors to relinquish some of their control).[5] Better yet, "in the ideal world," ethics would be taught "three years after graduation."[6]

Over time, law school ethics courses have evolved, asking students to view actual legal practice "holistically" and "introduc[ing] them to the many ways lawyers practice law and how they see themselves fitting into that picture."[7] Legal aid clinics were seen as offering a "unique exposure to real-world substance and impact, combined with the comparatively low risk of anyone being harmed by a student's inexperience."[8] (Hmm, makes one wonder if the legal aid clients are adequately apprised of their role in this aspect of the students' education.) In 2014, Stanford University's McCoy Family Center for Ethics in Society invited lecturers from Stanford's business and law schools, and philosophy department, to celebrate the Center's 25th anniversary and examine the question, "Does teaching ethics do any good?"[9] The lecturers agreed: "ethics classes cannot be expected to make students more ethical."[10]

Learning and Applying Legal Ethics Today

On and off for the past 30 years, I've taught courses and guest lectured at both Colorado Law and the Daniels College of Business at the University of Denver. And from time to time I've been invited to address ethical issues. In preparing for these lectures, I often thought about my unease at dealing with difficult real-world ethical issues in the moment, with little time to reflect on or analyze those issues. I wondered whether I could develop an exercise to highlight this challenge and illuminate a useful pathway through the thicket.

A kernel of an idea emerged after I attended a lecture presented by then Judge Robert McGahey of the Denver District Court.[11] The lecture was part of a course Judge McGahey taught to a judicial externship at Denver Law, where scenes from movies involving lawyer characters were shown and the lawyers' conduct analyzed against the Colorado Rules of Professional Conduct. I watched Judge McGahey with great appreciation as he led the class through a scene from the 1950s film *Anatomy of a Murder*—a first-rate movie in its own right and a great teaching vehicle. Building on that exercise, I created a similar exercise that didn't involve viewing movies but rather two lawyers play-acting a witness preparation session. The students would assume the role of associates observing the "play," and then afterward would evaluate the lawyers' ethics. The focus was on the dynamic back-and-forth between the lawyer and the client-witness, including the lawyer's decision-making in the moment when responding to the client's answers to the lawyer's questions and when answering the client's questions.

Later, and for several years, Professor Peter Huang of Colorado Law invited me and another Colorado lawyer, Lin Brenza, to lecture in his torts class on the subject of "Mass Tort Practice as Big Business." It was a rollicking good interactive lecture that the students seemed to keenly enjoy and that elicited tons of thoughtful questions. Also, although I didn't know Lin before we did these lectures together, I found him to be an amazing teaching partner, and we were able to draw on our extensive class action experience to delve into the subject matter with gusto, draw up some great (and close to real-life) hypotheticals, and engage in some friendly banter between a class action plaintiff lawyer and class action defense lawyer.

Professor Huang later invited Lin and me to bring our dog-and-pony show to his legal ethics class. Lin and I honed the two exercises described below and, relying on our limited acting skills, presented the exercises to Professor Huang's class. The students' reaction was so positive we were invited back by Professor Huang for several years. Eventually, the exercise moved over to Professor Melanie Kay's ethics class at Colorado Law, with her playing the lawyer and me playing the client for many years and through the present.

Exercises to Help Explore Dynamic Ethical Decision-Making

In the first exercise, the students observe a lawyer who appears to be quietly acceding

to her client's desires, seemingly assisting him in altering his testimony for trial to the client's advantage. In the second exercise, the students see a lawyer who ostensibly seems to be purposefully manipulating her client to change his testimony for deposition. The exercises are taught in law school within the broader sphere of legal ethics in general. To more fully frame the discussion, I explore with Professor Kay in the ensuing dialogue the broader contours of her legal ethics course and with Lin Brenza his perspective on how the exercises jibe with his legal practice and experience. I also discuss their take on the students' responses to the exercises.

Exercise 1

The first exercise begins with a "senior lawyer" relaying the following information to the students: "This is our first meeting with our client—a longtime business client of the firm, but with whom I've never worked before. The client, Mr. Sands, pulled out a licensed concealed handgun and killed a foreign student during a confrontation. The student had pulled his beat-up Mazda close behind the client's Mercedes in the Whole Foods parking lot and proceeded to berate the client for cutting him off dangerously twice while the client was chatting on his cell phone. The grocery store surveillance camera shows the middle part of the confrontation, but all that is visible is a view of the student from behind, standing still, gesturing vigorously with one hand in the direction of someone just outside the camera's field of vision. After the shooting, a broken beer bottle with the student's fingerprints was found near the student's body. The student's blood alcohol test results were lost by the hospital. The client's cell phone records show that he was on his cell phone for a few minutes that afternoon—he said he called his daughter, who lives in another city, to discuss the then ongoing civil unrest in that city."

