

INFUSING ETHICS INTO THE CURRICULUM

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Carrying Out the Commitment

“My thesis is simple and straightforward. Every law school has a profound duty – and a unique opportunity – to inculcate principles of professional ethics and standards in its students. This duty should permeate the entire educational experience beginning with the first hour of the first day of law school.”¹

**Warren E. Burger,
Chief Justice of the United States**

I. Introduction

I show my Professional Responsibility classes a clip by former Saturday Night Live comic Don Novello featuring Father Guido Sarducci, a favorite SNL character of mine. The theme of his monologue in this clip is the “Five Minute University.”² The theory behind the Five Minute University is that five years after they graduate, college students remember only about five minutes of what they learned in college. Sarducci concludes that if they are only going to remember five minutes worth of material, why not cut the cost, time, and effort and simply *offer* five minutes of material? At the end he says he is thinking of starting a law school right next door and then he asks, “Got a minute?”³

I came to Thomas M. Cooley Law School two years ago on a mission. With nearly 24 years of civil litigation practice, seven years as a member (two as chairperson) of the State Bar of Michigan Subcommittees on Professional and Judicial Ethics, and six years on Michigan’s Attorney Discipline Board, I contribute a practical perspective to the teaching of Professional Responsibility. I’ve witnessed enough unethical, unprofessional, unscrupulous, unconscionable conduct among lawyers that there are times I almost

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¹ Warren E. Burger, *The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility*, 29 CLEV. ST. L. REV. 377 (1980).

² Don Novello, FATHER GUIDO SARDUCCI LIVE AT ST. DOUGLAS CONVENT, *Five Minute University*, Warner Bros., 1980).

³ *Id.*

believe Sarducci's premise. We are experiencing a crisis in the legal system, and thus far, efforts to abate it have proved futile. While acknowledging that, in the end, lawyers themselves are responsible for their own behavior, I agree with commentators who think that law schools should accept a role in assuring that law school graduates enter the profession with a basic understanding of legal ethics and professionalism. Legal educators should be concerned with the needs of their client – the profession; and our client needs legal educators who teach professionalism and its fundamental values from the outset of a would-be lawyer's career.⁴ As part of a bold effort by Cooley's President, Board of Directors, administration, faculty, and students to emphasize the teaching and implementation of professionalism school-wide, I hope to do my part in changing the ethical culture of lawyers. In other words, I want lawyers to remember the fundamentals of Professional Responsibility throughout their careers. The foundation of the Cooley effort is the *Professionalism Plan*. The *Plan* articulates professionalism principles and eighteen initiatives to implement them.⁵

The focus of this paper is on the teaching of ethics and professionalism, specifically, Initiative Four of the Professionalism Plan, "Consider further refinements to the curriculum to infuse professionalism themes: focus on knowledge and ethics."⁶ The explanation accompanying this initiative states:

Ethics and professionalism lessons can be infused into the entire curriculum. For example, Introduction to Law I, which teaches briefing and other skills, could be tied to Trial Workshop and use cases that pertain to a Trial Workshop problem. First-term students could serve as witnesses and bailiffs in Trial Workshop and observe the lawyering skills of the students participating attorneys. This tie-in addresses a key need of first-term students – to see an immediate connection between the skills they must master for law school and the skills exercised by attorneys in practice. Introduction to Law II can more directly tie in MacCrate skills as part of the professional skills the students learn in that course (analysis, synthesis). Criminal Law could be tied to Teen Court so that first-term students are mentors to teen defendants (which could also constitute some of the community service required for their portfolio). Law Practice could be adjusted so that students are working together as a law firm. Externship journals can include entries on professional character, or ethical issues the student observes during the externship. In large "stand up" classes, students could work as law firms to recite cases and respond to questions from the professor. **And into every class, professors may incorporate lessons involving professionalism.** (Emphasis added.)

⁴ Jerome J. Shestack, *President's Message: Pervasive Professionalism Must be Part of Legal Education*, 84 A.B.A. J. 6 (1998).

⁵ Thomas M. Cooley Professionalism Committee, *Professionalism Plan for the Thomas M. Cooley Law School*, app. (2002).

⁶ *Id.* at *Teach Students to Be Professional*.

The PR/Professionalism faculty should work directly with individual faculty members and with the Faculty Curriculum Committee, the Departments, and the Curricular Issues Subcommittee of the Professionalism Committee, and make proposals for particular courses.⁷ (Emphasis added.)

So armed with the Professionalism Plan charge, I undertook to devise a manual to infuse professionalism into the curriculum. I thought it would be a practical approach, one made up of easy-to-use modules designed to be incorporated into lesson plans for the core curriculum subjects. These modules, I thought, would be irresistible to the Torts, Criminal Procedure, Contracts, Property, and other core curriculum professors eager for tips on how to include ethics and professionalism in their classes without sacrificing precious time for the rest of the curriculum. At first blush, this would seem to be a simple enough proposition. However, I quickly discovered that law schools have attempted, and largely failed, to infuse ethics into the curriculum for over a century. This article summarizes the history behind what is known as the “pervasive” method of teaching ethics and the debate as to its efficacy. With that background, the paper goes on to briefly describe what other schools and academicians have tried, and finally, it suggests ways to overcome the challenges of teaching professional responsibility pervasively.

In proposing this effort, I am not dismissing the other law schools that have attempted broad infusion efforts. Institutions such as Notre Dame, Stanford, Fordham, Vanderbilt, and UCLA are some of the notable law schools that, in varying degrees of breadth and with equally varying degrees of success, have truly committed to making professionalism an integral part of the legal curriculum. They are the pioneers. It is upon those efforts I hope to build.

II. Defining Professionalism

If we are to infuse professionalism into the curriculum, we must first define it. Surprisingly, commentators continue to debate the meaning of “professionalism.” The discussion centers on whether professionalism encompasses ethics or simply is the teaching of values central to the practice of law. Most commentators agree that the term “ethics” generally refers to the rules, laws, and discipline system governing lawyers. In the introduction to the textbook, *The Law and Ethics of Lawyering*, by Hazard, Koniak, and Cramton, ethics is characterized as referring to “imperatives regarding the welfare of others that are recognized as binding upon a person’s conduct in some more immediate and binding sense than *law* and in some more general and impersonal sense than *morals*.”⁸ They say the source of ethics is the “deliberation about how one should act given the existence of rules established by a consensus that one shares substantially if not unreservedly.”⁹

⁷ Thomas M. Cooley Professionalism Committee, *supra* note 5 at *Teach Students to Be Professional*.

⁸ GEOFFREY C. HAZARD, JR., ET AL, *THE LAW AND ETHICS OF LAWYERING, Relationship of Law, Lawyers and Ethics*, 1 (Foundation Press, 3d ed. 1999).

⁹ *Id.*

“Professionalism” or “professional responsibility,” on the other hand, are elastic concepts, the meaning and application of which are hard to pin down.¹⁰ In a 1965 article, Professor James E. Starrs said: “Like Caesar’s wife, professional responsibility is, in content, many things to many persons.”¹¹ The ABA Commission on Professionalism adopted Roscoe Pound’s definition:

The term refers to a group...pursuing a learned art as a common calling in the spirit of public service – no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.¹²

Frequently, the terms “professionalism” and “professional responsibility” are used interchangeably. According to another ABA report in the early 1960’s, professional responsibility was described as concerning the “moral obligation of the lawyer to assume in society the position of leadership for which his education has so well prepared him. Such obligations include the promotion of law reform, adequate representation of indigents and participation in community service projects and public affairs.”¹³

The Cooley Plan defines professionalism by capturing it in a set of principles that reflect an intention to combine the ethics rules with the spirit of a profession dedicated to public service.¹⁴ The Plan articulates the philosophy that professionalism comprises the knowledge students must obtain regarding their ethical and professional obligations, the skills students must acquire to conduct themselves appropriately, and the ethics they must internalize to be successful in their professional lives.”¹⁵

Johnstone and Treuthart articulated the thrust of this philosophy that law schools are responsible for teaching more than “just” ethics in a 1991 article, “Doing the Right Thing.”¹⁶ Johnstone and Treuthart reject the exclusivist focus on doctrine, stating:

¹⁰ Report of the A.B.A. Commission on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, 1986.

¹¹ James E. Starrs, *Crossing a Pedagogical Hellespont Via the Pervasive System*, 17 J. LEGAL EDUC. 365, 367 (1964-65).

¹² Report of the A.B.A. Commission on Professionalism, *citing* Roscoe Pound, *The Lawyer From Antiquity to Modern Times*, 5 (1953) (quoted by Hon. John F. Grady in his testimony before the Commission on May 24, 1985).

