国際シンポジウム**「法曹の社会的役割と法曹養成教育の標準化」**ご挨拶

本日は、日頃より法科大学院において法曹倫理教育にご尽力の先生に、ご多忙のなか急なご案内にもかかわらず、法曹倫理の国際シンポジウムにご来臨の栄を賜り、誠にありがとうございます。

開催の背景について簡単にご案内申し上げます。詳細は第2部の後藤報告に譲りますが、昨年春、法曹倫理の研究教育に携わる有志が、日弁連法務研究財団の基金プロジェクトとして「法科大学院における法曹倫理教育の標準化」研究会（以下「本研究会」といいます。）を立ち上げました。ご承知のように、この間、「法科大学院コア・カリキュラムの調査研究」グループによって、主要科目における共通的到達目標、いわゆる「コア・カリ」策定が進んでおります。法曹倫理についても昨日3月13日のシンポジウムでその第2次案が披露されました。

このような情勢を受けて、法科大学院を修了し法務博士の学位を得る者が、法曹となるにふさわしい法曹倫理を修得できるようにするにはいかなる法曹倫理教育を行っていくべきか。この問題を念頭に置き、日々努力しておられる先生が、コア・カリが教育現場で持つであろう影響をはじめ、いろいろとお考えで、同様の関心をお持ちの方々と議論を深める機会をお求めなのでは、と推察いたしました。

本研究会は、法曹の社会的役割・責任を見据えた、職務規範を教導する理念の共有を目指し、コア・カリ第2次案を素材に、これからの法曹倫理教育の課題とあり方について自由に議論・検討する機会を設けるべきだと考え、科研費基盤研究（B）「法曹養成における職業倫理教育の理論と方法」（研究代表者：森際康友）と共催で、下記の要領で、そのための国際シンポジウムを企画した次第です。どうぞ開催の趣旨を汲んで、成果の上がる会合にすべく、ご協力のほど、よろしくお願い申し上げます。さらに、この機会をもちまして、先生に本研究会の趣旨をご理解いただき、今後ともなおいっそうのご協力をお願い申し上げます。

記

1　日程　平成22年3月14日（日）午前10時～午後5時00分

2　場所　関西学院大学　大学院棟201号室

3　主催者　日弁連法務研究財団基金プロジェクト
「法科大学院における法曹倫理教育の標準化」
科研費基盤研究（B）203300321
「法曹養成における職業倫理教育の理論と方法」 共催

2010 年 3 月 14 日

主催者記す

【国際シンポジウム】法曹の社会的役割と法曹養成教育の標準化

International Symposium in Professional Responsibility

The Societal Role of the Jurist and the Standardization of Legal Education

午前の部（午前１０時～１２時）

司会：　下條 正浩　（西村あさひ法律事務所・弁護士）

開会の挨拶・趣旨説明　(15 分)

森際 康友（名古屋大学大学院法学研究科教授）

Wendel, Bradley (Professor, Cornell Law School)

"The Changing Role of the Lawyer
and Professional Responsibility Education in North America"
北米における弁護士の役割の変化と法曹倫理教育の課題
（通訳を含め、約 60 分）

質疑応答　（45 分）

午後の部（１３時～１７時）

司会：　松本 恒雄（一橋大学大学院法学研究科教授）

第１部　13:00 – 14:15

豊川 義明　（関西学院大学法科大学院教授・弁護士）

「法曹の役割と職務規範の指導理念」
"The Role of the Jurist and the Guiding Principles
of Professional Codes of Conduct"
（15 分）

議論（60 分）

休憩　　14:15-14:30 (15 分)

第２部　14：30-15：30

後藤 昭　（一橋大学大学院法学研究科教授）

「法曹倫理コア・カリ案と本プロジェクトの課題」

“The Core Curriculum Draft for Professional Responsibility and the Goals of the JLF Project”

（15 分）

議論 (45 分)

第３部　15:30 – 17:00

森際 康友

「法曹倫理の新たな課題」

“A New Look at the Elements of Legal Ethics”

(25 分)

議論 (60 分)

閉会の辞

豊川 義明

The Changing Role of the Lawyer and Professional Responsibility Education in North America[1]
北米における弁護士の役割の変化と法曹倫理教育の課題

