

Teaching Legal Ethics Online: Pervasive or Evasive?

ARCHIE ZARISKI*

INTRODUCTION

This article will explore two themes using examples taken from my online teaching in a commercial law subject at Murdoch University Law School. The first theme is the need to take seriously a commitment to teaching legal ethics pervasively in law school. The second is the tension between legal and business ethics and the relevance of this issue for the law curriculum.

It is my view that teaching legal ethics pervasively entails not only incorporating legal ethics into a majority of law school subjects but also dealing with it in a pervasive manner within those subjects. I suggest that the benefits of the pervasive method are lost both when ethical issues are confined to explicit modules within a subject as well as when ethics teaching is confined to a stand-alone subject in the curriculum. This article explores the demands of being constantly alive to ethical issues in our teaching.

It is also my view that law teachers can make productive use of contrasts and comparisons between legal and business ethics, particularly in commercially oriented law subjects. I explore how such a comparative approach may help stimulate student discussion and reflection on professional roles and responsibilities.

LEGAL PRACTICE AND TRANSACTIONS

One of the subjects that I teach at Murdoch Law School is entitled Legal Practice and Transactions (“LPT,” formerly Legal Practice and Documentation). It is (seemingly) unique in its scope

and content as a subject in Australian law schools. Its main aim is to introduce students to the work of a solicitor in Western Australia.¹ The unit is required in the LLB degree for Western Australian law students by the professional accrediting body, the Legal Practice Board. LPT in effect functions as a type of bridging subject between academic legal study and the post-graduation professional training conducted in the Western Australian Articles Training Program.

As its name suggests, LPT covers a broad range of content, touching upon all the major practice areas engaged in by Australian solicitors, with an emphasis on commercial matters. Topics considered include: wills and estates; buying and selling land and businesses; drafting leases, licenses, and securities; and calculating stamp duty. Legal ethics is not a discrete topic in the LPT syllabus, and I have attempted to teach it pervasively within the subject as discussed below.

Since 1995 I have used aspects of the Internet in my teaching in LPT, beginning with a simple e-mail discussion list.² Most recently I use an integrated multi-purpose website based on the Web Course Tools (WebCT) software platform.³ WebCT provides a number of functions of which I have taken advantage in teaching LPT; foremost among these is the electronic bulletin board system. An instructor may set up any number of web-based bulletin boards (called “forums” in WebCT) for various purposes and give individual students (or guests) access to selected boards as well as allow the whole class to access other bulletin boards for reading and submitting comments. I created separate private bulletin boards for workshop groups (tutorials) as well as bulletin boards accessible to all students in the class dedicated to each topic covered in the subject.

Not all teaching in LPT is done online – there are some face-to-face lectures and workshops. I believe in a mixed mode approach to using the Internet in teaching and, therefore, half of the twelve workshops and a third of the thirteen lectures were held face-to-face on campus. However, in this article I focus on the online “web lectures” and “web workshops” because they furnish archived textual records of ethics teaching and learning in the subject. Typically a web lecture consists of assigned reading from the prescribed texts (including website references), brief written comments provided online by me or by a guest lecturer (typically a

city practitioner), and one or more questions or issues set for discussion by the class. Discussion occurs through asynchronous postings of student comments to the designated WebCT bulletin board. These student postings are monitored by me or by the guest lecturer and responded to as necessary. All students in the class (or in a particular workshop group) may read the submissions of others and post their own contributions. I encourage students to follow through ideas suggested by others, thus I help develop the topic being considered. My goal is to create the kind of classroom discussion that could occur if time were not limited and everyone in the class had ample opportunity to participate. Similar discussions take place in the workshop (tutorial) online bulletin boards but with reduced numbers in each group.

Since these bulletin board discussions occur over days rather than minutes, as they would in a live class, students have more opportunity to reflect on issues and to compose considered comments rather than just offer spontaneous reactions. In some learning situations the lack of immediacy and spontaneity in discussion may be a drawback; however, in law studies, and particularly in relation to complex ethical issues, I consider the slower pace a benefit. Students were marked on their bulletin board contributions so they had an extra incentive to make worthwhile postings. Having a written record of students' comments in lectures and workshops is obviously far superior when it comes to marking participation in discussion. The WebCT system allows the instructor or workshop leader to list quickly and review all postings by an individual student, making the job of marking more efficient.

I have learned through experience that firm guidelines on the extent and manner of online participation are necessary, no less than in a face-to-face class.⁴ Such guidelines operate for the benefit of both students and the instructor. If no word limits on student comments are set, for instance, the volume of reading to be done on a topic becomes unmanageable. The instructor or workshop leader also has a difficult and sensitive job in moderating the online discussion and responding as required. Again, experience has shown me that the instructor must tread a fine line between letting the discussion flow or intervening to correct serious misconceptions, or attempting to steer the discussion back on track to the topic at hand. There is now a good deal of accumulated wisdom in the online community to help a law teacher accomplish

this delicate task.⁵

I will now describe my approach to teaching legal ethics in LPT within the online environment described above.

THE PERVASIVE OR THE EVASIVE APPROACH?

Murdoch University Law School has no separate legal ethics subject in its curriculum. However, this is not to say that the School takes ethics lightly. The School's vision statement emphasises the value of "integrity," and its leaders set high standards for ethical conduct by staff and students. The way in which Murdoch Law School puts its dedication to ethical professionalism into action is by adopting the so-called "pervasive" method of instruction in legal ethics.

