

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

9-1-2000

Bringing the Practice to the Classroom: An Approach to the Professionalism Problem

Steven H. Goldberg

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Legal Education Commons](#), and the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Steven H. Goldberg, Bringing the Practice to the Classroom: An Approach to the Professionalism Problem, 50 J. Legal Educ. 414 (2000), <http://digitalcommons.pace.edu/lawfaculty/79/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Bringing *The Practice* to the Classroom: An Approach to the Professionalism Problem

Steven H. Goldberg

In the 1980s many leaders of the organized bar and a few academic commentators began to complain that the legal profession was in a decade-long process of losing its professionalism.¹ As the dialog grew, there were disagreements about whether anything was lost; if so, what it was; and whether it was worth finding. Nevertheless, concern about the "professionalism problem" has kept the profession in an uproar for close to twenty years.² I doubt that we will see, in our lifetimes, any agreement on defining the problem, much less a solution to it, but three observations seem beyond argument.

- There has been a dramatic diminution over the last twenty years in the time practicing lawyers spend tending to the acculturation of new lawyers into the profession.
- The organized bar has focused on law schools as a primary resource for solving the professionalism problem—however it is defined.
- The faculties responsible for law school curricula have not thought much about professionalism, have not agreed about the existence

Steven H. Goldberg is a professor of law at Pace University.

I am grateful to the students in *The Practice*, whose work and interest have made the course a success, and to David E. Kelley, the writer and producer of the television series *The Practice*, whose knowledge of the legal profession and fidelity to its portrayal made the course possible.

I am a member of the Professionalism Committee of the ABA Section of Legal Education and Admissions to the Bar. The observations, reflections, and opinions in this article are my own and do not necessarily reflect the opinion of the committee or any other of its members.

1. Presidents of the American Bar Association were prominent in the movement. See, e.g., Morris Harrell, Preserving Professionalism, 69 A.B.A. J. 864 (1983); John C. Shepherd, Resolving to Preserve Professionalism in 1985, A.B.A. J., Jan. 1985, at 10; Justin A. Stanley, Professionalism: Everyone's Talking About It, Wis. B. Bull., Dec. 1987, at 28. Academic commentators, though fewer in number, saw the same problem. See, e.g., James R. Elkins, Ethics: Professionalism, Craft, and Failure, 73 Ky. L.J. 937 (1985); Mary Joe Frug, Introduction: The Proposed Revisions of the Code of Professional Responsibility; Solving the Crisis of Professionalism, or Legitimizing the Status Quo? 26 Vill. L. Rev. 1121 (1981).
2. See, e.g., Marc Galanter, Lawyers in the Mist: The Golden Age of Legal Nostalgia, 100 Dick. L. Rev. 549 (1996); Deborah L. Rhode, The Professionalism Problem, 39 Wm. & Mary L. Rev. 283 (1998); William H. Simon, Ethics, Professionalism, and Meaningful Work, 26 Hofstra L. Rev. 445 (1997); Timothy P. Terrell & James H. Wildman, Rethinking "Professionalism," 41 Emory L.J. 403 (1992).

or the nature of the problem when they have thought about it, and would have little idea of what to do if they could agree.

It is not my purpose to quarrel with the organized bar's belief that there is a serious problem or with its hope that law schools can help solve it. Similarly, it is not my intention to excoriate law faculties for relative lack of interest or to blame law schools for failing to implement curative programs. A global response to a cultural shift about which there is so little agreement is probably unattainable. I do hope, by describing a satisfying experience with a professionalism course, to encourage faculty attention to and innovation about courses that might help students understand and contribute to the profession that most of them will enter.

The first section of this article presents a brief history and description of a professionalism movement that continues to urge law schools to do more to solve the "professionalism problem." The second discusses legal education's failure to bring professionalism into the law school curriculum. The third describes the structure and teaching method of *The Practice*—a different kind of course about professionalism—while the fourth discusses the professionalism content of the course. I conclude with a plea for law faculty to direct their considerable talents toward collecting stories and data about the profession and creating material to facilitate law school courses that teach about the profession.

The Professionalism Movement

Discussion of "professionalism," a subject of interest to lawyers almost forever, reached a full-throated crescendo among academic and professional commentators following the 1986 report of the American Bar Association's Commission on Professionalism, . . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*. Books, articles, and symposia were devoted to defining professionalism, arguing that it had been lost, suggesting strategies for its return, and discussing who was responsible for the losing and who should be responsible for the returning.³ A few expressed concerns about the "rekindling of lawyer professionalism,"⁴ but even those who would rain a little on the professionalism parade agreed that the subject should be addressed.⁵ Indeed, it was addressed so much that by 1990 one commentator called for a "professionalism nonproliferation treaty."⁶

3. See, e.g., Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (New York, 1994); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass., 1993); Sol Linowitz (with Martin Mayer), *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (New York, 1994); *The Professional Responsibilities of Professional Schools*, 49 J. Legal Educ. 23 (1999); *A Symposium on Civility and Judicial Ethics in the 1990s*, 28 Val. U. L. Rev. xiii (1994); *Symposium on Legal Ethics*, 7 Notre Dame J.L. Ethics & Pub. Pol'y 1 (1993); *Teaching Legal Ethics: A Symposium*, 41 J. Legal Educ. 1 (1991).
4. See, e.g., Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229 (1995).
5. See, e.g., Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 263 (1995).
6. Monroe Freedman, *A Brief "Professional History"*, Legal Times, Dec. 17, 1990, at 22.

