

Teaching Professionalism

by Patrick E. Longan *

I. INTRODUCTION

In *Work and Integrity*, William Sullivan posits that all professional schools must train their students in “three apprenticeships.”¹ The first apprenticeship is intellectual; it develops the knowledge base and the habits of the mind that the profession deems most important for the practitioner to possess.² The second equips the student with the set of skills that will be necessary for translating the intellectual training into effective action in practice.³ The third inculcates the student with the values and ideals of the profession.⁴ To master the complex tasks we expect of professionals, and to use that mastery in ways that are

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1. WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 207-16 (2d ed. 2005).

2. *Id.* at 208.

3. *Id.*

4. *Id.* at 208-09.

consistent with the profession's purpose, professional schools must integrate all three apprenticeships into their programs.⁵

The first two apprenticeships are familiar to legal educators. Regarding the first, aspiring attorneys at one time obtained their intellectual training by "reading law" under the supervision of practicing lawyers.⁶ That endeavor, however, long ago moved to the university setting. Doctrinal courses give students a fundamental grounding in various fields of law. These courses (especially in the first year) also help students develop the habits of mind that practitioners need. By reading cases and discussing them with the professor, students learn how to engage in common law reasoning and otherwise to "think like a lawyer."

The second apprenticeship also moved into the law school setting, although much more recently. Lawyering skills at one time were learned on the job, but eventually those in the profession began to urge the law schools to better prepare students for the things they would need to do in practice.⁷ The clinical legal education movement of the 1970s was one reaction to this entreaty. After the MacCrate Report⁸ of the early 1990s, law schools made even greater efforts to include skills training of various sorts in their curricula. The president of the Association of American Law Schools recently included increased skills training as one of the top ten major changes in legal education in the last twenty-five years.⁹ More clinics, improved legal writing courses, simulation courses, and a wider variety of externship opportunities are all intended to equip students with skills they can put into practice from their first day on the job.

This leaves the third apprenticeship. Traditionally, education about the values and ideals of the legal profession came, like intellectual and skills training once did, from actual apprenticeship.¹⁰ Older lawyers would help younger lawyers learn what it meant to be a professional

5. *Id.* at 207-08.

6. Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117, 118 (2001).

7. *Id.*

8. AM. BAR ASS'N, SECTION ON LEGAL EDUCATION & ADMISSIONS TO THE BAR, *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* (1992) [hereinafter *The MacCrate Report*].

9. N. William Hines, *Ten Major Changes in Legal Education Over the Past 25 Years*, AALS NEWS, Nov. 2005, at 2, available at http://www.aals.org/services_newsletter_pres_Aug05.php.

10. Sullivan & Podgor, *supra* note 6, at 136.

through examples and one-on-one instruction.¹¹ The profession's willingness or ability to provide this third apprenticeship, however, has waned.¹² The economic pressures of law practice, especially the billable hour, have made mentoring activities too expensive to happen naturally as often as they once did.¹³ Lawyers who did not receive such mentoring in turn find it more difficult to provide it.¹⁴ Unsurprisingly, the profession has looked to the law schools to provide what it cannot or will not. To some extent, training in the values of the profession has been around since the post-Watergate era, when law schools were required to provide instruction on the rules of conduct. Many schools have expanded this training to include courses on the "Law of Lawyering." These courses include not only the rules of conduct but also other ways, such as civil and criminal liability, in which lawyers' professional responsibilities are enforced.

Yet this training has not been enough. The American Bar Association has twice in the recent past explicitly called for *professionalism* education in law schools.¹⁵ The ABA Standards for Approval of Law Schools require instruction not just in the "rules and responsibilities" of lawyers but also in the "history, goals, structure, [and] values" of the profession.¹⁶ Law schools have responded to the call for professionalism education in a variety of ways. These responses have included, among other activities, orientations on professionalism, distinguished guest speakers, practitioner involvement in classes, mandatory mentoring, public service requirements, integration of skills courses and values

11. *Id.*

12. *Id.* at 118. Barry Sullivan and Ellen Podgor have written that the traditional view that the teaching of professionalism should be left "mainly to the practicing bar and the bench . . . has been overtaken by events." *Id.* Among other events, they point to the "increased size and diversity of the legal profession," the "increased specialization and diversity of law practice," and "pressures created both by the economics of private law practice and by fiscal constraints placed on public law offices." *Id.* Professors Sullivan and Podgor conclude that "the teaching of professionalism is critical to the health of the legal profession and the society it serves." *Id.* at 151.

