A Failure to Instill Realistic Ethical Values in New Lawyers: The ABA and Law School's Duty to Better Prepare Lawyers for Real Life Practice

Sabrina C. Narain
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I. INTRODUCTION

You have been with the district attorney’s office for less than four years. During this time, you have successfully prosecuted two murder suspects. However, shortly thereafter, the convictions have been called into question. And after further investigation you discover new evidence proving the two murder suspects are innocent. Immediately, you tell the district attorney (DA). The DA’s response is, “I do not care. Go into that court hearing on the reversal of the convictions and defend the case.” The DA has admitted that if you do not defend the case, your caseload will be reassessed.1

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1. Benjamin Weiser, Lawyer Who Threw a City Case is Vindicated, Not Punished, N.Y. TIMES (Mar. 4, 2009), http://www.nytimes.com/2009/03/05/nyregion/05da.html?_r=0 (The “hypothetical” posed in this Article is based off of an interview of assistant district attorney Daniel L. Bibb who admitted he deliberately lost one of his office’s big cases); see also Stephen Gillers, REGULATION OF LAWYERS: PROBLEMS OF LAW & ETHICS (9th ed. 2012) (The basic facts used in this Article are taken from Stephen Gillers’ casebook Regulations of Lawyers: Problems of Law and Ethics. Some facts have been modified and supplemented with fictional facts for the purpose of emphasizing awareness to new lawyers. Specifically, Mr. Bibb had been with the Manhattan District Attorney’s office for twenty one years and there are no real facts indicating Mr. Bibb was facing any financial obstacles or reassessment of his case load.).
You were the only attorney in the district assigned to this case, and the only one there throughout the trial, and the only attorney for the hearing about the reversal of the convictions. Therefore you are in the best position to know that all of the evidence weighs in favor of overturning the convictions. You have heard of the phrase "throwing a case" to the defense to assist in the reversal, but you have also heard of the repercussions of such conduct including impacts on your salary, bonuses, and most importantly your reputation in the district. What do you do? Did you miss this chapter in your Professional Responsibility course? Unlikely, because it was probably never there.

If you turn to the American Bar Association Rules of Professional Conduct (the "Model Rules") Rule 3.8(g) provides:

When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

1. promptly disclose that evidence to an appropriate court or authority, and
2. if the conviction was obtained in the prosecutor's jurisdiction, promptly
   i. disclose that evidence to the defendant.

On its face, you have sufficiently complied with the Model Rules by disclosing the evidence to the appropriate authority. But even if you present the exculpating evidence, the district attorney is not asking you, but rather telling you, to argue against the suspect's innocence regardless of the new evidence or your personal belief of the suspect's innocence. Which Model Rule advises you how to handle an unethical situation when your job is at stake and your student loans remain a significant financial obstacle?

The purpose of this Article is to increase awareness about the lack of ethics courses offered at American Bar Association (ABA) accredited law schools, and the need for the ABA and its members to offer courses that are not solely meant to assist in passing the Multistate Professional Responsibility Exam (MPRE). Aside from a Professional Responsibility course, law schools are rarely paying attention to the social and cultural contexts of the legal practice. In fact, surveyed students have reported that law school did not prepare them well to deal with the ethical dilemmas they face as a practicing attorney. Law students are simply not ready to ethically practice law without such exposure.

The problem became apparent after having taken an ethics course outside of the Professional Responsibility course at my law school. After much research on the issue, it appears that the opportunity to contemplate ethical dilemmas ex ante is not as prevalent as one would expect. Being exposed to such problems ex ante decreases the risk of breaking rules of ethics and possibly causing harm to yourself, the firm, or your

client. It has been argued that irrational decisions stem from not having time to fully contemplate situations through or being ethically uneducated and facing powerful organizational pressures, forcing one to balance the individual's sense of right and wrong with pleasing their boss.  

This Article begins with an examination of the changes that were made to the legal ethics codes since 1908 and why those changes were important to instilling a code of ethics in attorney work life. The Article will then explain that although the ABA may not have an express duty to require additional ethics courses, the ABA's vigorous establishment as the national representative of the legal profession may give an implied duty to the ABA and its laws schools to require more ethical courses. The ABA should ensure that its lawyers enter into the practice of law with awareness of ethical dilemmas they may face. Some examples in both civil firms and the district attorney's office will exemplify conflicting ethical situations law students would not be exposed to without such courses. The Article will then suggest a resolution to implement in-depth studies on ethics. The resolution proposes that the adoption of an "ethics clinic" is an effective way to fulfill the school's duty to increase exposure, such as the ethics clinics offered at California Western School of Law and Yale Law School. Specifically, an ethics clinic would expose students to ethics by either advising real practicing attorneys who are currently facing ethical dilemmas, or by exposing students to hypotheticals derived from real life situations and requiring students to resolve those dilemmas under pressure taking into account different cultural and personal factors.