The professionalism movement has become institutionalized within the organized bar. A decade after the report of the Commission on Professionalism, the Professionalism Committee of the ABA's Section of Legal Education and Admissions to the Bar published a report aimed at determining how the organized bar could "better inculcate a higher sense of professionalism among American lawyers."⁷ Professionalism has become a respectable topic of scholarship in the academy, at least among those teaching Professional Responsibility. It gained even wider exposure in the academic community when a PR teacher, Deborah Rhode, served as president of the Association of American Law Schools and set a "professionalism" agenda for the plenary session of the 1999 annual meeting. It is not at all clear, however, that practitioners and academics have the same thing in mind when they talk about professionalism.

Roger C. Cramton illuminated the difference in the approaches of legal practitioners and legal academics, without specifically labeling it as such, in the keynote address to a 1996 symposium on the Professionalism Committee's report.⁸ He described the profession's most often articulated descriptions of professionalism as "false faces." Civility, disdain for commercialism, public or pro bono service, and self-regulation, he contended, "masquerade as the real thing by treating a modest concern as the heart of the subject."⁹ For the practitioners whose bar journal commentaries first raised the professionalism problem, those "modest concerns" were "the heart of the subject." They would save or restore professionalism by an instrumental adjustment in the shape of the profession or the manner of practice in order to address one or another of those "modest concerns."¹⁰

Cramton's more fundamental approach is the kind of critique voiced by most academic commentators. He believes that professionalism as he defines it—"a public profession serving public interests"—is becoming extinct because of a basic philosophical change to a "contemporary professional ideology of total commitment to clients, reinforced by legal subcultures in various domains of litigation and practice."¹¹ No return to sportsmanship,¹² instrumental adjustment in lawyer civility, concern for the bottom line, pro bono activities, or the method of self-regulation will solve the problem. "The exces-

7. Section of Legal Education and Admissions to the Bar, American Bar Association, Report of the Professionalism Committee: Teaching and Learning Professionalism 1 (Chicago, 1996) [hereinafter Professionalism Committee Report].

8. On Giving Meaning to "Professionalism," in Professionalism Committee, Section of Legal Education and Admissions to the Bar, American Bar Association, Teaching and Learning Professionalism, Symposium Proceedings 7, 8 (Chicago, 1997) [hereinafter Symposium Proceedings].

9. *Id.* at 14.

10. See, e.g., Hanna S. Cohn, Professionalism Means Pro Bono Service, N.Y. St. B.J., July-Aug. 1991, at 63; Roland L. Ozark, If It Please the Court, 68 Mich. B.J. 834 (1989); Jeanne S. Miller, Self-Regulation: The Essence of Professionalism, Res Gestae, July 1989, at 33; John W. Kuykendall, The Ten Commandments for Professionalism, 34 N.C. St. B.Q. 24 (1987); Franklyn M. Gimbel, Profit v. Professionalism, Wis. B. Bull., Sept. 1986, at 3; David S. Doty, Professionalism: Formula for Success . . . , Bench & B., Sept. 1984, at 3.

11. Cramton, *supra* note 8, at 19.

12. D. A. Frank, Good Sportsmanship Is the Heart of Professionalism and Our Activities, 52 Tex. B.J. 1021 (1989) (first published in 1939).

sive preference for clients threatens the ideal that the practice of law is a public profession serving public interests."¹³ Nothing short of a return to the "central moral tradition of lawyering" will do.¹⁴

The organized bar continues to look to the legal academy to be a major force in solving the professionalism problem, despite the different perspectives on professionalism and the growing perception of increased separation between legal practitioners and the legal academy.¹⁵ Cramton's more fundamental concern about the loss of professionalism—harking back to a 1958 report of an AALS-ABA special committee¹⁶—is influential, arguably central, to the Professionalism Committee's report.¹⁷ And the report's most elaborate recommendations for attacking the loss of professionalism are in its section on Law School Professionalism Training.¹⁸ Despite the report's apparent reliance on the law schools, there is no consensus about the academy's ability to have a substantial influence. The report itself is ambivalent. It describes an academy disconnected from the profession, decries the lack of practice experience among law school teachers, complains about a "lip service" approach to the pervasive method of instruction in legal ethics and professionalism, and implies that law schools have little interest in professionalism instruction of any kind.¹⁹ Yet it looks to law school as the place of resurrection as it recommends "[e]levating legal ethics and professionalism to the same level as the other major components of the curriculum [and] treating this subject matter with the same seriousness and allocation of faculty and other resources as, for example, the business or commercial law curriculum."²⁰ The hundred or more practitioners, judges, bar association officials, and law teachers attending the 1996 followup symposium on the report reflected the same ambivalence: virtual consensus about the existence of a professionalism problem, and anything but a consensus about the nature of the problem or about what law schools should do to fix it.²¹

Do Law Schools Teach "Professionalism," Whatever It Is?

There are no data or recent surveys available, but my sense of legal education's approach to professionalism in the year 2000 is that not much has changed since the 1996 symposium.

13. Cramton, *supra* note 8, at 19.

14. *Id.* at 24.

