## APPENDIX A

Incorporating Professional Responsibility and Legal Ethics
into the First Year Curriculum
Prepared for the Working Group on First Year Curriculum Reform
Professor Janet Mosher
Revised August 24, 2006

There are three inter-related literatures relevant to the task at hand; the literature on legal ethics, on the lawyering process and on the profession. There is a further body of literature that addresses pedagogical approaches to the teaching of these subjects within law school curricula. As one might imagine, the literatures reveal a tremendous breadth of issues that could easily fill an entire year of law school. There is also, again not surprisingly, debate about just what it is that law schools seek to accomplish through the teaching of legal ethics, professionalism, etc. In this background memo I sketch out my provisional sense of what Osgoode's priorities should be, and how we might, as an institution, approach these issues within the first year reforms we are contemplating. I have organized the priorities into three central learning objectives. The three objectives are deeply interwoven and would be pedagogically pursued in an integrated fashion. Before turning to the objectives, and then to options for delivering those objectives, a few preliminary observations might assist.

One of the debates in the literature concerns whether to approach the subject of legal ethics as a set of prescriptive rules (focusing on the rules of professional conduct and judicial interpretations thereof, much in the manner of other doctrinal courses), as an examination of the behaviour required to sustain the adversary system (focusing on the notion of "role morality" wherein the lawyer's entire moral universe derives from her role within an adversarial system); or as a branch of ethics, seeking to expose students to normative frameworks external to law that will give them conceptual tools to engage in moral deliberation and to exercise moral judgment. This latter approach engages students with the basic elements of important strands in moral theory, and creates opportunities to practice moral deliberation by using clinical experiences, simulated experiences, detailed case studies, film, literature – any device that will bring students much closer to the messiness and complexity of the contexts in which moral deliberations occur and in which moral judgment must be exercised. It is this latter approach that infuses my recommendations. There are many compelling reasons for choosing this latter approach.

Much of law practice happens outside of an adversarial context; this has long been the case, but it is increasingly so. An ethics grounded in adversarialism offers little guidance in non-adversarial contexts, nor in many instances do the rules of professional conduct, which themselves largely presuppose adversarialism. It is important to expose students to a multiplicity of lawyering roles, and the multiple contexts in which those roles are performed. Simultaneously, we need to encourage students to think critically and reflectively about the ethical frameworks which should guide them in those roles/contexts. Additionally, a focus solely or primarily upon the rules of professional

conduct or upon adversarial contexts sharply narrows both the scope of the issues that students/lawyers identify as potentially entailing moral questions or concerns and the tools that they bring to problem-solving and decision-making. The rules speak to how a lawyer conducts herself in relation to client, court and other members of the profession. This box, so carved, excludes from the lawyer's moral universe questions, for example, of whether a client's proposed course of action, though legal, may raise troublesome moral questions that a lawyer ought to engage the client in conversation about. As our colleague Les Green has argued, we need to teach students to be able to confront law with a moral framework external to law and to see that moral reflection is integral and necessary in making serious decisions (about one's role, about the advice and counsel given to clients, about the obligations of the profession). And the rules, although they do speak to the lawyer-client relationship, are silent on some of the most difficult and systemic normative questions about that relationship (for example, how power is exercised within the relationship). As Buckingham has argued, reliance on rules does little to develop empathy, to bring attention to the impact of actions on others, or to underscore the ethical obligations of the profession as a whole. The last indictment of the rule-following approach is that in reality, the rules often provide little guidance. Many of the rules are permissive, indicating what a lawyer may do, but not what she ought to do – the normative question. Nor do the rules assist in decision-making where they conflict with each other. All of this is not to say that the rules of professional conduct have no place, but rather to suggest the nature of the place they should occupy.

A second preliminary observation is that our approach to legal ethics should be grounded in an examination of the profession (an approach advocated years ago by our colleague Harry Arthurs). All too easily the teaching of legal ethics can become fixated on ethical dilemmas, especially smoking guns. But ethical dilemmas already presuppose much – that we have identified to whom we owe a duty, and something about the nature of that duty. In our pedagogical approach we need to step back and ask more foundational questions about to whom lawyers owe duties (only their clients? the public? third parties? adversaries? the public interest? justice?), and the nature and source of those duties. This requires an examination of the profession and the duties, individual and collective, deriving from the elite status conferred upon legal professionals and the role of law in society.

