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Preparing for the Challenge of a Corrupt Environment

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An environment getting tougher for lawyers

Lawyers are operating in an environment where their responsibilities are growing. They are faced with legislation with extra-judicial effect, such as the US Foreign Corrupt Practices Act 1977 and the UK Bribery Act 2010. Many jurisdictions are introducing legislation which imposes criminal penalties for actions of lawyers which were previously regarded as 'unethical' and regulated by professional bodies rather than the courts. Examples of this is the UK Proceeds of Crime Act 2002, the Serious Organised Crime and Police Act 2005 and the Serious Crime Act 2007. In addition, there is a tendency towards tougher professional regulation by bar associations. It therefore becomes increasingly important that lawyers are prepared to deal with corruption when they encounter it, both in their own and their clients' interests.

Universities' role in preparing lawyers for a corrupt environment

Although universities in different jurisdictions have different roles in respect of preparing lawyers for practice, we in the university sector should not restrict ourselves. We miss an opportunity for influence (and possibly income) if we fail to show that we are the best at helping lawyers' firms and individual lawyers to develop ethical practice and to meet the challenge of corruption. The Review of Legal Education currently taking place in the UK includes a focus on professional ethics amongst its main concerns. These are signs we should not ignore.

The CCBE Recommendation on Training Outcomes for European Lawyers (2007) identifies three areas which must be addressed in the education and training of lawyers:

- Deontology and professional status
- Implementing the work of the lawyer
- Means of performing the lawyer's mission.

Their rationale is:

1. The first section sets out the outcomes relating to deontology and professional rules. Their function is to make future lawyers aware of their professional identity and of the role of the profession within the administration of justice and in society at large. Through mastering these outcomes future lawyers learn **who lawyers are**.

2. The second section's outcomes relate to the execution of the mission of lawyers. They describe, in general terms, the theoretical and practical knowledge that lawyers should have in order successfully to perform their functions. Through mastering these outcomes future lawyers learn **what lawyers do**.

3. The third section's outcomes are related to the organisation of the activities of lawyers. If lawyers, fully aware of their mission and role, and in possession of all the necessary technical skills are to perform their functions more effectively, they must understand these outcomes as they explain **how lawyers should work**.

This presentation is designed to help us to address all these issues.

European professions facing US competition

Colleagues of mine in City law firms in London tell me that they are facing increased competition because of global legal commercial practice. In particular, US law firms are aggressively seeking work internationally. Many have long had branches in European cities and are increasingly direct competitors. We in Europe need to be aware of developments which are taking place there, and which prepare US lawyers better for their professional responsibilities.

The Carnegie Report: *Educating lawyers: Preparation for the Profession of Law* (Sullivan, 2007) has challenged US law schools to improve their performance. Their analysis is based on experience from many professions and applied research from the discipline of moral psychology. Their focus is professional judgment and one element of their challenge is to improve the ethics and the professionalism of newly-qualified lawyers. US law schools are rising to this challenge. For some examples of their responses, see Cunningham and Alexander: *Developing Professional Judgment* (Cunningham & Alexander, 2010).

Amongst the lessons of the Carnegie Report is a recognition that preparing professional lawyers requires more than knowledge of the rules. This is, of course, true of all professions and considerable developmental work has been done in relation to the preparation of other professionals. James Rest (1994) was concerned with the professional development of dentists. He developed the ideas of Lawrence Kohlberg (1981) which recognised six stages of moral development and the importance of achieving the higher stages before professionals could be entrusted with ethical dilemmas.¹

Rest identifies a Four Component Model of Morality, which first identifies four predictors, any of which could lead to professional misconduct. These are:

- Moral blindness: simply not noticing the ethical issue in a situation.
- Faulty reasoning: failing to analyse an ethical dilemma effectively.
- Lack of Motivation: which may include a failure to adopt the ethical norms of the profession and also a failure in moral courage when faced by a powerful demand to behave unethically.
- Ineffectiveness: characterised by a lack of competence, either in solving problems or in effectively communicating with others.

Rest's approach to addressing these predictors of misconduct identifies four corresponding moral capacities, all of which are necessary, but none by itself sufficient to ensure moral behaviour. They are:

¹ Kohlberg's work has been applied to legal education by Hartwell (1994) and specifically to the teaching of legal ethics by Duncan (2011).

- Moral sensitivity: the capacity to interpret ambiguous clues in real-life settings, and thus recognise when ethical issues arise.
- Moral judgment: the capacity to analyse moral issues and provide justifications for decisions.
- Moral motivation: the capacity to internalise and give priority to professional values, which may also require moral courage.
- Moral implementation: the capacity for empathic interaction and problem solving.