15. See, e.g., Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992).

16. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

17. See Professionalism Committee Report, *supra* note 7, at 8.

18. See *id.* at 13–25.

19. *Id.* at 14.

20. *Id.* at 19.

21. See Symposium Proceedings, *supra* note 8. Compare Small Group Break-Out Sessions I and II, Teaching and Learning Professionalism in Law Schools, *id.* at 129–32, with Small Group Break-Out Sessions III and IV, Teaching and Learning Professionalism in the Practice of Law, *id.* at 132–35.

Professionalism remains a label in search of content. With no attempt to resolve which "professionalism" is the subject that law schools should teach, here are some of the suggested "solutions" for the professionalism problem.

- Do more to teach the skills and values needed to be a competent professional.
- Teach less about esoteric theory and more about the kind of doctrinal issues that make up the day-to-day concern of the living law.
- Teach more about what it takes to be a good lawyer and a good person.
- Teach more about the philosophy of the law.
- Teach about how the profession can be changed so the legal system will better serve society.
- Study and teach more about the organization and structure of the legal profession.
- Do more to acquaint students with the life of a lawyer.

The first two are less about teaching professionalism as a course or a body of understanding than they are competing critiques of a perceived general educational gap between the legal academy and the profession. As such, they are beyond the inquiry of this article, though it is worth noting that experiential learning in clinics, externships, and simulation courses has provided some students an opportunity to develop lawyering skills and, to some extent, lawyering values. It is worth noting, as well, that the validity of the critique that the law curriculum has become too esoterically theoretical and pays too little attention to the useful doctrinal base of the law depends upon who is doing the evaluating and at what school.

The five remaining "solutions," though different in approach, have in common that they are specific areas of inquiry, with the last two aimed directly at helping students to anticipate the world they will enter after law school and to understand the life they will lead in that world. Which of the five professionalism "solutions" is attempted in the curricula of American law schools? With very few exceptions, the answer is none of the above. David B. Wilkins contends that this state of affairs is "more than just a pedagogical oversight or a scholarly shortcoming" and characterizes it as "nothing less than an ethical failure by the legal academy."²² One need not accept the ethical characterization to agree with his assessment of the academy's "systematic and pervasive failure to study and to teach about the profession"²³—not exactly the "pervasive" the committee had in mind when it recommended that "the pervasive method of teaching legal ethics and professionalism should be seriously considered by every law school."²⁴

22. The Professional Responsibility of Professional Schools to Study and Teach About the Profession, 49 J. Legal Educ. 76, 76 (1999).

23. *Id.*

24. Professionalism Committee Report, *supra* note 7, at 18.

Professionalism receives hardly a mention in law school courses other than Professional Responsibility. To be sure, professional responsibility instruction has done no better. Despite a sustained professorial lobbying campaign to infuse professional responsibility throughout the curriculum and at least one text designed to facilitate that,²⁵ the pervasive approach is pervasive only in the long list of schools in which professional responsibility remains locked in a single classroom.²⁶ If an already well-defined subject involving rules, laws, and discipline cannot squeeze into a teacher's favorite doctrinal course, what chance has professionalism, a subject without definition, rules, doctrine, or text?

Professionalism, unfortunately, does not do substantially better inside the Professional Responsibility classroom than it does outside. While professionalism and Professional Responsibility both focus on lawyers, professionalism receives only a fleeting glance in a course that after thirty years is still a kind of stepchild with law school faculty and is even less well regarded by law students. As one of my students wrote, "I believe that professionalism is neglected. Generally, it is only addressed in Professional Responsibility, which is treated as a joke class among students here." Most PR teachers will confirm, with regret, that even if students do not think of the course as a "joke," they are uninterested at best, and they hate it at worst. They take PR because it is required, which they resent. It is the course in which they will memorize as much of the Code or the Rules as they think will get them through the Multi-State Professional Responsibility Examination. They resent the MPRE too. The result is a group of students, ranging from discontented to aggravated, who will resist with inattention and silence anything beyond black letter recitation calculated to help them successfully traverse the MPRE.

Encouraging class discussion or interest in the general topic of "legal ethics" as defined by the Code or the Rules is a Herculean task at which only a precious few PR teachers succeed. Is it any wonder that, for the most part, they do not try to overcome the students' grudging, rule-oriented tolerance for the Professional Responsibility course by addressing professionalism, a subject that, irrespective of its focus on lawyers, is disconnected from disciplinary attention to lawyer crime and punishment?

The reluctance of teachers to address professionalism, either because they know their captive PR students will not respond to it or because they are not willing to sacrifice any part of their syllabi in other courses, is not the only impediment to the introduction of professionalism into the curriculum. Most law faculty do not have extensive practice experience. This is particularly important for those approaches to professionalism that focus on the structure of the world students will enter and the lives they will lead in it. Concerns

25. See Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method*, 2d ed. (New York, 1998).

26. For an insightful discussion of the difficulties encountered in persuading teachers to accept the pervasive method of professional responsibility, see an article by the method's leading proponent, Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, *Law & Contemp. Probs.*, Summer/Autumn 1995, at 139, 145-46.