13. See MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* 27-28 (1994).

14. See *id.*

15. See AM. BAR ASS'N, COMM'N ON PROFESSIONALISM, ". . . *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*" 16-19 (1986) [hereinafter *ABA Blueprint*]; AM. BAR ASS'N, SECTION ON LEGAL EDUC. & ADMISSION TO THE BAR, *Teaching and Learning Professionalism* 13-25 (1996) [hereinafter *Teaching and Learning Professionalism*].

16. AM. BAR ASS'N, SECTION ON LEGAL EDUCATION & ADMISSION TO THE BAR, STANDARDS FOR APPROVAL OF LAW SCHOOLS 302(a)(5) (2008-09), available at <http://www.abanet.org/legaled/standards/20082009StandardsWebContent/Chapter%203.pdf>.

training, and other programs.¹⁷ Legal education has responded, and is continuing to respond, to the need for law schools to introduce law students to the third apprenticeship.

Two recent comprehensive reports on legal education have again called for law schools to address questions of professionalism.¹⁸ In *Educating Lawyers: Preparation for the Profession of Law*, a study conducted for the Carnegie Foundation for the Advancement of Teaching, William Sullivan and his co-authors, Judith Wegner, Anne Colby, Lloyd Bond, and Lee Shulman, write that “in a time when many raise questions about the legitimacy of the legal profession in both general and specific terms, professionalism needs to become more explicit and better diffused throughout legal [education].”¹⁹ Similarly, Professor Roy Stuckey of the University of South Carolina writes in his recent *Best Practices for Legal Education* that “legal educators should take leadership roles in making professionalism instruction a central part of law school instruction.”²⁰ Now more than ever, law schools need to consider how they can fulfill this need to provide more and better instruction about professionalism.

This Article is about one law school’s efforts to teach professionalism. In the spring semester of 2004, the Walter F. George School of Law of Mercer University (Mercer) began to require all of its first-year students to take a three-credit, graded course on the Legal Profession in addition

17. See *Teaching and Learning Professionalism*, *supra* note 15, at 39-59 (describing programs as they existed in 1996). For a more up-to-date listing, consult the web site of the Nelson Mullins Riley & Scarborough Center on Professionalism at the University of South Carolina Law School, <http://professionalism.law.sc.edu>. Even more recent information has been collected by Professor Clark Cunningham of the Georgia State University College of Law in connection with the National Award for Innovation and Excellence in Teaching Professionalism. Professor Cunningham has collected and made available all of the applications for the award. Award information can be viewed at <http://law.gsu.edu/ccunningham/Professionalism/Award-Home.htm>. See also AM. BAR ASS’N, STANDING COMM. ON PROFESSIONALISM OF THE ABA, *Report on a Survey of Law School Professionalism Programs* (2006), available at http://www.abanet.org/cpr/reports/LawSchool_ProfSurvey.pdf. One particular course that shares some goals and methodologies with what Mercer is doing is the “Legal Profession” course at the Indiana University-Bloomington, Maurer School of Law. To see a description of that course, visit <http://apps.law.indiana.edu/degrees/courses/lookup.asp?course=258>. Another program that deserves particular mention is described by Neil Hamilton & Lisa Montpetit Babbit, *Fostering Professionalism through Mentoring*, 57 J. LEGAL EDUC. 102 (2007).

18. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007); ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007), available at http://law.sc.edu/faculty/stuckey/best_practices/best_practices-full.pdf.