Much has been written on the pervasive approach to teaching legal ethics as an instructional strategy.⁶ Suffice it to say here that this approach involves raising legal ethics issues in a variety of different subjects in the curriculum rather than confining ethics instruction to one or more discrete ethics subjects. The pervasive approach is designed to demonstrate that ethics should be a continuous and important matter of concern to legal professionals rather than just another code of rules to be consulted when a difficulty arises. In part, the pervasive approach seems to highlight the importance of being constantly vigilant in relation to potential ethical difficulties before they become actual problems for the practitioner.

The laudable goals of the pervasive approach can be frustrated in at least two ways.⁷ First, because no single unit is designated as the focus of ethical instruction, staff members may assume their colleagues will cover ethics sufficiently and, therefore, ethical issues need not be integrated into their own subject area. If enough staff members adopt this stance and there is no curriculum level coordination of ethics content, what can happen by default is that few, if any, law subjects actually raise ethical issues. I call this the "evasive approach" to teaching ethics in law school.

Another way in which the pervasive approach to ethics teaching can be frustrated is by "modularising" ethics content within traditional law subjects. As noted above, one of the aims of pervasive teaching is to show that ethics issues can arise at any time in a multitude of circumstances and the careful practitioner is,

therefore, always alive to the demands of behaving ethically. The message is that behaving ethically should be a constant consideration while conducting all professional work. This message is diluted when ethics issues are dealt with in separate modules apart from the usual doctrinal or practical content of a law subject. The challenge for the law teacher, therefore, is to make ethics teaching pervasive within their particular subject area in keeping with the pervasive approach across the curriculum. Confining ethics teaching to discrete modules within a subject, in my view, does not meet this challenge adequately.

There is another challenge involved in the adoption of the pervasive approach. In addition to integrating ethics issues at planned points throughout a subject, the law teacher should be prepared to take up such issues when they surface unexpectedly. Doing this can model for students the lesson of being continually aware of, and willing to deal with, ethical problems whenever they arise. Letting ethical issues pass without comment can convey the opposite impression – that they are best ignored and avoided. The pervasive method, therefore, demands that instructors keep a constant focus on ethical issues whether they are designed into a subject or arise spontaneously through questioning or discussion. One law teacher describes the challenge of “seizing the moment” to deal with ethics issues:

Drawing from the model of parenting, I give myself permission to “seize the moment” and take advantage of an opportunity to teach professional values. I allow myself to take advantage of whatever opportunity may present itself, whenever it presents itself. Like parenting, my experience shows that the most meaningful opportunities that arise for us, as law faculty, to impart this sense of professionalism are not usually of our own making. These moments usually occur spontaneously during the course of class discussion. Therefore, I seize the moment whenever it may arise rather than run the risk of not having another such opportune moment during the course of the semester. In seizing such moments, I have learned over the years to temper my distress at abandoning my game plan for the day by taking comfort in the knowledge that these values of professionalism are large and important themes for students to be exposed to and for me to concentrate on in the classroom.⁸ (notes omitted)

Below I hope to show how I have responded to the demands of “seizing the moment” in legal ethics teaching in LPT.

BUSINESS ETHICS VERSUS LEGAL ETHICS?

Most students at Murdoch Law School, who are not already graduates, follow a joint programme of study, combining their LLB with another degree. Amongst students doing double degrees, the largest number study law and commerce (LLB and BCom). It is by now well known that many law students expect to find careers in business rather than the private practice of law and such a course of study is well suited to this goal.⁹

The influence of concurrent business education on our law classes is significant, particularly for subjects such as LPT with its commercial orientation.¹⁰ It is, I suggest, also a factor that can have an impact on ethics teaching in law subjects. In my view, law and commerce students, in particular, have the opportunity to gain a unique perspective on ethical issues facing law and business through exploring multiple perspectives: those of the legal practitioner, the business client, and other business related professionals. Business students in law may also help their classmates better understand the complex issues surrounding professional obligations in the nexus of law and business. Those law and business students who specialise in their studies in accounting bring a further perspective to the discussion of ethics – that of another profession.

The subject of business ethics is a current and lively one in tertiary teaching in Australia.¹¹ Law teachers can capitalise on this interest by comparing and contrasting business and other professional ethics with those of lawyers and tap into the debates and discussions of the business schools.¹² In my opinion, such an approach will appeal particularly to those students who are studying both law and some aspect of business.¹³

I will now provide some examples of how I have tried to engage both law and business ethics in online discussions in LPT, while adopting a pervasive approach to teach legal ethics.¹⁴ In the discussion that follows, I will not delve deeply into the ethical issues that are raised since my purpose is rather to focus on the methods by which they were raised for consideration by students and the students' responses.

LPT EXAMPLE 1 – KEEPING CONFIDENCES

One of the topics considered in LPT is the solicitor's role in

making wills and helping administer deceased estates. In order to illustrate the pitfalls of not diligently carrying out a lawyer's duties to her or his client when drafting wills, I asked students to read a number of reported contested wills cases available online through AustLII. Students were then asked to comment in the appropriate bulletin board on how they would have conducted themselves as solicitors in order to avoid causing the problems the cases revealed.