about personal/professional relationships and conduct, or about the problem of squaring the practice of law with personal values, do not have rules or guidelines around which a course syllabus is easily constructed. The combination of faculty practice inexperience and the lack of rules or doctrinal guidelines makes a course in professionalism difficult to produce. One need not agree with the Professionalism Committee's suggestions that the legal academy must hire a "significant number of experienced practitioners" in order to have "excellent role models for students" or agree that "only faculty with extensive practice experience . . . teach the basic and advanced ethics and professionalism courses,"²⁷ to acknowledge that the paucity of law teachers with substantial practice experience has an indirect influence on the failure of law schools to do much with professionalism.²⁸ Law teachers are responsible for academic culture and curriculum. Professionalism, particularly the approach that explores personal values and relationships, is not the normal grist of the law school mill. It does not suggest the analytic rigor, the policy perspective, or the doctrinal analysis that are the core concerns of the legal academy. It is not so much that such a course would not receive approval from a curriculum committee, but rather that there are not many faculty whose experience might cause them to propose it. In the same vein, law teachers create most of the material from which courses grow—casebooks, problem books, texts, and the like. No one has created material with which to structure courses that deal, in large part, with personal/professional relationships and conduct.

Stories of the practice of law that provide a context for student understanding are the indispensable material for addressing professionalism. Ask those often dispirited souls stomping around in the vineyard of law school Professional Responsibility—making more vinegar than wine—and they will tell you that PR classes fail largely because students have no understanding of the context in which the ethical issues arise. The same subject matter and the same issues are red meat for practitioners in continuing legal education courses. Throw out just one good legal ethics hypothetical and practitioners will chew on it for hours. Why are practitioners so interested in something that law students ignore or despise? Context and personal involvement. The practitioners can fill in the spaces of the hypothetical, spaces that students without experience cannot even see. Practitioners understand the subtle human dynamics that make a factual scenario a real-life problem. They can visualize the impact of a suggested theoretical resolution on the lawyer, the client, or the society. Practitioners know that the most difficult and absorbing ethics issues are not those addressed by the Code or the Rules, but those that slip between

27. Professionalism Committee Report, *supra* note 7, at 18.

28. See Thomas D. Morgan, Law Faculty as Role Models, in Symposium Proceedings, *supra* note 8, at 37, 44. Morgan's caution that "faculty members who model qualities of maturity and vision" might be found in others besides those with "extensive practice experience" and his observation, by indirection, that the committee's limitation on the teaching of professional responsibility and professionalism would exclude some of our best teachers and most influential scholars cannot be gainsaid.

the cracks, leaving the lawyer with nothing on which to rely but judgment and a sense of professionalism. It is no accident that in an attempt to breathe life into their law school courses, Professional Responsibility teachers have turned increasingly to videotaped scenarios—war stories of a kind—in hopes of bringing the context into the classroom and, thereby, duplicating in students the practitioners' interest.²⁹ What these teachers hope will make their PR classes more interesting for their students works for teaching about professionalism.

Bringing the Practice into the Classroom

Bringing the practice into the classroom always has been a struggle for legal education. Courses that focus on nondoctrinal or nontheoretical professional preparation have always awakened the law school identity crisis between academy and professional training ground. Clinics, simulations, and externships became standard components of legal education only after years of turmoil over funding, the legitimacy of the experiential pedagogy, and the faculty status of the teachers, many of whom are still not permitted on the tenure track. The skills curriculum can be a wonderful venue in which to examine professional responsibility issues as they come up in the context of practice strategies and tactics, but professional responsibility issues are neither the focus nor the heart of the enterprise. Experiential learning courses, designed to give students opportunities to be lawyers, with occasional forays into professional responsibility, are unlikely to leave much room for the more general, less immediate consideration of professionalism.

The task in teaching professionalism is to bring the practice into the classroom for the sole purpose of sparking the students' interest in professionalism and, inevitably, professional responsibility. War stories and drama are the tools. Though long disparaged as classroom distractions—a kind of educational Gresham's Law, with the "bad" war stories or drama driving out the "good" analysis—war stories and dramatic representations of the practice are what students need if they are to appreciate the issues in the life of a lawyer. The recent academic fascination with Jonathan Harr's *A Civil Action*³⁰ underscores the teaching power of a good story. The book has been used in courses ranging from Alternative Dispute Resolution to Civil Procedure and has spawned both a documentary companion and a video supplement for use in a first-year course.³¹ It is a rich recounting, and such richness is rare.

David E. Kelley's television series, *The Practice*, tells realistic stories about the lawyers in Bobby Donnell's small criminal defense/plaintiff personal injury

29. The most extensive library has been created by Stephen Gillers and is available through New York University School of Law.

30. New York, 1995.

31. See Lewis A. Grossman & Robert G. Vaughn, *A Documentary Companion to A Civil Action* (New York, 1999); Marilyn J. Berger, *Lessons for Woburn: The Untold Stories, A Video Companion to A Civil Action* (New York, 1999).

firm and those lawyers that interact with them.³² Of late it has succumbed to the ratings' cry for caricature, and both the legal arguments and the characters have become unrealistically extreme; but during its first two years it was a well-drawn portrait of complex characters experiencing the pressures, pleasures, fears, and joys of the practice of law.³³ The emphasis on the ethical, moral, and personal issues in the early episodes was so pointed that one reviewer disparaged the series as unworthy television:

On rare occasions we catch a glimpse of someone struggling with a brief, but for the most part—if one were to accept what the scripts of "The Practice" suggest—lawyers spend their days and their nights in hot debate over what is right and wrong. What am I if I do this or that, put on this witness or the other? Am I a good person or a bad person? There's not much danger, of course, of running into lawyers like this in the real world. Still, they can get quite tiresome in "The Practice," which otherwise moves at a nice clip and raises compelling legal questions—inevitably buried, soon thereafter, in the brooding discourses.³⁴

Those "brooding discourses" make the early episodes of *The Practice* the perfect vehicles for thinking about, discussing, and beginning to understand professionalism. The professionalism that I hope students in my course, *The Practice*, will learn about has no more precise definition than acculturation into the practice of law. It was once accomplished after law school with the assistance of older lawyers or by experience in a relatively slow-moving occupation that gave time for reflection and understanding of the public enterprise and the lawyer's responsibility to it. The current size of the profession and the importance of the bottom line, among other factors, have erased those opportunities except in the rarest of circumstances, leaving the acculturation process to happenstance or to the law schools. Neither happenstance nor the law schools have succeeded, if the commentators are correct.

The Practice is my attempt to fill the gap left by the profession. It does not fit the description of any typical law school course. It is a combination of research seminar and clinical externship, presented through a modified simulation method of instruction. A "virtual" experience of practicing law in the classroom with the fictional lawyers of *The Practice* provides the context, the structure, and the issues for a course designed to produce lawyers who will put the lie to the reviewer's snide observation that real-world lawyers are unlikely to give much thought to right and wrong. The students' vicarious professional experience in the public enterprise of law gives them the beginnings of an understanding of what it aspires to, what it fails at, what it does well, what it does for and to clients, what it does for and to lawyers, and how well or poorly

32. Through the generosity of David E. Kelley Productions, I reviewed episodes from the first two years of *The Practice* with an eye to choosing 13 episodes that would present the issues I hoped the students would chew on during the course. I found 28 episodes with a variety of issues of law, ethics, morality, and personal conflicts that in part define the practice of law. I rotate them through the course in different semesters.

33. Michael Asimov, "the practice" May Not Be Perfect, But as a TV Show, It's Darn Close, *Nat'l L.J.*, Nov. 9, 1998, at A22.

34. Dorothy Rabinowitz, TV: A Virtuous Brood, *Wall St. J.*, Nov. 9, 1998, at A21.

it serves society. Practicing and solving problems along with the lawyers in Bobby Donnell's firm has encouraged students to consider topics they might not otherwise touch, pore over law review articles they would not otherwise have read, and conduct professionalism discussions usually beyond the reach of the law school classroom. They are introduced to the course before registration with a description of what they might expect and the amount of work they should anticipate in a course unlike others they have taken:

The Practice is a three-hour course (meeting once a week) designed to provide students with a contextual exploration of the ethical, legal, moral, and personal conflicts in the practice of law. Although the issues cut across the entire profession, in *The Practice* they arise in a small-firm general trial practice with an emphasis in criminal defense work. This discussion class is limited to twelve students. It is aimed at third-year first-semester day students and third-year second-semester evening students. Professional Responsibility is a prerequisite.

Each week students will view an episode of the award-winning television series *The Practice*. The episode will provide the context for the following week's research, reading, and two-hour discussion of ethical, legal, moral, and personal issues. The class will be conducted as a law firm of sorts. Students will research and explore the law and literature about the issues chosen from the last-viewed episode of *The Practice*. The following week, students will discuss from a first-person perspective the issues that arise—the students stepping into the characters' dilemmas or situations and resolving issues with the students' sense of the appropriate legal, ethical, moral, or personal values. The discussion is a free-flowing give-and-take among the students who structure, lead, and are the main participants in the discussion.

The nature of the course makes it hard to quantify the work involved with any precision, but students should anticipate spending between six and nine hours of work outside of class each week. Weekly reading will vary from student to student and from week to week, but will usually consist of something approximating eighty pages of law review, bar journal, manuscript, or popular press material. Each student will keep a weekly journal concerning the readings the student chooses, the class discussions, and the student's personal reflections on the issues discussed. Although journals will be evaluated on quality, not quantity, the material in the course will probably justify six to ten journal pages per week, unless a student has a Lincoln-like ability to capture the entirety of the War Between the States in a two-minute speech. *The Practice* is a professional experience. As in a law firm, there will be no nonemergency absences or tardiness without prior permission. Grading will not be anonymous and will be based upon the *quality* of class participation and the *quality* of the journal.

This extended description of the course and the work is offered because the normal drop/add rules do not apply to *The Practice*. It cannot be taken on an "I'll see what it's like and drop it if I don't like it" basis. There have been in the past more students wanting to enroll than spaces available. It is almost impossible to catch up if a student is not available for the first session of the class. To give students initially shut out of the course the opportunity to enroll when initial enrollees decide to drop, all drops must be completed by 4:00 p.m. of the day before the first class session.

The simulated law firm is an attempt to create a learning environment that will encourage students to step out of their law school lives and into the lives of lawyers. If students are actively engaged and begin to think of themselves as lawyers, they research, discuss, and resolve problems as if the risks and the

consequences will fall to them and to the clients for whom they are fiduciaries. The simulation provides students with an opportunity to begin to develop "a capacity for ethical judgment . . . through practice."³⁵ Because the simulation does not have the real client of the clinic or the performance anxiety of a Trial Advocacy course to sharpen the students' attention, the teacher must pay vigilant attention to the law firm atmosphere and attitude. Little things—such as viewing the episodes together, discussing issues in the first person, conducting the sessions around a conference table—help to make the law firm simulation more like a clinic than like a traditional classroom and *The Practice* more reality than television.