19. SULLIVAN ET AL., *supra* note 18, at 14.

20. STUCKEY ET AL., *supra* note 18, at 29.

to the third-year Law of Lawyering course.²¹ It is important at the outset to note that the course is less about what lawyers should do and more about who they should *become* as professionals.²² In other words, the course is about the formation of professional identity. The course seeks to equip students with the information they need to choose what kind of lawyer they will become and inspire them to make choices that will enable them best to serve their clients, fulfill their public responsibilities, and find deep meaning in their work.²³ The notion of helping students form their professional identities has received much deserved attention in recent years, and our course is just one of the steps that law schools have tried.²⁴

In the past five years, we have experimented with a variety of techniques and covered a variety of subject matter in an attempt to fulfill the need for students to be introduced to their professional responsibilities at an early stage in their legal educations. This Article will describe the course in its present form and discuss our experiences with it. The first part of the Article covers the classroom component. The second part concerns several elements of the course that take place outside the traditional classroom and also briefly discusses assessment.

21. The Carnegie Report is critical in general of addressing deficiencies in legal education by an “additive approach,” one that simply adds a course to the curriculum in response to a perceived need. SULLIVAN ET AL., *supra* note 18, at 58. The Legal Profession course is admittedly additive. We use it, however, to introduce students to issues of professionalism in the hope that it will facilitate later discussions and reflections. Our Law and Public Service Program, for example, explicitly builds on the lessons of the Legal Profession course while the students are participating in practicums and clinics. For more information on that program, visit <http://www.law.mercer.edu/academics/service>. The Carnegie Report endorses this approach of giving the students a basis in the first year and then cultivating this “base soil” throughout the three years. SULLIVAN ET AL., *supra* note 18, at 154.

22. I am indebted to Jack Sammons for the simple but profound notion of what the course should be about. The idea for teaching this course at Mercer originated with Professor Sammons, and that is how he described the purpose of the course in the five-year plan that first proposed it. Five Year Plan (on file with the Author).

23. One of the readings the students usually do in our course is Anthony T. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835 (1987). Dean Kronman expresses this point about professional identity:

To live *in* the law, rather than *off* it, is to submit to its discipline and to accept its ideals. Among these ideals is the attainment . . . of good judgment or practical wisdom. To possess good judgment, however, is not merely to possess great learning or intelligence, but to be a person of a certain sort, to have a certain character, as well.

Id. at 873 (internal citations omitted).

24. The formation of professional identity is a central theme of the Carnegie Report. See SULLIVAN ET AL., *supra* note 18.

William Sullivan's metaphor of the three apprenticeships is a powerful device for thinking about professional education. As the third apprenticeship for law students joins the first two already established in the law school setting, law teachers need to learn from each other about effective ways to provide it. Mercer's experiences with the Legal Profession course may be instructive for other schools that are considering how to ensure that law students receive the exposure they need to what professionalism means for lawyers.

II. THE LEGAL PROFESSION COURSE: CLASSROOM LESSONS

The Legal Profession course is in the required first-year curriculum because we believe it is essential for students to acquire some understanding of professionalism at the outset of their legal education.²⁵ The course covers four lessons in a traditional classroom format, each of which is described in detail below. First, students learn what professionalism means for lawyers and why it is important. This training gives the students a vocabulary and a structure for discussing and analyzing issues of professionalism as they arise in later courses, summer jobs, and their first places of employment after law school. Second, they learn about the pressures, economic and otherwise, that might lead lawyers to engage in unprofessional conduct. This knowledge girds the students to meet the challenges that await them. Third, students learn how the expectations of professionalism are promoted and enforced. This instruction prepares them to become responsible members of a self-regulating profession, and it alerts them to gaps in the profession's ability to enforce professionalism. Finally, students begin to understand the connection between professionalism and their own personal senses of fulfillment as lawyers. As they enter a profession that has too many unhappy members, the students need to know that there is a relationship between what the profession asks of them and the satisfaction they will derive as lawyers. These are explicit lessons, and they can and should be taught overtly.