¹³ Starrs, *supra* note 11.

¹⁴ Thomas M. Cooley Professionalism Committee, *supra* note 5.

¹⁵ Thomas M. Cooley Professionalism Committee, *supra* note 5.

¹⁶ Ian Johnstone & Mary Patricia Treuthart, *Doing the Right Thing: An Overview of Teaching Professional Responsibility*, 41 J. LEGAL EDUC. 75, 82 (1991). (This article cites Vincent Robert Johnson’s identification of two emerging camps of legal ethics teachers and scholars: law-givers and story-tellers. For the law-givers, legal ethics is chiefly concerned with the identification, transmission, and enforcement of uniform standards governing the conduct of lawyers. In contrast, the story-tellers emphasize person and context over principles and procedures and aim to cultivate a “deeper less mechanical sense of professionalism” than rules can provide. Vincent Robert Johnson, *Law-givers, Story-tellers and Dubin’s Legal Heroes: The Emerging Dichotomy in Legal Ethics*, 3 GEO. J. LEGAL ETHICS 341, 342-43 (1990). See also Theodore Smedley, *The Pervasive Approach On a Large Scale – The Vanderbilt Experiment*, 15 J. LEGAL EDUC. 435-436 (1962-63) “...the lawyer’s professional responsibility embraces, in addition to his duty to observe the high ethical standards of the bar, other obligations. Prominent among these are the

First, it assumes more certainty than the rules themselves supply. Codes of conduct inevitably leave considerable room for ethical discretion. The validity of particular ethical choices depends on the circumstances and no amount of precision in formulating a code of conduct can account for all possible fact situations. Second, overemphasizing doctrine suggests that ethical and legal reasoning are identical. A program of instruction should explore the nature of ethical reasoning rather than assume it. What role, for instance, does emotion play in ethical judgment? Does traditional legal analysis leave out an emotional element that is essential to effective ethical reasoning? Third, exclusive concentration on doctrine runs the risk of inculcating the view that professional responsibility can be reduced to the making and following of rules. It sends the message that legal ethics involves no more than distinguishing permissible from impermissible conduct and that all ethical concerns can be resolved by referring to a clear set of rules. Teaching the rules alone simplifies the pedagogical task by discouraging reflection and by failing to consider whether codes of conduct can adequately capture the moral universe within which lawyers operate.¹⁷

The criticisms that Johnstone and Treuhart so ably level at the doctrinal focus are borne out in the Profession Responsibility classroom. Those of us who teach the subject can attest to the tendency of our students to reduce everything to what they perceive to be the black and white of the Model Rules of Professional Conduct or the Model Code. They struggle to categorize and perfect their answers within the body of rules but without taking into consideration whether what they propose is adequate, reasonable, practical, moral, or justified. Sometimes they squeeze the square peg of an ethical dilemma into the round hole of a rule that neither fits nor resolves the dilemma. They are completely nonplussed to find that there is not a rule to fit every situation.

Many times students look at the rules as a “one size fits all” solution to problems that are far more complex and without consideration of other rules or standards. I know this occurs in other subjects when ethics issues arise. In a Civil Procedure II class I taught, many students were confused when I described the information necessary to be disclosed under the Initial Disclosures provision of Federal Rules of Civil Procedure Rule 26(a)(1)(A).¹⁸ They were adamant that Model Rule of Professional Conduct 3.3 requires

need to work for law reform; to advocate improvement in the quality of the bench and bar; to provide leadership in the development of sound public opinion in regard to significant social, economic, and political issues; to accept the burden of service through public office; and to organize community improvement programs”).

¹⁷ *Id.*

¹⁸ FED. R. CIV. P. 26(a)(1)(A). ((a)Required Disclosures; Methods to Discover Additional Matter. (1) *Initial Disclosures*. Except in categories of proceeding specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties: (A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information.).

the disclosure of *all* witnesses, supportive or unsupportive, because to do otherwise would be a misrepresentation to the court. They need to see how legal ethics rules work in conjunction with the other substantive and procedural rules governing their behavior. From there, it is only one step farther to teach them that the application of legal ethics rules also must be considered in the context of the circumstances, including other ethics rules, liability ramifications, and where appropriate, the personal ethics of the lawyer.

Cooley has chosen its philosophy of teaching professionalism because of its commitment to practical legal education. We cannot do that by simply requiring the rote memorization of rules. We must convince our students that professionalism is what they will practice – just the same as they will practice criminal defense law, or corporate law, or any other legal vocation. Therefore, we teach the *rules* of ethics and the *conduct* of professionalism. We call it Professional Responsibility, and we seek to incorporate it into our curriculum.

III. How Law Schools Have Taught Professionalism Historically

A brief examination of the history of teaching ethics and professionalism in the law clearly demonstrates that knowing what to teach and implementing its instruction are two different propositions. Law schools have had an intermittent love affair with legal ethics and professionalism training. Perhaps “love” is too strong a term because originally, there were no courses exclusively devoted to teaching either subject. Originally, there were no courses at all. The teaching of ethics and what eventually came to be loosely known as “professionalism” was thought to be subsumed by the apprenticeship that constituted the indoctrination into the practice of law. Once schools devoted to the teaching of a substantive law curriculum became a fixture in legal education, ethics and professionalism were included in professional responsibility instruction, which remained quite minimal, usually consisting of lecture series by judges or prominent attorneys.¹⁹

For many of these series, no credit and no grades were given; sometimes, as it turned out, neither were the lectures. Those that did occur were generally short on content and long on platitudes; “general piffle” was the description offered by one of the first serious scholars in the field.²⁰

Thus, the debate over how the less substantive/more sensitive concepts of professional responsibility should be imparted to future lawyers ensued. Strong resistance to the teaching of ethics or professionalism dominated most law school faculties. There are a number of explanations for this resistance. Many legal academics think that ethics need not be taught because the Socratic method is sufficient to build moral character.²¹ This paper is not about the efficacy of the Socratic method – maybe it builds character or maybe it does not, but in and of itself, it does not teach ethics or professionalism. Moral

¹⁹ Russell G. Pearce, *Teaching Ethics Seriously*, 29 LOY. U. CHI. L.J. 719, 722 (1998).

²⁰ Pearce, *supra* note 19 citing Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 37 (1992).

²¹ Pearce, *Legal Ethics Must Be the Heart of the Law School Curriculum*, 26 J. LEGAL PROF. 159, 161 (2001-2002).

character and legal ethics are not the same thing, moral character being that more personal code of conduct described by Hazard, and legal ethics encompassing rules particular to the profession. Moreover, this attitude ignores the consensus over the past 30 years that the existing methods of teaching law and of lawyer discipline do not adequately ensure that lawyers are ethical.²²

Some law teachers think that legal ethics cannot be taught because law students are young adults whose values are already fully formed and not likely to change.²³ Not only has the current literature disproved this theory,²⁴ but this attitude, carried to its logical extreme, could lead to law teachers making assumptions about the values one possesses on the basis of race, gender, socio-economic status, or ethnic background. Indeed, Pearce cites the views of Henry Drinker as an example of such extreme thinking. Drinker, described by Pearce as the leading legal ethicist of the mid-twentieth century, took the view that the biggest ethics problem facing the bar was Russian-born Jews whose disproportionate responsibility for ethical violations resulted from family upbringings lacking in American values, and he acted on that view by seeking to exclude them from admission.²⁵

Many academics believe that legal ethics should not be taught because they are values as opposed to facts, and values are not the stuff of scientific pedagogy.²⁶ This theory is based upon the Langdellian model of legal education: the study of law is a science.²⁷ Science emphasizes facts, not “moral values,” and those who seek to promote the science of law believe “that law can attain the prestige of science only by showing a thorough contempt for judgments of value.”²⁸ Felix Cohen suggests that this perceived disconnect between the science and the ethics has resulted in outright academic hostility to teaching ethics.²⁹

²² *Id.*

²³ *Id.*

²⁴ Donald Weckstein, *Perspective Courses and Co-Curricular Activities*, 41 U. COLO. L. REV. 398, 399, 400 (1969). (There is an additional danger to this theory. Initially, we have the problem of deciding precisely when our ethical boundaries are set. Does this occur at three years of age when we’re taught the concept of property (ours and that of others), or at five years of age when we’re taught appropriate behavior for school? Or is it at seven years, the historical age of “reason?” Does it come in high school or college when we learn the Core Democratic Values? If we assume any age is the cut-off point, then we assume there is no further learning past that point. My experience with having students articulate their own “personal codes of conduct” belies that assumption. Time and again students have come to me and expressed 1) little recognition until engaging in this exercise, of precisely what their values were; what values are most important to them; in a minority of cases, that they even had values and 2) shock that their values have changed since coming to law school. We must have confidence that it’s worth it to teach ethics, no matter what the age of the student.)

