



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

2001

Is it Educational Malpractice Not to Teach Comparative Legal Ethics?

Susan Saab Fortney

Texas A&M University School of Law, susanfortney2014@gmail.com

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Legal Education Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Susan S. Fortney, *Is it Educational Malpractice Not to Teach Comparative Legal Ethics?*, 2001 *Juridikum* 144 (2001).

Available at: <https://scholarship.law.tamu.edu/facscholar/615>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.



As United States President George W. Bush was departing Slovenia after his June 2001 meeting with Russian President Vladimir Putin, I was packing for my own departure from Slovenia, the country where I spent five months teaching legal ethics. In reflecting on President Bush's visit in Slovenia and my own stay, I am struck by the value of both visits in forging relationships and fostering understanding. Now, I appreciate the opportunity to comment on my own experience, answering a number of questions related to teaching legal ethics. After reading this essay, readers can consider their own answer to the question as to whether it is "educational malpractice" not to teach a comparative legal ethics class.¹

What Brought a Texas Law Professor to Slovenia

The logical starting point is to explain my presence at the Law Faculty at the University of Ljubljana in Slovenia. My journey to Slovenia started two years ago when I explored the Fulbright Program, an exchange program sponsored by the U. S. government and supported by participating countries. The Fulbright Program aims "to foster mutual understanding among nations through educational and cultural exchanges."² Annually, the program publishes a listing of teaching and research positions around the world. In reading the descriptions, I was thrilled to learn that the preferred specializations in Slovenia included legal ethics, a course I love to teach.

Why Teach Legal Ethics

For decades the commonly held belief was that legal ethics training in law schools was unnecessary. This view appeared to be based on various assumptions. One assumption was that legal ethics effectively amounts to making morally right or wrong choices. Essentially, the belief is that students' moral fiber is established before they begin their legal education. As sarcastically stated by one critic of legal ethics training, "What do you do . . . teach them not to steal."³ As suggested by this comment, the criticism is that legal ethics cannot be "taught" in law faculties. A different assumption is that law graduates will learn ethics and applicable codes of conduct once they enter their period of practical training. Basically, the expectation is that in practice senior attorneys will impart to their subordinates ethical principles and standards. I believe that both of these assumptions do not fully appreciate the current realities of law practice and ethical decision-making.

First, the formal study of ethics gives students an opportunity to be intentional in approaching ethical decision-making

as a skill that can be developed. "We need to help students develop a vocabulary that will help them analyze the difficult moral choices they will face in practice, and to develop the interpersonal and organizational skills to deal with difficult situations in the workplace."⁴ By tackling difficult ethical dilemmas during law school, graduates hopefully will enter law practice with the ability to identify the ethical issues, to know what questions to ask, and possibly where to go for guidance.

Second, ethics instruction recognizes that law graduates may receive limited formal guidance on ethics issues during their practical training period. When training on ethics matters does occur in legal practice, it tends to be random and

Is It Educational Malpractice not to Teach Comparative Legal Ethics?

Susan Fortney

non-systematic. Generally, attorneys tend to handle only those problems that arise in the course of representing specific clients. Moreover, supervising attorneys may not have the time nor opportunity to effectively mentor legal trainees as protégés. In the U. S., increased pressure on supervising attorneys to generate revenue has led to a serious decline in mentoring of junior attorneys. Reports from practitioners in European countries suggest a similar decline in mentoring. With the decline of mentoring in practice settings, a legal ethics class may be the only opportunity for law graduates to obtain structured and comprehensive legal ethics training. Given the complexities of modern day law practice, such training provides the necessary background for law graduates to handle the array of ethical dilemmas that attorneys now encounter.

A final reason for providing legal ethics training in law faculties is that it sends a powerful message. Requiring the formal study of legal ethics communicates to students, practitioners, and the community that ethical decision-making is at the heart of practicing law as a public profession.

Over twenty-five years ago, the American Bar Association (ABA) attempted to communicate this message when it man-

1 See *Mary C. Daly*, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INTERNATIONAL LAW JOURNAL* 1239, 1251 (1998) (boldly asserting that it is "educational malpractice to ignore the present and ever growing impact of globalization on the delivery of legal services").
2 Fulbright Grant Program Fact Sheet, United States Department of State,

<http://www.unf.edu/dept/scholar-programs/fulbright.html>.

3 Roland D. Rotunda, *Teaching Legal Ethics a Quarter of a Century After Watergate*, 51 *HASTINGS LAW JOURNAL* 661, 663 (2000) (citing a law school colleague who ridiculed formal ethics instruction in law school).

