



## **Bridging The Gap: Introducing Ethical Skills Exercises to Enrich Learning in First Year Courses**

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### OUTLINE OF PRESENTATION

#### **Why integrate ethics in the first year of law school?**

- ABA Standard §302(a)(5) – law schools must offer *substantial* instruction in “history, goals, structure, values, rules and responsibilities of the legal profession and its members.”
- The Carnegie Report emphasizes the importance of integrating ethical training, lawyering skills, and knowledge of doctrine.
- Exposure early and often to ethics/professionalism is critical because it infuses all types of legal practice and students begin to develop their professional identities while in law school.
- Negative PR about unethical lawyers has prompted calls for law schools to spend more emphasis on ethics/professionalism.
- Greater preparation for passing the MPRE

#### **Why integrate skills in the first year of law school?**

- Doctrine vs. skills is a myth – doctrine in a vacuum doesn’t exist in the real world.
- All practicing lawyers integrate the application of doctrine with a variety of lawyering skills.

- Students with different learning styles may gain better access to and understanding of the doctrinal law.
- It makes the substantive law come alive.
- It lays the groundwork for upper-level lawyering skills courses.
- Law school deans love to brag about making their students “practice ready!”

### **Why integrate ethics and skills in a Contracts class?**

- Many of our students will engage in transactional practice and too many courses have a backward-looking focus on litigation skills.
- Concretizing a particular transactional situation into its context may make the doctrinal law more accessible to different style of learners.
- It avoids the inclination to pigeon hole cases as “contracts” or “ethics” and instead encourages students to see clients’ stories as multi-faceted.
- Because of the lack of oversight by a court, transactional work is a breeding ground for ethical slippery slopes.

### **Most Challenging Learning Objective in Both Contracts & Ethics**

- The ability to *apply* basic doctrine of contract law to a client’s needs for drafting and/or interpreting the provisions of a contractual agreement.
- The ability to *apply* a sound framework of decision-making when faced with an ethical dilemma in the representation of a client, which is consistent with the Model Rules of Professional Conduct as well as other relevant law.

### **Moving Students from Novice to Competent Practitioners**

- **Novice Practitioners:** No experience with the situations in which they are expected to perform. We teach the rules and, by definition, we emphasize that rules apply across different contexts. The rule-governed behavior typical of the novice is extremely limited and inflexible. As such, novices have no “life experience” in the application of the rules.
- **Competent Practitioners:** Having learned the rules, competent practitioners are able to engage in organized strategic planning and problem solving for clients by synthesizing and applying those rules. Flexibility and consideration of multiple goals are demonstrated.

## **Goals for the Exercise**

- Apply the doctrine of fraud within the context of a simulated client's situation.
- Give students the opportunity to identify the appropriate ethical parameters for lawyers who face client fraud scenarios, and to brainstorm how to construct rules that should govern lawyer behavior.
- Introduce students to the Model Rules of Professional Conduct that are implicated with client fraud.
- Introduce students to the lawyering skills of client interviewing and counseling, problem-solving, drafting, and synthesis of law and fact.

## **Instructions for the Exercise**

- This exercise is designed to be used after the students have explored the black letter law of fraud through case law and class discussion.
- We assume the students have had no formal introduction to the rules of professional ethics.
- We divide the class into law firm groups; each group is given a memo from a senior partner at the firm, relaying background information about a new client and providing instructions for a follow-up meeting.
- The students are given a few minutes to meet in their law firm groups to prepare for a follow-up meeting with this new client.
- Each law firm group then has a 10 minute meeting with the client, during which the students have the opportunity to learn new facts from the client and must counsel the client about how to proceed with the upcoming contract negotiation and the embedded ethical issues.
- The class then comes together for a plenary discussion on their experiences with the client interview.

## **Demonstration of the Exercise**

- Divide in to groups.
- Prepare with small group
- Perform the client meeting

## Plenary Session Discussion

### 1. Review each groups' experience with the foundational lawyering skills of:

- client interviewing and counseling
- problem-solving
- synthesis of law and fact

### 2. Review Black Letter Contract Law of Fraud in the Inducement:

- Lacy has made an affirmative misrepresentation under § 159 of the Restatement by making an assertion not in accordance with the facts, when she filled out the application, and again when she signed the contract.
- This misrepresentation is fraudulent under § 162(1)(a) since she knows her true birthday and therefore has made this assertion knowing it is not in accord with the facts.
- This misrepresentation is also material under § 162(1)(b), since Lacy knows that her representation about her age is likely to induce Fox to enter into the contract with her.
- Bottom line: Since Fox's manifestation of asset was induced by her fraudulent and material misrepresentation, on which they are justified in relying, the contract is voidable by Fox.
- As a practical, real-world matter, Fox can only sue her to void the contract if and when they learn of the misrepresentation. So the contract is voidable, but they don't know it. Yet. Their background check will likely come back clean, and so the only way they will find out about the misrepresentation is through you. Which leads us to...