²⁵ Pearce, *supra* note 21.

²⁶ *Id.*

²⁷ Pearce, *supra* note 19.

²⁸ Pearce, *supra* note 19, citing Felix Cohen, *Modern Ethics and the Law, in the Legal Conscience: Selected Papers of Felix S. Cohen* 17, 19 (Lucy Kramer Cohen ed., 1970).

²⁹ *Id.*

Despite these justifications for not teaching the subject, legal ethics did, sort of, make it into the curriculum, not as a self-contained course but first by what came to be known as the “pervasive” method. In a 1938 Harvard Law Review Article authored by Sidney Post Simpson, the subject of the teaching of ethics arose as the result of a review and revision of the Harvard curriculum. The Committee on Curriculum opined:

Either...a course in [Legal Ethics] would be one in legal etiquette, which we believe to be unnecessary; or one in how far a lawyer can safely go, which we believe to be pernicious; or one of “hortatory moral instruction,” which we believe to be useless; or one to prepare men for bar examination questions on the Canons, which we believe to be no function of the school.³⁰

With this less than ringing endorsement, the committee concluded that the duty to teach students a sense of responsibility and the ideals of what should be a profession of justice can be discharged *only* by making every course in the school to some extent a course in the social significance of law and the responsibility of lawyers.³¹ Accordingly, the author said, “The imparting of such moral education must proceed indirectly and interstitially but always pervasively in each law teacher’s instruction and in his relations with his students.”³²

A generation later, Professor Brainerd Currie recognized the need for pervasive professional responsibility training in the law school curriculum, writing in 1956 that “training for professional responsibility and for the awareness of the role of law in society is not a matter that can be parceled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time.”³³ The idea is that law students will be introduced to situations they may encounter as practitioners, which will raise questions about the lawyer’s obligations to the client, the public, the judicial system, and the profession.³⁴ By raising these issues at naturally occurring points in the curriculum, whether in the context of contracts, torts, civil procedure, or any other law school course, the professor is able to assist the student in viewing the coursework through the lens of the lawyer’s broader ethical and professional responsibilities.³⁵ Traditionally, the aim was not to provide specific answers to the problems raised, but to help students recognize and analyze ethical considerations when choosing a course of

³⁰ *New Harvard Curriculum*, 51 HARV. L. REV. 965, 983 (1937-38).

³¹ *Id.*

³² *Id.*

³³ Brainerd Currie, *Law and the Future: Legal Education*, 51 NW. U. L. REV. 258, 271 (1956), citing C. Paul Rogers, III, *Teaching of Professional Responsibility, An Approach to the Teaching of Professional Responsibility to First Year Law Students*, 4 OHIO N.U. L. REV. 802 (1977).

³⁴ E. Wayne Thode & T.A. Smedley, *An Evaluation of the Pervasive Approach to Education for Professional Responsibility of Lawyers*, 41 U. COLO. L. REV. 365, 366 (1969).

³⁵ *Id.* at 366.

action.³⁶ With ethics and professionalism being “taught” pervasively, there were few distinct courses in “Professional Responsibility.”³⁷

Unfortunately, the expression of the philosophy of teaching ethics or professionalism pervasively did not assure that the material would actually be taught.³⁸ Monroe Freedman says ethics was never mentioned during his law school years.³⁹ Criticism of the pervasive method abounded. Commentators said that law schools were producing finished law students, not finished lawyers.⁴⁰ While faculty were successfully addressing simple issues, such as not stealing from clients, the more complex ethical dilemmas like the conflict between the duty to the client and candor to the court, were being ignored.⁴¹

More practical criticisms also surfaced. Truly incorporating ethical issues required the deletion of necessary substantive matters from courses already overloaded with material.⁴² Additionally, the method was branded as sporadic; haphazard; not systematized; and at the same time, too systematic and attempting to do too much.⁴³ Some commentators have said that pervasion is too much like sugar-coating a bitter pill to be gulped down unwillingly by students; others have feared that it may create frustration and produce a sense of insecurity in the student.⁴⁴

Along with practical problems, more deeply rooted criticisms were leveled. Some critics charged that individual teachers would attempt to indoctrinate students to their own ethical predilections and that the pervasive method artificially breeds unrealistic resolutions of ethical problems because the external pressures facing a practitioner are not present in the classroom.⁴⁵

Perhaps the most serious charge of the pervasive method stems from the application of professional responsibility concepts by those whose knowledge and expertise lie elsewhere. In an ideal world, all law professors are capable of and disposed to educate ethically. Despite the perception that any teacher qualified to hold a position on a law school faculty should find teaching professionalism within his or her competence,⁴⁶ the reality is that all law professors are not so capable or disposed. Too often, professional

³⁶ Thode, *supra* note 34.

³⁷ DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY, ETHICS BY THE PERVASIVE METHOD*, xxix (Aspen Publishers, Inc., 1998).

³⁸ See Thode, *supra* note 34 for an excellent evaluation of the positive and negative aspects of the pervasive method.

³⁹ Monroe Freedman, *Infusing Ethical Issues into Mundane Classes*, 138 N.J.L.J. 1505 (1994).

⁴⁰ Noyes Leech, *The Law Schools and the Teaching of Professional Responsibility*, 33 BUS. LAW. 1524 (1978).

⁴¹ *Id.*

⁴² C. Paul Rogers III, *An Approach to the Teaching of Professional Responsibility to First Year Law Students*, 4 OHIO N.U. L. REV. 802 (1977).

⁴³ Thode, *supra* note 34 at 365.

⁴⁴ *Id.*

⁴⁵ Rogers, *supra* note 42 at 802.

⁴⁶ Shestack, *supra* note 4 at 2.

responsibility is delegated as someone else's responsibility.⁴⁷ While some professors are interested in ethical questions and readily introduce ethical discussion into their courses, unless the curriculum is carefully structured and monitored, the best that can be accomplished is that in some law courses, some students will be exposed to some ethical problems.⁴⁸ However, more than a few professors lack the practice experience that would have exposed them to the ethical dilemmas inherent in their fields of expertise, and to many more law professors, Professional Responsibility is a complex discipline that cannot be easily mastered and applied to substantive law courses.⁴⁹ According to Roger Cramton and Susan Koniak, "the volume and complexity of case law dealing with the responsibilities of lawyers has exploded; new and more challenging textbooks have been published on the subject; and the subject we refer to as 'the law and ethics of lawyering' has become a half way respectable field of academic scholarship."⁵⁰ With this seeming elevation in stature comes the negative result that professors in other disciplines view the material as intimidating, time consuming, and logistically beyond their reach.

Regardless of the reasons for it, many professors do not address the issues, or if they do, they precede their remarks with demeaning statements further minimizing its importance. As early as 1955, one commentator criticized what little was offered in the way of formal legal instruction, saying:

When I was in law school, this took the form of the traditional course in "Legal Ethics." I need not remind you what a dull and useless waste it was. We memorized – well enough to survive the exam, at least – the text of the Canons of Legal Ethics. We were lectured, usually without explanation, to be honest. In Calvin Coolidge's famous phrase, the lecturer was against sin. And then, the exam over, we promptly forgot the whole boring episode. Those who were already honest were unharmed; the others were untouched.⁵¹

In 1968, at an AALS Symposium on Education in the Professional Responsibility of the Lawyer, known as Boulder II, much time was spent arguing about whether ethics should be taught pervasively or through a separate course.⁵² Arguing is just about all that occurred, with some professors still asserting that commitment to professional norms and values cannot be learned through law school, others denying the responsibility of law schools to teach ethics, and still others claiming that lawyers are uninterested in ethics.⁵³

⁴⁷ *Id.*

⁴⁸ Leech, *supra* note 40 at 1524, 25.

⁴⁹ Rogers, *supra* note 42 at 801.

⁵⁰ Russell G. Pierce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 725 *citing* Roger C. Cramton & Susan P. Koniak, *Rule, Story and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145 (1996).

⁵¹ Robert Kingsley, *Teaching Professional Ethics and Responsibilities, What the Law Schools Are Doing*, 7 J. LEGAL EDUC. 84 (1954-55).

⁵² Hon. Tom C. Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249, 257 (1974-75).