The client then enters the room and sits across from the lawyer. The lawyer begins by explaining to the client that there are basically four defenses to murder: I didn't do it. I didn't mean it. I was crazy. I was justified. The lawyer than asks, "Now, why don't you tell me about the events that led up to shooting."

At this point, the client, who is an obviously self-assured and intelligent individual and a polished speaker, begins by asking the lawyer a series of questions clearly intended to flesh out what would be the best testimony to establish self-defense, and then, once the nature of that testimony is outlined by the lawyer, the client essentially parrots its salient points by integrating them into the facts of his story as to what happened. He never commits to any particular fact until he has confirmed, through careful questioning of his lawyer, that the version he commits to most strongly supports his claim of self-defense. From the students' perspective, the client seems to be clearly steamrolling the lawyer and crafting his narrative to fit the law and not necessarily the facts.

Exercise 2

In the second exercise, the students are told by a "senior lawyer" that the client, "Ron," ran over and killed a 5-year-old girl while driving to a construction site in a residential neighborhood. The client's insurance company has hired the firm per the client's insurance contract to defend him in the ensuing lawsuit. The students are reminded that the client is Ron, not the insurance company. Ron was only insured for $50,000, and the little girl's family wants $250,000 to settle. In contrast to the first exercise, the client immediately unloads the heart-wrenching details of the accident and his intense guilt over killing a little girl with his pickup. He explains how he had consumed some liquor and some edibles the night before; how he was running late that morning after being warned to be on time; that he felt he was driving too fast; and that he never saw the little girl before he hit her. He can't imagine making the girl's family relive the events of that day, and he just wants his insurance company to settle the case.

The lawyer points out two things to the client: First, to date, the other side has refused to settle despite the client's insurance company offering all of the client's $50,000 policy limits. Second, every piece of objective evidence the lawyer has located—including eyewitness statements, post-accident blood tests of the client, and the conclusions of her accident reconstructionist—establishes that the client did nothing wrong and that he could not have avoided hitting the little girl who unexpectedly darted out in front of his truck from behind some thick bushes alongside the road. From the students' perspective, the client seems very sympathetic, upset, and badly confused, and the lawyer needs to educate the client and help get his story straightened out.

Prelude to the Exercises

Before the exercises start, the students are briefly told about the civil deposition process, how civil and criminal trial testimony is elicited, and the goals of direct and cross-examination. They also are asked about how they think a lawyer might or should react to a client who they believe may be lying to them. The students are asked what relevancy the "truth" bears on their future work as attorneys, and what exactly constitutes the "truth." The class discusses *Rashomon*, an extraordinary movie by Japanese filmmaker Akira Kurosawa that depicts a murder trial occurring during samurai times and even includes testimony from one witness channeling the deceased's recollection of the events surrounding his own demise. Self-interest, bias, imperfect memory, and powerful emotions distort all the movie witnesses' testimony. I then ask, "Should we expect better from our own clients?"

Last, I explore with the students the general topics of emotional intelligence and empathy. I explain that I came from a family of mental health practitioners, majored in psychology, took graduate-level psychology classes during my last year in college, and then realized that I really didn't want to listen to other people's problems all day for the rest of my life, so I elected to attend law school. After which I practiced law for over 40 years and . . . listened to other people's problems every day for the rest of my life.

The Dialogue

InQuiring Lawyer: I recall my law school ethics class consisting of learning the provisions of the code of professional responsibility (or whatever it was called last century) and then analyzing and applying its rules by reviewing complicated hypotheticals and "spotting" all the issues. It was a rude awakening when I started practicing law and found myself facing ethical quandaries that didn't seem to fit neatly within the code and, critically, didn't allow me to simply "spot the issues" but rather forced me to make hard calls that could sour a relationship with a client or affect the firm's fee. I almost never dealt with a hard call without talking it over with the firm's partners. But sometimes those chats weren't possible when I had to make the decision pressed by the crush of time. I certainly wished my law school ethics classes had better prepared me for the dynamic ethical decision-making that cropped up in real time within the crucible of actual practice.

Lin, what shortcomings, if any, have you perceived between the legal ethics curricula you were exposed to in law school and the real-time challenges lawyers face in their legal practices?

Lin: I was probably taught ethics close to the same time and in the same way as you, Ron. It definitely suffered from "law school exam" issue-spotting hypotheticals rather than more practical applications of the duties. Though I never thought I'd have anything good to say about the bar exam, the ethics part of the exam actually helped me acquire a more practical understanding of ethical duties.

InQ: How so?

Lin: It reinforced some very simple rules to follow like—I'm paraphrasing—"don't steal from your clients," "don't tell your client's secrets," "don't hold your client's file hostage if they want to hire a different lawyer," and perhaps most importantly "never lie for your client." While that kind of perhaps oversimplified teaching isn't a complete answer to every situation, it gives some great toeholds that allow further reasoning in nuanced situations while keeping the big picture in mind. Certainly nothing teaches how to practice law like actually practicing law, and I doubt any academic instruction could entirely prepare a lawyer for real life. But keeping the toeholds in mind, such as the duties of competence, loyalty, diligence, confidentiality, and candor, a lawyer ought to be able to navigate successfully as they encounter more difficult questions.