Bradley Wendel
ブラッドレイ・ウェンデル
Cornell Law School
コーネル・ロー・スクール

A. Professional Ideals.

What are the characteristics of a liberal, capitalist society? The basic idea is the overlap of two general concepts – autonomy and the rule of law. Autonomy means that private actors, including individuals and corporations, should be free to do pretty much whatever they want, subject to self-imposed limitations, social norms, and ethical considerations, but limited by the state only by laws properly enacted and enforced. This is the connection with the rule of law. All exercise of power in a liberal democracy must in principle be answerable to a demand for justification. As Morigiwa-sensei puts this point, in a society characterized by the rule of law, the little guy can say to the big guy, "Hey, you can't do that to me!" When you think about it, this is a significant social achievement. Power alone is not a sufficient reason for doing something. Actions must be based on *rightful*, or lawful power. There is a difference between a demand, on the one hand, and a legitimate directive on the other.

The question is, therefore, what makes the exercise of power rightful or lawful. The answer given in a liberal democracy is that legal rights and obligations must be based on something that is common, public, or shared. In the United States at least, there is a tremendous amount of disagreement about what rights and duties citizens *ought* to have. People disagree about every imaginable question pertaining to morality and justice. The role of the legal system, therefore, is to provide a framework for citizens to cooperate on mutually beneficial undertakings, and to resolve any resulting disputes through peaceful, orderly means. Because of the value of autonomy, citizens should be free to define, as much as possible, what for them constitutes a worthy undertaking. The state should not unduly interfere with the capacity of citizens to act

[1] Tomo's take: The idea is to talk about the ideals that the lawyer should have about her profession, not in a lofty way, but being very conscious of the societal role the legal profession should play in a liberal democratic, but capitalist society. Bearing in mind Ethics 20/20 and the step forward taken by UK legal profession from professionalism to business, your mandate is to introduce these recent changes, and to discuss whether they have impact enough to change the bearings of the ideal of the attorney in a liberal society.

on their own conception of the good. On the other hand, in a society characterized by the rule of law, there must be some warrant for doing anything that interferes with the interests of others. When the little guy says, "you can't do that to me," the big guy must be able to respond by pointing to a reason that the little guy can appreciate, so that the little guy will say, "okay, I see why you are allowed to do that." Another way to put this point comes from the political philosopher John Rawls – in order to be legitimate, actions must be based on reasons that can reasonably be endorsed by affected citizens.

The law enables legitimate action in a variety of ways. One way is to establish prohibitions on inflicting certain kinds of harm on others, enforced through the criminal law, private law remedies for tort and breach of contract, and administrative penalties. By implication, that which is not prohibited is permitted, and legal permissibility is therefore a reason that can be endorsed by affected citizens. Lawyers who represent clients in court are concerned primarily with this aspect of the law. Their role is to try to preserve their clients' autonomy by arguing for a construction of the law under which their clients' conduct would not be deemed wrongful. Many lawyers in the U.S., however, do not practice primarily in connection with the resolution of litigated disputes. Here it is necessary to avert to the distinction between a unified and a divided profession. As you all know, the American profession is unified in its training and licensing requirements. Someone who has graduated from law school and passed the bar exam in the U.S. is permitted to appear in court on behalf of clients, but also may have a career as a transactional planner or an advisor to clients, whether employed directly by the client (in-house, as we say) or independently employed and retained by the client for assistance with a particular matter. Japan, by contrast, has a divided profession in which tasks that would all be performed by American lawyers are divided up among *bengoshi*, judicial scriveners, corporate legal advisers, and so on.

I think there are some important comparative points to be made in this connection, which affect the lessons we can learn about regulating the profession and teaching legal ethics. Because of the unified profession in the U.S., American lawyers tend to think like in court litigators – *bengoshi* – even if they are acting in a different capacity. The recent controversy over the lawyers in the Department of Justice under the Bush administration, over the legal authorization of torture, shows the litigator's mindset of American lawyers. The construction of the law developed by these lawyers in the advisory memos might be permissible if urged in court as a reason not to punish government officials for this conduct. (I emphasize the word "might" because some of the legal reasoning was so bad that it might even fail the standard for permissible in-court advocacy.) As forward-looking advice, however, these memos are gravely flawed. They make no effort at all to reason toward the best understanding of the applicable law, or even a position that is somewhere in the range of reasonable constructions of the law. The same is true of much of the advice given by lawyers to companies like Enron, supposedly permitting them to enter into a transaction that in fact was not legitimate.