⁵³ *Id.* at 257.

As if to demonstrate that lawyers were not getting enough in the way of ethics or professionalism instruction, a generation after Currie made his statements and five years after Justice Clark bemoaned the attitudes expressed at Boulder II, we suffered Watergate, with the clear involvement of lawyers in criminal activities, top to bottom. The pervasive method was not exactly working. The Watergate disclosures and the ensuing embarrassment to lawyers led to the ABA accreditation requirement that each “approved” law school provide each student “instruction in the duties and responsibilities of the legal profession.” What have we gained with this requirement? Not nearly enough to pronounce ourselves successful in educating our students in professionalism.

First adopted in August, 1973, the ABA accreditation requirement has neither been interpreted nor even referred to or enforced in the accreditation process.⁵⁴ This has enabled some law schools to pay lip service to the requirement, without really addressing its fulfillment. The “pervasive method,” at most schools that profess to use it, actually is little more than tokenism designed to satisfy the American Bar Association (ABA) accreditation department.⁵⁵

If the informality of the pervasive method provoked debate, the ABA requirement heightened it. The debate turned toward whether ethics instruction should be taught by way of a required course.⁵⁶ A moving force behind the effort to require professional responsibility instruction (as opposed to simply relying on the pervasive method) was Stanford E. Lerch, member of the Arizona bar’s board of governors. Strongly objecting to the dismissive manner in which the pervasive approach in law school dealt with teaching professional responsibility issues, Lerch said, “Anybody who will tell you the truth will tell you that the pervasive method is a bunch of garbage.”⁵⁷

Recommendations abounded for law schools to add specific professional responsibility classes, but many schools continued to argue that the pervasive method was the preferred method of teaching professional responsibility. Curriculum committees operated with the expectation that as ethical problems presented themselves in the usual law courses, the professors would discuss those problems in the contexts in which they arose.⁵⁸ But that was not really happening. According to Professor Rhode, the inadequacy of this approach led almost all schools to eventually require a separate course in legal ethics or the legal profession.⁵⁹

The addition of separate professional responsibility courses has not resolved the inadequacies of professionalism education either. More recent articles demonstrate that

⁵⁴ Roger C. Cramton, Susan P. Koniak, *Rule Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 148 (1996).

⁵⁵ *Id.*

⁵⁶ Leech, *supra* note 40.

⁵⁷ Johnstone, *supra* note 16 at 87. *See also* Starrs, *supra* note 11 at 383 (where the author, in arguing against the application of the pervasive method, suggests that in this method lies the perversion of professional responsibility rather than pervasion).

⁵⁸ Leech, *supra* note 40 at 1524.

⁵⁹ Rhode, *supra* note 37.

the attitudes that shaped the education of law students in ethics and professional responsibility for fifty years continue to influence the teaching of professional responsibility. In 1995, Koniak and Hazard had this to say:

Unfortunately, much of what is taught is done so without reflection. Slipshod, ill-informed teaching is generally condemned in law school. Yet that fact only demonstrates how little respect the subject of legal ethics commands, for when it comes to discussing what a lawyer should do, shoddy “anything-goes” instruction is commonplace and accepted. Many professors fail to recognize matters of professional responsibility when they come up, and thus end up communicating an answer to an ethics question without knowing they have done so.⁶⁰

The commitment of the legal academy to the rule requiring legal ethics remains embarrassingly low. In 1996 Cramton and Koniak said: “At many schools any teacher will do, whether or not the teacher is a full-time academic, dedicated to the subject, or engaged in scholarship on it.”⁶¹ Any other subject that is viewed as part of the “core curriculum” would never be staffed in such a manner.⁶² Low course credit offerings and indifference to course materials also characterize ethics offerings.⁶³

Not only have ethics and professional responsibility course requirements been superficial, the addition of a course requirement has removed what little pressure there was on law school faculties to treat professional responsibility issues throughout the law school experience. In 1998, Deborah Rhode reported that limiting discussion of legal ethics to a single course has resulted in the risk of marginalizing, and ultimately subverting, the intended goal of having a separate course.⁶⁴

Also in 1998, Russell Pierce echoed other commentators when he bemoaned the failure of professionalism among lawyers. In doing so, he referred to the lip service given the importance of legal ethics, with most law schools failing to give legal ethics the same respect and attention given to most other courses, let alone a central role in the curriculum.⁶⁵ In 2000, Steven Goldberg echoed those sentiments when he said: “Despite a sustained professorial lobbying campaign to infuse professional responsibility throughout the curriculum and at least one text designed to facilitate that, the pervasive approach is pervasive only in the long list of schools in which professional responsibility remains locked in a single classroom.”⁶⁶ As recently as 2002, Russell Pearce suggests that legal ethics still occupies second class status in the eyes of faculty.⁶⁷ I have recently

⁶⁰ Susan P. Koniak & Geoffrey C. Hazard, *Teaching Legal Ethics, “Mainstreaming” Ethics: The Pervasive Method of Teaching Ethics, Paying Attention to the Signs*, 58 LAW & CONTEMP. PROBS. 117, 119 (1995).

⁶¹ Cramton, *supra* note 54 at 156.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Rhode, *supra* note 37.

⁶⁵ Pearce, *supra* note 19 at 719.

⁶⁶ Steven Goldberg, *Bringing the Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 419 (2000).

⁶⁷ Pearce, *supra* note 21 at 159.

heard the subject described to students by one professor (not a professor of Professional Responsibility) as “not cognitively dense.”

Predictably, students are not clamoring for ethics training either. Like Robert Kingsley when he was a student, current students reflect the attitudes of the faculty. While many of my Professional Responsibility students actively and enthusiastically engage in the concepts I teach, both professionalism and rule-oriented, my experience has mirrored that of Steven Goldberg who quotes one student as writing, “I believe that professionalism is neglected. Generally, it is only addressed in Professional Responsibility, which is treated as a joke class among students here.”⁶⁸ Only recently, as I was entering my Professional Responsibility classroom for the first day of class, I conversationally asked a student who was also entering, “Are you here for Professional Responsibility?” He answered balefully, “Yes, unfortunately.”

Cramton and Koniak cite a 1975-76 study by Ronald M. Pipkin, entitled “Law School Instruction in Professional Responsibility: a Curricular Paradox,” which concluded that the “latent hierarchy” of legal education led law students to believe that legal ethics courses, because they were not taught in the Socratic method, were less important and less intellectually demanding.⁶⁹ The Pipkin study found that students perceived professional responsibility courses “as requiring less time, as substantially easier, as less well taught, and as a less valuable use of class time” than other courses.⁷⁰ Like the attitudes of faculty, those of students have not changed in the past 30 years.

Mary Daly, Section Chair of the AALS Professional Responsibility Section, optimistically said in the 1996 newsletter, “Today [Professional Responsibility] is a valued member of the academic community and Professional Responsibility teachers have won the grudging respect of most of their colleagues.”⁷¹ Ironically, in the same newsletter, Deborah Rhode told the story of Supreme Court Justice Ruth Bader Ginsburg’s description of a student’s encounter with legal ethics. The professor of one of the core curriculum classes described a lawyer’s tactic that “bothered and bewildered” the student. “But what about ethics?,” the student asked. “Ethics,” the professor frostily advised, “is taught in the second year.”⁷² The consensus among commentators appears to agree more with Deborah Rhode’s assessment than that of Mary Daly.

Despite our gloomy history, we have made progress. Over the past several years, the leaders in the field of Professional Responsibility have struggled to take the subject from the margins to the core in the minds of administration, faculty, and students. The products of these efforts are meaningful courses in Professional Responsibility in many curriculums. Enlightened, thoughtful academic scholarship has delivered an array of challenging, interesting textbooks as well as enlightened teaching methods using movies

⁶⁸ Goldberg, *supra* note 66.

⁶⁹ Cramton, *supra* note 54, citing Ronald M. Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 AM.B.FOUND.RES.J. 247, 262-65.

⁷⁰ *Id.* at 257-58.

⁷¹ Mary Daly, *Message from the Chair*, Association of American Law Schools, Section on Professional Responsibility Newsletter 1 (1996).

⁷² Deborah L. Rhode, *Successfully Teaching Professional Responsibility – An Oxymoron or Unrealized Future*, Association of American Law Schools, Section on Professional Responsibility Newsletter 2 (1996).

and television programs.⁷³ More and more law schools are employing faculty whose expertise lies in the field of professional responsibility rather than just arbitrarily assigning it to the unlucky non-tenured faculty members who happen to get stuck with it. Today's materials and the commitment of academics devoted to the field eliminate any excuse for slipshod teaching of Professional Responsibility as a separate course.