4 Kathleen Clark, *Legacy of Watergate for Legal Ethics Instruction*, 51 *HASTINGS LAW JOURNAL* 673, 676 (2000). To illustrate her point that legal ethics

training enables students to develop skills for practice, Professor Clark argues that such training may have assisted junior lawyers involved in Watergate by helping them develop professional skills to deal with difficult situations where clients and supervisors want assistance in illegal matters. *Id.* at 674.

dated ethics instruction in the professional responsibility of attorneys. Largely, in response to the number of attorneys involved in the Watergate scandal,⁵ the ABA in 1974 adopted an accreditation standard for law schools.⁶ Under this standard, a law school can only earn accreditation if the school “requires of all students . . . instruction in the history, goals, structure, duties, values and responsibilities of the legal profession and its members, including instruction in the Model Rules of Professional Conduct of the American Bar Association.”⁷

How Legal Ethics Training Occurs in U. S. Law Schools

To satisfy the accreditation requirement, schools generally provide legal ethics training in one of two ways. Ideally, the most effective method is to use a pervasive method of teaching ethics, integrating legal ethics throughout the curriculum. The clear advantage of this approach is that it addresses legal ethics problems in the context in which problems occur. Unfortunately, the difficulty with the pervasive method is that many professors may not be interested or prepared to weave ethics into their courses. Because of the difficulty and resistance to including ethics throughout the curriculum most U. S. law schools opt to provide the ethics training in separate courses, typically called professional responsibility or legal ethics.

When such courses are taught the professor must decide on the subject matter and approach. U. S. law professors tend to use two pedagogical approaches to teaching legal ethics.⁸ One approach considers the subject matter from the perspective of moral philosophers, exploring issues related to the role and moral responsibility of attorneys.

Although most ethics professors I know love to discuss such issues, they tend to use a more practical approach to teaching their students. Largely due to the limited time and the concern that students need exposure to ethics codes and problems that they will face in practice, many ethics professors rely on a regulatory approach. This approach focuses on applicable ethics rules and other applicable law.

Persons within the academy and the practicing bar have criticized such emphasis on rules, believing that it has contributed to the legal profession losing its moral compass and aspirational goals.⁹ They believe that the rule-based approach has resulted in many U. S. attorneys equating ethical

conduct with compliance with the minimum rules necessary to avoid disciplinary action.¹⁰ Therefore, the critics urge legal ethics professors to explore with students the precepts of law as a public profession¹¹ and issues related to moral responsibility of attorneys.¹²

Regardless of the pedagogical approach, one popular teaching tool is to rely on problems. Typically, such problems require that students answer questions by applying ethics codes and other law governing the conduct of attorneys. Personally, I modify the problem-solving approach so that students do not answer questions in abstract terms. Rather I ask the students to actually stand in the shoes of the attorneys in the problems by conducting role-plays based on the hypothetical situations posed. These kind of role-plays force students to appreciate the fact that many dilemmas that attorneys must deal with may not be resolved simply by referring to applicable rules or statutes, but that they require counseling skills and various judgment calls. In order to make those judgment calls, aspiring attorneys need to examine their own moral compass. Thus, role-plays can be effective tools for discussing questions related to professionalism and moral responsibility of attorneys.

Why Teach Comparative Legal Ethics

Legal ethics professors have begun to incorporate the study of comparative legal ethics, considering transnational law practice issues. By exposing students to ethics issues related to cross-border law practice, ethics professors fulfill their own professional responsibility in helping train global lawyers for the twenty-first century. As stated by legal ethics expert, Professor Mary C. Daly, “law schools owe an ethical obligation to their present students, the first generation of global lawyers, to educate them to meet professional responsibility challenges they are likely to encounter in providing cross-border legal services.”¹³

With globalization of capital and financial markets linking even the remotest parts of the world, cross-border practice is no longer limited to attorneys who handle private and public international law matters.¹⁴ Rather, attorneys on Main Street in countries around the world, as well as attorneys on Wall Street in New York City and in financial centres throughout

5 According to John W. Dean, III, the former White House counsel who blew the whistle in Watergate, “not less than 21 lawyers found themselves on the wrong side of the law.” John W. Dean, III, *Watergate: What Was It?* 51 HASTINGS LAW JOURNAL 609, 612 (2000). Mr. Dean offers “three underlying rationales that help explain the malfeasance by attorneys: an arrogant belief that the law did not apply to them or that they could cheat and get away with it; incompetence; and loyalty.” *Id.* at 613.

6 Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U. S. and Foreign Lawyers*, 32 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 1117, 1139 (1999).