One student who had worked in a law firm described his experience with an estate matter. I saw a problem with the posting because it possibly revealed confidential information about the firm and its client. This issue arose because the student's full name appeared on the posting, and it would be common knowledge where the student had worked amongst his classmates. I believed a response was necessary and, therefore, posted this reply to the student's contribution for all the class to read:

Message No. 551: [Branch from no. 510] posted by Archie Zariski (L369) on Sat, Mar. 18, 2000, 09:27

Subject: Re: Montgomery v Tomlinson

[A student writes, "I worked for a prominent Perth solicitor who attended the bedside of a wealthy client (dying) in order to finalise instructions for the client's many commercial interests. Whilst he was acting for the client he was also ensuring that his firm would continue to handle these transactions and to continue to be retained by the client's family."]

I agree that this type of situation raises ethical issues for a solicitor. It is hard for me to comment on the example . . . without further facts. In particular, what exactly did the solicitor do to ensure continued use of his firm?

It is often inappropriate and could be unethical for a solicitor to strongly recommend that they be appointed an executor or trustee. The law of undue influence could also be applied I think to negate such an appointment if the facts warranted it.

Keep in mind that at an executor or trustee cannot be bound to use the services of a particular firm if they do not wish to do so. However, in some cases they may find it the only practical and economic thing to do given the firm's intimate knowledge of the testator's affairs.

I will not ask (the student) to post more facts that might breach the rule of confidentiality he is bound to observe. [The student] may have gone a bit far already.

I am happy to discuss these issues further however if anyone wishes to respond.

Archie

Some students followed up on these postings to comment that it might make very good commercial sense to have the client's estate handled by solicitors who already knew a great deal about a

deceased's affairs. Rather than stimulate any further possible breach of confidence, I thought it best not to encourage the discussion further.

This is an example of both anticipated and unexpected ethical issues arising during student online discussions. I took the opportunity to comment on the student's possible indiscretion in keeping with the pervasive approach to teaching legal ethics. In the context of that pedagogical strategy, this student's posting was a serendipitous event that I promptly incorporated into the topic being studied.

LPT EXAMPLE 2 – THE CORPORATE LAWYER

Another topic studied in the LPT subject is the sale of a business including a negotiation and a sample of some documents that accompany this type of transaction.

In this topic I asked the question, "What should be the ethical concerns of a solicitor acting for the vendor or purchaser of a business?" I had in mind, in particular, trade practices law as it relates to professional communications; however, students quickly raised other legal, moral, ethical, and business aspects of the solicitor's role in such transactions. I found little need to intervene in this online discussion. I present some of the most interesting postings below.

Message No. 642: posted by . . . on Mon, Mar. 20, 2000, 14:17

Subject: Ethical consideration?

Aside from the usual ethical considerations of fairness, one of the considerations a solicitor must consider when selling a corporation to another corporation, in particular, is that of monopoly.

Consider this NSW legislation which prohibits monopolisation of a trade or commercial interest: <http://www.austlii.edu.au/cgibin/disp.pl/au/legis/nsw/consol%5fact/ma1923144/s5.html>

It is not clear whether similar legislation exists for each state, or even at the Federal level, but a solicitor must be wary that the sale of the one corporation to the other does not result in the one corporation fully controlling the industry, though the appearance of competition is maintained. For example, Cadbury chocolate has as a subsidiary Fry's chocolate. "Fry's turkish delight" is such a popular flavour that Cadbury's has now released a turkish delight in a family block – "with the kind permission of Fry's". It is only when you read the fine print of a Fry's chocolate bar that you realise that Fry's is owned by Cadbury. If it weren't for Nestle, Cadbury would have a monopoly of chocolate, though the appearance of competition remains. A solicitor could mistakenly eliminate monopoly, especially in the case of companies with more than one interest.

Message No. 651: posted by . . . on Mon, Mar. 20, 2000, 18:03

Subject: Ethical considerations of solicitors

In relation to the ethical considerations of a solicitor facilitating the sale of a corporation, I would suggest that all the solicitor need be concerned with is ensuring that the sale is made according to relevant legislation and that there is no conflict of interest. Should a solicitor be hindered by further ethical considerations that go beyond their statutory and common law duties? I think not. I am in favour of a doctrine of corporate governance that sees a greater emphasis placed on the rights of employees. That being, in the sale of a corporation to another corporation, there should be some way of protecting the rights of employees that are often subordinated within prevailing corporate governance regimes. Whilst this should be a concern of company directors and government, should it be a concern of the solicitor facilitating the sale? I would suggest not. Indeed, a solicitor is instructed to complete a task, and provided that task is carried out in a manner consistent with both statutory and common law obligations, then the solicitor need not be concerned with other ethical issues that are best left to either government or other entities within the corporate structure.

Message No. 657: [Branch from no. 651] posted by . . . on Mon, Mar. 20, 2000, 21:37

Subject: Re: Ethical considerations of solicitors

The main point that I took from (a student's) comment is that solicitors have a job to do. They are hired to act in the best interests of their client. This is the guiding principle for the Legal Practitioners Act (WA) 1893 to be found at: http://www.austlii.edu.au/au/legis/wa/consol_act/lpa1893207/ This Act encompasses all basic ideas of fairness and honesty, such as confidentiality, which all practitioners have to follow. However, in the sale of one corporation to another, certain other ethical issues come to light. As a person concerned for the welfare of a client, a practitioner should raise matters of concern as to the client's future. But how can a practitioner do this informatively if they know nothing about the client or their business?