At bottom, my view is that we should think about the incorporation of professional responsibility and legal ethics as, to cite Buckingham, "...a space to influence students as they form a vocational vision of what law and legal practice can and should be." What are the visions we want to transmit? What are the messages we want to convey about what is important, vital to being a lawyer? What are the messages we want to send about what is means to "think like a lawyer?" What images and ideals do we want to present as possible, desirable? What is the nature of the foundation we are laying for the vital decisions our students make about "how they will live their lives as lawyers?" (Pearce).

On this note, let me add briefly a few points about timing. There is a wide consensus in the literature that the most intense socialization into the profession takes place in the first year of law school and that a common fall-out from that socialization is students'

detachment from an active concern for equality and justice. It appears that students' openness to engage in moral conversation about lawyering is most expansive in the first semester of first year; thereafter it increasingly gives way to a cynical and instrumental view of lawyering and a "narrowing careerism" (Brest). They shift from "thinking like themselves" to "thinking like a lawyer", which usually means as a hired gun (or "neutral partisan") whose moral universe is defined in advance and exhaustively by her role in an adversarial system. As Brest argues, based on Stanford's experience with a first year lawyering process course, "focusing on these issues [personal identity, professional responsibility and the ideological foundations of the legal system] at the outset may enable at least some students to approach their professional education and practice more reflectively."

### *A. Core Learning Objectives*

(As noted above, these are deeply intertwined and their separation into distinct categories artificial. The three categories as presented below suggest no particular sequencing of topics or ordering of priority.)

1. The development of a critical and reflective approach to the question of what it means to be a "professional" and a "legal professional" in particular. Tied to this is a deep appreciation of the self-conscious choices to be made regarding one's practice vision; about *how* one will practice law.

2. An appreciation of the breadth and diversity of the roles lawyers perform, of how any particular role will itself vary depending upon context, and the ability to discern an ethical framework appropriate to role and context.

3. A working knowledge of the major strands of moral theory and the ability to engage this knowledge to identify moral issues, deliberate about them and exercise moral judgment not only in regard to lawyers' obligations individually but as members of a collectivity, the profession.

### *The Objectives in More Detail*

1. The development of a critical and reflective approach to the question of what it means to be a "legal professional."

- What is a profession?
- Why is law a profession?
- What is professionalism? (The Chief Justice of Ontario's Advisory Committee on Professionalism has recently created a detailed definition of "professionalism" which might usefully serve to ground this discussion.)
- History of the Canadian legal profession (issues of exclusion and its gender and race composition – Mossman, Backhouse); how has this impacted on conceptualizations of professionalism (e.g. the lawyer as gentleman, notions of "civility") and how has this impacted on the development of substantive law, and the ability of marginalized or disadvantaged communities to access justice?

- Features - monopoly and self-regulation; argued to be in public interest.
- What is the public interest? (CBA Report, Transitions)
- Surveying unmet legal needs and ideas re access to justice.
- Does the profession have a duty to challenge and eradicate existing barriers to access to justice? What does it mean to claim that the legal profession exists in the public interest to advance the cause of justice and the rule of law? (McMurtry, Cronk)
- What responsibilities does each lawyer bear? Are all lawyers "public" lawyers or is there a special group of lawyers called "public interest lawyers" and if so what special professional responsibilities do they have? (Guinier Course Materials, Harvard)
- What are the norms or institutions prevailing in the legal profession, and what political projects are favoured by those norms and institutions? (Guinier)

Professional identities

- What does it mean to be a lawyer? What does it mean for me to be a lawyer?
- Could start by having students articulate their current visions, and attempting to locate the source of those visions (popular culture, family members, etc.)
- Exposure to the literature re different practice visions; of *how* one undertakes the tasks of lawyering (this is not so much about the kind of law one practices, but rather how one undertakes that work; with a lot of attention paid to power dynamics in lawyer-client relationships, to the scope of the conversation lawyers ought to have with their clients, and to duties owed beyond the duty to the client). For example, practice visions include lawyer as collaborator, lawyer as expert, lawyer as facilitator, lawyer as translator/story teller, lawyer as friend, lawyer as hired gun. (Article by Sophie Bryan - written while a student at Harvard and struggling to find a practice vision for herself; another by Marilyn Poitras, writing about her experience at Queen's law school as a Metis woman). Emphasize the importance of self-consciously selecting a practice vision.
- Possibly use biographies, fiction and/or popular culture to facilitate process of self-imagination re professional identities.