II. THE EMERGENCE OF A LEGAL ETHICS CODE

Both public and private professional businesses are regulated through a code of ethics. In the legal profession those standards are also governed under a code of ethics promulgated by the ABA. Some background is necessary to show the rationale and significance behind the endorsement of a legal ethics code.

3. See generally Personal Ethics in the Workplace, OOCITIES.COM, http://www.oocities.org/stratfordteacher/business.html (last visited Mar. 12, 2014) (A professor lectured on issues that come into play when explaining why people make unethical decisions. Other than the two issues emphasized for purposes of this Article, the professor also notes other factors leading to unethical and irrational decision making: individuals and organizations are either immature or deranged; economic self-interests; special circumstances outweigh other ethical concerns; probable rewards outweigh probable risks or punishments; and overuse of the “game” or “war” metaphor.); see also O.C. FERRELL & GARETH GARDINER, IN PURSUIT OF ETHICS: TOUGH CHOICES IN THE WORLD OF WORK (1991) (The lecture cited above was drawn heavily from this book).

In 1908, the ABA promulgated the Canons of Professional Ethics (Canons). The ABA Report suggested that a code of ethics would be useful in guiding new lawyers in acting ethically before they could be led astray to act unethically. In 1969, the ABA replaced the code with the Model Code of Professional Responsibility (Model Code) to represent disciplinary rules rather than the general moralizations presented by the Canons. In response to the many ambiguities and holes in the Model Code, the ABA adopted the Model Rules of Professional Conduct in 1983 and has continued to embrace the Model Rules with minor modifications. The Model Rules contain both “rules” and “comments” to be more instructive in handling legal ethics. Yet, similar to the Model Code, the Model Rules “do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.” Thus, the Model Rules result in a basic framework to prevent sanctions or disbarment and do not take into consideration instances where a lawyer’s conduct will be guided by their own conscience. Nonetheless, currently forty-nine states plus the District of Columbia have adopted, partly or entirely, the ABA’s Model Rules.

The ABA was uncertain whether the Model Rules’ existence alone was effective in infusing ethical value into the legal profession. In the early 1970s and shortly after the Watergate scandal came to light, the ABA required all accredited law schools to teach courses regarding the “duties, values, and responsibilities of the legal profession.” The ABA believed that a basic ethics course would have had an

7. Maine, supra note 5, at 1076 n.12.
8. Strassberg, supra note 6, at 909 (Strassberg writes that the presence of the ethical considerations in the Model Code suggests that a lawyer’s conduct would be a matter of conscience and that this continued appeal to conscience “detracted from the positive, enforcement-oriented thrust of the rules . . . .”). Further, the presence of the rules was perceived to make “a mockery of non-mandatory appeals to conscience.” Therefore, these problems coupled with the Model Code’s failure to address the conduct of lawyers in practice outside of litigation, resulted in the enactment of the Model Rules.
9. Id. (“The Rules define conduct which must or must not occur, indicate where a lawyer has a nonsanctionable discretion to act within a specified scope of discretion, and are intended to be enforced by disciplinary sanctions. The Comments provide guidance for compliance with the Rules in a variety of situations.”).
11. State Adoption of the ABA Model Rules of Professional Conduct, AM. B. ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 12, 2014) (It appears that California is the only state that has not adopted some form of the Model Rules. Otherwise, forty-nine states plus D.C. have adopted the Model Rules as early as 1984 and as late as 2008.).
12. Maine, supra note 5, at 1078.
impact on those involved in Watergate. The course came to be widely known as Professional Responsibility.

Today, most law schools require two or three credit hours of Professional Responsibility. The course is usually taught within a basic framework to avoid malpractice liability and disciplinary actions by the state bar. From personal experience in taking Professional Responsibility, the course was premised around a rulebook containing the code of ethics and its respective comments. The course also required a casebook, which was less helpful than the rule book itself, ending with several open ended questions per page. Perhaps, the casebook was trying to raise the issues that this Article is concerned about today: Do the Model Rules provide an answer for every ethical situation that an attorney may face? If so, the casebook was woefully insufficient.