Therefore, the first consideration a practitioner should have is to learn everything they possibly can about their client's needs and their business. Next, they need to investigate the potential buyer to assess their viability, particularly financially. After this, the lawyer will be much more qualified to advise their client, taking into account their client's specific interests.

As Archie said, a practitioner needs to become actively involved with a client to the extent that they may be considered an expert on them. Simply advising a client without knowing all of the circumstances is very unethical and unfair to the client.

Message No. 671: posted by . . . Tues, Mar. 21, 2000, 12:29

Subject: Ethical Consideration

Q 3 – what ethical considerations should a “Lawyer” have in mind when acting as an “Agent” to negotiate the sale of a business. – Are there any laws governing the conduct of such negotiations that are relevant?

Legal meaning of “Agency” – Peterson v Moloney (1951) 84 CLR 91 at pp94-95 “Qui facit per alium facit per se” (ie) he who acts through another is deemed to act in person, for a principal is liable for the acts of his agents.

“Agent” – is a person who is able by virtue of authority conferred upon him to create or affect legal rights and duties as between another person, who is called his principal and third parties.

In addition to authority expressly conferred, an agent may have authority implied from the circumstances to give real effect to the intention of the parties.

The Status of “Agency” gives rise to a Number of duties and obligations – 1. to follow the principal’s instructions 2. to use reasonable, diligence, care and skill 3. to act in person 4. to act in the principal’s interest 5. not to divulge confidential information 6. to keep principal’s moneys separate, to keep accounts and to be ready to account for those moneys when required. As a “Lawyer” – Duty to use reasonable diligence, care and skill. The standard applicable is that which “A reasonable person would expect an ‘Agent’ of the type in question to exercise in the circumstances (ex) a real estate agent who is answerable to the principal (vendor, lessor) for any derelictions of duty, any failings, shortcomings or mistakes made by an agent will, depending on the circumstances be actionable.

The Special Relationship concept “Hedley Byrne & Co Ltd v Heller and Partners Ltd [1964] AC 465; [1963] 2 All ER 575 (Contract Law) Principal and Agent – the respective rights and duties of the principal and agent must be determined by reference to the agency contract, express or implied which exists between them. However certain duties will always be implied, in particular the duty of an agent to use reasonable care and skill in performing the terms of the contract. Where the agent’s negligent conduct renders the principal liable, the principal may be able to sue the agent for breach of that duty.

There is no specific Federal Legislation regulating the Sale of a business, some aspects of the operation are affected by Tax Law set out in the Income Tax Assessment Act 1936 (Cth), by the Corporations Law and certain conduct may be caught by the Trade Practices Act 1974 (Cth) such as mis-leading or deceptive conduct or Anti-competitive practices.

The doctrine of “Caveat Emptor” (let the buyer beware) applies subject to the provisions of the Trade Practices Act 1974 (Cth) and the Fair Trading Act equivalents prohibiting misleading or deceptive conduct (s52) including representations a the future matters (s51A) and false or misleading representations (s53).

Message No. 680: posted by . . . on Tues, Mar. 21, 2000, 18:04

Subject: Ethical Considerations : Insider Trading

An ethical consideration that a lawyer should have in mind when acting as an agent to negotiate the sale of a publicly listed corporate business to another corporation can be found under part 7.11, Division 2A of the Corporations Law http://www.austlii.edu.au/au/legis/cth/consol_act/cl184/. This division is concerned with the issue of “insider trading”. An inside trader is a person who uses sensitive information that is not readily available or disseminated in the securities market, to unfairly profit by selling or purchasing shares on the basis of their “inside” knowledge. A lawyer negotiating the sale of a corporate business to another

corporation would undoubtedly be privy to such market sensitive information. Not only would it be unethical for a lawyer to act on inside information, s.1002G of the Corporations Law prohibits this sort of conduct. The section states :

(1) Where (a) a person . . . possesses information that is not generally available but, if the information were generally available, a reasonable person would expect it to have a material effect on the price or value or securities ... and (b) the person knows, or ought reasonably to know ... (this)

THEN: (2) The insider must not: (a) subscribe for, purchase or sell . . . any such securities

Under s.1013 an inside trader can be made civilly liable for any losses suffered by buyers or sellers who entered into securities transactions with the insider.

These laws would be directly relevant to any lawyer thinking of trading on the stock market on the basis of information gleaned from their involvement in the sale of a corporation that has publicly listed shares.

Message No. 698: posted by . . . on Wed, Mar. 22, 2000, 14:29

Subject: Ethical considerations of solicitors

Some ethical considerations may include: Employee Entitlements If certain employees are ceasing employment. Consideration needs to be given to the amount of entitlement and whether sufficient provision has been made or the possibility of sufficient cash or assets to discharge this entitlement. Or if they are staying with the business the transfer of ongoing superannuation and benefit entitlements sufficient to fund past service liability.

Business Judgement Rule and Internal Corporate Governance Rules: S140 Corporations law has the effect of creating a contract between the company and it's members, company and each director and company secretary and each member and every other member. It may be necessary to consider the effects of the deal on members in their capacity as members. For example the sale of the company to a significant majority shareholder that allows them the voting power to change the Constitution of the company and affect the rights of the minority members. Eg If change constitution to affect their voting rights or allow sale of assets at less than market value. Whether all shareholders have the opportunity to participate in the benefits gained by the sale. If this involves the compulsory acquisition of shares that the appropriate procedure is followed.