InQ: Professor Kay, what sort of curricula have you developed to address these "practicality" concerns and perhaps better prepare students to analyze legal ethics questions in real time?

Prof. Kay: The scenario you just described—studying rules, trying to memorize and apply them in the vacuum of an academic setting, only to find yourself woefully unprepared for the befuddling array of nuances, moral dilemmas, and unanticipated complexities in the real world—is precisely the template I wanted to avoid when I first started teaching legal ethics. I practiced law for almost a decade before coming to Colorado Law, so I approached this course with a really practical mindset, essentially asking myself, what can I offer to my students to help them shortcut some of the struggles, confusion, and lack of confidence I experienced?

InQ: How did that broad goal shape your classroom instruction?

Prof. Kay: I start the semester telling my students that I absolutely do not want them memorizing the Model Rules of Professional Conduct. Instead, my goal is that by the end of the semester, they have a red flag/alarm bell system where they may not recall exactly which subsection of a rule is implicated, but they have the skills and sufficient familiarity with key issues to recognize that something might be ethically problematic. That should alert them to the need to slow down, talk to someone, look something up, and so on. To get there, we take deep dives into case problems where even the experts don't fully agree on a "right" answer, exploring the possible consequences depending on which door they chose to open. We acknowledge the uncomfortable reality that sometimes it's permissible to not select the "most ethical" option, but one that achieves

a satisfactory balance between obligations to your client, the court, and society at large. And we spend significant time on real-world concepts crucially important in building moral muscle—behavioral psychology, emotional intelligence, and techniques for how to actually stand up for your values.

InQ: Have you tapped any guest speakers to help illuminate how your students might think about and navigate legal ethics as practicing attorneys?

Prof. Kay: We've been able to bring in a hugely diverse array of incredible speakers on a variety of topics through various law school ethics programs. On a local level, we love to connect with our alums and community practitioners through an "Ethical Leadership Lunch" series designed to expose small groups of students to really interesting, accomplished people in a less formal setting where they can feel confident engaging in discussion and asking questions about ethical challenges in practice.

InQ: What kinds of people?

Prof. Kay: For the lunch series, we've welcomed community attorneys from government, private practice, in-house, nonprofit, and compliance positions, in fields including tech, criminal justice, politics, the environment, and reproductive technology, just to name a few. In larger events, a few exciting examples over the years include talks by a key whistleblower and a journalist who exposed and wrote a book about the Theranos scandal, the federal prosecutor who investigated and charged perpetrators in the Varsity Blues college admissions cheating scandal, the chief ethics and compliance officer at Carnival in the wake of their challenges with early coronavirus outbreaks and environmental violations, and an author who wrote a fascinating book about the mindset of white-collar criminals.

InQ: That sounds like a really excellent group of speakers—I would have loved to have sat in and listened to all of them. In addition to speakers, what sort of classroom exercises have you employed to sensitize law students to and prepare lawyers-to-be for the realities of legal ethics in the real world?

Prof. Kay: I have tried to build in experiential-type exercises to give my students realistic practice at common challenges. For example, I have my students try out "billing" and documenting their time on their schoolwork for a night, and it very quickly exposes them to a myriad of ethical dilemmas—do they round up to a six-minute increment if they only use two minutes? Do they remember to turn off the clock if they're interrupted? Do they end up having to try to recreate a narrative description of their work when they don't actually remember how they spent all their time?

InQ: Billing—such a seemingly mundane and simple task fraught with ethical peril. I began as a transactional and insurance defense lawyer, and I recall acutely the tedium of hourly billing. I was grateful that the lawyers I worked for insisted I spend the necessary time on every task, and they assumed the responsibility of reducing my billed hours as appropriate if some of the time seemed wasteful or excessive. Also, the rule was do your job to the best of your ability, get all your work done in a timely fashion, and then go and enjoy life and your family. No express or implied minimum billing requirements. Within those guidelines, billing ethically was easy.

Prof. Kay: Wow, that sure sounds lovely! While every workplace culture is different, I think many of my students unfortunately have some anxiety that their own billing experiences may not feel so balanced.

InQ: Any other exercises you have the students regularly engage with?

Prof. Kay: We also do a very clever roleplay exercise—written by a very smart and esteemed lawyer—that exposes students to some of the moral ambiguities of real law practice with really complicated clients. It's a highlight of the semester, as I think it's one of the most eye-opening, thought-provoking experiences the students get. The engagement with and feedback from the exercise is always top-notch.

InQ: I know that you have had your students read the two-part *Colorado Lawyer* article "So, How Does it Feel to Get Sued for Legal Malpractice?"[12] That article doesn't deal directly with the ethics code but focuses more on the emotional response of lawyers who are grieved or sued for legal malpractice. What made you decide to assign that reading to your students, and what sort of responses to the article have you garnered from them?