2. The Multiplicity of Roles Lawyers Play

- Heavy reliance on appellate court cases in the first year curriculum may give students limiting messages about the role of lawyer (hired gun; doctrinal analysis is the only skill that really matters to good lawyering). Our goal would be to expose students to the range of roles and contexts in which those roles are played and to encourage them to consider the ethical framework(s) that ought guide performance of particular roles in particular contexts. Some examples are provided below:
- Restorative justice models – what are the values at play, how should these values influence the role lawyers play, what kinds of ethical conflicts does this create for lawyers? (Archibold - piece on participatory processes in the criminal justice system and responsive professionalism)
- Negotiation – moral complications of bargaining, what are the ethics of exchange? Questions from Pepper: How should bargainers think about the moral aspects of their actions? If there are moral obligations to be honest or fair during negotiations, how

can we best describe or discern these obligations? What are they based on, where do they come from, and what are their boundaries? Do these various moral and ethical restraints apply to an attorney's negotiations in the same way that they might apply to a client's? Is there a duty to cooperate in bargaining? Does a negotiator have any moral obligation to try to collaborate or to expand the pie? How might moral theory assist – for example, Pepper argues that we can learn much from contractarian and contractualist moral theory regarding the moral dimensions of the negotiator's choice of whether to cooperate or compete. Do the nature of one's duties change depending upon the context in which the role is played – for example within a human rights regime, or statutory minimum standards of employment regime?

- Counseling – what are the moral dimensions of listening and empathy, what is required truly to hear and attend to another person despite disagreement? Or despite differences in cultural meanings? (Go, Chief Justice McLachlin). How does the lawyer translate effectively for those who are distant from her? How does not only our own cultural profile but our perception of others' cultural profiles affect the cultural landscape in conflict situations, and with what consequences? (Chew)

3. Ethics

- Enhance skills in ethical analysis by providing instruction in moral theory; engage with moral theory to evaluate and question not only lawyer's roles and ethical dilemmas connected to role performance, but also the collective obligations of the profession and substantive law doctrine (note that while I have described this earlier as giving students a framework external to law, it is also the case that the methods of reasoning to which students would be introduced – for example, utilitarianism – are often integral to legal reasoning itself). This could be taught using examples from legal contexts; e.g. confidentiality and its limits and grounded in first year subjects.
- Increase students' awareness of the situational factors that skew judgement.
- Encourage developing ways of identifying the moral problem (moral perception) and resolving moral dilemmas.
- Hartwell – "in moral discourse the method is self-revelation and the goal is self-knowledge: students cooperate together to understand mutually what each is saying with the goal of revealing to themselves and others their moral positions and moral reasoning"

***B. Pedagogy -- How to Teach These Issues? Ideas from the literature***

Here is a list from Deborah Rhode, one of the leading American scholars on legal ethics, of the requirements for effective legal ethics instruction:

- strong institutional commitment
- well structured course materials and methods of evaluation
- interactive teaching formats - broad based participation, candid exchanges, direct personal engagement
- tolerant classrooms approaches - neither value-neutral nor overly rule-bound; encourage tolerance without eroding commitment
- message that the subject is important

- challenge but do not overwhelm
- use compelling material - film, case histories, literature

Not surprisingly, the literature is consistent that small groups are essential to moral dialogue. Also, as suggested in the introduction, devices to draw students into the complexities of context are crucial – simulations, role plays, fictional accounts, biographies, films. So too are opportunities for critical, reflective conversation.

### *C. Linking These Objectives to the Proposed Reforms*

The first year reforms, as presently contemplated, provide two central homes to advance the incorporation of the objectives I have identified: the new course on *Ethical Lawyering in a Global Community*; and the integrated LRW, Civil Procedure course, *Legal Process*. A third potential home lies in the pick up of these issues within the other first year courses, and a fourth – one that bridges the first and upper years – in the public interest graduation requirement.

The September portion of *Ethical Lawyering in a Global Community* (four days, first week of September) will introduce students to the central questions regarding the nature of the legal profession and professionalism sketched out above. Both the September and January segments of the course will go some way to expose students to the multiplicity of roles that lawyers play, and the different institutional contexts in which lawyers' roles are embedded. The course would invite consideration of how these varied roles and their specific institutional and cross-cultural locations should shape the ethical framework within which lawyers practice. In explicitly engaging students with multiple normative orders, and with important strands of moral theory, it will also reinforce the consideration of ethical issues and ethical judgment outside of a single legal order.