The Business Judgement Rule involves the company management exercising their discretion in the best interests of the company. The decision being a rational one unless the belief is one no reasonable person in that position would have made. There is a statutory version of this in the corporations law s180(2).

This may also involve the duty owed to creditors if the purchaser carries the risks of the transaction. This may occur in making a purchase in which most valuable assets of the business are subject to charge or other secured security type arrangements.

Message No. 782: [Branch from no. 642] posted by . . . on Sat, Mar. 25, 2000, 15:56

Subject: Re: Ethical consideration?

Why is . . . obsessed with chocolate? Someone get the man a Snickers!
But seriously, one of the biggest ethical problems when acting for corporations is the question “Who is the client”? Since a company is a legal fiction, a lawyer’s problem is determining whose instructions represent those of the client. Is it the CEO, a director, etc?
Another problem, which . . . touched on, is that of employees. As a lawyer, would you be comfortable helping to facilitate a sale which could result in many job losses?

I believe this discussion illustrates the potential for learning that exists when one welcomes other professional and business viewpoints and ethical standards into the teaching of legal ethics to law students.

LPT EXAMPLE 3 – MULTI-DISCIPLINARY FIRMS

In the context of business transactions of all types I raised for discussion the issue of lawyers in multi-disciplinary firms (or multi-disciplinary practice, “MDP”). After directing students to a number of online sites where that development is described and analysed, both Australian and international, I asked students for their perceptions of how such firms might benefit clients.

Legal ethical issues were raised by the students without explicit prompting by me. Below I reproduce some of the online discussion that occurred, starting with my posting that comments on an ethical issue raised by a student.

Message No. 728: [Branch from no. 718] posted by Archie Zariski (L369) on Thurs, Mar. 23, 2000, 13:33

Subject: Re: The Rise (and Fall?) of Multi-Disciplinary Firms

[A student writes, “My (limited) understanding on the issue of conflict of interest is that one firm can undertake proceedings for both parties as long as the parties do not interact during the proceedings. This, of course, depends upon the MDP having more than one legal practitioner on its payroll, but where this is the case, there should be no impediment to the firm representing both parties.”]

I would say that this is not the prima facie ethical rule in such situations. Rather, the basic rule is that one firm cannot act for two clients in conflict. What . . . refers to is the so called “Chinese wall” approach and it would be an exception to the usual ethical rule. Such an approach would require express permission of a court if the conflict involved litigation. I am sure there are many online resources and cases discussing “Chinese walls” if anyone wants to follow them up.
Archie

Message No. 779: posted by . . . on Sat, Mar. 25, 2000, 12:40

Subject: Advantages & Disadvantages of MDPs

The most important advantages expressed so far seem to be – a. client service in terms of the “one stop shop”, the ability for legal advice to be formulated with a deeper understanding of the client’s circumstances, a reduction in communication barriers and cross-fertilisation of ideas; b. cost- minimisation for clients and lawyers; and c. equal opportunity for lawyers to compete with other professions.

The cons seem to come in two categories – a. the ethical ones such as conflict of interest, restriction on independence of advice, and the possibility of misuse of LPP; and b. concern about the survival of the profession such as monopolies “swallowing” little firms, loss of legal identity etc.

I don’t like the particular “brave new world” that we find ourselves in, so I have some empathy for the con arguments. However, I question their foundation.

Why are any of the ethical issues more telling in the MDF context that they are in the context of generally more flexible practice structures?

The Society’s view is that ethical standards, including LPP, are the obligation of the individual practitioner and that practice structures don’t change this.

With regard to the survival issues, there are strong arguments that more and more “legal work” will simply be taken over by other more competitive entities if the profession does not change. There is also an argument that MDPs may allow the survival of smaller practices through cost sharing and wider service provision.

Message No. 794: posted by . . . on Sun, Mar. 26, 2000, 16:37

Subject: Conflict of Interest

Like (student 689) I am a proponent of the “one-stop shop.” I believe with careful planning the majority of conflict of interest issues can be overcome. I work in a Government Department where the potential for conflict of interest for contracted providers is an ongoing problem. The issue for the Department is not that a conflict of interest exists, but how the provider manages the particular conflict of interest.

When a potential conflict of interest is identified, the provider is not automatically precluded from dealing with the matter. However, the provider is obliged to advise the Department of potential conflicts and how they will be dealt with (a Conflict of Interest Management Plan usually forms part of the funding agreement). Providers can and do manage their conflict of interest in a successful way, by being aware of what constitutes a conflict of interest and by implementing processes and procedures to overcome this.

In the same way, I believe it is possible for a MDF to successfully manage its conflict of interest. The organisational structure for a MDF could include a discrete division for each discipline. The organisation may have a comprehensive Risk Management Plan, which is regularly updated. All risk management contingencies, including conflict of interest, may be catered for. Clear and comprehensive guidelines on conflict of interest may be available for every member of staff to follow.

However, I also agree that there may be some situations where the conflict of interest would be too difficult to overcome (742: best legal advice would be to sue Accounting Division). These situations should also be identified

in the Plan, along with ethical solutions.