The point is that the legal system consists of more than just criminal and civil prohibitions on conduct. It also establishes mechanisms for private ordering, such as

contracts and the means to establish entities like corporations, partnerships, and joint ventures. The law gives stability to expectations, so that people know promises will be enforced, and that liability to pay damages will be based on certain defined conditions, clearly established in advance. This has been the great contribution of the concept of the rule of law to capitalist economies. The antithesis of the rule of law is the kind of pervasive corruption that holds back many countries in the developing world. It is a substantial deterrent to investing and doing business in a country if benefits and punishments are at the whim of some government official or powerful private citizen. The rule of law thus enhances autonomy by creating certainty and predictability, which enables individuals and entities to make long-term plans, knowing that their expectations will be secure. It does so on the basis of a narrower set of values that are shared, and can be endorsed by affected citizens. While citizens may disagree about the substantive merits of some course of action, they may be able to agree that there should be some procedure for settling this disagreement and establishing a resolution that stands in the name of society as a whole.

Of course, in order for the legal system to perform this function, the law itself must be stable. If the role of lawyers in a liberal democracy is to maintain the framework that enables a stable society in the face of disagreement, then it follows that lawyers must have certain obligations. These obligations are what is meant by the law school subject of legal ethics or professional responsibility in the United States. Ethics can have other meanings, including the inquiry into the relationship between one's role as a person and one's professional role, but when we speak of legal ethics as taught in law schools, we are talking about the duties that lawyers owe, to clients, courts, and third parties, as a function of participating in the legal system. It is not about doing what is right, from the point of view of an ordinary person; rather, ethics in this sense means the considerations that are specific to the law and the legal system.

B. History of Regulating and Teaching Professional Responsibility in the U.S.

There are several implications for legal ethics of the idea of lawyers in a liberal democracy. Remember that one of the central commitments of political liberalism is to individual autonomy, that is, the notion that citizens should be free to define for themselves, as much as possible, what is important, valuable, right and wrong. Liberalism contrasts with totalitarianism, in which the state defines for citizens what is good and bad, right and wrong. Less dramatically, a liberal system might be criticized for being too legalistic and bureaucratic, and burdening individuals and industry with excessive regulations – red tape, as we say in the U.S. An implication for the legal profession of the value of autonomy is that lawyers owe duties of loyalty to particular clients, despite having a state-granted right to practice their profession. Lawyers in the United States believe this intuitively, but the U.S. is a very individualistic society. The complicated questions involving duties of loyalty tend to involve conflicts of interest where multiple clients are being represented. But lawyers don't see themselves as having much in the way of obligations to third parties, to courts, to society as a whole, or to act in the public interest.

Interestingly, however, most of the public pressure on law schools and the legal profession, to do something to improve lawyers' ethics, have come from public scandals or controversies in which the major criticism of lawyers has been that they were excessively loyal to their clients. As you may know, legal ethics became a required subject in U.S. law schools in the early 1970's, after the Watergate scandal of the Nixon administration, where government officials were involved in covering up the attempt by one political party to steal information from the other party. The public outcry, which eventually led to the impeachment and resignation of Richard Nixon, was also directed toward the legal profession because so many government lawyers had been found to have cooperated in the cover-up. People believed there must be something wrong with the way legal ethics is taught in law schools and enforced by the profession if so many lawyers were willing to assist law-breaking.

Every subsequent call for changes to the rules of professional conduct or the way legal ethics is taught has come in the wake of a similar allegation, of lawyers assisting their clients in some way in wrongful activity. The savings and loan crisis in the 1980's, the collapse of the dot-com bubble and the financial accounting disasters of Enron, WorldCom, and other companies, the recent financial industry disaster, and the controversy over the involvement of government lawyers in the violation of human rights at Guantanamo Bay and elsewhere – all of these cases share the common feature of lawyers being blamed for being too loyal to their clients. As a federal trial court judge famously said, after uncovering all of the crooked transactions of a bank that had failed, "Where were the lawyers?" The answer, unfortunately, is that they were helping the client do what it wanted to do.