The Legal Process course will introduce students to a range of dispute resolution processes and corresponding lawyer roles. It too will engage questions regarding the ethical norms that ought to govern lawyers' role performance. Mid-semester students would be introduced to role morality, adversarial ethics, neutral partisanship, and many of the varied critiques of this framework. The modules on negotiation and mediation will each put into play questions regarding the ethical norms to govern the lawyer's role, and concrete ethical dilemmas that arise in those practice contexts. In the second semester, ethical questions will be raised throughout the curriculum.

As noted above, a third vehicle for the integration of issues of professionalism and legal ethics is through the incorporation of such issues within other first year subjects. Many scholars of legal ethics argue that the teaching of legal ethics is ideally pursued through a pervasive method, where the moral implications of particular outcomes, the ethical issues counsel faces in performance of role, etc. are raised throughout the curriculum. Shaffer, discussing his own teaching of property law, explains what this might mean: he notices moral issues raised by the substantive law and engages students in conversation about those issues; and he makes a point in his classes of imagining the moral life of a lawyer

doing this work. Institutional supports made available to interested faculty would facilitate the development and incorporation of course-specific materials.

Finally, the public interest requirement that will now be a pre-condition of graduation offers a further vehicle to advance our objectives in relation to the incorporation of professional responsibility and legal ethics. The public interest requirement will provide students with concrete, grounded experiences from which they can reflectively consider questions regarding the profession, its public interest obligations, professional roles, and professional identity.

To summarize, the unfolding of the Professional Responsibility and Legal Ethics curriculum in the first year within the proposed reforms would look as follows:

a) *Ethical Lawyering in a Global Community* -- 4 days, first week of first semester; introduction to the profession, the profession's obligations in relation to the public interest (including ensuring access to justice). This will establish some of the groundwork for the public interest requirement and be integrally tied to materials in the January semester.

b) *Legal Process* – mid semester introducing role morality, adversarial ethics (neutral partisanship) and critiques. It may also be possible to imagine a more robust treatment of legal ethics at this juncture through a dedicated full day for all first year sections, with a plenary session and small groups. A full day could include an introduction to the concepts of "ethics" and "morality," a more sustained treatment of the concept of "role morality" and a fuller opportunity to work through the application of the rules of professional conduct to particular case scenarios to illuminate more clearly the nature of the guidance that the rules do indeed offer. Additional teaching resources would be required if we were to offer the full day.

c) *Legal Process* – modules on negotiation and mediation will include an ethics component, and ethical issues will be threaded throughout the second semester.

d) *Ethical Lawyering in a Global Community* – in the January term encourages the shift to imagining legal problems and role outside of a single legal normative order and presents a multiplicity of lawyering roles and contexts and the ethical issues embedded in contemporary lawyering practices.

I am mindful that this may seem fragmented and disjointed. Much attention will need be paid to doing our best to make explicit the links between the segments at each juncture. On the other hand, this approach may enable students to understand that ethical issues are pervasive across all areas of law, and send a clearer message to students than we do at present about the importance of critical reflection on the role of the legal profession and the ethical conduct of lawyers.

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# APPENDIX B

**To: Curriculum Working Group**
**From: Craig Scott**
**Re: Executive Summary of Memo entitled *Elements of International, Comparative and Transnational Law ("ICT") for required curriculum***
**Date: July 5, 2006**

Please consult the full memo for an elaboration of all these points.

Comment on Learning Goals for ICT Elements in First Year

1. *generate basic awareness of the essential or otherwise valuable ICT dimensions to law and lawyering*
2. *encourage and develop modest critical skills apart from doctrinal analysis skills*
3. *'cover' certain high-level or structural doctrinal principles to be learned qua content by the students*
4. *make it more likely that Osgoode will graduate a higher percentage of students with peripheral (horizontal, cosmopolitan, creative) vision rather than tunnel vision*
5. *promote learning by faculty themselves*

Public and Constitutional Law

1. Canadian doctrine on interface with and reception of international law:
2. Explore notion of common law and relationship to statutes, constitution, and statutory interpretation by including two ICT dimensions: Is our common law tradition already a tradition of "transnational law"? What does it mean to say that customary international law is directly part of the common law?
3. Explore the notion of "constitution" and, crucially, of the conceptual and institutional evolution of orders imagined as constitutional as a thematic entry-point for three introductory overviews: basic scheme of institutional powers in UN Charter; evolution of the European Union order from economic community to community to union to imagined "constitutional" order; the question of supplanted international Aboriginal sovereignty.
4. Introduction to two key international sub-orders: UN human rights treaty order, noting the Inter-American regional variant; World Trade Organization, noting NAFTA and bilateral treaties.
5. Comparative Law: criminal law and territorial principle as constitutional presumption
6. Comparative Law: on tests for / approaches to limitations on rights.

