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Incorporating Ethics into the Research Curriculum

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Two decades have passed since Deborah Rhode argued for teaching legal ethics by the “pervasive method”—that ethics should be both the subject of robust specialized courses and also woven into the fabric of the curriculum generally.¹ The method envisions a curriculum infused with a deep appreciation for the privileges and responsibilities of our largely self-regulated profession. It also recognizes the importance of arming students with a keen awareness of the dilemmas that they are likely to encounter in practice—a particularly pressing concern given the current job market and emphasis on producing “practice-ready” graduates.

The basic premise of the pervasive method is widely accepted and well established.² Substantial opportunities remain, however, for incorporating professional responsibility themes into legal research instruction. The exercise described below addresses this gap and provides students with an active learning experience that goes beyond the usual legal research sources of the first-year curriculum.

A. The Need: First-Year Ethics Research Opportunities

The pervasive method promotes *active* engagement with the material—beyond, say, simply adding a lecture on relevant ethics issues—beginning in the first year of law school. This early integration conveys the central importance of ethics obligations to legal studies and maximizes learning opportunities.³ While such learning opportunities remain few and far between for many first-year students,⁴ legal research and writing (LRW) professors have picked up much of the slack. Teaching what is often the first course in which students grapple with how to use law on behalf of a particular client, LRW faculty are particularly cognizant of addressing the responsibilities that accompany practice. LRW faculty have incorporated ethics teaching in numerous ways, including, for example, writing exercises that require students to consider how misconduct of various types may influence prospects for bar admission, citation exercises that confront the slippery slope of plagiarism, and using a professor’s real-life ethical dilemmas as a basis for discussion.⁵

Largely absent from these teaching innovations, however, is a focus on the research component of the basic LRW curriculum. Except as tangential to

³ See, e.g., *id.* at 152-54; Celia R. Taylor, *Teaching Ethics in Context: Wood. v. Lucy, Lady Duff-Gordon in the First Year Curriculum*, 28 Pace L. Rev. 249 (2008).

⁴ See, e.g., Miriam R. Albert & Jennifer A. Gundlach, *Bridging the Gap: How Introducing Ethical Skills Exercises Will Enrich Learning in First-Year Courses*, 5 Drexel L. Rev. 165, 169-70 (2012).

⁵ The entire Fall 2012 edition of *The Second Draft*, a magazine published by the Legal Writing Institute, was devoted to strategies for incorporating ethics lessons into legal writing programs. Additional resources include Richard K. Neumann & Kristen Konrad Tiscione, *Legal Reasoning and Legal Writing* 101-08 (7th ed. 2013); Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (2d ed. 2009); and Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 Legal Writing 105 (2006).

¹ See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. Legal Educ. 31 (1992).

² See, e.g., William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 151-52 (2007). Georgetown, for example, offers more than a dozen courses with professional responsibility themes as a primary focus, and the student evaluation form filled out for every course—whether professional responsibility-focused or not—assesses as an independent measure whether “the instructor identified and developed pertinent policy and ethical issues.”

writing assignments that touch on ethics themes, students have little opportunity to engage with primary and secondary sources of ethics law and commentary. And that is an opportunity missed for “pervasive method” goals because research assignments—incorporating as they do multifaceted levels of engagement—are a particularly effective vehicle for active-participation learning.⁶

To provide first-year students with skills that are both valued in practice and key to understanding multiple and interrelated sources of law, Georgetown LRW courses are required to introduce students to “advanced research sources,” including federal administrative law and federal legislative history. The manner in which such material is introduced is left up to the individual professor. For me, this requirement presented an active-engagement opportunity to incorporate ethics teaching into the first-year research curriculum. The resulting exercise is described below, and the homework assignment and in-class exercise are attached at Appendixes I and II.

B. The Vehicle: Ethics “Ripped from the Headlines”

The research exercise is organized around a dramatic but real scenario: lawyers whose client confesses to them that he committed a murder for which an innocent person is on trial. I knew that this scenario would immediately grab students’ attention. But I also chose it to focus on what is often the first professional responsibility issue faced by new lawyers, regardless of the type of law they practice or the setting in which they practice it: a lawyer’s obligation not to disclose confidential information without the client’s consent.⁷

⁶ See, e.g., Aliza B. Kaplan & Kathleen Darvil, *Think [and Practice] Like a Lawyer: Legal Research for the New Millennials*, 8 *Legal Comm. & Rhetoric*: J. ALWD 153 (2011).