7 ABA Standards for the Approval of Law Schools, Standard 302(b), (2001)www.abanet.org/legaled/standards/html.

8 See Daly, supra note 2, at 1257–58 (describing the two goals of professional responsibility teachers as follows: “to familiarize the students with the specific codes that govern the conduct of lawyers . . . and to explore a broad range of professionalism issues, often against the backdrop of

philosophic reasoning (e. g. the role of lawyers in society, the nature of the search for truth in an adversarial system of justice, the delivery of legal services, etc.)”

9 See, e. g., Heidi Li Feldman, Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators? 69 SOUTHERN CALIFORNIA LAW REVIEW. 885, 886–87 (1996) (comparing “technocratic lawyering” with genuine deliberations).

10 At the ABA’s 23rd National Conference on Professional Responsibility held in 1997, the moderator of the panel discussion on *The Model Rules of Professional Conduct: Have We Lost Our Professional Values* called for “broader devotion to ethics than is stirred by the Model Rules.” ABA Speakers Debate Proposals for Reshaping Ethics Rules, 13 LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT (ABA/BNA) 158 (June 11, 1997).

11 For example, Anthony Kronman, Dean of Yale Law School, has called for the rekindling of the concept of lawyer as statesman. ANTHONY KRONMAN, *THE LOST LAWYER* 14–15 (1993).

12 As stated by the authors of the text I used for the Ljubljana ethics class, “If rules of lawyer discipline and malpractice are the only limit on what

lawyers and clients do (and we fear that this is increasingly the case) – then we are in trouble.” THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR. *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY*, Preface (1994). According to Professors Shaffer and Cochran, their purpose in the book was “to seek out and examine the moral standards clients and their lawyers bring to the law office, to hold those standards up as better than the minimum lawyer standards, and to identify a way that lawyers and clients can talk about and apply their standards in the law office on ordinary Wednesday afternoons.” *Id.*

13 Daly, supra note 2, at 1249.

14 Mary C. Daly, *Thinking Globally: Will National Borders Matter to Lawyers a Century from Now?* 1 JOURNAL OF THE INSTITUTE FOR THE STUDY OF LEGAL ETHICS 297 (1996) (noting that telecommunications and technology advances that have intimately linked the remotest parts of the world are “here and improving every day.”

the world, find it necessary to consider cross-border and ethics issues in representing clients.¹⁵ Increasingly, lawyers represent diverse populations, including immigrants who maintain connections to their homelands.¹⁶ For example, a family lawyer in Vienna may need to understand the property and domestic relations issues of the client-immigrant's homeland.

Even if clients are not mobile, the Internet has connected people around the world, resulting in legal entanglements. This is illustrated by the custody dispute over the twins adopted by the couples in Great Britain and the U. S. Although the only connection the couples shared was an Internet "adoption broker," the couples became embroiled in a cross-border custody dispute.¹⁷ As a result, the attorneys for the couples, like the securities lawyers handling international business transactions, must understand the role and ethics of attorneys in other legal cultures, as well as applicable substantive and procedural law. This suggests that the primary motivation for studying comparative ethics is client service and competence.¹⁸

At the same time, the study of comparative ethics helps bridge cultural gaps.¹⁹ A study of the European Institute in Florence on the state of legal ethics in five European countries has recognized the importance of legal ethics in providing a particular view of law and lawyers, as well as the legal services market and the culture of the law.²⁰ Comparative study enables lawyers and law students to consider the extent to which they agree on core values and to appreciate that differences often turn on cultural differences. This is illustrated by different perspectives on professional independence. While the ABA Model Rules of Professional Conduct (ABA Model Rules) and various European ethics codes recognize the professional independence of attorneys as a core value, the conceptualization of independence varies. Under the ABA Model Rules the term "independence" is generally used to refer to the attorney's duty to exercise independent professional judgment on behalf of clients, free from the control of the

state or third parties. On the other hand, under French professional standards, for example, "independence" includes independence from clients.²¹ By examining such differences attorneys and law students around the world can learn from one another while exploring the adoption of an international code of ethics for cross-border practice around the world.²²

The adoption of the Code of Conduct for Lawyers in the European Economic Community (CCBE Code) clearly demonstrates that lawyers from different civil and common law legal systems and backgrounds can reach some agreement on ethical principles applicable to lawyers.²³ In European Union member states and various associate states the professional authorities responsible for lawyer regulation have adopted the CCBE CODE, specifying that it will apply to cross-border practice. This move is in stark contrast to the territorial trend in lawyer regulation in the U. S. As Europe moves toward transcending national borders, states within the U. S. continue to be exclusionary, largely prohibiting lawyers licensed in one state from practicing in another state where they are not licensed to practice. Now regulators in the U. S. are watching the European experience with an eye toward eliminating interstate barriers to law practice within the U. S.²⁴ Because it now affects their pocket books, practitioners in the U. S. are joining academics who are interested in easing restrictions on cross-border practice and studying comparative legal ethics.