The result of these public revelations has been twofold: First, there has been considerable pressure to change the rules of professional conduct and other aspects of the law governing lawyers, so that lawyers would have to take the interests of non-clients into account. Perhaps the best known example is the long-running debate over exceptions to lawyer-client confidentiality. After the Enron scandal, the American Bar Association amended its rule on confidentiality to permit lawyers to disclose information to the extent necessary to prevent, rectify, or mitigate their clients' fraud, if their services had been used in connection with the fraud. This amendment was a response to pressure from regulators, including the Securities and Exchange Commission, which adopted its own rules for lawyers representing publicly traded companies, requiring lawyers to take active steps to correct wrongdoing by clients. Second, the public demands on law schools, to do a better job teaching legal ethics, have generally focused on the duties lawyers owe to non-clients. Often this is stated in terms of the obligations of lawyers to practice their profession in the public interest, or in the interests of justice.

Lawyers respond that they are acting in the interests of justice when they represent clients zealously, but this response misses the point of the public's criticism. The problem with the conduct of lawyers in all of the cases just cited is that justice is more than just what a powerful client can get away with. Justice within the rule of law means that the lawyer enables clients to do that which is rightful or legitimate, but not to transgress the bounds of the law. The under-emphasized aspect of legal ethics is

therefore the obligation to be a diligent and loyal representative, but only to the extent that the client's conduct is legally authorized. Sometimes American lawyers object that this creates a conflict of interest, but this isn't really accurate. Rather, the role of lawyer requires respecting both the duty of loyalty to the client and what might be called a duty of fidelity to law. This dual role has its roots in the liberal democratic foundation of both American and Japanese society. Citizens have a considerable degree of autonomy, but they are bound to respect the rights of other citizens. Lawyers are stuck in the middle, so to speak, and mediate between the interests of their clients, who may wish to exercise all of the freedom to which they are legally entitled, and the interests of other citizens, as embodied in the law.

The regulation of the American legal profession can be understood as an attempt by courts, legislatures, and administrative agencies to strike the right balance between these two obligations. In some cases, one of the obligations is subordinated to the other. In litigation, for example, where the client's conduct is in the past, a lawyer may argue for a favorable interpretation of the law. Zealous representation takes priority over respecting the bounds of the law, because the litigation system is set up to consider the competing arguments of the parties, and enable the judge to decide how the law should best be interpreted. Where the client's conduct is yet to occur, however, a lawyer cannot think of her role as if she were representing a client in court. What the client does depends to a great extent on what the lawyer says is permissible. This means that a lawyer must bear more responsibility for respecting the bounds of the law, and must be able to resist the pressure brought to bear by a powerful client.

C. Recent Changes – What's on the Horizon?

The subject of powerful clients raises the question of what are some of the recent changes in the regulation of the legal profession. Many of the pressures for modifying the regulation of the profession are the result of changes in the market for legal services, including the increase in the size and power of in-house legal departments, mergers and consolidation of both law firms and clients, multijurisdictional practice enabled by technology, and the increasingly global nature of both business transactions and the legal marketplace. What is extremely interesting about this pressure is that it is coming not from the public, and does not reflect concern about lawyers failing to uphold the law as against the demands of a powerful client. Rather, the pressure is coming from within the legal profession itself, and to a large extent it is driven by fear of competition – at home from other service providers such as accountants and investment bankers, and in the global market from lawyers in other jurisdictions who are better able to offer the services that clients demand.

Responding to these trends, the American Bar Association recently established the Ethics 20/20 Commission, described as follows:

> [T]he Commission will perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of

> advances in technology and global legal practice developments. Our challenge is to study these issues and, with 20/20 vision, propose policy recommendations that will allow lawyers to better serve their clients, the courts and the public now and well into the future.[2]

The Commission recently held its first public meeting, in February 2010. One of the major issues discussed at this meeting was alternative business structures, including the issue of whether non-lawyers could invest in law firms, as is presently allowed in Australia in, to a limited extent, for lawyers located in Washington D.C. This is a reprise of a debate within the profession in the 1990's, over the permissibility of so-called multidisciplinary practices, or MDP's. An MDP is simply a law firm that also does something else, such as provide accounting or business consulting services. There was quite a bit of controversy over whether MDP's should be allowed, but this debate abruptly ended with the collapse of Enron and the other financial accounting scandals of the early part of this decade.