Prof. Kay: I assigned those articles because I found them wonderfully refreshing. I think they peel back the curtain on topics many lawyers feel afraid to discuss out in the open, and they help to lessen some of the fear of the unknown and stigma that law students sense around lawyer discipline. I like that the article focused on the emotional stages a lawyer goes through upon being grieved or sued, and practical aspects like how a suit affects the lawyer's relationship with the firm, or how lawyers' experiences being a witness or "guest in their own lawsuit" cause them to reflect on their own clients' experiences. I think students are so appreciative of any opportunity to get a better understanding of what it's really like to practice law.

InQ: Lin, what value do you see in exposing students to lawyers' stories like those highlighted in that *Colorado Lawyer* legal malpractice article?

Lin: Getting law students or young or new lawyers to take a different perspective of themselves is always going to be valuable. So will getting them to play out some scenarios that could follow mistakes or ethical lapses. Internalizing the potential consequences of certain behaviors beforehand is a good way to check those behaviors. On the bright side, while the legal profession is often maligned by the laity as ethically challenged, I have a more optimistic view—to me the profession seems to do more than a lot of others to get members consciously thinking about their ethical duties and how to live them. The extensive efforts firms expend to check conflicts of interest before agreeing to take on new clients is an example of that. I don't see that happening in a lot of other professions. In the same vein, some law firms have a professional devoted to ethical issues of the firm. Legal ethics is a frequently discussed topic in legal professional circles, as this interview demonstrates. I think we lawyers ought to be modestly proud of the extent we include ethics in our internal dialogues.

InQ: Professor Kay, you alluded earlier to a roleplay exercise that you and I have partnered on for several years now. I have described that exercise to the readers in the introduction to this article. What stands out to you from running that exercise in your class over the years as far as the

students' reactions, and what sort of things have they said to you about the exercise afterward?

Prof. Kay: I love this exercise. The students' reactions absolutely fascinate me—often a class one year will have a diametrically opposed view to a class the next year based on the same exercise facts. Sometimes "groupthink" takes over until one brave student speaks out and slowly persuades others to see things differently. Sometimes emotions run strong and students feel passionately about their viewpoint and arguments break out. Other students are completely uncomfortable by the ambiguity. It's a wonderful teaching vehicle! Without fail, students report this as one of their favorite, most thought-provoking classes, whether informally to me or through end-of-semester course evaluations.

InQ: That's very gratifying to hear, and I feel lucky having you invite me back every semester to participate in this activity. You have traditionally played the lawyer in the exercise and I have played the client. You've always played your role straight, essentially providing each client some background to the legal process and responding to the clients' questions as they came up during the witness preparation session. Most times after conducting the exercise—at the start of our debriefing of the students—I ask them to give you a letter grade in your role as attorney. As best I can recall, you usually get Cs and Ds, and maybe a very few Bs, following the first exercise. What goes through your mind as your students grade you?

Prof. Kay: It's hilarious. And I'm sure deliciously cathartic for them to get to brutally judge their professor for once. But what I love is that they're operating on only partial perception and awareness. They grade me before they fully understand the lawyer's strategy, and only a rare few seem to "get it" before we do the reveal—and another few never quite get it! Admittedly, even after the reveal some still think I am mediocre at best, but there's probably a reason I didn't stick it out as a litigator for the entirety of my career.

InQ: Yes, the transformation in the students' initial perspectives and their sometimes harsh judgments that occur before our post-exercise discussions occur is amazing to observe in real time. I admire your courage in the face of the students' first impression. Since I play the client-witness in each instance, I'm sensitive to how the students react viscerally to my persona: quite negatively to the wealthy, privileged, and possibly bigoted businessman in the first exercise, while very sympathetically to the less articulate, emotionally wracked day laborer in the second exercise.

InQ: Lin, you and I collaborated in presenting the same role-playing ethics exercise that Professor Kay and I just discussed some years ago at Colorado Law. What stands out to you from your participation in that exercise as far as the students' reactions?

Lin: We were teaching law students, and they were there to learn and didn't possess a mastery of the subject. One of their reactions I found most interesting was their instinct on how to deal with a criminal defendant client, and by inference any client that may have done or been accused of doing something that the students viewed dimly.

InQ: What was their response?

Lin: Their initial reaction was to judge their own client, sometimes harshly, rather than hear them out, exploring possible defenses and helpful facts the client might remember—without suborning perjury of course—and generally fulfilling the duties of competence and loyalty in that situation. I recall you and I had to remind them that as the defendant's lawyer, they were the defendant's only friend in a process in which a large and powerful justice system was arrayed to act against their client, and that they owed a duty of loyalty, competence, and diligence to even a defendant who may have committed a serious crime. That showed me that some of the ethical duties of a lawyer aren't always obvious and must be learned rather than just flowing naturally from an initial gut reaction.