How Did I Structure the Comparative Ethics Class

Once the practicing attorneys and academics recognize the value of studying comparative legal ethics, the next question is how do you undertake the study. In organizing the Comparative Ethics course that I taught at the Ljubljana Law Faculty, I articulated a number of course objectives designed to expose students to moral responsibility questions, as well as regulatory issues.²⁵ With different regulatory topics, such as confidentiality, we used a comparative approach, examining

15 For a discussion of how globalization has "trickled down from 'Wall Street to Main Street'" see *id.* at 309. For examples of how solo practitioners and small firm attorneys provide cross-border services, see Mary C. Daly, *Practicing Across Borders: Ethical Reflections for Small Firm and Solo Practitioners*, 1995 THE PROFESSIONAL LAWYER 123.

16 "Immigrants, even those who eventually become citizens, are retaining financial, cultural and personal ties to their countries of origin." Daly, *supra* note 2, at 1250-51.

17 Sarah Lyall, *Battle by 2 Couples to Adopt U. S. Twins Moves to Britain*, New York Times, January 18, 2001, <http://www.nytimes.com/2001/01/18/world/18ADOP.html> (noting that the couples paid the same adoption broker, resulting in an "extraordinary international tug of war" revealing the vast difference between adoption laws.)

18 As stated by Professor Daly, "lawyers who engage in cross-border practice cannot competently represent their clients if they are unaware that the foreign lawyers who are also providing legal services in the same transaction, arbitration, or litigation are subject to different or even conflicting ethical norms." MARY C. DALY, *TRANSNATIONAL LEGAL PRACTICE* (forthcoming book) Chapter 5, at 1.

19 See Roger J. Goebel, *Lawyers in the European Community: Progress Towards Community Wide Rights of Practice*, 15 FORDHAM INTERNATIONAL LAW JOURNAL 556, 646 (1991-92) (urging that cross-border legal practice be fostered because it "benefits clients, facilitates U. S. - E. C. trade, and

helps to bridge the cultural gap between diverse legal traditions.")

20 DALY, *supra* note 19, Chapter 5, at 1-3 (quoting the justifications for studying legal ethics advanced in the European Institute study set forth in Avrom Sherr, *Dinners, library seats, wigs and relatives*, 4 INTERNATIONAL JOURNAL LEGAL PROFESSION 5 (1997).

21 John Leubsdorf, *The Independence of the Bar in France: Learning from Comparative Legal Ethics*, in *LAWYERS' PRACTICE & IDEALS: A COMPARATIVE VIEW*, John J. Barcelo III & Roger C. Cramton, editors, at 275, 280 (1999) [hereinafter A COMPARATIVE VIEW]. Similarly under the Code of Conduct for Lawyers in the European Economic Community (CCBE Code), the attorney's identity is not collapsed into the client's. Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code Part I: An Analysis of the CCBE Code of Conduct*, 7 GEORGETOWN JOURNAL OF LEGAL ETHICS 1, 48 (1993). Rather, an attorney under the CCBE Code maintains an independent identity, having certain rights that do not necessarily derive from clients. *Id.* at 52.

22 An English Barrister who served as the First Vice President of the Council of the Bars and Law Societies of the European Community asserts that if the will exists that a common international code can be agreed upon based on the ABA Model Rules, the Japanese Code, and the CCBE Code). John Toulmin, *Ethical Rules and Professional Ideologies*, in A COMPARATIVE VIEW, *supra* note 22, at 377, 378-79.

23 On October 28, 1988 the twelve member states

of the European Economic Community adopted the CCBE Code. John Toulmin, *A Worldwide Common Code of Professional Ethics?* 15 FORDHAM INTERNATIONAL LAW JOURNAL 673 (1991-92). Even the initials "CCBE" were kept even after the name of the organization was later changed to Council of the Bars and Law Council of the Bars and Law Societies of the European Community. *Id.* at note 1.

24 As stated by John B. Harris, Chairman of the Association of the Bar of the City of New York Committee on Professional Responsibility, "You look at the experience in Europe and say, 'Why can't that happen in the U. S.?' " Debra Baker, *New Push for Going Mobile, European-style cross-border practices may be the next big wave here*, A. B. A. JOURNAL, July 1999, at 18.