A. *Lesson One: What Professionalism Means and Why it Matters*

At their orientations, most law students will be urged to conduct themselves with professionalism. They will have no idea what this means. Oddly, many of the speakers who deliver this message also will

25. The Carnegie Report agrees that instruction relating to professional identity and purpose in the first year is "essential." SULLIVAN ET AL., *supra* note 18, at 154. However, the Report also stresses that discussion of these issues should continue throughout law school. *Id.*

not be able to give a precise meaning of what they mean by professionalism. Their presentations, though well-intentioned, often have an “I know it when I see it” quality. Professionalism, as generally defined, means simply the set of qualities that are characteristic of a particular profession.²⁶ For lawyers, the word has an aspirational quality as well as a descriptive one. Lawyers and law students are exhorted to act with something called professionalism in the hope that certain qualities will remain, or become, characteristic of the legal profession. The word itself, however, does not convey what those qualities are or what they should be. That requires deeper analysis.

There has been no shortage of attention to the expectations that the legal profession has for its members.²⁷ The American Bar Association’s Model Rules of Professional Conduct are in part an expression of those expectations.²⁸ Since the mid-1980s, dozens of courts and bar associations have issued codes of conduct or civility that are intended to put in writing with greater detail what lawyers should and should not be doing.²⁹ The ABA’s two major reports on professionalism each discuss the meaning of professionalism.³⁰ From these sources it is possible to develop a definition of lawyer professionalism that students can learn, remember, and apply as they go on their way. In other words, it is possible to set forth precisely the qualities that are, or should be, characteristic of members of the legal profession. Professionalism instruction for law students must begin with these sources.³¹

1. Defining Lawyer Professionalism for Students. The Legal Profession course begins with a series of classes in which professionalism for lawyers is given a specific definition. The first difficulty is how to

26. THE OXFORD ENGLISH DICTIONARY 574 (2d ed., vol. XII 1989).

27. For another definition of professionalism derived from these same sources and others, see Neil Hamilton, *Professionalism Clearly Defined*, PROF’L LAW., vol. 18, no. 4, at 1 (2008).

28. See generally MODEL RULES OF PROF’L CONDUCT (2007).

29. Many of these are collected on the web site of the American Bar Association Center for Professional Responsibility, <http://www.abanet.org/cpr/professionalism/profcodes.html>.

30. See *ABA Blueprint*, *supra* note 15, at 10-11; *Teaching and Learning Professionalism*, *supra* note 15, at 5-7.

31. I start the students with a quotation from Karl Llewellyn: “Ideals without technique are a mess. But technique without ideals is a menace.” Karl Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935). The purpose of beginning this way is to help the students see the connection between this course and their other courses, where in one form or another they are learning the “techniques” of lawyers. Technique is necessary but not sufficient. The ideals, or traditions, of the profession also matter. For more on Karl Llewellyn’s views on professionalism, see GLENDON, *supra* note 13, at 17.

approach first-year students who may not yet have a clear idea what lawyers do. Students will understand some of the requirements of lawyer professionalism more readily if they first think about what they expect from physicians.³² Few students have engaged the services of a lawyer, but almost all will have been treated by doctors.

First, patients expect their doctors to have specialized knowledge and skill. In other words, they expect their doctors to be competent. Second, patients expect their doctors to act in the patients' best interests. Patients are at a disadvantage when they deal with their doctors because they have to rely on the doctors to know more than they do. Patients also usually come to the doctor at times of illness or injury, which are often times of vulnerability. The combination of the doctor's superior knowledge and the patient's vulnerability makes it possible for the doctor to take advantage of the patient—by ordering unnecessary and expensive tests, for example—but the patient relies on the doctor to resist that temptation.