One of the most helpful tools I found for studying Professional Responsibility was multiple choice exercises, much like the practice exams one can find online to assist in preparation for the MPRE. However, the multiple choice problems had the same effect as the practice exams: it simply helped me pass Professional Responsibility. I have witnessed students who passed Professional Responsibility also pass the MPRE, while those students who have not taken Professional Responsibility prior to taking the MPRE fail the MPRE. David Zarfes, Associate Dean of Corporate & Legal Affair at the University of Chicago’s School of Law emphasizes, “For too many law students around the country, the study of professional responsibility is undertaken without interest, certainly without passion, but simply as a means to satisfying graduation requirements—in some cases, perhaps, with the hope of getting a leg up on preparing for the MPRE.”

Thus, law students see Professional Responsibility as having two purposes: First, Professional Responsibility is a conditional course in law school to graduate.

15. Maine, supra note 5, at 1078; see also Stephen Gillers, The Bar Got Tough on Ethics, N.Y. TIMES (June 13, 2012), http://www.nytimes.com/roomfordebate/2012/06/13/did-any-good-come-of-watergate/one-lasting-change-bar-associations-ethics-rules (“[T]he new rules give lawyers who work for an organization, whether a company or the government, an explicit duty to protect their clients even if doing so requires them to reveal the misconduct of their boss. That means that today the Watergate lawyers would have been empowered and expected to report the unlawful acts of the president and others to the attorney general or even to Congress.”).
16. Id.
17. Id.
18. Id. at 1078-79.
20. GILLERS, supra note 1.
21. 2011 Statistics, NAT’L CONF. OF B. EXAMINERS, http://www.ncbex.org/assets/media_files/Statistics/2011Statistics.pdf (last updated Apr. 9, 2012) (The MPRE is a prerequisite to the Bar Examination in most states and used in about 52 jurisdictions. The exam consists of 60 multiple-choice questions including general concepts such as regulation of the legal profession, client confidentiality, legal malpractice, and judicial conduct.).
Second, the course is an effective tool for preparing for the MPRE, a prerequisite for the State Bar Examination. The results beg the question: Are young lawyers ethically fit to practice law after taking Professional Responsibility? Has the student been taught everything he or she needs to know about ethically practicing law after law school? New York University law professor Anthony Amsterdam admits, "[c]ourses in [P]rofessional [R]esponsibility are about as useful to a practicing lawyer as a valentine is to a heart surgeon."

One apparent difficulty with the Model Rules is that the answers are often obvious: do not harass third parties; do not charge your client unreasonable fees; and do not lie when advertising services of your firm. These issues will certainly come up in practice, but do the Model Rules address all of the possible gray situations that lawyers are faced with? Not quite, for two reasons. First, the Model Rules are literally only a model for states in the codification of their own code of ethics. Second, such a list of rules would be impossible because a "[o]ne size fits all' regulation may not be of much use to lawyers working in different organizational contexts, serving different type of clients, and attempting to accomplish different ends."

This Article should not to be interpreted to mean that since the Model Rules are broad in nature they should be done away with completely. The Model Rules were a step in the right direction. However, the code became an "unrealistic set of ideals rather than a guide to real world behavior." The ABA and law schools fail to take steps to fill these empty gaps to guide ethical behavior in practice.

Evidence of the ABA's lack of care in this area exists in its broad requirement of implementing an ethics course into the law school curriculum. Particularly, the ABA's standards for approval for law schools provides:

A law school shall require that each student receive substantial instruction in:

(1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;

(4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and

(5) the history goals, structure, values, and responsibilities of the legal profession and its members.

29. Id. at 501.
The drafters’ interpretation of these requirements is explicit in suggesting
“instruction[s] in matters such as the law of lawyering and the Model Rules of
Professional Conduct of the American Bar Association.”

Evidence of law schools’ lack of due care is disconcerting by limiting ethics to
a simple instruction of the Model Rules as proposed by the ABA, and nothing more. From an economic standpoint, if the ABA is instructing its law schools that a course
premised around the Model Rules is enough, why would schools spend their resources
to go the extra step as long as the schools are complying with ABA rules to maintain
accreditation? While the excuse may be that it is impossible to cover every ethical
situation that an attorney will face, the more ethical issues covered the better ethically
trained lawyers the ABA and law schools will produce.

III. THE AMERICAN BAR ASSOCIATION AND LAW SCHOOLS’ DUTY
TO TEACH MORE ETHICS

It does not appear that the ABA has a duty to impose stricter standards of
teaching ethics in law schools because it is not the job of the ABA to create laws of
lawyering, a field generally left to the states. However, the ABA and law schools at
the very least have an implied duty to teach more ethics in its curriculum because of
the reputation the ABA has established for itself.