Why did Enron end the MDP debate? The reason is that one of the causes for the Enron failure was related to the principal objection to MDP's, namely the threat to the independence of lawyers. Opponents of MDP's worry that if lawyers practiced with other professionals, they would lose their ability to say no to clients. Enron, of course, was a large-scale case of the failure to say no to a powerful client. The reason for this is due in part to the enormous legal fees earned by law firms representing Enron, but the full explanation for this professional failure is not simple greed. A more subtle, satisfying account of the involvement of lawyers in the collapse of Enron would emphasize the merger between the legal and business aspects of the client's activities.

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[2] Within the last ten years, technological advances and globalization have impacted lawyers' relationships with clients and among themselves. U.S. lawyers and law firms are engaged in efforts to increase their access to the legal services markets of other countries, while lawyers from other countries are seeking increased access to the U.S. legal services market. Because of the significant number of U.S. lawyers and law firms with offices and clients abroad, practice and regulatory developments in other countries have practical, ethical, and regulatory implications that require consideration. U.S. ethics rules pose challenges to lawyers and law firms from other countries too, raising choice of law and other issues.

Clients and their legal needs have evolved. Lawyers can now serve clients ranging from individuals, to multi-state and multinational corporations in both civil and criminal situations and inside and outside U.S. borders. Representing clients in cross-border and international transactions and litigation challenges lawyers and their clients in new ways. Clients also face new vulnerabilities when they obtain legal forms and documents via the internet that may not have been drafted in the U.S. or by lawyers, and that are not tailored to their particular legal needs.

The Commission members represent a broad spectrum of expertise in U.S. and global ethics rules, lawyer regulation, globalization, and technology. They come from all segments of the legal profession. Our work will be guided by three principles: protecting the public, preserving the profession's core values, and maintaining a strong, independent, and self-regulating legal profession.

Or, to return to the theory of liberal democracy, Enron represented the total subordination of the rule of law to the notion of autonomy. Its managers had visions of themselves as visionary entrepreneurs who perceived ways to overcome inefficiencies which others had overlooked in various markets. In order to create efficiencies, the company needed to engage in complex transactions which stretched the limits of existing legal and accounting standards. Lawyers and accountants were therefore called upon by the client to be "creative and aggressive" in their advising. They did so not because they were bad people, but because they had adopted their clients business values, and believed that their client ought to be able to do what it wanted, because of all of the wealth it was creating.

This is capitalism without any constraints, and you all know the results. The round of legal ethics reform we went through most recently, in 2003, culminated in amendments to the rules of professional conduct, as well as regulatory changes like Sarbanes-Oxley, which emphasized the public responsibilities of lawyers to serve as gatekeepers and not to become involved with their clients' unlawful transactions. It is a bit worrisome that the reforms on the horizon appear to be oriented more toward enhancing the competitiveness of the American legal profession in the global marketplace. Competitiveness is not bad by itself, but there are reasons for concern when it becomes the primary focus of professional discourse. The legal profession in a liberal society needs to be cognizant of its dual role, of enhancing client autonomy but doing so with scrupulous concern for the rule of law.

法曹の役割と職務規範の指導理念

The Role of the Jurist
and
the Guiding Principles of Professional Codes of Conduct

関学法科大学院教授・弁護士
豊　川　義　明
TOYOKAWA Yoshiaki
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はじめに
私の課題提起の制約
時期　活動分野　大阪→日弁連（東京）
’71年登録 （市民、新司法改革）
当事者法曹として
第一、総括的検討
1、法曹の役割論
（1）代理人、弁護人としての活動
（2）司法作用
（3）日本社会のなかで
2、法曹モデル　歴史、時代とともに
（弁護士）
（法曹一元でなく、制文法の下で）
（1）在野（戦前、戦後）
（2）プロフェション
（3）サービス、ビジネス
（4）公共
（5）「法の支配」担い手を支援する法の専門家
3、各モデル（像）の相互関連と統一性（的把握）の必要性
4、国の制度（立法、行政、司法）のなかで司法権そして司法作用→具体的事案における法の適用と一般的にいわれる
不文法ではないが→個別事案における法の形成、創造を含まざるを得ない
5、（法的）代理（弁護）活動は、事実と法（律）を結合し、その具体的妥当性、正当性の社会的認知（司法作用として）を目指す活動である。
（1）創造でありながらも法的判断の枠組みを必須とする⇔事実と法の相互作用
（2）代理を完全化する保障としての守秘義務と利益相反禁止