InQ: That's an interesting comment. Too often, when students ask me how to respond in the moment to a gnarly ethical quandary with little time for analysis, I say something to the effect of, "Trust your instincts, that feeling inside, and if a decision seems close to the line, don't just not cross the line, but stay a good distance from it." Too glib?

Lin: Instincts are a great place to start and are often correct. But gut reactions by themselves sometimes aren't sufficient. One has to consider whether a gut reaction may reflect personal preferences or biases rather than fulfillment of a lawyer's duties to his client under the ethical rules.

InQ: I've always believed that empathy—and its cousin emotional intelligence—is critical to being a successful lawyer and counselor to others. I also view these traits as critical to navigating the ethical dilemmas that come our way as practicing lawyers. Professor Kay, what are your thoughts about this?

Prof. Kay: I could not agree more. I think young lawyers often have the misguided perception that they have to come across as ultra-tough, confrontational, non-compromising, and confident-bordering-on-arrogant in order to be successful. I had a lot of insecurity early on in my career that I wouldn't be able to be an effective lawyer if I didn't fit that stereotype—that I frankly couldn't fake if I tried. It wasn't until I finally tapped into some of my compassion, empathy, and other emotional intelligence skills that I really felt an intuitive understanding of how to be an effective counselor. To me, it is by far the most important thing you can bring to a representation. If you can't listen, feel, empathize, care, and just generally get along with people, you're going to run up against a lot of brick walls, whether with your own client, opposing counsel, a deponent, or the judge. This is amplified all the more in dealing with highly fraught, emotionally intense ethical dilemmas.

Lin: Ron, you're right that often a lawyer is called upon to be an emotional support counselor to his client, not just a lawyer. It's a role that some lawyers are better at than others. Most lawyers at least of our generation likely have never received any instruction on how to provide this kind of support. I have mixed feelings about how far a lawyer should go in attempting to fill this role, particularly if it's not a natural strength. There is a line between making clients feel comfortable, and making sure clients realistically understand what's at stake in their case so they can make knowing and informed decisions; that can involve inducing a degree of discomfort. I can see an argument that lawyers should practice law and mostly leave the support-counseling to those more

skilled in providing that support. That said, ignoring the emotional needs of the client is unlikely to be desirable or even possible. Respect, honesty, and accountability are great rules for any professional.

InQ: Well said. One of the most interesting parts of the exercise for me is when I ask the students how they should respond to a client when they believe the client is lying to them or fabricating part of their story. The students' responses have ranged across the spectrum. I've told them that I've never accused a client of lying and probably never would. At most, I've pointed out the inconsistencies between the client's story and other testimony, evidence, and, maybe, just plain common sense, in the guise of "The other lawyer might raise these points, what do you think of them?" I thought that subtle approach was the better direction to take the students.

But then I had lunch with a law school friend, who is also an experienced trial lawyer. I shared with him the outline of our classroom exercise and my question to the students about the lying client. My friend said he has on several occasions told his clients that he thought they were not being truthful with him. I was surprised by this and wondered if I needed to alter my approach with the students, or at least point out how other lawyers have dealt differently with the potentially lying client. Professor Kay, what do you tell law students or new lawyers about how to deal with a client who they believe is lying to them?

Prof. Kay: I think a key skill in emotional intelligence is reading the person you're dealing with. In talking with them, do you get the sense they're hypersensitive or insecure? Scared? Defensive? Egotistical? A straight shooter who appreciates real talk? I think my answer would depend on what I read from the client I suspect might be lying. With some people, an honest, constructive, direct conversation where they feel safe and supported might be the most effective way to get the real story. With others, that approach will get you nowhere, and you need to let them save face while more subtly guiding them to a better strategy.

InQ: Lin, your thoughts on a client who may be lying to you?

Lin: It's a matter of degree. Everyone, clients included, has a view of events that is in some ways shaped by their preexisting views and experiences. Deviations between how the client perceives events and what you think you can establish as "fact" may not necessarily amount to lying but rather natural variation in how people see things. Ron, you reinforced that with me in one of our teaching sessions by recommending folks watch the movie *Rashomon.* That movie features four different versions of the same events recollected by four differently placed observers. If I recall, we started assigning that Akira Kurasawa movie as required viewing for law students. I still would.

InQ: I love that you remember that movie reference! Lately, when I discuss "truth" versus "perception" I've sometimes omitted the *Rashomon* discussion because usually, at most, one student understands the reference and it takes too much time to summarize the movie for the others.

Lin: In addition to perceiving the same events differently, people also live with imperfect memories and memories can be legitimately refreshed with documents or other evidence without necessarily ascribing an incorrect recollection to falsification. Of course, there are some witnesses so willing to change their views on central facts or to shade the facts to benefit themselves that it's hard to chalk it up to memory or misperception. Even there, I wouldn't directly accuse the client of lying—I've never seen any good come of that even if measured solely by whether it brought the testimony closer to "truth." When people are accused of lying, they generally get defensive and angry and locked-in, which isn't constructive. I'd try to get the witness to adhere their testimony more to what we believe is the truth by pointing to the evidence and how the jury will see things differently without directly impugning a client's honesty.