The American Bar Association was established in 1878 with 289 members
selected under membership procedure reserved only for the elitist. It was not until
1922 when the ABA almost fully integrated with local and state bar associations to
establish a broader base and to achieve greater cooperation among the nation’s various
bar associations. The ABA went a step further and created a federal structure
through a House of Delegates, “comprising representatives of national, state, and local
organizations . . . to be its legislative arm.” Although the House of Delegate’s
legislation had no real binding power, its purpose was to “allow the ABA to speak
with a more authoritative and representative voice for the [legal] profession.” Thus,
the ABA was no longer a “club,” but rather an “umbrella organization,” authoritatively

31. AM. BAR ASS’N, 2013-2014 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW
content/dam/aba/publications/misc/legal_education/Standards/2013_2014_final_aba_standards_and
32. About the Model Rules, Am. B. Ass’n, http://www.americanbar.org/groups/professional_responsibi
lity/publications/model_rules_of_professional_conduct.html (last visited May 13, 2014). The
ABA’s Model Rules purpose is only to serve as a model for the ethics rules of most states. States are
free to adopt all, a portion, or none of the Model Rules.
PUB. POL’Y 537, 541 (1993).
34. Id. at 544.
35. Id.
36. Id. at 544-45.
expressing its concern with different legal interests. The ABA established itself as the "national representative of the legal profession." After the ABA's federalization, the ABA took on many critical roles to the legal profession such as approving law school accreditation, screening nominees for the profession, and self-regulation of the profession through its initial adoption of the Canons of Professional Conduct. Essentially, the ABA began to regulate the legal profession in its entirety, including the law school curriculum.

Considering the ABA's vigorous involvement in regulating the legal profession and its purported title as being "the national representative of the legal profession," one would reason that a duty arises to effectively produce and guide ethically behaving attorneys. Such a national representative would want to ensure that law students are ready to face the realities of the profession by the time they graduate. If the ABA believes they have fulfilled such a duty, the ABA is mistaken. Every attorney I have worked for has advised, "law school teaches you nothing; you learn everything you need to know when you get out in practice."

It is extraordinarily unlikely that the ABA is not aware of the problem. Rather, the ABA uses its time and resources to go as far as releasing "public policy" opinions on the issue of abortion. Aside from lawyers representing anti-abortionists or pro-choice advocates, abortion is an issue, which to me, seems unrelated to the representation of the legal profession. Further, over the last few decades numerous law review articles, including all articles referenced herein, are addressing ethics within the legal profession; the articles represent a trend of raising awareness of ethical issues faced by attorneys. Simply put, nothing has changed over the past few years and there appears to be no legitimate reason why the ABA should be turning their cheek on the issue. The ABA established themselves as "national representatives" of the legal profession; it is thus their duty to ensure that law students are receiving the proper training to ethically represent clients in the legal world. Fortunately, there have been a few schools that have taken ethics training in their own hands as will be shown

37. Id. at 545.
38. Id. at 558 (citing AM. BAR ASS'N, POLICY AND PROCEDURES HANDBOOK (1991)).
39. Leonard, supra note 33, at 545-46.
41. Id. at 538
   (In 1992, "debate on the socio-political role of the national bar was sparked by a strong pro-abortion rights resolution adopted by the ABA . . . . Proponents of a politically active ABA argue that it is the duty of the legal profession to counsel society and government on the important non-legal issues of the day. Conversely, their opponents argue that while individual attorneys may advocate stances on non-legal issues, the ABA should be neutral on such issues.").
below. Unfortunately, what I have learned in my personal experience is that what students learn in those courses seems to come as a shock during class discussions of the ethical issues frequently faced by attorneys. One cannot imagine the shock new lawyers will endure when facing these issues for the first time in practice.

IV. WILLFUL BLINDNESS

During my enrollment in law school I was fortunate to take an ethics course outside of Professional Responsibility: Ethical and Moral Problems for the New Lawyer, the same course that inspired this Article. My experience was unsettling. It was unsettling that so many of the open class discussions were about complex ethical dilemmas faced by attorneys in real cases, news articles, and situations posed in the course’s required casebook authored by Stephen Gillers. Gillers never showed up in my Professional Responsibility course. This is not the fault of the professional responsibility course. There is simply too much ethical and professional responsibility material to cover in one two-unit course. Had it not been for the opportunity to take such a course, I would have been faced with complex predicaments in real time, with perhaps my livelihood and/or my clients at stake, with no time to ponder its resolution.