Cooley took an additional step in increasing the Professional Responsibility course credit from two hours to three. Increasing the credit hours accomplishes two things. It sends the message to the students that Professional Responsibility is a course on a par with other core curricular courses. Second, it provides time to teach not only the rules governing our profession but also leaves time to teach the concepts of becoming and being part of a profession.⁷⁴ These concepts include not only the ideals of professionalism but undertaking unpaid service to the community; addressing the downfalls of the profession, such as alcohol and stress; teaching sensitivity to bias; understanding the impact of failing to meet ethical requirements of the profession; career counseling; and taking financial responsibility as well.⁷⁵

Another excellent development in law schools since the 1960's is the promotion of clinic education with a corresponding emphasis on professionalism and ethics. Former Supreme Court Justice Tom C. Clark said in 1973 that the teaching of professional responsibility and effective student clinics go hand in hand.⁷⁶ An effective clinic program, utilizing well trained lawyers experienced in practice, addresses a major criticism of the pervasive method of teaching professionalism and ethics: the ignorance or unsophistication of academics in the teaching of practical skills, including professional skills. Clinical experiences cause the student to confront the very issues that prevail in a public service profession – the poverty, ignorance, and injustice experienced by their clients. While developing skills through practice, clinic programs provide a unique opportunity to raise ethical questions concerning the role of the lawyer in court and in counseling.⁷⁷ My experience with students who have matriculated through Cooley's clinical programs is that they have a true grasp of and respect for professionalism.

To complete the professionalism education of our students, we need one more component: the collaboration of our fellow legal academicians. Clearly, well thought out, thorough courses in Professional Responsibility combined with effective clinic programs and the systematic pervasive teaching of ethics throughout the curriculum would assure that our students receive the message that ethics and professionalism are the soul of the profession.

IV. Meeting the Challenge to Teach Professionalism Responsibly

⁷³ See for example, Goldberg, *supra* note 66 at 421.

⁷⁴ Thomas M. Cooley Professionalism Committee, *supra* note 5 at Initiative 1.

⁷⁵ *Id.*

⁷⁶ Clark, *supra* note 52 at 256.

⁷⁷ Weckstein, *supra* note 24 at 398.

Initiative Four of Cooley's Professionalism Plan -- "infusing" professionalism and ethics into the curriculum -- is the commitment Cooley has made to institutionalizing the pervasive teaching of ethics in the curriculum. Many Cooley professors have already embraced this initiative. When asked about what they teach in the way of ethics, several responded with examples of having their classes engage in community service or pro bono work; incorporating ethics lessons such as lawyer incompetence, client perjury, and conflicts into discussions of other issues relative to their subjects; and finally, modeling professional behavior in their personal and professional lives. But if we fail to support our faculty and to systematize, at least to some extent, the teaching of ethics and professionalism, we run the risk of falling prey to the same pitfalls law schools have suffered for the last 50 years.

I tell my students that when I was in practice and hoped for a particular decision from a judge, I made it my job to provide everything legally and factually necessary to make it as easy as possible to decide my way. That is the kind of support we ought to be providing our colleagues if we want them to take up the teaching of ethics as well as the substantive courses they already teach. I will go a step farther and suggest that we ought to make them *want* to teach the ethical and professional precepts that apply to their particular disciplines because of how completely relevant and critical ethical considerations are to the completion of their students' consideration of the substantive issues. As a practitioner, there was not a day that passed during which I was not confronted with an ethical or professional decision. Many students leave law school thinking that ethics is a set of rules that one learns in order to take the MPRE and then forgets because most law students, after all, do not think they are going to be practicing ethics. They need to understand that ethics pervades practice. There is no better way to teach them than to have ethics pervade law school.

Most commentators agree that in order to teach ethics pervasively, there needs to be strong faculty and administration commitment.⁷⁸ Professor Peter Joy, who actually designed, with the collaboration of core curriculum faculty members at Case Western Reserve University School of Law, a series of Professional Responsibility problems for use in first year courses at Case Western⁷⁹ says: "Although I believe that law professors should discuss legal ethics issues in every law school course, I do not believe that anyone should be compelled to do so. Even if there were not academic freedom concerns, I agree with the observations of Professor Paul Brest that '[i]f a professor does not want to teach ethics as part of his or her torts or criminal law or constitutional law course, the ways of subverting it are myriad. There is no worse message one can give to students than one faculty member did when he announced "Here comes the sermon." ' "⁸⁰

⁷⁸Rhode, *supra* note 72. See also David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485 (1989).

⁷⁹ Peter A. Joy, *Professional Responsibility Problems*, (1992) (copy on file with the author and at Case Western Reserve Library).

⁸⁰ Peter A. Joy, *Teaching Ethics In the Criminal Law Course*, 48 ST. LOUIS U. L.J., 1239 (2004), citing Paul Brest, *The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration and the Pervasive Method*, 50 FLA. L. REV. 753, 754 (1998). See also, Dennis Turner, *Infusing Ethical, Moral, and Religious Values Into a Law School Curriculum: A Modest Proposal*, 24 U. DAYTON L. REV. 283, 295 n.70 (1999).

The Cooley Professionalism Plan has resolved that concern in two ways. Initially, the Plan itself is a collaboration between members of the faculty, staff, and administration, including faculty members from every core curriculum course. While the language of Initiative Four is couched in voluntary terms: “and into every class, professors may incorporate lessons involving professionalism,”⁸¹ the Plan was unanimously adopted by the Cooley faculty. Given the willingness of many faculty members to incorporate lessons involving professionalism on their own, I think that with materials prepared and updated by the Professional Responsibility faculty, we increase the chances of correct application of ethical and professional principles in courses throughout the curriculum. This would be a yeoman’s task for one person, but we have six faculty members who teach Professional Responsibility. By dividing up the core curriculum courses among the members of the professionalism department, we assure that those courses get individualized attention, frequently by a teacher who is interested in the core curriculum course as well as Professional Responsibility.

Deborah Rhode also suggests that teaching Professional Responsibility cannot succeed without well-structured course materials.⁸² Professor Rhode has produced the only publication to date that provides course materials for Professional Responsibility as well as materials for integrating professional responsibility into the broader curriculum.⁸³ Additionally, articles for individual courses abound. Not only are the problems compiled by Professor Joy available through the Case Western Reserve library, but he and several other commentators have written law review articles detailing ways of introducing professional responsibility into particular classes.⁸⁴ One means of support the Professional Responsibility faculty can provide is to supply such articles to the professors responsible for teaching the relevant classes and summarizing them, if necessary. If no article exists, the Professional Responsibility faculty can devise materials, similar to what Professor Joy did. These materials do not need to be extensive but can be as simple as articulating the relevant model rule, explaining its relevance, and providing discussion questions. The materials should be based upon materials in the casebook used by the core curriculum professor that are already being covered. At times, the topic can take off from a note following a case in the casebook.

⁸¹ Thomas M. Cooley Professionalism Committee, *supra* note 5.

⁸² Rhode, *supra* note 72.

⁸³ Rhode, *supra* note 37.

⁸⁴ See, for example: Robert N. Covington, *The Pervasive Approach to Teaching Professional Responsibility: Experiences In an Insurance Course*, 41 U. COLO. L. REV. 355 (1969); Joy, *supra* note 80; Thomas L. Shaffer, *Using the Pervasive Method of Teaching Legal Ethics In a Property Course*, 46 ST. LOUIS U. L.J. 655 (2002); Carol M. Bast & Susan W. Harrell, *Ethical Obligations: Performing Adequate Legal Research and Legal Writing* 29 NOVA L. REV. 49 (2004); Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPAC L. REV. 961, 2003; Richard G. Johnson, *Integrating Legal Ethics & Professional Responsibility with Federal Rule Of Civil Procedure 11*, 37 LOY. L.A. L. REV. 819 (2003); Raleigh Hannah Levine, *Learning Civil Procedure, Practicing Civil Practice, and Studying a Civil Action: a Low-Cost Proposal to Introduce First Year Law Students to the Neglected MacCrate Skills*, 31 SETON HALL L. REV. 479 (2000); Lester B. Snyder, *Teaching Professional Responsibility in Tax Courses*, 41 U. COLO. L. REV. 336 (1969).

We could generate several modules on various topics so that professors could select whether to incorporate and what they wish to incorporate. One other use for modules would be for professors to assign topics to students related to the modules to heighten the students' awareness of ethical issues present in other core curriculum casebooks.