As a sidenote, witnesses offering testimony that they don't really believe tend to be poor witnesses. Judges and juries are pretty attuned to detecting overly self-interested recollections. And, of course, exposing that kind of testimony is one of the main purposes of cross-examination, which can leave the witness in a far worse position than if they had just told the truth in the first place.

InQ: Another concept I try to illuminate in class is that of anchoring. This comes from the work of Daniel Kahneman and Amos Tversky as explored in Kahneman's book *Thinking Fast and Slow*. It refers to the natural human cognitive bias to latch onto the first thing one hears about a subject and how that often influences how one thinks about the subject going forward. For example, a lawyer will want to frame for a jury how they want the jury to see and hear the evidence with the hope that the jury will pull from the evidence the facts most consistent with that narrative. In everyday life, such anchoring might occur if a friend ballparks what a particular new appliance might cost and then you gauge whether the prices you are seeing seem high or low depending on the ballpark figure your friend supplied, even if that figure was really a wild guess on their part.

With that background, I discuss with the students that as soon as you ask your client to tell you their story, the client often becomes anchored to that story and may try hard to stick with and justify it even after being presented with overwhelming contradictory facts. This may be because the client simply misremembers certain facts or their emotional state is coloring their recollection. We then discuss the risks of one's client becoming so wedded to an initial version of events before their memory is refreshed or they take time to carefully consider what they are saying divorced from the emotional patina that may be influencing their recollection or opinions. To some students, it may seem that they are leading their client away from the "truth" if their interactions with the client cause the client to change their story when, instead, they actually may be leading their clients to their best and most accurate recollection of what occurred. Professor Kay, how do you view this effort on my part?

Prof. Kay: I think your discussion around anchoring is such an "aha" moment for the students. It certainly was for me, the first time I heard your explanation and examples of it. And it shows the psychological complexities a good lawyer must consider when trying to deduce the "truth" from their clients. Not to get too philosophical, but can we ever know real truth when dealing with perception and

memory? Humans are confusing, messy beings even when they're not experiencing the stress and trauma of a lawsuit. So being able to understand and empathize with some common emotional responses of clients can really help the lawyer be more effective. We cover a lot of behavioral psychology concepts in my class, so the anchoring tendency really fits in well with some larger themes we explore in the semester.

InQ: I have sometimes shared with the students an experience I had when I was a new lawyer and I was permitted to sit in on another lawyer's client-witness preparation in an unusual case where I had previously represented the party that had sued the lawyer's client-witness. This lawyer is now deceased, as is his client. The client-witness was now suing a third-party in an effort to recoup some or all of the money the client-witness owed my client—so we had an identity of interest in recovering these sums.

While I served mostly as a fly on the wall, I was also asked to pitch in with the client-witness prep and offer some hypothetical cross-examination. In my mind, the "woodshedding" that the other lawyer engaged in with his client-witness easily crossed the line I would have drawn if the client-witness was my own client. It reached the point where the client-witness was changing their answers entirely after being woodshedded. And I don't mean simply clarifying or massaging their answers, I mean saying something was black when they had just said it was white. And all this changed testimony ultimately was likely to benefit my client greatly if the fact finder accepted the testimony. What's your reaction to this story, and how might you have responded in real time to the events I describe?

Lin: This example is approaching law school exam territory—you had an interest in, but no control over, the witness and testimony.

InQ: Believe me, I wish it had been a law school exam question. I've rarely had as uncomfortable a moment in my professional life. So what would you have done?

Lin: I'd probably fall back on the principles I discussed in my prior answer on how to encourage a witness to more heavily weigh the objective evidence in his testimony and likely would have discussed the situation with others for advice.

Prof. Kay: I'm always so curious about lawyers' war stories, because they have expanded my understanding of the possible. When I practiced, my universe was relatively small and sheltered, and so I formed what I now see were unrealistic assumptions about the range of "normal" lawyer behavior and conduct. Upon hearing others' stories, I realized the range is so much wider than I thought. Even if some of the stories are outliers, you can still learn from them and prepare for how you might react in such a situation. And I think that's the real value for students. Because in unanticipated, sudden moments of ethical crisis, we often freeze in place and miss our chance to correct a problem before it spins further out of control. So while the students might be a little shocked by some of the stories, I think they benefit from the chance to think through what they might do if faced by something similar.