⁷ Every state has adopted a rule of professional conduct concerning disclosure of confidential information. The basic rule, as framed by the ABA, prohibits a lawyer from disclosing “information relating to the representation of a client unless the client gives informed consent” or unless the disclosure falls within other specified exceptions. See Model Rules of Prof’l Conduct (hereafter “Model Rules”), R. 1.6 (2013).

1. The Private Lawyer Perspective

The “ripped-from-the-headlines” framework for the exercise follows a 2009 *60 Minutes* news report concerning Alton Logan.⁸ Logan was charged with a murder that, as the report makes clear, he did not commit. The man who did commit the murder, Andrew Wilson, confessed the crime to two lawyers, Dale Coventry and Jamie Kunz, who were representing him on a separate murder charge. Wilson refused to allow his lawyers to reveal Logan’s innocence, both during Logan’s trial and after Logan’s 1982 conviction.

Coventry and Kunz concluded that the Rules of Professional Conduct did not allow them to reveal the information without Wilson’s permission.⁹ They say that had Logan been given the death penalty, they would “somehow” have figured out a way to reveal what they knew. But since Logan instead received a sentence of life imprisonment, they said nothing. The truth finally came to light only because Coventry and Kunz convinced Wilson to sign an affidavit permitting them to disclose Wilson’s confession after his death. When Wilson died in 2008, the lawyers contacted Logan’s lawyer with the information.

Students begin the research exercise by watching the *60 Minutes* piece. They usually have immediate and strong opinions regarding the defense lawyers’ decision to remain silent—and, at least in my experience, overwhelmingly conclude that Coventry and Kunz did the wrong thing. Students then locate and read ABA commentary making the point that “virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system,

⁸ Depending on the time available, the *60 Minutes* piece can be assigned as homework (as it is in Appendix I, which also provides a link to the report), or it can be watched in class. The latter option provides the professor with the opportunity to gauge student reaction and to tap into an emotional moment for a particularly robust discussion.

⁹ The *60 Minutes* report somewhat conflates the professional responsibility obligation of confidentiality with the attorney-client evidentiary privilege. However, as the issue was disclosure—not evidence—the primary prohibition stemmed from the rules of professional conduct, which protects client confidences in all settings. See, e.g., Model Rules, R. 1.6, comment 3.

“... research assignments—incorporating as they do multifaceted levels of engagement—are a particularly effective vehicle for active-participation learning.”

and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.¹⁰ These basic tensions permeate the rest of the exercise, and we return to them throughout.

To understand Coventry and Kunz's decision, we have to understand the professional conduct constraints at the time—a good segue for introducing students to advanced research strategies and sources. Depending on the professor's goals, students can either peel through the research layers of locating the 1982 Illinois confidentiality rule or they can jump right to the process of locating current Rules of Professional Conduct. Taking the latter course, students locate and read Alabama's current rule,¹¹ which is similar in relevant part to the 1982 version of the Illinois rule. Either way, students at the end of this part of the exercise understand that Coventry and Kunz correctly interpreted the rule, which offered no exception from the broad disclosure ban, even though disclosure might have led to the exoneration of an innocent man.

At this point many students struggle to interpret the rule in a way that would have permitted disclosure in Logan's case, leading to a discussion of the perils of "over-lawyering" professional responsibility directives.¹² Others contemplate whether, if standing in Coventry and Kunz's shoes, they might choose to risk their licenses rather than live with the burden of the undisclosed information. Still others conclude that the rule must be worded as it is for a reason, leading to a conversation about the importance of lawyer-client confidentiality and the slippery slope potential of carving out exceptions.

Talking through the policy considerations underlying the confidentiality rule leads us to consider other ways in which the competing

interests might be balanced—a question answered through further research and an opportunity to use alternative research methods and sources to locate other states' rules. The current rule in Illinois, as in most jurisdictions, permits disclosures that are "necessary to prevent reasonably certain death or substantial bodily harm."¹³ Does a long prison term, with its concomitant health risks, or even a sentence of death qualify for this exception? We find some guidance by digging deeper into the research to locate the "comments" accompanying the rules,¹⁴ and reasonable, and sometimes emotional, arguments are made on both sides of the question.