Message No. 805: posted by . . . on Mon, Mar. 27, 2000, 11:00

Subject: multidisciplinary firms

Although multidisciplinary firms seem to be in line with the trend towards integration of services in order to provide a more efficient service to consumers, the integration of law with other disciplines may be problematic. So far, we have seen the advent of mdps mainly in the area of the Big 5 accounting firms. However, could it be possible that eventually mdps will be made up of more questionable combinations of services. Consider, for instances, a criminal defense lawyer joining with a bail bonds group. The lawyer would have motive to seek a higher bond in order to benefit the MDP financially. (See Orange County Task Force on MDPS for more examples). Another concern is that although MDPS may be subject to rules of professional conduct preserving independent judgement, it is foreseeable there would be cases where the non lawyer is the driving force of the operation and hence the lawyer is subject to the non lawyers direction. Will the lawyer be able to preserve independent judgement in all cases, where the non lawyer(boss) wants a different course of action? Will the lawyer risk unemployment to preserve professional ethics? MDPS are wrought with problems such as these in which the final loser is the consumer. I think a cautious approach is necessary.

Here again the students seized upon ethical issues without being instructed in advance and contributed to a lively debate that helped all students confront them in another practice context. The influence of business motivations and perspectives can also be seen in the discussion.

LPT EXAMPLE 4 – CONFLICTS OF INTEREST

The ethical principles governing conflicts of interest are basic to the solicitor's role. I, therefore, raised them for discussion online by the class. One context that presented itself was the practice of acting for both the vendor and purchaser of land. Here is some of the discussion that ensued, including one intervention by me:

Message No. 877: posted by . . . on Wed, Apr. 5, 2000, 16:44

Subject: Conflict of Interest – “do not act for vendor and purchaser”

In relation to “golden rule 9,” “The Professional Conduct Rules” for legal practitioners (approved by the Law Society of Western Australia), may shed some light on whether it is acceptable for a lawyer to act both for the purchaser and the vendor.

Rule 7 of The Professional Conduct Rules covers the area of “Conflict of Interest.” The relevant parts of rule 7 state: “. . . a practitioner shall give undivided fidelity to his client's interest, unaffected by any interest of the practitioner of any other person . . .”. Based on this principle, it would

seem that it would be impossible to represent two people in relation to the same transaction, as “undivided fidelity” would not be possible.

“A practitioner or a firm . . . shall only represent or continue to represent two or more parties in other matters (not being litigation) where to do so is not likely to prejudice the interests of any client and they are fully informed of the nature and implications of such conflict, and voluntarily assent to, the practitioner or firm of practitioners so acting or continuing to act.” Based on this principle, it appears that it is possible for one solicitor or firm to represent two parties and it is left up to the particular firm/solicitor to decide whether or not dealing with two parties in relation to the same transaction will prejudice either party’s interests.

However, in a sale of business transaction, the fact that one party is the purchaser and the other is the vendor means that there are technically competing interests, despite the fact that both parties may appear to outwardly agree on every matter. It is my view that it would be a conflict of interest if one solicitor/firm agreed to represent both parties in a sale of business transaction. If both parties approach a firm/solicitor to be jointly represented, it would be more prudent of the firm/solicitor to lose the business of both parties, than to take the risk of prejudicing the interests of one party over another or becoming embroiled in an ethical dilemma.

Message No. 924: [Branch from no. 879] posted by . . . on Fri, Apr. 7, 2000, 01:14

Subject: Re: Why not Act for both Parties

Though you raise some interesting points, I disagree with you . . . It’s essential to clients, the public, and the legal profession that a lawyer never act for both sides of a sale of business.

For clients even when they are amicable, this relationship can change as . . . [a practitioner guest lecturer] mentions is her experience. Even if this does not occur immediately disputes can arise later. Having different lawyers acting for buyer and seller is also necessary to prevent either party from being exploited, especially where the buyer and seller have a close relationship. Our role must be to act in our clients’ best interests, in the eyes of the client and the wider public. This is essential for preventing problems of conflict arising and for the community’s confidence in unbiased representation. There must be no conflict of interest, and no perception of it, thus even if clients agree to a “middle ground”, it is essential that we still act for only one side.

Addressed to the guest lecturer . . . you have discussed some of the practical problems with lawyers acting for both sides in the sale of a business, do you think this is something lawyers have an ethical duty to avoid? From your experience, do you think that lawyers should have responsibility to the wider community and possible business purchasers when acting for the seller of a business, eg. if the contract is obviously extremely disadvantageous to any potential purchaser? How does this change if a lawyer does not represent the purchaser? Is this a common situation?

Message No. 1010: posted by . . . on Mon, Apr. 10, 2000, 15:33

Subject: Conflicts of Interest

It’s not acceptable for a lawyer to act for both the purchaser and the vendor in the land. This premise arises from the foundation of legal ethics; that a

lawyer must act in the best interests of his or her client. Representing two parties whose interests are inherently antagonistic means that the lawyer's loyalty to one party is compromised by his or her loyalty to the other. Moreover it is only the potential for such a conflict which makes the rule operative; a lawyer need not have an actual conflict of interest to be in breach of the rule. Because of this a lawyer should not seek to represent both purchaser and vendor, even if they agree to all terms since their interests are inherently opposite.