Third, we expect doctors to care for the sick and injured, at least in emergency situations, without regard to the patient's ability to pay. In other words, we expect doctors to render services when they are needed. A related and broader point is that we expect doctors to bear some responsibility for organizing medical care in such a way that the sick and injured have access to the help they need. What we expect of doctors is clear from our common experience, and the medical profession itself confirms the legitimacy of these expectations.³³

Lawyer professionalism includes these same components. Clients go to lawyers for help that requires special expertise. Lawyers, like doctors, must be competent. Competence for lawyers means, in particular, having the knowledge, skill, diligence, and judgment necessary to assist the client.³⁴ The need for such help often arises because of crises that

32. In some years, we have also talked about analogies between the work of lawyers and the work of clergy. These discussions about what professions can learn from each other have led us to a series of extraordinarily fruitful conferences and other discussions among faculty members from Mercer's Schools of Law, Medicine, Theology, Nursing, Education, Business, and Liberal Arts, with participation from distinguished guests such as William Sullivan and William May. The materials generated by this report on Mercer University's *Professionalism and Vocation Across the Professions Project* are on file with the Author and will soon be available for others. Pending their publication, anyone who is interested in them should contact the Author at longan_p@law.mercer.edu or Professor Mark Jones at jones_ml@law.mercer.edu.

33. See Am. Coll. of Physicians, *Medical Professionalism in the New Millennium: A Physician Charter*, 136 ANNLS INTERNAL MED. 243-46 (2002), available at <http://www.annals.org/cgi/content/full/136/3/243>.

34. MODEL RULES OF PROF'L CONDUCT R. 1.1. "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill,

make the clients vulnerable. The clients may have been injured, they may be getting divorced, or they may have been accused of a crime. That vulnerability, combined with the lawyer's expertise, puts clients at the mercy of their lawyers in ways that are analogous to the relationship between the doctor and patient. We expect lawyers not to exploit the opportunity to take advantage of clients. We expect them to be faithful to their client's interests—to demonstrate fidelity to the client.³⁵

Furthermore, there are circumstances in which we expect lawyers to provide service regardless of the client's ability to pay. Like doctors, we expect lawyers to be of service and to try to maximize access to their professional services for people who cannot afford them.³⁶ "Justice for

thoroughness and preparation reasonably necessary for the representation." *Id.* In 1986, the ABA defined professionalism in part by the expectation "[t]hat its practice requires substantial intellectual training and the use of complex judgments." *ABA Blueprint, supra* note 15, at 10. Ten years later, the ABA listed the following as "[e]ssential characteristics of the professional lawyer": "[l]earned knowledge," "[s]kill in applying the applicable law to the factual context," "[t]horoughness of preparation," and "[p]ractical and prudential wisdom." *Teaching and Learning Professionalism, supra* note 15, at 6-7. Justice O'Connor may have said it best when she wrote that "[o]perating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts. This training is one element of what we mean when we refer to the law as a 'learned profession.'" *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 489 (1988) (O'Connor, J., dissenting). By this definition, I do not mean to exclude parts of competence, other than knowledge of the law and familiar legal skills, that are often ignored. Cultural competence and emotional intelligence are examples of components of lawyer competence that deserve greater attention. See Melissa L. Breger, Gina M. Calabrese & Theresa A. Hughes, *Teaching Professionalism in Context: Insights from Students, Clients, Adversaries, and Judges*, 55 S.C. L. REV. 303, 314 (2003) (discussing cultural competence). Regarding emotional intelligence, see DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* (1997).

35. Requirements of fidelity pervade the rules on conflicts of interest. See MODEL RULES OF PROF'L CONDUCT R. 1.7-1.12. The *ABA Blueprint*, in discussing the meaning of professionalism, states "[t]hat since clients cannot adequately evaluate the quality of the service, they must trust those they consult" and that "the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good." *ABA Blueprint, supra* note 15, at 10. The ABA later included among the supportive elements of professionalism the "[s]ubordination of personal interests and viewpoints to the interests of clients and the public good." *Teaching and Learning Professionalism, supra* note 15, at 7. Justice O'Connor's articulation of the need for this element of professionalism is that the lawyer's specialized knowledge "by its nature cannot be made generally available, and it therefore confers the power and the temptation to manipulate the system of justice for one's own ends," including "abuse of the client for the lawyer's benefit." *Shapiro*, 486 U.S. at 489 (O'Connor, J., dissenting).