The relatively distortion-free mirror on the practice of law created by the early episodes of *The Practice* is a major factor in making the simulation work. Each episode focuses on one or two major legal or ethical issues (the text), while also presenting the continuing development of the law firm, the growth of the lawyers, and interaction (the subtext) as these complex and believable characters handle realistic cases in a true-to-life court and legal community environment. The personal character development, professional relationships, and dramatically presented human responses to the legal or ethical problems and to the professional environment put the students next to lawyers "in their contextual complexity, making choices . . . layered with events, other actors, internal motivations, feelings and realized consequences of their actions."³⁶

Everything the students do and think about in this simulation course, both professional and personal, is recorded in their journals. They are generally unaccustomed to articulating their personal and moral views in law school classes, most of which are driven by attention to doctrinal evolution or public policy considerations. Early emphasis on the journals as personal diaries, and not just a record of the students' activities as lawyers in the firm, is part of an attempt to convey the message that *The Practice* is as much about the future lawyers in it as it is about the profession they will enter. The journals help to move the course participants from observing students to participating lawyers.

I give the students careful instructions about their journals.

The journal you will create in *The Practice* will be your only written work product for the course. It is your record of your activity in the virtual law firm that constitutes this class. What you choose to put in it—both as to content and volume—is your business. In order that I can appropriately evaluate the journals, however, I ask you to follow the structure set out in this memorandum.

Legal, ethical, moral, or personal issues. We will rarely deal with more than two or three major legal, ethical, moral, or personal issues each week. As to those major issues, please follow this form:

1. State the issue as you want to discuss it—or in alternative fashion if you want to take it on from more than one perspective.

35. Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, in *Symposium Proceedings*, *supra* note 8, at 25, 33.

36. Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 *McGeorge L. Rev.* 1, 2 (1999).

2. Cite the relevant case law, if any, that you considered.
3. Cite the relevant ethics rules or other bar association pronouncements that you considered.
4. Briefly describe how you researched the issue. (Include citations, if any, to interesting-looking laws, rules, articles, or books that you decided not to read.)
5. Citations to the rules, articles, and books that you read.
6. Brief, broad description of the point of the rule, article, or book. (Rarely will be more than a short paragraph.)
7. A summary of those portions of the articles or books that you read that relate to the issue as you have framed it.
8. A resolution discussion of the issue that includes the consequences, both good and bad (from your perspective) of the resolution upon the lawyer, the client, and society at large.

Personal issues. Each episode of *The Practice* will present a number of personal issues that arise from being a member of the legal profession. Describe the occurrence in the episode that raised the issue and discuss its resolution from your personal perspective. (These might be issues such as how partners talk with each other, how you lawyer together, how you deal with opponents, personal relationships with colleagues, etc., or merely personal observations about the practice of law as it relates to what you expect, want, like, dislike, etc.) You may occasionally find interesting articles or portions of books dealing with these subjects. If so, cite them and briefly describe the point of the article or book as it relates to the issue. Be aware, however, that often there will be little to bring to the subject other than your own sensibilities. Be sure you discuss your reasons for the resolution you choose with attention to both the benefits and the costs.

Afterthoughts and personal observations. This section of the journal is for reflecting on anything from the class discussion that changed your mind or modified your opinion about any issue. It is also the place for any thoughts, discussions, or occurrences during the week that help to shape your view of the profession or your prospective place in it.

The Professionalism of The Practice

The direction of discussion is dictated almost entirely by the stories of *The Practice*. The content of the discussion is dictated by the reaction of the students to the stories. My contribution is limited to acting as a senior partner whose only function is, when prodded, to fill in the students' experience gaps. The goal is to give students a virtual practice experience that will help them begin to develop the habit of being concerned for what is right and wrong about what they do and how they do it, along with an understanding that it is rarely easy. The course is aimed neither at cataloging all of the professionalism issues lawyers encounter nor at providing answers to particular issues. It is as much about what lawyers should be and how they get that way as it is about what they should do about any particular problem.

The most persistent theme in *The Practice* is about the roles the system demands of lawyers and the conflicts inevitable in those roles. This "text" focuses on the bigger issues of professionalism, which often implicate law and ethics: the proper bounds of zealous advocacy, the importance of representing unpopular clients, racism in the legal system, jury nullification, grounds for judicial recusal, the influence of plea bargaining, and the like. Though

capable of being discussed in a traditional classroom setting, such issues take on a deeper dimension when they are presented complete with human reaction and consequence. The bundled-plea-bargain episode is an example.

Bobby Donnell is the court-appointed lawyer for a man charged with putting a gun to the head of an eighty-year-old proprietor while robbing her store. She cannot make a positive identification. There is a videotape from the security camera. After losing a motion to suppress the videotape, Donnell tells his client that he should consider a plea. The maximum penalty for armed robbery is life. Donnell tells the client he will try for the best deal he can get and says that six years, which he is not sure he can get, would be a fantastic deal. The client says, "Yeah, for you. You just want to get rid of me and this case." During the ensuing conversation, the defendant shows disdain for court-appointed counsel in general and Donnell in particular. Donnell tells him to get another lawyer if he wants, but so long as he represents him, the defendant gets his full loyalty and attention. The defendant tells Donnell to see what he can get on a plea.