More cynically this rule could be understood as simply a means by which to maintain lawyer's salaries. This way 2 lawyers have to be employed essentially to do the work of one transaction. The rule could be that if the vendor and purchaser agree to all the terms, then the agreement which results can later be taken to 2 different lawyers if disputes arise. There could be an arbitration clause setting these terms out. The lawyer then is in fact looking after the best interests of his or her client(s) because s/he's keeping their costs down and giving them what they've said they wanted. If 2 antagonistic parties can agree then shouldn't the lawyers duty be to follow suit?

Message No. 1032: posted by . . . on Tues, Apr. 11, 2000, 10:31

Subject: Acting on Behalf of Both

Apart from the size of the task involved in selling and purchasing land. I do not see how it can be acceptable or viable for a lawyer to act on behalf of both individuals. The advice a lawyer would give to his/her client would be constrained, by the duty the lawyer has in respect to both parties. The parties would also be restricted in their openness and honesty towards the lawyer for fear of lawyer bias. The interests of the purchaser and vendor, are different thus, it would be difficult and delicate for a lawyer to meet the needs of his clients. Price negotiations would be impossible, considering that the lawyer is aware of the top price each client is willing to give. Further the lawyer is supposed to walk in the clients shoes, so that the best deal can be reached. It is impossible for anyone to be impartial, once they are working for both parties. Eventually, the lawyer is only human and inevitable unconscious biases would arise. In addition, it is not ethical and the chances of being sued by either party increases to almost 100%. Consequently, a lawyer should never act for both parties.

Message No. 1075: [Branch from no. 1071] posted by Archie Zariski (L369) on Thurs, Apr. 13, 2000, 12:55

Subject: Re: Conflict of Interest..

[One contributor wrote, "The need for individual legal representation will arise when either the vendor or purchaser wishes to 'cloak' some particular fact in order to deceive the other party and hence benefit him or herself."]
With this in mind then surely it is the intentions of the vendor or the purchaser that will dictate the need for independent legal advice. If one party wishes to withhold information from the other then we enter a confrontationist situation in which case both parties will need a "champion" to further their cause.

I don't think this analysis fully takes account of the situation of the lawyer involved. If a lawyer acts for two parties to a transaction and one of them reveals a material fact to the lawyer the lawyer is then obliged by ethical

and equitable rules to pass that information on to the other client. This is one of the consequences of acting for both that each client should be made aware of before agreeing to use the same lawyer. And the problem with looking to the parties' intentions is that this will be hard to know before the lawyer's work starts. It will often be only in the course of rendering legal services that one party's lack of good faith becomes apparent, and then it is too late since the principle of disclosure discussed above comes into play. I stick to my view that acting for both parties to a transaction is never in the best interests of clients or lawyers given the uncertainties of the situation. Better safe than sorry!
Archie

Message No. 1083: [Branch from no. 1075] posted by . . . on Thurs, Apr. 13, 2000, 16:06

Subject: Re: Conflict of Interest...

(Archie responded to a student's view by pointing out the ethical obligations imposed on a lawyer who represents both parties to the same transactions, and the inherent conflict of interest that arises when discovering misconduct by one party after the lawyer has already become involved.)

I would like to take the conflict argument back one step further. If parties to transactions could be relied on to act "honourably" then the legal profession would never have been born. The human frailty for conflict will pay our bills when we graduate!

Buyers and vendors have different bona fide interests. Those interests are in conflict. "Honour" really has nothing to do with it. The very nature of a real property transference is ensuring both needs are met.

Five years ago I purchased a house with a standard white ant clause in the contract. In compliance, the vendor engaged a white ant company to check the premises, and supplied me with a certificate of clearance prior to settlement. All straight forward, open and up front.

Immediately following settlement I began renovations. When the roof was lifted, extensive live white ant activity was discovered and it had seriously damaged the roofing timbers. The settlement agency who had acted for both myself and the vendor and who had procured the white ant company disclaimed involvement and pointed the finger at the white ant company, encouraging me to take direct action against them. This was clearly misinformation (I should have engaged a lawyer for conveyance) and a conflict of interest on the settlement agent's part.

Even the best of intentions can have problems.

(My renovations remedied the problem so I did not pursue the matter.)

This discussion became a lively online debate over ethical issues within the context of professional and economic realities that drew as well on the students' personal experiences.

CONCLUSION

I draw three conclusions from the experience described above.

- 1 Online asynchronous discussion through an electronic bulletin

board system such as the one used in LPT is an effective way of presenting legal ethics issues to law students; this medium encourages student engagement with, and reflection on, these important matters. This feature of the online environment helps students develop into reflective practitioners that is a major goal of legal ethics teaching.

[Another] purpose of instruction in professional responsibility is to cultivate a capacity for and willingness to engage in reflective judgment. "Reflective judgment" should be conceived as a character trait and not merely a skill. . . . Reflective judgment, however, develops over time and through experience, unlike character traits such as honesty and courage, which tend to form early in life. Legal education and the practice of law are well suited to fostering a capacity for reflective judgment and making it habitual.¹⁵

- 2 The pervasive method of instruction in legal ethics mandates both planned and unplanned teaching within a variety of subjects in the law curriculum; the challenges for a law teacher in following this approach are significant, but they can be met successfully.
- 3 Legal ethics can be productively contrasted and compared with the ethical standards of business and other professions when teaching law students; this contributes to a richer and more contextualised appreciation of professional roles.