The course was unsettling in another sense because of the responses from fellow students enrolled in the course. I did not find many of the suggested resolutions repugnant in anyway. What I found was that many students were quick to refer back to the Model Rules as a crutch, completely ignoring any cultural or personal factors that should be taken into account when analyzing such issues. I can only label this experience as students placing a shield of willful blindness over their heads; being exposed to real situations faced by real attorneys, yet refusing to believe that such situations occur in practice or strongly believing that a black and white rule could resolve a gray dilemma. The students’ responses consisted of solutions which required any and all personal considerations to disappear when one becomes a lawyer. Their perspective reflected the idea that a lawyer’s only duty is to act ethically under the Model Rules or the governing code in their respective state. Yet, practicing attorneys seem to report otherwise. Of course, there are no black and white answers explaining when personal considerations should be given more weight than pleasing your boss or client. It is for these reasons an ethics course outside of Professional Responsibility is necessary for more exposure. Exposure will create a sense of familiarity and avoid shock if students are faced with similar dilemmas in practice. Exposure will also improve critical thinking skills resulting in increased rational decision making as a

43. Ethical and Moral Problems for the New Lawyer at Western State College of Law taught by Professor Ryan T. Williams.
44. GILLERS, supra note 1.
45. Lerman, supra note 42, at 2164 (An attorney admits that he did whatever he could to pad his bills in order to meet his 2000 hour billing requirement. He remembers thinking “I’m going to have to do something here so I don’t get fired.” When he spoke to the judge, for whom he clerked for, the judge responded, “They are probably not going to fire you, at least not right away.”).
practicing attorney, while serving both personal interests and the interests of the firm or client.

V. WHAT LAW SCHOOL DOES NOT TEACH YOU

A. Associates at Civil Firms

Agency law has often been used to describe an associate’s role at a firm to be “both a servant and a sub-agent” owing fiduciary duties to the law firm.46 Leonard Gross writes about three general duties owed to law firms by their associates: the duty of good care; the duty of loyalty; and the duty of obedience.47 The duty of care requires the associate to “possess the requisite skill and experience ordinarily required to perform [their] job.”48 Under the duty of loyalty, the associate has a duty to act for the firm’s benefit and not for the associate’s personal interest or interests adverse to the law firm.49 The duty of care and duty of loyalty are fairly simple and have been historically instructed as the two main fiduciary duties in business law.50

While law firms recognize these basic fiduciaries duties, firms also require an associate to uphold the duty of obedience.51 Under the duty of obedience, an associate is “under an obligation to obey all reasonable instructions of the ... firm regarding ... performance of his [or her] job.”52 The problem inevitably arises when obeying the instructions of the firm conflicts with the associate’s own interest.53 The natural reaction is that when an associate must protect their personal interests to act ethically, the associate need not obey the instructions of the firm.54 If an associate is asked to perform their job in an unethical manner, the associate should disobey the instruction and adhere to the rules of ethics in their respective state.55 Are there consequences for disobeying the instruction of the partner? One commentator suggested that firing an associate for not following an unethical instruction may be a violation of the Model Rules.56

However, an associate who disobeys the unethical instructions of a partner may increase their risk of isolation making it difficult to prevent discharge as time goes on. There is no express Model Rule that suggests a partner is not permitted to arbitrarily discharge an associate.57 Consequently, the associate hits a cross road: Do I act unethically to uphold my duty of obedience or do I act ethically and breach my

46. Gross, supra note 42, at 262.
47. Id. at 262-67.
48. Id. at 262.
49. Id. at 264.
51. Gross, supra note 42, at 266.
52. Id.
53. Id.
54. Id.
55. Id. at 266-67.
56. Id. at 267.
57. Gross, supra note 42, at 298.
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duty of obedience and duty of loyalty by reporting the firm to the state bar? There may not be a wrong or right answer to this issue, but the issue could be troubling if this was faced by an unprepared attorney. This is especially true when law students are taught to reference to the Model Rules although one will quickly find there are no specific rules to guide your decision on the issue.

Lisa Lerman interviewed a former associate who was troubled by many of the situations he faced at his law firm and the crossroads he faced to fulfill his duty of obedience to the firm. The attorney spoke of one situation where he was “routinely told to double and triple” the billing time worked to assist in meeting the firm’s goal of 2000 hours per associate. Specifically, if the lawyer spent an hour doing one task, the partner would urge him to find a way to do three tasks in that hour and then bill three different hours to three different clients. New associates to large firms will find that to satisfy billing minimums, some attorneys operate as “billing machines,” billing all or most of the time they are at work. In contrast, experts have reported that at least one third of those billed hours are not billable because the hours include personal issues, continuing legal education, and client development.