Meanwhile Eugene Young, Donnell's friend and partner, represents a woman being harassed and threatened by the husband she is divorcing. The husband is ordered from the home, but despite repeated efforts Young cannot get a protective order. The husband breaks into the house and begins to throw things around. The thirteen-year-old son shoots the father with an arrow and kills him.

The prosecutor on Donnell's armed robbery case is the same prosecutor who has the charging decision on Young's thirteen-year-old. Young asks Donnell, who has a particularly good relationship with the prosecutor, to persuade the prosecutor not to charge the boy. Donnell agrees. When he raises the charging issue, the prosecutor says let's talk about the two cases, the armed robber and the boy, together. Donnell protests that it would be improper. The prosecutor says, "You're right. We'll deal with them one at a time. Let's do the armed robber first." It is clear to Donnell that the prosecutor will not charge the boy if Donnell will stop pushing for six years and persuade the armed robbery defendant to agree to ten years. Donnell believes he could work the prosecutor down to six years on the robbery if she did not now have the leverage provided by his interest in the thirteen-year-old's case. He believes, also, that he can persuade the armed robbery defendant to take the ten.

What should Donnell do? The students' discussion is always rich in consideration of the ethical boundaries, the importance of the moral compass of the lawyer, the influence of personal relationships, and the real tensions that exist when the problem is not a law school hypothetical, but a real-world experience in which real people will sustain real consequences. The discussion almost always opens with one of the students citing Standard 4-6.2 of the ABA Standards for Criminal Justice, The Defense Function, and its admonition: "Defense counsel should not seek concession favorable to one client by any agreement which is detrimental to the legitimate interests of a client in another case." Discussion of the standard, its rationale, and its status as a guideline, is usually followed by one of the students suggesting that Donnell's representation of the thirteen-year-old is a Model Rule 1.7(b) conflict that

could result in discipline. Sometimes a student will raise the possibility that the prosecutor's bundling suggestion creates a firm conflict under Model Rule 1.10, requiring either Donnell or Young, or both, to withdraw. The conflict issue invariably segues into discussion of the inherent conflict in a plea bargaining system that involves consistently repeating players. After the various avenues for conforming to what the students believe is required by the Rules, the discussion turns, invariably, to what should be done. Despite the Defense Standard guideline and the disciplinary caution of the conflict rules, every student who has taken the course, save one, has chosen to stay in the case and persuade the armed robber to take the ten years. They know the decision is "ethically" wrong under the Rules, but they believe, almost unanimously, that it is the right thing to do given all of the human circumstances. The contextual reality that pushes the result cannot be communicated in the usual spoken, or even written, law school hypothetical.

The human talents and circumstances the students see in the story—the talents and circumstances of which they will be aware in their own practices—drive the result. They see that the thirteen-year-old being traumatized is a good boy who was protecting his mother, albeit with the unreasonable belief that she was in mortal danger from a husband who is a jerk (at least). They know that the armed robber is a despicable scumbag, guilty of many things worse than the robbery. They know, by the history in court and the interaction between Bobby and the prosecutor, and by the work they have seen of some court-appointed counsel, that the ten years Bobby will get for the armed robber is still a good deal under the circumstances and almost certainly better than what another lawyer would do. They feel the responsibility that Eugene Young feels for the failure of the system and for his part in not finding a way to protect the mother from the father's harassment. They understand the bond between Donnell and Young that is far greater than a relationship between law partners. And they appreciate that talking the armed robber into ten years, instead of the six that he might otherwise receive, goes against everything that Donnell believes about providing the best representation to people usually chewed up in the system because they are poorly represented.

The decision by the student-lawyers about what they should do in the bundled-pleas problem is almost always unanimous and always tortured. They are never happy, but they invariably decide to do what Donnell did. They hold their noses, make the deal, and then feel professional shame afterwards. The professionalism lesson, of course, is not about discovering the unquestionably right thing to do, but rather about understanding that the human experience of the practice of law often makes it difficult to decide what is right. One student made this journal observation of frustration and insight: "I guess that I was hoping to have found some magic solution to the problems associated with plea bargaining. Not having one makes me disappointed with the criminal justice system. I cannot believe that it places attorneys in such a difficult place with no way out."

Though its value in presenting the big issues is significant, the stories of *The Practice* are a truly rare and valuable vehicle for addressing the smaller issues of professionalism. There is no good way to address the topics of personal/

professional relationships and conduct—topics for which there are no legal or ethical guidelines—except through richly told stories. Even the overarching life issue of squaring the practice of law with personal values is difficult to address meaningfully without a context in which to consider it. These smaller issues of professionalism are the subtext of *The Practice*. They range from the professionally consequential (Is the practice of law so engulfing that the lawyer must sacrifice personal and family interests on the altar of serving clients?) to the personally day-to-day: Is it okay to date a colleague? An opponent?