Finally, students locate the Massachusetts confidentiality rule, which represents a potential new trend, specifically excepting disclosures "to prevent the wrongful execution or incarceration of another."¹⁵ As the mirror image of the rule governing Coventry and Kunz's conduct in 1982, students assess the same considerations from the opposite perspective: Is the potential but rare opportunity to free a wrongly convicted person worth the potential but much more likely damage to the sanctity of the lawyer-client relationship? The exercise does not aim to answer this question. Rather, it actively engages students in researching the primary sources necessary to begin to assess the question.¹⁶

2. The Government Lawyer Perspective

The exercise then shifts to Anita Lopez, a hypothetical federal prosecutor employed by the U.S. Department of Justice (DOJ). Lopez learns from a witness in an unrelated matter that someone other than Alton Logan committed the murder for which Logan was convicted. The rules of professional conduct in every jurisdiction recognize the principle

¹⁰ Model Rules, Preamble & Scope, comment [9].

¹¹ See Ala. Rules of Prof'l Conduct, R. 1.6 (2013).

¹² For example, the rule permits disclosure for purposes of keeping a client from committing certain crimes. See, e.g., *id.* at § 1.6(b)(1). Although there is no suggestion in the facts that disclosure of Wilson's information was necessary to prevent a crime, first-year students argue strenuously that *surely* keeping silent must constitute *some* crime.

¹³ See, e.g., Ill. Rules of Prof'l Conduct, R. 1.6(c) (2013).

¹⁴ See *id.* at comment 6.

¹⁵ See Mass. Rules of Prof'l Conduct, R. 1.6(b)(1) & comment 9A (2013).

¹⁶ For an overview of the evolution of confidentiality rules assessing a private lawyer's obligations in the situation of Coventry and Kunz, see James E. Molitano, *Rectifying Wrongful Convictions: May a Lawyer Reveal her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 *Hastings Const. L.Q.* 811 (2011); and Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence*, 17 *Tex. Wesleyan L. Rev.* 499 (2011).

that a prosecutor “has the responsibility of a minister of justice and not simply that of an advocate.”¹⁷ We consider what this means in practical terms—a significant issue given the substantial number of students who will be employed in government service as interns, externs, or staff attorneys.¹⁸

This shift in perspective raises the immediate question of whether and to what extent a federal government lawyer is bound by state rules of professional conduct. Answering this question requires advanced research skills involving legislative history and executive branch regulations. DOJ argued in the 1980s and 1990s that state rules should not apply to federal prosecutors, or at least should not apply to the extent that such rules would interfere with federal law enforcement priorities. DOJ lost this argument in 1998 when Congress passed the Citizens Protection Act (CPA).¹⁹ Because the CPA employs typically vague and confusing statutory language, students locate the legislative history and implementing regulations to understand its meaning. Utilizing an efficient combination of commercial and free resources, students are able to discern that the CPA binds federal prosecutors to state ethics rules in exactly the same way as all other lawyers are bound.

Having determined that Lopez is bound by state rules of professional conduct, we move to the specific question of whether she may disclose the witness’s information concerning Logan’s innocence. Students dig back into our previous research on various state versions of the confidential information rule to understand that protected information extends substantially beyond information received directly from a client. Rather, “confidential information” in the ethics context includes “all information relating to the representation, whatever its source”—an extremely broad formulation that has been adopted

in every jurisdiction.²⁰ Thus, Lopez has no greater leeway to disclose the witness’s information under the confidential information rule than Coventry and Kunz had to disclose what Wilson told them.

It is true, of course, that Lopez—again like Coventry and Kunz—could disclose the information with her client’s consent. We discuss the nature of the government “client,” which for this purpose is represented in the person of the Attorney General or his delegate, and why the government client might *not* agree to the disclosure. Logan’s situation was unusual, with actual innocence so clearly established. More typically, government lawyers are bombarded with “evidence” of innocence from witnesses or others who may be lying or may simply be wrong. The costs of disclosure may be significant, with a settled verdict upended or a witness potentially put at risk. Of course the costs of suppressing such information are significant too—certainly to the defendant but also to society. With this tension in mind, we engage in one more research exercise: locating rules concerning a prosecutor’s “special responsibilities,” including the decision to adopt, or not, a rule *requiring* disclosure of substantial evidence that a person has been wrongfully convicted.²¹

In the end, students’ active participation in the exercise leaves them with an appreciation for the multilayered sources implicated in complex ethics questions. They also appreciate that various research strategies can be employed depending on such factors as the lawyer’s existing base of knowledge, time pressures, and financial constraints. Substantively, students are left with a meaningful appreciation of the nuances of a lawyer’s obligation of confidentiality—and the pitfalls inherent in answering even the most seemingly innocuous question: “So, what happened at work today?”