Another effective way to encourage the use of materials is to make them available on-line so that professors are able to cut and paste from the module, right into their own outlines. This form of communicating the modules would also allow for easy updating and keeping the modules fresh.

An additional use for the modules would arise from the Professional Responsibility classes. Professional Responsibility professors could use the same modules used in the core curriculum classes to delve further into the ethical issues presented, thereby refining or enhancing the students' understanding of the issues.

V. Modules for Teaching Ethics in the Torts Curriculum

In thinking about what kinds of modules to devise for the Torts curriculum, I considered many of my own experiences practicing in the field of personal injury litigation. One abrupt awakening was the realization that I'm not equipped to find all of the possible places in the Torts curriculum where professional issues arise that can confront the personal injury practitioner. Attracting clients, counseling prospective clients, undertaking representation, setting fees and devising fee agreements, competence in representation, negotiation, civil litigation, dealing with third parties, and settlement all join the more obvious categories of conflicts, candor to the court, confidentiality, and privilege in seeking attention. To solve this problem, the tactic that other commentators have used, that of collaborating with the core curriculum professors, is absolutely necessary. This method also works to generate interest of those professors in using the modules. The following modules, selected arbitrarily by me, are two examples for our Torts classes, based upon cases found in Prosser, Wade & Schwartz, Torts, Cases and Materials, 10th Ed.

Torts Module

Meritorious Claims and Defenses – MRPC 3.1

This material could be used when discussing the elements for a successful claim or defense (Chapter I, "Development of Liability Based on Fault," Chapter IV, "Negligence," Section 2, "Elements of Cause of Action"), when teaching about joint tortfeasors in Chapter VII, "Joint Torfeasors," in covering "Misuse of Legal Procedure" in Chapter 20, or when discussing the Chapter 12, "Duty of Care, Failure to Act" case of *Hegel v. Langsam* on page 412.

Model Rule 3.1⁸⁵ requires our claims and defenses to be meritorious, just as Rule 11 of the Federal Rules of Civil Procedure does.⁸⁶ The commentary following Model Rule 3.1 tells us we have “a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.”⁸⁷ Both rules make an exception for good faith arguments to change existing law but the issue of meritorious claims and defenses frequently arises in every day tort litigation where there is no argument for changing the law, good faith or otherwise. Suppose for example, that a lawsuit ensues against two motor vehicle drivers who, during the course of a road race, cause a collision with a third vehicle, seriously injuring an occupant of the third vehicle. *Bierczynski v. Rogers*, a 1968 case discussed in Prosser, is just such a case.⁸⁸ The jury found both defendants negligent, and the Delaware Supreme Court affirmed the verdict for the plaintiff.⁸⁹

What if, instead of joint responsibility on the part of both defendants, the plaintiff’s lawyer has evidence suggesting that one driver was primarily at fault.⁹⁰ What is the responsibility of the plaintiff’s lawyer? Should the lawsuit continue against both defendants, or do the rules require the plaintiff to dismiss the lawsuit against the party who is not at fault? What if the evidence shows that one party was clearly not at fault or involved in any way? What if the party primarily at fault is not the “deep pocket” but is the less at-fault party? How does the plaintiff’s lawyer ethically balance the desire for justice for the plaintiff against fairness to the defendant?

What the lawyer does depends upon the degree of evidence pointing to the liability of one defendant over the other. A suggestion that one defendant is primarily at fault may not completely relieve the other defendant of responsibility. Some ethical issues are resolved by simple good lawyering. However, a categorical exclusion puts the lawyer in the position of violating both MRPC 3.1

⁸⁵ MODEL RULES OF PROF’L CONDUCT R. 3.1. (A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law...).

⁸⁶ FED. R. CIV. P. 11(b) (By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a non frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information...).

⁸⁷ MODEL RULES OF PROF’L CONDUCT R. 3.1., cmt.2.

⁸⁸ VICTOR E. SCHWARTZ, ET AL, PROSSER, WADE & SCHWARTZ, TORTS, CASES AND MATERIALS, 356 (Foundation Press, 10th ed. 2000).

⁸⁹ *Id.* at 357.

⁹⁰ Rhode, *supra* note 37 at 789.

and FRCP 11 if the lawyer continues to pursue the claim against the party not at fault. This is an issue that regularly confronts the plaintiff's personal injury lawyer.

Looking at the case from a different perspective, what is the responsibility of the defense lawyer who, when filing the Answer, asserts all the boilerplate defenses the lawyer can think of, regardless whether they apply? To protect the client, until discovery establishes that most, if not all, of those defenses are unsupported by the evidence, the lawyer has a duty to give the client the benefit of the doubt and to protect the client's interests by pleading all applicable defenses.⁹¹ But once discovery reveals inapplicable defenses, what is the defense lawyer's responsibility? In the absence of a motion for summary judgment regarding the unsupported defenses, the lawyer's duty is to consult with the client and secure authorization to advise the lawyer's opponent that the lawyer is abandoning those defenses. What if there are no defenses and liability is clear? What is the defense lawyer's responsibility in this circumstance, when faced with an instruction from the client to stall? How does the defense lawyer balance these considerations in the face of the demand for billable hours and more fees?

Frivolous claims and defenses may be so because they lack factual or legal support, or they may be frivolous because they are brought to harass or maliciously injure a third party.⁹² Model Rule 4.4 precludes such conduct.⁹³ Comment 1 explains that while the lawyer is obligated to put the client's interests first, that obligation does not imply that the lawyer may disregard the rights of third parties in the process.⁹⁴

In the *Bierczynski*, *supra*, case, what if the client insisted upon pursuing the claim or defense, even though the lawyer had determined it was meritless?⁹⁵ Does the lawyer follow the client's directive? Not if it requires the lawyer to violate the law or the Rules of Professional Conduct.⁹⁶

This discussion could naturally segue into a discussion of the civil claims that may arise with the misuse of legal procedure. *Friedman v. Dozorc*,⁹⁷ a 1981 Michigan Supreme Court case, tells the story of Leona Serafin, who died at a local hospital after surgery for removal of a kidney stone. The autopsy showed

⁹¹ MODEL RULES OF PROF'L CONDUCT R. 3.1, cmt. 2.

⁹² JAMES E. MOLITERNO, CASES AND MATERIALS ON THE LAW GOVERNING LAWYERS, 561 (Anderson Publishing Co., 2d ed. 2003).

⁹³ MODEL RULES OF PROF'L CONDUCT R. 4.4(a). (In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or sue methods of obtaining evidence that violate the legal rights of such person.)

⁹⁴ MODEL RULES OF PROF'L CONDUCT R. 4.4, cmt.1.

⁹⁵ Rhode, *supra* note 37 at 789.

⁹⁶ MODEL RULES OF PROF'L CONDUCT R. 1.16. (If the lawyer is unable to convince the client that the claim or defense should be abandoned, the lawyer's responsibility is to withdraw or move to withdraw if the case is pending before a tribunal. MRPC 1.16 mandates withdrawal if the representation would violate the rules of professional conduct.)

⁹⁷ SCHWARTZ, *supra*, note 88 at 998; *Friedman v. Dozorc*, 412 Mich. 1, 312 N.W.2d 585 (1981).

that Ms. Serafin had died of a rare and uniformly fatal blood disease, the cause and cure of which are unknown. Nevertheless, her estate brought a medical malpractice suit against the hospital and doctors involved. The judge directed a verdict for the defendants at the close of plaintiff's proofs. Dr. Friedman then sued the Serafin Estate's lawyer on theories of negligence, abuse of process, and malicious prosecution. He lost on all three counts. The court reaffirmed the application of the traditional English "special injury" rule to claims redressing frivolous lawsuits, requiring parties who bring those suits to prove damages beyond the normal "expense and travail" of defending a lawsuit.⁹⁸ Even though a majority of jurisdictions have rejected the English rule, most still absolve the attorney from a duty to investigate the client's motive and from any duty to "prejudge" the claim.⁹⁹ As long as the client does not proceed for improper purposes, the attorney may proceed with representation, even if the chances of prevailing are slight.¹⁰⁰

One final note regards lawyers who uniformly take cases they deem meritless because they either, feel sorry for the claimant and would like to recover "something" for them or, they make a habit of accepting "nuisance value" cases as a way of supplementing their own incomes. While the first motivation is understandable and lawyers should exercise compassion, it does not justify violating the rules. Moreover, since "Tort Reform" the likelihood of success, even for nuisance value, is minimal. Finally, students must understand that taking the meritless case with the slim chance of "getting something" for it, really does the client no favor because it raises hopes, causes the client additional inconvenience and aggravation, and delays the inevitable delivery of "bad news." Sometimes the best service a lawyer can provide the prospective client is to tell the client there is no case to be brought.