Many of the students in my ethics class disapproved of this billing tactic. Yet, what troubled me was that several students argued that they would immediately quit working for the firm and begin looking for another job if instructed to bill in such a manner. Is it that easy in reality? What if the prior year you did not meet your 2000 hour mark and if you missed the mark once again, the attorney warned of a decreased caseload, eventually weaving you out of your position at the firm? The attorney interviewed by Lerman did not find it so easy to quit his job on the spot. In fact, the attorney stated that he knew three months into working at the firm he wanted to quit. Nonetheless, he stayed with the firm for longer than a year hoping to get a bonus. When the bonuses were delayed by a couple months, he continued to work for the firm, and finally resigned after bonuses were announced. The attorney did not

58. See Lerman, supra note 42 (Lisa Lerman interviewed an attorney who discussed ethical issues he faced as a new associate. He admits he chose not to report the firm to the disciplinary authorities, but instead sought to recount what happened at the firm in the interview to raise awareness of such issues.).
59. Gross, supra note 42, at 298-99 (Others would disagree that there are no Model Rules guiding a partner’s decision to terminate an associate arbitrarily. For instance, Gross refers to a professor’s interpretation of Model Rule 5.1(b) requiring that a supervising lawyer make reasonable efforts to ensure that the conduct of the supervised lawyer conform with the Model Rules of Professional Conduct to be consistent with a partner’s inability to terminate in such manner. Further, the professor argues that under Model Rule 8.4, it is professional misconduct to knowingly assist or induce another to violate or to attempt to violate the Rules of Professional Conduct. Thus, it would be unethical for a partner to discharge a law firm associate who refuses to follow unethical instructions.).
60. See Lerman, supra note 42.
61. Id. at 2159.
62. Id.
63. Fortney, supra note 42, at 248.
64. Lerman, supra note 42, at 2164.
65. Id.
66. Id.
67. Id.
expressly state that his motivation to stay with the firm was caused by financial problems. Yet, one could infer financial setbacks may have been part of the motivation to continue to work at the firm considering the attorney chose to place his morals aside, continued to play into the firm's billing tactics, and continued to uphold his duty of obedience in hopes of receiving a bonus. The answer may be easy to the outsider, but much more difficult for the attorney who has to make the ultimate decision.

Partners are not openly admitting these pressures at the outset. Firm managers communicate their billing expectations in different ways; some deny the firms have minimum billable hours or quotas, preferring to call the number of hours a "target." Some firm managers admit that an increase in billable hours may result in an increase in salaries, while others more guardedly indicate that increased salaries simply require attorneys to become "more productive" and charge higher billing rates. These conversing outlooks on how ethical issues are handled by firms are the kinds of issues new lawyers need to be exposed to before they enter into practice. The ABA and law schools need to make it clear that ethical situations in practice do not have the black and white resolutions painted by a Professional Responsibility course.

B. Prosecutors

Coming from a school heavily tied with the criminal law field, a high percentage of law students interned at the district attorney's office (DA's office). When engaging in discussions with such students about ethical issues they may face as a prosecutor, the students were quick to respond that in their experience working at the DA's office, ethical violations were not that prevalent. They all stated they never witnessed any of their supervising prosecutors act unethically when bringing charges or when deciding whether to try a case. I informed them of a recent class discussion on ethical issues faced by prosecutors. My views were quickly cut short with many of these students admitting they did not want to hear about the course simply because the teaching professor has "never practiced criminal law." The students' automatic reaction that the professor does not know what he is talking about is a leading example of willful blindness. It is willful blindness because facts contrary to students' perspective exist, yet they just choose not to hear it or believe it.

As discussed in the introduction, "throwing a case" is one situation in which a prosecutor may admit the government does not have enough evidence for a conviction, although the case has already been set for trial or has begun trial. In the Bibb case referenced above, several commentators expressed their reaction to the prosecutor's action of throwing the case to the defense. Specifically, one commentator stated that a formal federal prosecutor admitted "prosecutors often throw cases at the grand jury

68. Fortney, supra note 42, at 247.
69. Id. at 249.
70. See GILLERS, supra note 1.
71. Id. at 493-500.
stage, because they think the case stinks but they’re under political pressure to take it to the grand jury.” 72 This is support that the situation faced by Bibb is not a rarity.