Legal Process and Civil Procedure

General Comments: 1. In general, it is exceedingly important in first year that students know what a conflict of laws situation entails – in effect what the three main questions are.
2. It is valuable to introduce students to a selected range of transnational dispute settlement contexts, processes and institutions outside standard domestic court adjudication and appeal is also crucial.

Specific Elements:

1. I would start with the following materials on geographically complex cases in order to introduce students to the basics of how Canadian law deals with their adjudication: Lee Kuan

Yew v Globe and Mail; Cambior case in Quebec: extract from Harker Report on Talisman in Sudan; Talisman case in New York courts under their Alien Tort Claims Act; USA v Ivey in Ontario courts; Distomo decision in German courts; Hague Convention on Child Abduction or Hague Convention on Adoption; example of private arbitration award enforced under one of our arbitration acts; also a mixed arbitration award example perhaps under NAFTA.

2. Then move on to create a "torture as tort" progression of materials, with emphasis on
   -- Comparative jurisprudence
   -- Public international law dimension: The relationship between interpretations of a human rights treaty developed by the body charged with overseeing the treaty (CAT) and what Canadian courts may, must or should do with such interpretations. Here there would be two primary issues:
      - Whether article 14 of CAT requires, encourages or permits states to take a form of universal civil jurisdiction over civil suits for torture
      - Whether state immunity can be pleaded as a bar to torture claims under international law, and, if so, how this relates to interpreting our State Immunity Act as currently worded (with parallel issue of movement for parliamentary reform of SI Act)
   -- Whether and how customary international law or general principles of international law can or should ground a new cause of action in Canadian law, or otherwise create a sui generis strand within existing torts -- Moral questions of responsibility for harm in which Canada is involved abroad (tied to state responsibility doctrine in international law).
   -- Showing multiple levels of dispute settlement, domestic and international, formal and informal, legal and political and how dispute settlement processes feed into law development
   -- Showing how international and foreign developments inform Canadian law, and its development

The following is the rough order in which I would introduce Canadian, foreign and international case law in order to create a narrative context around 'torture as tort' for a series of 'what should be the law?' questions for students to ponder: extract from Dickson Somalia inquiry about the torture-death of Shidane Arone; some overview extract from a journal article on what military disciplinary and criminal consequences flowed for the soldiers and on what Canada claims to have done by way of a financial settlement to the Arone family; Family of Shidane Arone v Canada case in Ontario court; Bouzari v Iran in Ontario courts; private members bill introduced in Parliament on amendment to State Immunity Act; recent Concluding Observations of UN Committee Against Torture where CAT expresses concern at Bouzari outcome and recommends Canada reconsider its state immunity laws for civil suits involving torture; key passages from Al-Adsani v Kuwait in UK; key passages in majority judgment and dissenting judgment of European Court of Human Rights version of the Al-Adsani v Kuwait case transformed into Al-Adsani v UK; documentation from motion for substitute service being brought in July 2006 by lawyers for Falun Gong who are seeking to serve China for a lawsuit alleging torture and other human rights abuses; a note that gives a précis of situations of torture alleged to have been inflicted on 3 Canadians abroad – Arar, Kazemi and Sampson; selective extracts from a few chapters in Torture as Tort around the ways in which customary law on torture could be translated into a common law cause of action for a tort of torture; Arar v Jordan and Syria, in Ontario; Arar v United States in New York; Arar v Canada statement of claim in Ontario showing the mix of existing tort causes of action and new ones that parallel international human rights law violations; extracts from Arar Inquiry Report (supposed to be released in fall 2006); Jones and Sampson v Saudi Arabia, judgment in June 2006 of House of Lords; Kazemi v Iran and Named Officials, statement of claim in Quebec courts;

3. Beyond the foregoing, in the realm of Public International Law, I think the following two petition processes should be included in the how-to-bring-a-claim procedural side of the course: filing a "communication" against Canada with the Human Rights Committee for a violation of the ICCPR; filing a petition against Canada with the Inter-American Commission on Human Rights.

4. Use a piece by the former Prime Minister of New Zealand, Geoffrey Palmer on the Rainbow Warrior incident to show how creative lawyering and multiple venues and processes were needed.

Upper Year Mandatory Component

After noting five options, I recommend Option 4 whereby students must take one of Public International Law, Conflict of Laws (Private International Law), or Comparative Law and also take one from a healthy list of designated seminars / courses.