The second motive is even more unfair to the client because the lawyer is simply using the client to generate income. Accepting cases for the nuisance value they can generate violates Model Rules 1.7(a) prohibiting representation in the presence of a concurrent conflict of interest,¹⁰¹ and arguably, 1.8(b), prohibiting the use of confidential information of the client to the disadvantage of the client.¹⁰² Lawyers who undertake representation under these circumstances

⁹⁸ Rhode, *supra* note 37 at 790.

⁹⁹ Rhode, *supra* note 37 at 791.

¹⁰⁰ *Id.*

¹⁰¹ MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2). (A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: ... (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.)

¹⁰² MODEL RULES OF PROF'L CONDUCT R. 1.8(b). (A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.)

should remember the admonition to doctors from Hippocrates, “First, do no harm.”¹⁰³

This module, with a few alterations, could also be used in Civil Procedure I. For professors using Yaezell, *CIVIL PROCEDURE*, 5th Edition, the relevant opportunity would be Chapter VI, “Pleading,” page 424, which begins the discussion of Rule 11 with a short paragraph about Ethical Principles as a limitation on pleadings. The case following, *Business Guides v. Chromatic Communications Enterprises* 498 U.S. 533 (1991), features a publisher of a trade directory that placed minor inaccuracies in its directory to detect copying of the directory by competitors.¹⁰⁴ After discovering some of the inaccuracies in a competitor’s directory, the plaintiff filed suit for copyright infringement, conversion, and unfair competition. The law firm hired to represent the plaintiff apparently relied completely upon its sophisticated client for information in drafting the complaint, resulting in Rule 11 sanctions for the lawfirm and the client for “failing to conduct a proper inquiry.”¹⁰⁵ A module could be developed expanding upon negligence in drafting pleadings. Comment [2] to Model Rule 3.1 states, in part, “What is required of lawyers...is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”¹⁰⁶ This view of Model Rule 3.1 emphasizes its impact where the lawyer is merely negligent, as opposed to knowingly asserting a false claim or defense. The discussion could quite naturally lead to knowingly asserting false claims and a discussion of *Religious Technology Center v. Gerbode* case which follows *Business Guides, supra*, in the same chapter.¹⁰⁷

Another opportunity to introduce ethical precepts in a Torts class takes place in discussing cases with conflicting testimony and the lawyer’s responsibility for candor to the court. The following is a module designed to be used in conjunction with the materials taught in Chapters 2 and 4 of the Prosser textbook.

Torts Module

Candor to the Tribunal – MRPC 3.3 Client/Witness Perjury

As officers of the court, lawyers are responsible for maintaining the integrity of the judicial system. The lawyer’s responsibility of candor pervades the Model Rules of Professional Conduct. From the requirement that the lawyer provide the client with “candid” advice¹⁰⁸ and the prohibition against the knowing misrepresentation of fact or law to third persons,¹⁰⁹ the rules make honesty a key

¹⁰³ Hippocrates, *Epidemics*, Book 1, Section 1.

¹⁰⁴ Stephen C. Yaezell, *CIVIL PROCEDURE*, 424 (Aspen Publishers, Inc. 5th ed. (2000)).

¹⁰⁵ *Id.*

¹⁰⁶ MODEL RULES OF PROF’L CONDUCT R. 3.1, cmt. 2.

¹⁰⁷ Yaezell, *supra* note 104 at 427.

¹⁰⁸ MODEL RULES OF PROF’L CONDUCT R. 2.1. (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice...”).

¹⁰⁹ MODEL RULES OF PROF’L CONDUCT R. 4.1. (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person...”).

component of representation. MRPC 3.3 carries those directives one step further. Not only are lawyers prohibited from the knowing use of false statements of fact or law, they are also responsible for the conduct of their clients and witnesses. In the civil arena, where the client lies and the lawyer knows about it, the lawyer is required to rectify the behavior, either by convincing the client to tell the truth or by disclosing the lie to the court, even if the disclosure involves revealing confidential or privileged information.

This module could be used when discussing any case that involves conflicting testimony. For example, in *Zeni v. Anderson*, a Michigan Supreme Court case found on page 220 of Prosser, Anderson, the driver of a vehicle that struck Zeni, a pedestrian, testified that she had turned on the defroster in the car, and her passenger said she had scraped the windshield.¹¹⁰ Another eyewitness testified that the defendant's windshield was clouded, and he doubted that the occupants of the vehicle could see out.¹¹¹ Students need to understand that clients and witnesses who disagree about what they observed in a particular occurrence are not necessarily lying. Everyone sees and speaks from a different perspective. Lawyers must give their clients the benefit of the doubt. That does not mean that they should close their eyes to reality, however. What about the lawyer who is confronted with evidence that the lawyer's client or witness intends to commit perjury or has already done so during the course of a deposition or trial? What if the defense lawyer in *Zeni, supra*, reasonably believed, based upon the physical evidence, the testimony of the eye-witness, the weather, and the lighting, that the defendant planned to lie about the condition of the windshield?

Lawyers must balance the persuasive and zealous advocacy they owe to the client and the duty to keep the client's confidences with the responsibility to maintain the integrity of the judicial system. Consequently, although a lawyer in an adversarial proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.¹¹²

The issue of client perjury in civil cases is not nearly as complicated as in criminal cases where the criminal defendant's constitutional right to testify on his own behalf collides with the Model Rules prohibition against the presentation of false testimony. In civil cases, given the scope of civil discovery and extended trial preparation time, lawyers rarely should be surprised by client perjury at trial or by a client's proposal, on the eve of trial, to lie in court.¹¹³ In civil cases, as in criminal cases, the lawyer owes the client the benefit of the doubt. But it is well settled that if the lawyer believes or knows that the client intends to lie or if the

¹¹⁰ Schwartz, *Zeni v. Anderson*, 397 Mich. 117, 243 N.W.2d 270 (1976), *supra*, note 88 at 220.

¹¹¹ *Id.*

¹¹² MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. 2.

¹¹³ RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW, 379 (Matthew Bender & Co., Inc. 2d ed. 2002).

lawyer determines that the client's story is clearly untenable in the face of other facts revealed during the lawyer's investigation, the lawyer has a responsibility to counsel the client regarding the inconsistency. If the client persists in the intention to lie, the lawyer should explain the consequences of perjury, including the lawyer's responsibility to remedy perjury by, if necessary, disclosure to the court. If the client still insists on testifying falsely, in a civil case, the lawyer may refuse to offer the testimony, may move to withdraw from the representation, and if required in the jurisdiction, must explain to the court why the withdrawal is necessary. Likewise, if the lawyer reasonably believes that the client proposes to offer the false testimony through a witness, the lawyer may refuse to offer the testimony.

Support for this proposition comes from Model Rule 3.3(a)(3), which prohibits lawyers from knowingly offering false evidence.¹¹⁴ "A lawyer may refuse to offer evidence...that the lawyer reasonably believes is false."¹¹⁵

What if, rather than being apprised of the client's intention to lie beforehand, the lawyer finds that the client has already lied during a proceeding? There, the lawyer must take steps to correct the testimony.¹¹⁶ If the false testimony is offered during a deposition or contained in answers to interrogatories, the lawyer must counsel the client to correct the testimony as quickly as possible after discovering that the testimony is false. If the client refuses to make the correction, the lawyer must notify the tribunal of the false testimony and may move to withdraw from representation. In no way may the lawyer continue the litigation without correcting the lie. In all jurisdictions, continuing to litigate after you discover a falsehood without correcting it will be considered in assessing sanctions.¹¹⁷

Disclosing witness perjury is simple, but does the duty to disclose client perjury to avoid misleading the court conflict with confidentiality and privilege rules? MRPC 1.6, the lawyer confidentiality rule, is subordinate to Model Rule 3.3(c). "The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."¹¹⁸ Even the attorney-client privilege exempts privileged communications from its protection if they are sought or obtained to enable or aid anyone to commit or plan to commit what the client knows to be a fraud. Lawyers may not assist their clients in committing the crime of perjury.

¹¹⁴ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3).

¹¹⁵ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3). ("A lawyer shall not knowingly...offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.")

¹¹⁶ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3).

¹¹⁷ William R. McErlean, *What Do You Do When Your Client Lies?*, LITIG., (1989), (Richard A. Zitrin & Carol M. Langford, *supra* note 113 at 380).