25 The following are the course objectives I communicated to the students: (1) to examine the ethical concerns raised by the attorney-client relationship and attorneys' role in society, (2) to provide each student with an opportunity to study and analyze scholarship, commentary and inter-disciplinary literature related to legal ethics, (3) to analyze ethical decision-making theories and approaches; (4) to provide students an opportunity to examine his or her own beliefs and perspectives and those held by other class members, as well as those held by law students and attorneys in the U. S., and (5) to give students the basic framework so that they know what questions to ask in approaching ethical dilemmas.

different provisions in the Code of Professional Conduct of the Law Society of Slovenia, the CCBE Code, and the ABA Model Rules. I was impressed on how the students appreciated that different approaches reflect economics, as well as the cultural and political context in which professionals practice law and make decisions.

I was also pleased to see how engaged the students were in the second portion of the class devoted to exploring moral responsibility of attorneys. On a weekly basis the law students at the Ljubljana Law Faculty and my home law school in Texas completed readings relating to the role of attorneys and moral discourse with clients.²⁶ Then they would exchange views, addressing specific questions that I posed via e-mail. In the weekly class meetings the students would explore what they learned from the exchanges. During the class meetings the students also participated in exercises and role-plays.

I also required that they interview a practitioner. The students shared their interview reports with their e-mail partners. This enabled the students to get perspectives of an attorney in their own country as well the views of an attorney from another country. The students indicated that they found the interviews to be productive and insightful. A few commented that the interview exercise gave them a reason to interview an attorney.

The attorney interviews complemented the students' on-line chat with a "holistic" attorney. After they had read an article on the attorney which included his views on "therapeutic jurisprudence" they posed questions to him on the class website. A number of students recognized the value of the exchange in giving them a perspective on how a good person can be a good lawyer.

What We Learned from the Experience

The comparative legal ethics class proved to be a very meaningful experience for me as the course leader and hopefully for the students as participants. The students on both sides of the Atlantic commented on how much they valued the opportunity to learn from law students and attorneys in a different culture and legal system, as well as those in their own country. The Slovenian law students realized that American television programs and movies do not provide a representative portrayal of law practice in the U. S. The U. S. law students who tend to know little about other legal systems learned a great deal from personal communications with fu-

ture attorneys in former socialist country with a civil law system. In their final essays, many students noted on the extent to which their e-mail partners shared similar values and views.

The students also appreciated the reflection exercises and questions. Many explained that they had gone through their legal education spending little or no time seriously thinking about their role and moral responsibility as attorneys. Given that students in civil law countries tend to pursue a legal education following secondary school, they can only benefit from experiences that challenge them to consider attorneys' position as public servants. At the same time, the U. S. law students who had previously only taken regulatory ethics classes blossomed in the exchanges. Some commented that they openly expressed themselves in e-mail communications, although they seldom spoke in their other law classes. Based on my experience in teaching the comparative legal ethics class I am resolved to create more opportunities for students to reflect on moral responsibility and discourse with clients.

A Challenge for the Future

For professors who are interested in offering a comparative legal ethics class, ample course material is now available.²⁷ Regardless of the emphasis of the course, the Internet will continue to be a multi-faceted tool for exploring comparative ethics. By using the Internet and other resources we can train our students as international lawyers who are grounded in their own legal system and "particularly attuned to issues that may arise in other jurisdictions."²⁸

I hope that my reflections on teaching a comparative legal ethics class provide an impetus for law faculties who are considering how to train future attorneys for the challenges they will face in the twenty-first century. As legal educators it is our responsibility to continuously re-examine our curriculum generally and the content of our courses specifically. By critically evaluating our students' needs and our teaching objectives we recognize our own professional responsibility as gatekeepers of the legal profession.

Professor Susan Fortney teaches at Texas Tech University School of Law; in 2001 she stayed as a Fulbright Scholar at the University of Ljubljana Law Faculty.

²⁶ The readings principally came from *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* by Thomas L. Shaffer and Robert F. Cochran, Jr. (1994).

²⁷ The following materials provide good suggestions for structuring a comparative legal ethics course: (1) the conference materials from the American Association of Law Schools and American

Society of International Law Workshop on Shifting Boundaries: Globalization and its Discontents, January 4, 2000; and (2) a Mary C. Daly article entitled, *The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century*, 21 *FORDHAM INTERNATIONAL LAW JOURNAL*

1239, 1251 (1998). I am happy to provide copies of these items as well as my course syllabus.

²⁸ Emmanuel Gaillard, *A Comparative Look at the Roles, Functions, and Activities of U. S. Lawyers and Those in Major European Countries*, in *A COMPARATIVE VIEW*, supra note 22, 221, 224.