### 3. Review ethical issues that arose in the meeting with the client:

- What has the lawyer learned from the client?
- What can/should the lawyer do after learning this information?
- Who gets to call the shots re: control of the information?

#### 4. Brainstorm about possible construction of ethics rules that should regulate the lawyer's behavior

- What conduct should the rule(s) regulate?
- Who is the rule(s) designed to protect and why?
- What policy concerns should be reflected in the rule(s)?
- Should there be a default rule with exceptions? If so, what should those exceptions be?
- Should the rule be applicable to all situations, all clients, all lawyers? Why or why not?

#### 5. Review applicable Model Rules of Professional Conduct:

##### Rule 1.2: Decision-Making Between Lawyer and Client:

- Lawyer must *abide by a client's decisions* concerning the objectives of representation and *consult* with the client as to *the means* by which they are pursued.
- Client has ultimate authority to decide purposes served by legal representation, *within the limits imposed by law and the lawyer's professional obligations.*
- Lawyer cannot *counsel* a client to engage in fraud or *assist* a client in conduct that the lawyer knows is criminal or fraudulent.

##### Rule 1.6: Permission to Disclose Confidential Info

- Ordinarily, lawyer cannot reveal confidential info (any information that relates to the representation of the client) unless client gives informed consent
- But, if the lawyer reasonably believes that she has to reveal the info to prevent the client from committing a crime or *fraud* that is *reasonably certain* to result in *substantial injury* to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services, then the lawyer is *permitted* to disclose the confidential info.

##### Rule 4.1: No False Statements to 3<sup>rd</sup> Parties

- Lawyer cannot knowingly making a false statement of material fact or law to a third person.

Rules 4.1/1.6: Required Disclosure:

- Lawyer must disclose material facts to a third party when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client AND disclosure is necessary to prevent the client from committing the crime/fraud that is reasonably certain to result in *substantial injury* to the financial interests or property of another OR disclosure is necessary to prevent/mitigate/rectify crime/fraud that is reasonably certain to result or has already resulted in *substantial injury* to the financial interests or property of another.

**6. Discussion of Ways to Solve the Problem for Attorney and for Client:**

- Attorney needs to explain the ethical implications to Lacy.
- Attorney can't counsel/assist any continuing fraud by Lacy.
- Attorney can't make any false statements about Lacy's age to Fox.
- Attorney has an affirmative duty to disclose Lacy's correct age because:

Lacy's age is a material fact

Lacy has engaged in fraud by lying about her age in the application

Lacy is using the attorney's assistance with negotiating/drafting the terms of the contract

It is reasonable to assume that there will be substantial injury to Fox's financial or property interests if Lacy fails to disclose the information and it later comes out.

**7. Discussion About Implications of Changes in the Facts:**

- What if our background check on Lacy revealed her true age (rather than learning about it from the client). Same result?
- What if Lacy were only 2 weeks months older than the age cut-off (arguably reducing the potential financial injury for Fox). Same result?
- What if Lacy was within the required age range, but when interviewed for the background clips that are used during the competition, Lacy lied and said that she had been abandoned by her parents and was homeless, living in her car. In reality, she spent a lot of time in her car, which happened to be a brand new Porche, parked in her parents' estate in East Hampton making out with her boyfriend. Same result?
- What if Lacy were instead 1 year younger than the minimum age required (making the contract voidable on her part as a minor)? Same result?

### **Benefits of the Exercise For Students**

- Integration of doctrine, skills, and development of professional identity
- Opportunity to apply law to simulated client situations
- Introduction to client counseling and problem-solving skills
- Deeper understanding of doctrine and its implications
- Makes doctrine seem more relevant
- Increases marketable skill-set of students
- Opportunity for collaborative work

### **Benefits of the Exercise For Faculty**

- Collaboration with colleagues
- Exposure to new doctrinal areas
- Renewed interest and engagement in teaching familiar material
- Development of new teaching skills and ways to present material to reach a broader array of students with a variety of learning styles

### **Alternative Approach: “Fishbowl” Modifications**

- Small group break out sessions may not be logistically viable for larger classes
- Additionally, you need sufficient “clients” for each group
- Alternate approach is to select students to serve as the lawyer team, and have them do the simulation with the client in front of the class, and then work through the discussion points as a group

## MEMO

**TO: Students**  
**FROM: Professors Albert and Gundlach**  
**RE: Client Simulation**

In our next class, you will engage in a collaborative, simulated client counseling exercise, during which you will all adopt the roles of attorneys working in a small law firm team on a new client's case. You will have the opportunity to prepare for and conduct a client meeting, in which you must gather facts, and counsel the client about her next steps in this matter.