InQ: One last area I'd like to visit with both of you concerns what I sometimes refer to as "soft ethics," that is, matters that may not fit squarely into one or more rules of professional conduct but that seem to touch on a lawyer's responsibilities relating to loyalty to and candor with a client, as well as the broader concepts of discrimination, bias, and duties to the world at large. In exploring this subject with the students, I relate the following true story about a law student's civil legal aid experience:

The student is assigned a phone intake from an elderly man who is having difficulties obtaining disability benefits. The man cannot leave his home, so the student visits him in Lyons. When the student arrives, he finds a dilapidated double-wide with the door slightly ajar. Inside, the prospective client sits in a beaten-up recliner. The man is breathing through a mask hooked up to an oxygen tank, and he greets the student somewhat gruffly. The man is very reluctant to discuss his medical or financial problems, although it becomes clear that he is in desperate straits and needs to secure additional money to subsist. Still, he speaks despairingly of accepting any handouts from the "nanny state" and seems almost ready to turn the law student away.

The student listens to the man's story, often interrupted by the man's heavy wheezing and coughing, about being a former coal miner, and notices that the pores on the man's hands and arms are blackened. Slowly but surely, the student gains the man's trust and maps out what seems like a promising legal strategy. The student tells the man he has a decent chance of receiving the benefits he needs. The student explains that he needs to go back to the legal aid office and then will call the man back to get some additional information to fill out needed paperwork on his behalf. While some of this information would include private financial, medical, and mental health details, the student feels confident he has gained the client's grudging trust and will be able to complete the remaining work over the phone. The student then gets up to leave, approaching the front door. He turns slightly and looks back at the man who, for the first time, has the trace of a smile and perhaps a glimmer of optimism in his eyes. The man says, "Thank you." The student feels great and experiences for the first time the rush that comes with helping a client in need. Just as he pulls the door open to exit, the man says, "I was so worried they were going to send me a Jew lawyer." The students are asked: "What, if anything, would you do or say at this point?"

Lin, what lessons, if any, would you want law students and new lawyers to draw from the experience described here? And what would you have done?

Lin: This story raises the question of whether a lawyer needs to agree philosophically with his client outside the scope of the legal representation. My feeling is "not necessarily." Lawyers may provide legal services without regard to their personal view of their client insofar as the law provides and the lawyer is able. As human beings, lawyers can put aside their personal views to varying degrees. For that reason, there is likely a range of appropriate responses to your story. Some lawyers might feel unable to continue with the representation in the face of an ugly slur. I'd understand that, though in the picture you painted, withdrawal would leave the client in a desperate, possibly deadly, situation, which presents countervailing ethical issues. But if a lawyer cannot loyally and diligently represent the client's legal interests because of personal feelings about the client, I believe the lawyer has an ethical duty to say so and

withdraw so that the client may find another lawyer who can represent him zealously such as, in your example, in a seemingly meritorious disability claim—which has nothing to do with his prejudices.

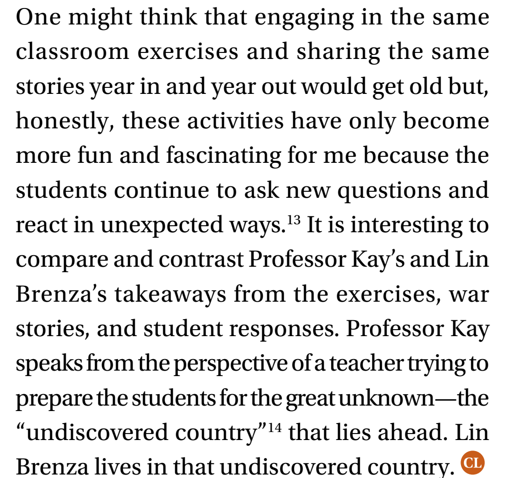
InQ: Can you think of an analogous situation that might help illuminate the analysis? A 20-year-old law student in 1981 might very well have chosen not to challenge the client's insulting words, yet a student in 2024 who has been taught to embrace confronting intolerance might face a much more difficult choice.

Lin: My personal view is that clients come to lawyers like sick patients come to doctors. We are sometimes required to take flawed clients "as they are" and focus on what we are hired to do. Clients have troubles, sometimes of their own making, sometimes not, sometimes very serious, sometimes less so. But in nearly all instances, they are looking to their lawyer to guide them through the legal system to protect their legal rights and secure whatever justice to which they are entitled. I analogize to the medical context where a long-time smoker is diagnosed with lung cancer. His doctor tells him, "It's your own fault. You made bad decisions smoking for many years and now you have cancer. I won't treat you." Most people would wonder if that doctor was satisfying his ethical duties to this patient and as a doctor. Many would likely hope the doctor would put aside his personal views of the patient's conduct and focus on meeting the patient's current medical needs.

Legal clients with flaws, prejudices, misunderstandings, moral shortcomings, mental illness, or even violent tendencies, all come to lawyers for help navigating our legal system. In most cases they hope—and should hope—to cause that system to work properly to reach the appropriate legal outcome in their particular case, not to validate every aspect of their life and being. While I've not personally encountered a situation like the one you described, I'd suggest that a lawyer, if able, should try to provide legal services without judging the client beyond what's relevant to the case, within the bounds of the law and ethical rules.