Another ethical issue in criminal law that stirs up controversy is when prosecutors receive bonuses or contingency rewards measured by trial convictions. 73 For example, in 2011 Denver prosecutors who won a large amount of guilty verdicts in the year were rewarded over $164,362 in bonuses. 74 The bonuses were handed out to prosecutors who tried at least five felony cases with a seventy percent conviction rate. 75 The DA made it clear that in prior years, in the same district, bonuses had not been tied to conviction rates. 76

Considering that prosecutors are generally compensated through fixed, flat, seniority based salaries, as opposed to criminal defense attorneys who can charge by the hour, it only seems fair to find a way for prosecutors to get a “little extra” for their hard work. 77 But then again, are there no other ways to compensate prosecutors? Denver’s district attorney’s office even admitted that bonuses had not been tied to conviction rates in the past. How do we know that prosecutors are not doing all they can to maintain convictions to get bonuses at the end of the year? Those opposed to prosecutorial contingency awards are fearful that the conviction mindset will tempt prosecutors to “overlook or withhold exculpatory or impeachment evidence.” 78 There is fear that prosecutors will threaten excessive charges, lie, block DNA testing, or “misrepresent facts to pressure or bluff defendants” into cooperation deals. 79

Ironically, the argument against prosecutorial contingent rewards rests on the same rationale as the prohibition against defense attorneys receiving contingency fees in criminal cases: criminal defense attorneys may be tempted to engage in illegal and unethical conduct to secure an acquittal. 80 The same rationale can be applied to prosecutors since there is already a belief that prosecutors are too concerned about conviction track records and prosecutors will be awarded under contingent reward plans long before the case is likely to be reversed on appeal. 81 The controversy of a

72. Id. at 495 (emphasis added).
75. Id.
76. Id.
77. Stephanos Bibas, Rewarding Prosecutors for Performance, 6 Ohio St. J. Crim. L. 441, 442 (2009).
78. Id. at 444.
79. Id.
80. Joy & McMunigal, supra note 73, at 57.
81. Id. (Some argue in favor of rewards for convictions claiming that rewards would create both a positive and perverse incentive for lawyers. The greater the likelihood a prosecutor will have to prove charges at trial beyond a reasonable doubt, the less the likelihood the prosecutor will add charges unsupported by evidence. Further, a contingent reward system could help motivate lazy or underachieving prosecutors to work zealously and regularly trying cases could help maintain and enhance the overall trial skills of the lawyer.).
prosecutorial contingency rewards plan is unsettling because it is difficult to measure whether prosecutors are trying and winning more cases because of bonus perks or not. Yet, in jurisdictions that have implemented rewards plans, such as the one in Denver, it can only be inferred that the motive to win a borderline case could be the bonus check at the end of the year. These are the kinds of basic issues law schools should be required to expose students to who are looking to pursue a career as a prosecutor. It is clear from discussions with DA interns that the prosecutors are not admitting such ethical issues to their trainees. This is likely because it is not the duty of the DA, rather the duty of the ABA and the law school to provide proper ethical training.

VI. WHAT IS THE RESOLUTION? SCHOOLS TEACHING ETHICS THROUGH CLINICS

Stephen Gillers, a law professor at New York University School of Law, devotes most of his time writing about legal and judicial ethics. Gillers writes to educate law schools, attorneys, and students of the need to raise awareness of ethical issues in real practice to enrolled students. Yet, although Stephen Gillers has been cited in several law review articles and has been highly recognized in the legal community for his discussion on ethics, few schools have taken strong measures to implement more ethics courses in their curriculum. Studies on the development of legal ethics in schools show that law schools “fail to complement the focus on skill in legal analyses with effective support for developing ethical and social skills.” Despite the addition of Professional Responsibility courses in the law school curriculum, “law schools rarely pay consistent attention to the social and cultural contexts of legal institutions and the varied forms of legal practice.” In fact, only half of surveyed students responded that their law schools prepared them well to deal with ethical dilemmas that came up in practice. Many students complain “the course was too canon-bound and ‘very accepting of the status quo’ . . . .” Moreover, “One

83. See Gillers, supra, note 15; see generally Gillers, supra note 1.
86. Id.
88. Moss, supra note 24.
[student] found *nothing* helpful in dealing with the performance pressure[ ] and conformance pressure generated in the real world of practice."89

A. *California Western School of Law – STEPPS*

David A. Santacroce is a clinical professor at the University of Michigan Law School and founding President of the Center for the Study of Applied Legal Education. Santacroce says that part of the answer to what type of training students should be receiving to gain the real-world lawyering skills needed to deal with ethics is through "ethics clinics," like those offered at California Western School of Law (Cal Western) in San Diego, California.90 Cal Western has been offering the STEPPS program—Skills Training for Ethical and Preventive Practice and Career Satisfaction—since 2009.91