¹¹⁸ MODEL RULES OF PROF'L CONDUCT R. 3.3(c).

The lawyer also has a responsibility under MR 3.3(a) not to make false statements of fact or law to a tribunal and must correct false statements of material fact or law previously made by the lawyer.¹¹⁹ This topic would arise quite naturally in Chapter 2, “Intentional Interference with Person or Property,” where note 1 on page 57 mentions the *Jones v. Clinton* case.¹²⁰ *Jones v. Clinton* is probably the best known contemporary case of possible perjury in the civil context.¹²¹ In a deposition given by President Clinton in the lawsuit brought against him by Paula Jones, he denied having sex with Monica Lewinsky and, in response to a question his own lawyer asked him, verified an earlier statement that Ms. Lewinsky had made in an affidavit that she and Mr. Clinton had not “had a sexual relationship” nor did he “propose” that they have a sexual relationship.¹²² When Ms. Lewinsky later disavowed portions of her own affidavit, President Clinton’s lawyer, Robert Bennett, wrote the court and advised that because some portions of Ms. Lewinsky’s affidavit were misleading and not true, he was advising the court that the affidavit should not be relied upon.¹²³

Does that letter complete Mr. Bennett’s ethical responsibilities pursuant to MRPC 3.3(a) or 3.3(c)?

Answer: No. If the lawyer determines that the lawyer’s client has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, including, if necessary, disclosure to the tribunal. Arguably, the Lewinsky affidavit was not material to the Jones case; however, when the court found President Clinton in contempt, it cited Bennett’s letter to conclude that Clinton’s answer had been just as misleading and not true, as Lewinsky’s affidavit itself.¹²⁴ Because Mr. Bennett had elicited the testimony from Mr. Clinton, he had a responsibility under Model Rule 3.3(a) and (c) to correct the court’s understanding regarding the Lewinsky affidavit, but also, the President’s testimony regarding it.

Adverse Controlling Authority

One of the dilemmas facing the honest lawyer arises from the requirement of Model Rule 3.3 to, for all intents and purposes, plead the opponent’s case. MR 3.3(a)(2) requires the lawyer to disclose controlling authority to the court when the opponent has failed to do so, even when the authority is adverse to the lawyer’s case.¹²⁵ Clearly, one has to be honest with the court, but how does this square with the responsibility to provide loyal, competent representation to the client? Is this not undercutting the client’s case? Are we not supposed to put our

¹¹⁹ MODEL RULES OF PROF’L CONDUCT R. 3.3(a).

¹²⁰ SCHWARTZ, *supra* note 88 at 57.

¹²¹ ZITRIN, *supra* note 113 at 381.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2). (A lawyer shall not knowingly...fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.).

own client's interests first? Students must understand and appreciate that the lawyer's duty to the integrity of the judicial system trumps the duty to the client in this instance. As officers of the court, we cannot allow the court to be misled by incorrect or incomplete information about the law. Examining the practicality of the rule also helps to make this responsibility more palatable. Initially, we have to recognize that nothing lasts forever and that includes, particularly, mistakes in law that a court might make. The law is an ever-evolving public document, freely accessible to every lawyer and every judge. Thus, a decision based upon a mistake in the law will rarely, if ever, stand up to the scrutiny of an appellate review or even a second look by opposing counsel. So in most circumstances, the revelation of the adverse authority is only a matter of time. If this authority is going to break the case, it is better revealed sooner rather than later when significant sums of the client's money will have been spent on fees and costs.

Secondly, the knowing failure to produce such adverse authority ignores an opportunity to do a number of things with it. How much more effective is the lawyer who is prepared to meet adverse authority, able to distinguish it and perhaps render it impotent, than the one who keeps quiet, hoping no one will discover the case, only to be surprised with it later, powerless to argue against it? How much more credibility does the lawyer have who shares even adverse authority than the one who hides it? How much more useful is that credibility when the lawyer is looking for the benefit of the doubt from opponent or judge?

Be sure to note that this rule applies to controlling legal authority only, and not *facts* adverse to the client.

Seeking Ex Parte Relief – Required Disclosures

This would be a good topic to cover when discussing the cases involving nuisance in Chapter 16 of Prosser. Beginning on page 802, a number of cases articulating public and private nuisances could easily accommodate a question about the ethics of how to secure ex parte relief. For example, what if, in *Boomer v. Atlantic Cement Co., Inc.*,¹²⁶ the plaintiff had sought an ex parte temporary restraining order to keep the defendant from emitting dust particles into the air? What would the plaintiff be required to demonstrate to support the restraining order? Certainly, evidence of the smoke and dirt in the neighborhood; maybe some medical records of residents, articulating an increased incidence of asthma and other respiratory ailments; perhaps evidence of deterioration of paint on automobiles parked in the area or paint on the houses nearby. All of these facts, if supported by competent evidence, could conceivably justify a temporary restraining order, and the lawyer for the plaintiff would be expected to provide all of that information to the court. But what if the plant was in the neighborhood first? What if it had made substantial improvements to its smoke and dirt emissions voluntarily? What if there was some other source of pollution in the area, which, arguably, could be the source of the problems confronting the

¹²⁶ SCHWARTZ, *supra* note 88 at 219.

neighbors? All of these facts too, would be material, and under 3.3(d), should arguably be included.

In ex parte proceedings, where the lawyer seeks a temporary restraining order, MRPC 3.3(d) imposes on the lawyer yet another requirement to present not just the lawyer's own client's case but, also, the lawyer must present relevant facts, if any, adverse to the lawyer's client in order to enable the court to make an "informed decision."¹²⁷ Ordinarily, an advocate has the limited responsibility of presenting one side of the matter that a tribunal should consider in reaching a decision; we assume the conflicting position will be presented by the opposing party.¹²⁸ But the lawyer who approaches a judge for ex parte relief has the advantage of no opponent to present the other side and so, in the interests of producing a "substantially just result," the lawyer who is present is required to disclose material facts known to the lawyer, even though adverse, and that the lawyer reasonably believes are necessary to an informed decision. Ethically, it simply is not fair to the absent opponent to disclose only one aspect of the case. Additionally, like the lawyer who allows the court to be misled when an opponent has missed a controlling case, the lawyer who allows the court to be temporarily misled by a one-sided version of the facts impairs the integrity of the judicial system.

The point may also be made that the result of the imposition of this rule is practical, as well. At some point, an opponent will likely come forward with the adverse information. If it was not revealed to the court when the ex parte relief was sought and it is the kind of information that could change the result, expense and time have been wasted on securing the ex parte relief to begin with. Additionally, the long memory of the judge will likely render the lawyer who does not produce the necessary information permanently suspect when it comes to any argument the lawyer makes in the future. Any advantage gained is lost in the end, and the damage inures to more than the existing client.

VI. Conclusion

In seeking suggestions from other Cooley professors for ways to encourage the inclusion of professionalism in their courses, many expressed a preference for structured options that would take no longer than 10-15 minutes of class time and that are tied in to the cases they are already discussing. Many of the same hand-outs, overhead materials, and bibliographic materials we use in Professional Responsibility could be provided as teaching aids. Some professors suggested a CD Rom or Power Point presentation, which could be supplemented with written materials. In our Professional Responsibility classes, we already use a number of clips from movies or television programs to emphasize points. Given the many movies demonstrating inappropriate lawyer behavior, this

¹²⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3(d). ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.").

¹²⁸ MODEL RULES OF PROF'L CONDUCT R. 3.3, cmt. 14.

component of the modules should not be difficult to incorporate. Materials could also be placed on the TWEN¹²⁹ pages that professors devise for each of their classes so that students may access them via the Internet. All agreed that having the materials would be a helpful addition to the treatment of their own materials.

Whether it is termed “infusion” or “pervasion,” there must be a school-wide commitment to teaching professionalism. Cooley has already begun the implementation of this commitment with the Professionalism Plan. With the accomplishment of this step, I believe we will go a long way toward meeting our goal.

Certainly the same obstacles that have plagued the pervasive effort in the past still exist. But the demonstrated commitment of the Cooley faculty, the availability of materials already in existence, and the determination on the part of the Professional Responsibility faculty to consider the time and work constraints of the core curriculum professors in suggesting and devising materials will overcome many of those obstacles, and the result will be more professional lawyers.

¹²⁹ The West Education Network (TWEN) is a service of Westlaw. It is an online “electronic extension of the classroom, integrating academic tools, Westlaw research,” and class-specific discussions lead by the professors. Westlaw Website at <https://lawschool.westlaw.com/shared/signon02.asp?src=twen> (last visited Apr. 4, 2006).