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¹⁷ See, e.g., Model Rules, R. 3.8, comment 1.

¹⁸ As a DOJ ethics advisor from 2000–2007, I was surprised to find that many otherwise diligent government lawyers had little sense of the parameters of their confidential information obligations.

¹⁹ The CPA is codified at 28 U.S.C. § 530B (2012). For a history of the debate leading to the law, see [Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 Geo. L.J. 207, 211–14 \(2000\)](#).

²⁰ See, e.g., Model Rules, R. 1.6, comment 3.

²¹ Compare, e.g., Colo. Rules of Prof’l Conduct, R. 3.8(g) & (h) (2013) (postconviction disclosure required), with Ill. Rules of Prof’l Conduct, R. 3.8 (2013) (no reference to postconviction disclosure).

C. Concluding Thoughts: Flexibility and Collaboration

I created this exercise with the specific goal of meeting Georgetown's advanced research requirement in a way that also furthered the "pervasive approach" to teaching ethics. The exercise is, however, easily adaptable to a host of learning environments, with inherent flexibility to emphasize particular research sources and strategies.

I have taught the exercise toward the end of the spring semester of the first-year LRW class. From a pedagogical perspective, the exercise works well as an advanced research unit for students who have by this time spent a full academic year working on effective research strategies for locating basic sources (cases, statutes, and some related secondary materials). From a time-management perspective, the self-contained exercise works well as a two- or three-hour unit that I can teach even as I am immersed in commenting on student briefs and that students can complete even as they are starting to seriously prepare for final exams in their doctrinal classes.

The exercise could also be introduced at other points in the year and tied into other components of the LRW curriculum. For example, a professor who incorporates a lesson on email communications might add a component to the exercise that focuses on related ethical concerns, such as the obligation to take reasonable steps to ensure delivery to the intended recipient and obligations upon receipt of an email that the lawyer knows was not intended for her eyes. A professor might also choose to include other advanced sources of ethics law and commentary, such as bar association opinions, connected with a particular writing assignment.

The exercise also is easily transferable to upper-level courses. Virtually all law schools now offer advanced writing and research courses that teach students to engage effectively and efficiently with a multitude of legal sources, as they will be expected to do outside of the law school setting. Even more intriguing is the possibility of incorporating the exercise into upper-level professional responsibility courses, which have

been the subject of frequent criticism for failing to meaningfully or actively engage students and for leaving students ill equipped to research and assess the ethical dilemmas they are likely to face. The exercise provides a ready tool to begin to address these deficiencies, most logically as part of a unit on confidentiality or prosecutorial ethics.

Finally, the exercise chips away at the stubborn pedagogical wall between research on the one hand, and analysis and writing on the other.²² At Georgetown, as at many law schools, librarians working outside the LRW classroom assume significant responsibility for research instruction. This exercise certainly could be taught in similar fashion, with students attending a librarian-led lecture on researching legislative history, regulations, and professional responsibility rules, followed by a separate meeting with the professor to discuss the substance of their findings. I have found, however, that teaching the exercise jointly with a librarian makes for a far more dynamic experience—one that flows back and forth between research strategy and substantive discussion, just as it would in practice.

APPENDIX I – HOMEWORK ASSIGNMENT FOR STUDENTS PRIOR TO CLASS

In class, we will explore advanced research techniques and sources, focusing on rules of professional conduct, federal legislative history, and federal regulations. To prepare for class, complete the following four-part assignment.

1. The exercise centers on the real-life story of Alton Logan, a man who was wrongly convicted of murder and sentenced to life without parole. Logan's story was the subject of a *60 Minutes* report. To begin your preparation, watch the report: <http://www.cbsnews.com/video/watch/?id=4126194n>.

²² See, e.g., Susan King & Ruth Anne Robbins, *Creating New Learning Experiences Through Collaborations Between Law Librarians and Legal Writing Faculty*, 11 *Perspectives: Teaching Legal Res. & Writing* 110 (2003). Indeed, the exercise described in this article benefitted substantially from the input of my co-teachers from the Georgetown library, Ann Hemmens and Morgan Stoddard, as well as my LRW colleague Diana Donahoe.