The STEPPS program is a sequence of two, three-credit courses covering five main focus areas: Professional Responsibility, Prevention and Problem Solving, Legal Research and Writing, Other Lawyering Skills, and Enhancement of Career Satisfaction.92 The Professional Responsibility section offers case handling and office meetings that contain realistic ethical issues to discuss and resolve.93 The Prevention and Problem Solving section holds office meetings in the context of a simulated law firm to introduce students to resolving problems beyond their own cases.94 The Legal Research and Writing section not only covers researching and drafting but involves case management in which correspondences and file memos are maintained as they would in a law office.95 The Other Lawyering Skills section is premised upon interviewing, counseling, and case planning. This section includes skills practice in the classroom and client representation by working on behalf of simulated clients.96 Finally, the Career and Satisfaction section simulates law office meetings to discuss actual casework and client demands of the simulations.97

In all, the STEPPS program is a sequence of courses that requires you to think and act like a real practicing attorney. The director of the program, Timothy Casey, emphasizes that the cases are real.98 The course is nothing like a class but closer to an

89. *Id.* (emphasis added).
91. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
actual representation in every aspect. The program even requires students to communicate by letter with the client.

B. Yale Law School – Ethics Bureau

Yale Law School in New Haven, Connecticut offers a similar program called the Ethics Bureau. The program is different from STEPPS in that the Ethics Bureau requires student participants to provide advice to actual lawyers on how to proceed when faced with possible violations of the Model Rules and other ethical dilemmas.

The program was inspired by two Yale Law students who helped research an amicus brief to be written on behalf of a group of ethics professors for the Supreme Court case, Holland v. Florida. Although a rarity, the Supreme Court cited and agreed with the amicus brief that a death row inmate’s attorney systematically violated his ethical obligations in failing to meet the statute of limitations for filing the defendant’s habeas corpus claim, even after the defendant urged his attorney to do so. After the project was complete, attorney Lawrence Fox was inspired by what the students had done and determined that their work could form the basis for an ethics clinic at the law school. The Ethics Bureau at Yale has been open for business since Spring of 2011.

As of 2011, only the two ABA accredited law schools discussed have implemented ethics in their curriculum through the use of clinics. If schools implement ethics clinics, like the clinics at Cal Western and Yale Law School, ethics teaching will go beyond what any basic Professional Responsibility course can offer. Stephen Gillers wrote in his text Regulation of Lawyers: Problems of Law and Ethics, “[an in-depth ethics course]... is the second most important law school class... [o]ther courses teach lessons that directly bear on your client’s legal problems. This course is for you.” Cal Western and Yale Law Schools have fulfilled this promise to their students.

VII. Conclusion

Most states’ codification of the Model Rules of Professional Responsibility may serve the goal of guiding attorneys as to how to act ethically in practice. But the Model Rules are broad and act as a “one size fits all,” attempting to guide different

99. Id.
100. Id.
102. Id.
104. Student Involvement in Supreme Court, supra note 103.
105. Id.
106. Id.
107. GILLERS, supra note 1, at xxiii.
lawyers working in different organizational contexts with different goals. Because of this unrealistic set of ideals, the ABA as a “national representative” of the legal community, along with its law schools, have an implied duty to fill the gaps and require more instruction on how to handle ethical situations that cannot be answered by looking in the rule book.

An ethics course will break the shield of willful blindness among students who have a passion to practice law, yet do not want to believe they may have to face unethical situations while practicing law. Students seeking to work in civil firms should be aware of the common billing tactics that are employed by firm associates to meet their minimum billing requirements. Students should further be familiar with the situation that, at times, associates feel it is necessary to ignore personal interests to not only meet their duty of loyalty and duty of care to the firm, but also their duty of obedience. Students seeking a career as a prosecutor should be aware of pressures by the district attorney to continue to try cases that should be dismissed or temptations to engage in biased conduct to secure yearly bonuses.

While some schools, such as Western State College of Law, are attempting to secure more ethics courses in its curriculum, only two schools have taken teaching ethics a step further by implementing ethics clinics within their curriculum. Cal Western and Yale Law School offer clinics that require students to resolve real life ethical dilemmas through simulated law firm activities or through interaction with real attorneys seeking advice in resolving ethical issues they are currently facing. It is not suggested that this is the only way to achieve effective ethical instruction, but rather a better way to instill ethical behavior in new attorneys until the ABA requires more. Stricter ABA requirements to teach ethics beyond Professional Responsibility, coupled with the efforts of law schools such as Cal Western and Yale Law School, will achieve the goal of ensuring the legal profession is comprised of ethically behaving lawyers.