This exercise is specifically designed to provide you with an opportunity to apply some of the doctrinal law that we have learned in Contracts within a practice setting. During the simulation, you will see how Contracts law impacts both doctrine from other substantive areas, as well as your professional responsibilities as lawyers. We encourage you to experiment with the foundational lawyering skills of interviewing, counseling, problem-solving, drafting, and synthesis of law and fact in this exercise.

### **Instructions**

We have broken the class into small law firm groups- please see your assigned group on TWEN. Please carefully read the attached memo from a senior partner at your firm, which relays background information about a new matter and provides instructions for an upcoming meeting with the client. At the beginning of class, you will be given an opportunity to meet with your law firm group to discuss the instructions and prepare for the meeting. Each law firm will then have approximately 10 minutes to learn new facts and counsel their client (who will arrive during class time) about how to proceed with the upcoming contract negotiation and the embedded ethical issues. After the client meetings have concluded, we will come together for a large group discussion as a class.

## MEMO

**TO: Junior Associate**  
**FROM: Senior Partner**  
**RE: New Client: Lacy Lowenstein**

I met our new client, Lacy Lowenstein, today and here is what I learned.

Lacy has dreamed of being a star since she was a little girl. She was the lead in every school musical and she managed to fit in some school work, but her real focus was developing herself into a true triple threat: singing, dancing and acting.

Her parents were very supportive conceptually, but sadly couldn't be of much support financially. So she worked any job she could to raise the cash for her myriad lessons. She sang at so many family weddings that non-family members started hiring her to sing at their events. That was good money, but not terribly reliable. She applied for any and all jobs, but her blessing and her curse was that she had a true baby face- she always looked at least 10 years younger than her true age. According to Lacy, this is a delightful fact in one's thirties- not so much in one's twenties!

Lacy is now sure she is on the cusp of her big break. Through the years she has watched with interest how *American Idol* has become a national phenomenon. She had never auditioned before – she sheepishly told me that she had been on a few dates with Simon Cowell back before he hit it big, and things didn't end well. He told her he didn't want to see her again, and that he wasn't being rude, he was just being honest. Being with her, he said, was like being trapped on a cruise ship from Bayonne to Budapest. She didn't understand this metaphor, which, like most of his metaphors, made little sense.

When she saw he was leaving *American Idol*, she knew this was her moment. She eagerly poured over the Rule and Regulations section of their website, and got that feeling that she always got when something good was about to happen. The rules required that she be able to prove that:

- (1) at the time of registration and audition she was a U.S. Citizen;
- (2) she had never progressed in a previous season of AI to the top 30;
- (3) she had no contract for talent representation or a music recording contract;
- (4) she had to be able to prove that she was “16 to 28 years old on January 1, 2011 (which means you must be born on or between January 1, 1983 and January 1, 1995). If you were born before or after this window, you are not eligible to participate this season.”

After confirming that Simon was not involved in the show at all, Lacy completed, signed and submitted the application. Much to her horror, the only audition site left was in Pierre, South Dakota and that was a very long bus ride. Thankfully, she sailed through the first round and got her golden ticket to Hollywood. During the audition, she charmed the judges with her accapella version of a mash of “Proud Mary” and “Thriller,” and tried not to flinch when Randy Jackson said, “Man, Dawg, I wish Cowell was here- he would really dig you.” She was somewhat gratified when Steven Tyler replied, “But I dig you!”

Lacy is now one of the top 10 finalists and the producers want her to sign their standard form talent contract. She wants us to represent her in this matter and I’ve scheduled a meeting with her for tomorrow. I’d like you to handle this meeting, with the primary purpose of gathering any further factual information that you think we’ll need for the negotiation and finalization of the

I’ve set up a client file and, as we do for all of our new clients, I asked our investigator to run a background check on Lacy and it came back clean. When I first met with Lacy I forgot to ask get the application materials that she submitted to American Idol so I’ve asked her to bring a copy to the meeting for your review.

I’ve reviewed the form of contract with Fox and it is pretty standard. As you will see, the agreement has in its “recital section” a reference to the application form, and that the agreement contains a number of representations to be made by our client, restating her compliance with the Rules and Regulations regarding her age, country of citizenship and lack of professional representation as an artist. Fox is eager to get this contract signed so that she can appear in the finalist round, which begins next week. Lacy is set to sign the contract at their offices at the end of this week and we will be present to ensure that the contract and all its terms meet our approval.