In sum, I share the enthusiasm for the pervasive method of teaching legal ethics held by Deborah L Rhode, a leading American legal ethics teacher, who wrote,

While integrating ethical issues poses some special challenges, it also offers some special rewards. For many students, these discussions are among the most memorable classroom experiences. At issue is how individuals want to live their professional lives, and students' interest in that topic is frequently infectious. Even faculty who never would have wandered voluntarily into the valley of ethics often end up liking the visit.¹⁶

Happy wandering!

* Senior Lecturer, Murdoch University School of Law, Perth, Western Australia, Australia.

©2001. (2001) 12 *Legal Educ Rev* 131.

I gratefully acknowledge the contribution made by my colleague Lisa Young in teaching this subject. We collaborated in putting the unit online as part of a project supported by funding from the Committee for University Teaching and Staff Development.

¹ See: <http://online.murdoch.edu.au/public/L369/index.html>.

² See <http://cleo.murdoch.edu.au/asu/edtech/caut94/lpd-rept.html>.

- ³ See <http://online.murdoch.edu.au/>.
- ⁴ Here are the current guidelines for LPT. “To gain maximum marks for your postings to the workshop group bulletin boards follow these rules: do not exceed 250 words in one posting; do not ask a question the answer to which is reasonably obvious from reading the required texts; do not just paraphrase another posting; do refer to other postings in order to further the discussion or extend the question; for this use the ‘quote’ feature, but sparingly; for instance, you may use your posting to critique another student’s contribution politely and constructively; do draw on your own experience if relevant to the topic; do preview your posting and edit before sending; alternatively compose using a word processor then copy and paste into a posting; do not make a posting unless you have something substantial to say.”
- ⁵ See eModerators.com: <http://www.emoderators.com/index.shtml>.
- ⁶ See Susan P Koniak & Geoffrey C Hazard Jr, Paying Attention to the Signs (1995) 58 *Law & Contemporary Problems* no 3-4, 117; Carrie Menkel-Meadow & Richard H Sander, The “Infusion” Method at UCLA: Teaching Ethics Pervasively (1995) 58 *Law & Contemporary Problems* nos 3-4, 129; DRF O’Dair, Ethics by the Pervasive Method – The Case of Contract (1997) 17 *Leg Studies* no 2, 305; David T Link, The Pervasive Method of Teaching Ethics (1989) 39 *J of Leg Ed* no 4, 485; Guy Powles, Taking the Plunge: Integrating Legal Ethics in Australia (1999) 33 *Law Teacher* no 3, 315; Deborah L Rhode, Ethics by the Pervasive Method (1992) 42 *J of Leg Ed* 3, Into the Valley of Ethics: Professional Responsibility and Educational Reform (1995) 58 *Law & Contemporary Problems* no 3-4, 139, *Professional Responsibility: Ethics by the Pervasive Method* (2nd ed) (New York: Aspen, 1998); Jerome J Shestack, Pervasive Professionalism Must be Part of Legal Education (1998) 84 *ABA Journal* 6 (March); Julian Webb, Developing Ethical Lawyers: Can Legal Education Enhance Access to Justice? (1999) 33 *Law Teacher* no 3, 284.
- ⁷ For some other criticisms of the pervasive approach see Susan Burns, Teaching Legal Ethics (1993) 4 *Leg Ed Rev* no 1, 141.
- ⁸ Therese Maynard, Preparing The Corporate Lawyer: Teaching Professionalism: The Lawyer as a Professional (2000) 34 *Georgia Law Rev* 895 at 922.
- ⁹ A 1995 study of law students concluded that “for most students the practising profession is not an ultimate career destination.” Livingston Armytage & Sumitra Vignaendra, *Career Intentions of Australian Law Students 1995* (Sydney: Centre for Legal Education, 1996) 15.
- ¹⁰ See John W Collins, Experience-Based Ethics Study: The Implications for Business Law Teachers (1992) 10 *J of Leg Studies Ed* no 1, 107.
- ¹¹ See Applied Ethics at QUT (<http://www.arts.qut.edu.au/humn/ethics/index.htm>), Australian Association for Professional and Applied Ethics (<http://www.arts.unsw.edu.au/aapae/>), Australian Business Ethics Network (<http://www.bf.rmit.edu.au/Aben/>), Australian Institute of Ethics and the Professions (<http://www.uq.edu.au/aiep/>), Key Centre for Ethics, Law, Justice, and Governance (<http://www.gu.edu.au/centre/kceljag/>) and Noel Preston, Issues for Higher Education in the Teaching of Ethics (1992) 11 *Higher Ed Research & Development* no 1, 9 (1992).
- ¹² Such a multi-disciplinary approach to ethics has been explored at Harvard University: see David B Wilkins, Redefining the “Professional” in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism (1995) 58 *Law & Contemporary Problems* no 3-4, 241.
- ¹³ On teaching tax ethics see Stan Ross, Tax Ethics Education in the United States and Australia (1992) 9 *Australian Tax Forum* no 1, 27.
- ¹⁴ In the following excerpts the names of all student authors have been removed. There has been no other editing of these bulletin board postings so that the flavour of what the students’ have written remains.
- ¹⁵ Ian Johnston & Mary Patricia Treuhart, Doing the Right Thing: An Overview of Teaching Professional Responsibility (1991) 41 *J of Leg Ed* 75 at 79.

¹⁶ Rhode, *supra* note 6, Into the Valley of Ethics: Professional Responsibility and Educational Reform, 139 at 151.