（3）司法作用の担い手（参加者）として、真実と「法の支配」が「規制」とともに正当性の根拠をもつ（背反的であって実は存在そのもの）。

例えば

a、真実義務

b、依頼者に「間違っている」といえる力

c、依頼者利益一元説

6、日本社会において「法の支配」を拡充する。それは司法、法的正義の実現に参加すること（司法制度改革審議会意見書参照）

7、具体的代理活動のなかでこそ、役割は果される

当事者の代理→（事実と法に基づく）討論→具体法の形成

第二　法曹養成教育のなかでの専門職責任

1、倫理一般ではない（誠実、共感、礼儀、勇気をどう考えるか）

2、法的紛争における責任規範

3、禁止よりも法曹像の重視

役割や使命（ミッション）

4、歴史的に（戦前、戦後）

5、具体的な活動を通じて

6、司法修習制度の弱体化の進行（二年→一年半→一年）

人数一同期の連帯がなくなっている

専門職責任はLSのなかでしか全体的、体系的に教えることはできない。

7、事件の取り組み自体が責任の履行であることの確認

8、正義とは何か、公共性とは何を考えさせる一自分達の抱いている法曹像との関連で⇔矛盾的立場のシュミレーション

9、全ての授業のなかで法曹は具体的妥当性と正義を実現することを提示する。

（民、刑実体法と手続法　公法　ローヤリングなど　）

10、授業のなかから院生は何を感じたか

第三　教育における場の重要性（矛盾、対立の局面を設定する）

クリニック、エクスターン、ローヤリング、専門職

第四　職務規程の「コアから標準化」にむけての作業（方法と内容）

1、内容

（1）受任一信認関係論

（2）利益か、正当な利益か

（3）　説得→ ｛ 依頼者
　　相手方
　　裁判官（判定者）

（4）誠実義務の射程<民事、刑事>
　　誠実義務一元説の評価

（5）インフォームド・コンセントについて

（6）利益相反と同意⇔切り離し

（7）守秘義務と公共的義務

（8）真実義務の位置と範囲

2、方法
　　各LSにおけるカリキュラム調査が前提となる

（1）学年　　半期又は一年

（2）他の科目との相互関連性

（3）教育側主体（弁護士、裁判官、検察官）

（4）学生の受けとめ（アンケートの実施）

国際シンポジウム「法曹の社会的役割と法曹養成教育の標準化」

法曹倫理コア・カリ案と本プロジェクトの課題

The Core Curriculum Draft for Professional Responsibility and the Goals of the JLF Project

後藤 昭

GOTO Akira

一橋大学大学院法学研究科

Hitotsubashi Law School

1．共通的到達目標（コア・カリキュラム）第2次案の成立過程

1）中央教育審議会大学分科会法科大学院特別委員会「法科大学院教育の質の向上のための改善方策について（中間まとめ）」2008年9月30日
「共通的到達目標」設定の提案

2）文部科学省補助金による法科大学院コア・カリキュラムの調査研究の開始（2008年9月）

3）中央教育審議会大学分科会法科大学院特別委員会「法科大学院教育の質の向上のための改善方策について」（2009年4月17日）

4）法科大学院コア・カリキュラムの調査研究班による第1次案発表（2009年12月）

5）第2次案発表（2010年3月13日）

2．本プロジェクトの経過

1）日弁連法務研究財団研究企画80「法科大学院における法曹倫理教育の標準化」開始（2009年4月1日）

2）法曹倫理科目におけるコア・カリキュラムの独自な意味
日本における法曹倫理学の未成熟

3．研究班コア・カリ作業と本プロジェクト研究員との関係

４．研究班コア・カリ案の限界

１）項目列挙のみ。

２）検察官・裁判官の倫理ついて、抽象的な表現に止まる。

作成経過から生じた限界

日本の法曹のあり方自体から生じた限界

５．本プロジェクトの課題

１）各項目について具体的内容の要点を提案する。

２）検察官・裁判官の倫理について、より実質的な内容を提案する。

３）実際の教育方法を提案する？

法曹倫理の新たな課題

A New Look at the Elements of Legal Ethics

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【ねらい】第2次案で十分に扱っていない諸問題の検討を通した法曹倫理の原理的考察