It will be immediately noticed that the last of these includes the 'soft skills' which, earlier today Zosya Stankovskaya explained to us the European Law Students Association have been developing and which Prof. Dr. Irmgard Griss argued were also a desirable attribute of judges.

We can see that if we rely on teaching only the law we may encourage efforts to minimise ethical rules through interpretation. We may also fail to develop students' capacity to recognise ethical dilemmas; analyse and justify ethical decisions; internalise and adopt professional values; and implement the ethically proper response. Instead what we need to do is to devise programmes which:

- Teach about the professional norms;
- Provide examples of good practice;
- Include systems which achieve student self-reflection about their own professional identity-formation;
- Practice to develop their skills of analysis and interaction.

The example of Anti-Money Laundering

What follows is an example of a resource which is designed to contribute to all of these aims. It consists of three short video clips which show an imagined conference between a solicitor and his client who is an estate agent. The video addresses the UK Proceeds of Crime Act 2002 and in particular four of the offences established by that Act: .

- Entering into a money laundering arrangement - s.328
- Acquiring criminal property - s. 329
- Failing to make a required disclosure - s.330
- Tipping off – s. 333A (defence s. 333D (2))

It is based on the case of *R v Griffiths* [2006] EWCA Crim 2155 in which the estate agent was convicted of the offences under ss. 328 and 329 and was sentenced to 3 yrs imprisonment (reduced to 27 m on appeal), and the solicitor was convicted of the offence under s. 330 and was sentenced to 15 months imprisonment (reduced to 6m). It is designed to address:

- The substantive law

- The adjectival law
- The role of the professional lawyer
 - Client care and client autonomy
 - Professional privilege
 - Conflicting professional duties
- The nature of morality
- Understanding oneself

The video was easy and cheap to prepare. It was a collaboration by the author with Clark D Cunningham, W Lee Burge Professor of Law and Ethics, Georgia State University, Atlanta and Emma Oettinger, Anti-Money-Laundering Policy Officer, Law Society of England & Wales. The script was written by imagining the conversation between the accused in R v Griffith. The recording room and facilities were provided free by Freshfields Bruckhaus Deringer. It has been produced as an open learning resource and is available as a free download on www.teachinglegalethics.org. This is the website of the International Forum for Teaching Legal Ethics and Professionalism, founded by the author and Prof. Cunningham. You are all invited to join it (there is no charge) and become members of the Forum.

I shall now play the first section of the video.

As you can see the solicitor has a number of reasons for caution and should now be considering what further enquiries he should make. This is an opportunity to explore with students or with lawyers in continuing professional development sessions what issues have arisen and how the solicitor should properly behave at this point.

I shall now play the second section of the video.

As you can see, the solicitor has made an attempt to explain the problems to his client, but, for a variety of reasons, has taken some fatal steps. This, in effect, is what happened in R v Griffiths which led to the conviction of both professionals. This can stimulate student discussion of the substantive law in the Proceeds of Crime Act; the provisions of the Code of Practice; the concept of privilege and its limitations; how to address conflicting professional duties; effective client communication; or even aspects of the individuals' moral characters. It could be used as a springboard for students (whether at University or undertaking continuing professional development) to role-play what the solicitor should have done.

We do not have time for me to show you the final section, which shows the solicitor, in essence, doing the ethically correct thing. However, it also has material which is designed to encourage further discussion and reflection in students. I encourage you to download it from www.teachinglegalethics.org and use it yourselves. Then, share your experience of using it with others by posting comments on the Forum. Equally, if you have learning resources of your own to share please post them on the Forum. That way, we all gain.

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References

Council of Bars and Law Societies of Europe, *CCBE Recommendation on Training Outcomes for European Lawyers*, 2007, http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf

Cunningham, C, & Alexander, C, 'Developing Professional Judgment', in Robertson et al (eds) *The Ethics Project in Legal Education*, (2010, London: Routledge)

Duncan, N, 'Addressing Emotions in Preparing Ethical Lawyers' in Maharg & Maughan (eds), *Teaching and Reaching the Whole Student – the Impact of Emotions on Learning (and Teaching) the Law*. (2011, Dartmouth: Ashgate).

Hartwell, S, 1994. 'Promoting moral development through experiential teaching'. 1 *Clinical Law Review* 505-540.

Kohlberg, L, *Essays on Moral Development Vol. 1: The Philosophy of Moral Development*. (1981 San Francisco: Harper and Row).

Rest, J, 'Background: Theory and Research', in Rest and Narvaez (eds), *Moral Development in the Professions: Psychology and Applied Ethics*, (1994, Hillsdale: Erlbaum)

Sullivan, W, et al, *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching, (2007, San Francisco: Jossey-Bass)