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2. In class, we will research and discuss the rule of professional conduct that governed the Illinois lawyers' obligations regarding their client's confidential information. We will also discuss other versions of this rule. To help you understand rules in context, navigate to the American Bar Association website, locate the Model Rules of Professional Conduct, and review paragraphs 1, 4, 7-9, 14, 16, and 19 from the "Preamble & Scope" section.

3. We will also research and discuss the professional responsibility obligations of a hypothetical federal prosecutor. Our initial question in this regard is whether the prosecutor is bound by state rules of professional conduct. In 1998, Congress answered this question with a law concerning "Ethical Standards for Attorneys for the Government." Using your statutory research skills from the Fall semester, locate this statute.

4. To understand the statute, we will locate and discuss its legislative history and implementing regulations. To prepare, complete the Library's "Legislative History" and "Administrative Law" tutorials: <http://www.law.georgetown.edu/library/research/tutorials/lrw.cfm>

APPENDIX II: RESEARCH PROJECT/IN-CLASS EXERCISE

A. A Lawyer's Obligation to Protect Confidential Information

1. The highest court of every jurisdiction has adopted a rule of professional conduct that prohibits lawyers from disclosing "confidential information." At the time of Alton Logan's 1982 arrest, lawyers in Illinois were subject to a confidentiality rule that was similar in effect to the rule that is currently in force in Alabama (and approximately one-third of American jurisdictions). The ABA website provides links to the current rules of professional conduct for each state. Using this free resource, find the **Alabama** rule concerning confidential information. Do you agree with Coventry and Kunz that a rule like this one prohibits lawyers in their position from disclosing Wilson's information? Was the information provided by their client "confidential" as that term is used in the context of the rule? Would you have made the same decision that they did?

2. The current rule in **Illinois** (and approximately two-thirds of American jurisdictions) now more broadly permits (or, sometimes, requires) disclosure of certain confidential information. Locate the current Illinois rule using WestlawNext[®] or Lexis[®] Advance. Does this version of the rule permit disclosure by lawyers in Coventry and Kunz's situation?

3. **Massachusetts** and Alaska have adopted rules that specifically address disclosure of confidential information relevant to another person's innocence. Find the Massachusetts rule using whatever resource is most efficient for the search. Does this version of the rule permit disclosure by lawyers in Coventry and Kunz's situation? Which of the three rules (AL, IL, or MA) best balances lawyers' various obligations as "a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice"? Why?

B. Federal Prosecutors' Obligations

Consider the following hypothetical scenario. It is 2002, twenty years after Logan's conviction. Assistant United States Attorney Anita Lopez is investigating Illinois gang members suspected of interstate drug trafficking. In the course of Lopez's investigation, she interviews a gang member who mentions that another gang member killed the man that Logan was convicted of killing. The witness begs Lopez not to disclose this information because the actual murderer will, according to the witness, "kill me if he finds out that I told." May (or must) Lopez tell anyone about the information that she received from the witness concerning Logan's possible innocence?

4. As part of the homework assignment, you should have found 28 U.S.C. § 530B. Using either WestlawNext or Lexis Advance, find the statute again and look at the credit or history note. Find the Public Law number.

5. Browse to this Public Law on Thomas.loc.gov to find the following information related to the bill that ultimately became law.

- a. The bill number (the “H.R.” number)
- b. The original sponsor of the bill
- c. Citation to the latest conference report
- d. The “latest title”

Click on the bill number to retrieve the bill-tracking report (also called the bill summary and status report). Can you determine how many amendments were offered?

6. Using Thomas, determine if the Representative identified for Question 5(b) has sponsored any legislation in the current Congress, and provide the name of one of the bills.
7. Locate and cite to regulations in the Code of Federal Regulations designed to implement 28 U.S.C. § 530B.

8. From the regulations cited in your answer to Question 7, determine: (a) whether Lopez is the type of “attorney for the government” covered by the statute, and (b) the meaning of the phrase “state laws and rules and local federal court rules governing attorneys.”

9. Now consider Lopez’s obligations regarding the information regarding Logan’s possible innocence that she received from the witness.

- a. Does the Illinois Rule regarding “Confidentiality of Information” permit Lopez to disclose the information?
- b. Using any method discussed in class, find the Illinois rule of professional conduct that concerns the “Special Responsibilities of a Prosecutor”—does this rule address whether Lopez may disclose the information? Would your answer be different if Lopez was an AUSA in Colorado instead of Illinois?