InQ: Professor Kay, what are your thoughts concerning this challenging client and his "ugly slur"?

Prof. Kay: I think this story is an excellent illustration of the gray, confusing, problematic dilemmas that arise in any realistic discussion of ethics issues. Many students come into the class thinking they'll just need to memorize rules and choose the correct multiple-choice bubble for black-and-white examples of overbilling, lying, violating confidentiality, or conflicts of interest. Most have never considered what they'd do as a lawyer in a situation like this one. I have noticed the students' answers are literally all over the map. Some feel a moral obligation to confront the client. Some feel his comment bears no relation to their representation and would just ignore it and move on to best represent his interests. Some feel they would need to withdraw from the representation. At least a few of us in the room grapple with how or whether being Jewish ourselves would influence our answers.



All could be right, or all could be wrong. And that's the real essence of grappling with ethical dilemmas, or at least with the interesting ones!

Conclusion

One might think that engaging in the same classroom exercises and sharing the same stories year in and year out would get old but, honestly, these activities have only become more fun and fascinating for me because the students continue to ask new questions and react in unexpected ways.[13] It is interesting to compare and contrast Professor Kay's and Lin Brenza's takeaways from the exercises, war stories, and student responses. Professor Kay speaks from the perspective of a teacher trying to prepare the students for the great unknown—the "undiscovered country"[14] that lies ahead. Lin Brenza lives in that undiscovered country. CL

NOTES

1. Justice Potter Stewart, as quoted in Ethics for Community Planning, Michigan State University, https://www.canr.msu.edu/news/ethics_for_community_planning.

2. Attributed to NYU law professor Anthony Amsterdam, by Dale C. Moss in "Out of Balance: Why Can't Law Schools Teach Ethics?" *Student Law.* (ABA Student Law Section, Oct. 1991).

3. Groucho Marx, as quoted by Judge Gregory W. Alarcon in "Groucho Marx Can Make You a Better Lawyer," *Advocate Mag.* (July 2019), https://www.advocatemagazine.com/article/2019-july/groucho-marx-can-make-you-a-better-lawyer, but also attributed at various times to Eleanor Roosevelt, Hyman George Rickover, Harry Myers, Laurence Peter, Martin Vanbee, Oliver Wendell Holmes Jr., Sam Levenson, and Anonymous. https://quoteinvestigator.com/2018/09/18/live-long.

4. Moss, *supra* note 2.

5. *Id.* (noting that the concern that the Socratic teaching method's focus on analytic thinking was not effectively teaching legal ethics has been attributed to work done by Professor Ronald Pipkin of the University of Massachusetts in the 1970s).

6. *Id.*

7. Center on the Legal Profession, Harvard Law School, "Teaching Ethics and Professionalism," *The Practice* (Mar./Apr. 2018), https://clp.law.harvard.edu/article/teaching-ethics-and-professionalism. Starting in 1984, Loyola law students were required to take courses exploring client interviewing, client counseling, and legal negotiation. Combining these subjects was done to underscore that "most ethical issues arise in the context of the representation of a client, and that, while some ethical issues could potentially be anticipated, many arise unexpectedly . . . ." Wolfson, "Professional Responsibility as a Lawyering Skill," 58 *Law & Contemp. Probs.* 297, 299 (Summer/Autumn 1995).

8. "Teaching Ethics and Professionalism," *supra* note 7.

9. "Stanford Panel Debates: Does Teaching Ethics Do Any Good?" *Stanford Rep.* (May 13, 2014), https://news.stanford.edu/stories/2014/05/stanford-panel-debates-teaching-ethics-good.

10. *Id.* The law professor who participated in the debate was Barbara Fried, the mother of Sam Bankman-Fried, the millennial FTX founder who was convicted of several fraud-related charges last year.

11. Judge McGahey discussed this exercise when I interviewed him for my article, "Does Popular Culture Influence Lawyers, Judges, and Juries?" 44 *Colo. Law.* 40 (Apr. 2015).

12. Sandgrund, "So, How Does it Feel to Get Sued for Legal Malpractice? (Part 1)," 46 *Colo. Law.* 67 (Mar. 2017); "So, How Does it Feel to Get Sued for Legal Malpractice? (Part 2)," 46 *Colo. Law.* 59 (Apr. 2017).

13. My only regret after engaging in these exercises over the years is that rather than pivoting from graduate work in psychology to law school, I should have chucked it all and attended acting school. Yes, I'm *that* good. I must admit, however, that I play to a rather captive audience.

14. *Star Trek VI: The Undiscovered Country* (Paramount 1991) steals this phrase from Shakespeare's *Hamlet*, repurposing the words to mean the "unknowable future." In Hamlet's famous "to be or not to be" soliloquy, the phrase refers to our fear and lack of knowledge about the afterlife. *See* https://www.shmoop.com/study-guides/star-trek-undiscovered-country/title.html.