In many respects, the smaller professionalism issues are the most fascinating for students—eye-opening questions of first impression that the students understand may shape and texture their professional lives. But they can present a trap for the teacher, to whom both the questions and the answers may seem too obvious for comment. The teacher must constantly be aware, as in the first week of a first-year course, of how little the students know—in this instance, about how law is practiced. Even third-year students—many with law firm work experience—are initially amazed at actions as run-of-the-mill as one lawyer interrupting another, a judge betraying a bias or scolding a lawyer, a lawyer preparing a closing argument out loud, a client conveying to the lawyer an intention to testify falsely, a client who will not pay the bill, big-firm corporate lawyers viewing small-firm trial lawyers with condescension, tensions among lawyers in a firm, and small and not-so-small discourtesies during discovery depositions. The smaller professional questions fill the student journals and dominate class discussion during the latter part of the semester. Questions range from the professional (How do I speak to a judge who is being unfair to my client?) to the personal: How do I tell my boss not to reprimand me in a public place? Some are practice-specific: How does a lawyer ethically prepare a witness to say things persuasively without unethically telling the witness what to say? How does the lawyer who attracted the client to the firm move the file to another lawyer and still keep the client happy? Others are general: How will I know if I'm competent to do . . . ? What do I do if I don't like the client? Still others plumb the depths of the students' personal values: How does a lawyer counsel a person the lawyer believes innocent to take a generous plea bargain rather than try a bad case and risk a long sentence? How can a lawyer use a constitutional "technicality" to free an obviously guilty client? Because the questions are asked in the context of compelling stories, general solutions offered can be tested against an immediate reality—even if the reality is fiction.

The Law School Mission: More Stories for Students, More Study for the Profession

Most observers believe that starting in the early 1970s the legal profession began a rapid transition, from a profession of mostly solo practitioners and small firms serving as counselors to mostly individual and small corporate clients, into a profession of megafirm technocrat barracudas serving mega-clients. The change, it has been suggested, is responsible for a loss of lawyer

autonomy³⁷ and is so cataclysmic that failure to study it and teach our students about it rises to the level of an ethical failure.³⁸ The evolution of the profession may be a bit overdrawn and the import of the law schools' failure to study and teach about it a bit overstated, but there can be no doubt about the direction of the profession or about the law schools' current failure to deal with it.

The Practice is a wonderful vehicle for introducing students to professionalism, even though it focuses on a small criminal law/personal injury firm. Most of the bigger professionalism issues presented, such as the boundaries of zealous advocacy, cut across the profession. Even the criminal-law-specific examples, such as jury nullification, raise the conflict between fidelity to client and obligation to the procedures and institutions of the law that Cramton believes is at the heart of the professionalism problem. All of the smaller professionalism issues are as applicable to large-firm transactional practice as they are to Bobby Donnell's practice and will be as applicable to the profession of the future as they are to that of the past. Being a part of *The Practice* world for a semester gives students an appreciation that as lawyers they will be influenced by many pressures, only some of which are written into or contemplated by the Rules of Professional Responsibility. Reacting as lawyers to fully drawn stories provides the beginning of an understanding that maintenance of the law as a noble public profession requires lawyers who are habitually aware, curious, and concerned for the consequences of their actions on their clients, the legal system, the society, and themselves.

But there are many other stories our students should hear in law school—stories that will give them the opportunity to learn other lessons of the profession in the more reflective environment of the academy. The positive student response to the simple and the sophisticated lessons of *The Practice*, in spite of its heavy workload, demonstrates their hunger for information and their willingness to put in the effort to get it. The diversity of practice that students are contemplating and the rate of change in the profession are reason enough for the legal academy to respond to the profession's call to teach about that profession for which we are preparing most of our students.

While the profession is right to insist that the academy take professionalism more seriously, it might be yet another example of the truth that you should be careful what you ask for—you might get it. The professionalism addressed in the law schools is unlikely to be a prescriptive list of appropriate manners and proper attitudes or a call for another Code of Civility. We need to tell our students more realistic stories about the profession—its heroes as well as its villains, its contributions to society as well as the damage it inflicts, its professional aspirations as well as its economic reality, and then encourage them to critique and improve what they see. We need to describe in its rich detail the practice on Wall Street and the practice on Main Street and let our students make their choices. They need to understand the horrendous hours of work

37. See, e.g., Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *Case W. Res. L. Rev.* 531, 611 (1994).

38. See Wilkins, *supra* note 22, at 76.

and poor chances of partnership that accompany the big-money offer from the major firms, just as they must understand the failure rate for those who hang out a shingle right after law school.

It is impossible to overstate the importance of finding and creating course material that will help law teachers with little practice experience effectively raise and discuss professionalism issues with law students who approach the subject with no understanding or, worse, a misunderstanding of the context. Carrie Menkel-Meadow has observed, "For those of us who teach, the images that students bring to their educations, formed in the crucible of media-watching and educational and recreational reading, are the 'texts' against which we teach."³⁹ We need to turn that around, to digest the popular material available and create from it the text "from which," not "against which," we teach. Where there is no handy material such as *The Practice* to be found, we need to create it.

David Wilkins has made the case for fieldwork, data collection, interviews, and empirical work in the profession.⁴⁰ But we need more than the information. Professionalism, ultimately, is no more or less than acculturation into a group with enough in common so its members can identify themselves and each other by what they do and how they do it. We need to create realistic stories, based in the reality of the information we gather and the practice we observe, that will help our students to step into and reflect upon the world we study.

39. Menkel-Meadow, *supra* note 36, at 3.

40. See generally Wilkins, *supra* note 22.