1　第 2 次案で十分に扱っていない弁護士倫理に関する事項
　1.1 職域拡大
　　1.1.1 組織内弁護士の規律
　　　1.1.1.1 独任か
　　　　1.1.1.1.1 業務命令・指揮命令関係をいかに考えるか
　　1.1.2 他士（さむらい）業との関係
　　1.1.3 大規模事務所
　　　1.1.3.1 スクリーニングの実態調査と対応（1）
　1.2 グローバル化への対応
　　1.2.1 スクリーニングの実態調査と対応（2）
　　1.2.2 グローバル規模での移動に伴う利益相反・守秘義務による支障を解消するための世界共通の法曹倫理規範の策定
　1.3 公共性と誠実義務
　　1.3.1 第三者的機関を引き受ける場合
　　　1.3.1.1 第三者委員会、仲裁センターという第三者的機関を引き受ける場合の守秘義務の解除等、特有の規律の問題
　　1.3.2 大学教授を兼ねる弁護士のあり方
　　　1.3.2.1 学者としての鑑定意見書と所属法律事務所の利益との関係
　　　　1.3.2.1.1 研究者倫理としては所属事務所の依頼者に有利な意見を書く場合
　　　　1.3.2.1.2 弁護士倫理としては所属事務所の依頼者に不利な意見を書く場合

2　裁判官倫理
2.1 他の2権による規範制定と裁判官の独立
2.1.1 比較法的視野の必要
2.2 裁判官倫理の国際的潮流
2.2.1 規律化へのアレルギー
2.2.2 第 1 世代　アメリカ　綱領型
2.2.3 第 2 世代　カナダ　提案型
2.2.4 第 3 世代　ドイツ　自問自答型
2.3 裁判官の私生活
3　検察官倫理
3.1 国際化の潮流
3.2 客観義務
3.2.1 無罪事件の取り扱い
3.3 被疑者被告人の権利との関係
3.3.1 取調べにおける黙秘権の尊重
3.3.2 弁護人の接見交通権の尊重
3.4 不偏不党
3.4.1 たとえば国会議員を逮捕する場合の政治的影響を考慮して不偏不党を目指すべきか、そのような考慮をしないのが不偏不党か
3.5 検察官の任務の公共性・多様性
3.5.1 訟務検事
3.5.1.1 行政、民事、家事事件の被告
3.5.2 組織犯罪処罰法に基づき組織犯罪の被害財産を没収・追徴し被害者に分配
3.5.3 法務総合研究所　等
4　理論枠組みを求めて
4.1 21 世紀型立憲民主制における司法のあり方
4.2 公共性の革新
4.2.1「野党民主主義」から「与党民主主義」へ
4.2.2 他の 2 権と対峙する用意がある体制へ
4.2.2.1 違憲立法審査権
4.2.2.2 権利保護の充実
4.2.3 官と民の双方で培う公共世界
4.3 公共世界の概念図
4.3.1 公権力は、公共財
4.3.1.1 公権力は、政治権力しか提供できない公共財を提供するのが存

在理由

4.3.2 人民主権における公権力の正統性は、公論　にあり

4.3.2.1 公共財提供の優先順位その他の秩序原理を衆議一決

4.4 公権力・正義・法のトリアーデ

4.4.1 公権力を指導し、正統性を付与する価値とは？　正義

4.4.2 誰が実定的正義を決定するのか？　公権力

4.4.3 公権力は、恣意的に正義を決定しうるか？　否。

4.4.3.1 法による決定

4.4.3.1.1 根拠

4.4.3.1.2 形式

4.4.4 法の支配の必然性

4.4.4.1 法は何故に正義を決定する方式として最適か？

4.4.4.2 公共的理由による集合的決定（支配）方式

4.4.4.3 その対概念は？　専制：わがままな暴力的支配・いじめ

4.4.5 公権力・正義・法のトリアーデ

4.4.5.1 公権力は正義を求め、正義は法を求め、法は公権力を求める。

4.4.5.2 逆も真。

4.4.5.3 双方向的相互依存の関係