36. See MODEL RULES OF PROF'L CONDUCT R. 6.1 (stating every lawyer should aspire to render fifty hours of pro bono service per year). In the *ABA Blueprint* and in *Teaching and Learning Professionalism*, the ABA uses Roscoe Pound's definition of a profession, which includes the pursuit of "a learned art . . . in the spirit of public service." *ABA*

All” is a platitude, but it captures a popular expectation for our legal system. These first three components of lawyer professionalism—competence, fidelity to the client, and service—emerge easily from a comparison between doctors and lawyers.

The other two components of lawyer professionalism are unique to lawyers and consequently will require more explanation for first-year students. One can be introduced easily by showing or describing a scene from the classic movie, *Anatomy of a Murder*.³⁷ Lawyer Paul Biegler is counseling his client, Lt. Frederic Manion, about how a murder defendant can defeat the charge. In the course of describing the law of homicide, Biegler arguably coaches his client into a lie that could exonerate him.³⁸ In one sense, coaching the client to lie surely may help the client and hence seem at first glance to be consistent with professionalism as defined thus far. The students should intuitively suspect, however, that professionalism does not include an expectation that an attorney will suborn perjury. One can easily expand the example to include not just suborning perjury but also the destruction or creation of evidence, or the bribing or intimidation of witnesses or jurors.³⁹ In conventional parlance, we have to recognize that lawyers have some obligations as “officers of the court” that must supercede their duties of fidelity to the client.⁴⁰ The point is actually broader than the expectations we have for lawyers as advocates. Imagine circumstances, such as the manipulations that led to the downfall of Enron, in which a lawyer’s knowledge and skill could be used to violate the law in profitable ways. We expect lawyers to refuse to give such assistance.⁴¹ The general point that emerges from these examples is that part of

Blueprint, *supra* note 15, at 10; *Teaching and Learning Professionalism*, *supra* note 15, at 6. The latter document adds that one of the essential characteristics of a learned profession is “[c]lost-effective legal services.” *Teaching and Learning Professionalism*, *supra* note 15, at 7.

37. ANATOMY OF A MURDER (Columbia Pictures 1959).

38. *Id.*

39. Model Rules of Professional Conduct 3.1–3.8 are specific examples of restrictions and responsibilities that we place on lawyers to uphold the integrity of the adversary process. See MODEL RULES OF PROF’L CONDUCT RS. 3.1-3.8. Justice O’Connor has described one temptation that flows from the lawyer’s specialized training as “overly zealous representation of the client’s interests; abuse of the discovery process is one example.” *Shapero*, 486 U.S. at 489 (O’Connor, J., dissenting).

40. Roscoe Pound made this point over a century ago. See Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 738-39 (1906).

41. See MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (stating that “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”).

lawyer professionalism is fidelity to the law and its institutions, even at the cost of client advantage.⁴²

The fifth and final component of lawyer professionalism is civility. It is the one that many students will find the most difficult to appreciate, and it is one that is not part of the definition of professionalism for other professions; for example, doctors do not operate on patients while another doctor tries to slap the scalpel away. Lawyers practice under circumstances in which they are expected to cooperate with lawyers whose interests and efforts are in direct opposition to theirs. To appreciate at least part of what we mean by civility, the students can watch or read about one of the examples of incivility in the career of the famous Texas lawyer, Joe Jamail. In one video excerpt available on YouTube, Jamail calls a witness a “dumb son of a bitch” and invites the witness to fight, among other things.⁴³ In another published exchange, Jamail insults a fellow lawyer by telling him, among other things, that he “could gag a maggot off a meat wagon.”⁴⁴ With these shocking counterexamples in mind, students will see that part of both what we practice and should expect of lawyers is civility towards one another, even when lawyers are adversaries.⁴⁵ This aspect of professionalism appears in numerous codes of conduct and professionalism.⁴⁶

This first part of their instruction will leave the students with a vocabulary and a structure that they did not have before. Lawyer professionalism requires that a lawyer act with competence, fidelity to the client, fidelity to the law and its institutions, and civility. It also requires the lawyer to render service to those who cannot afford to pay for it and, more generally, to act to ensure access to legal services for all. This structure gives students more than the vague generalities about practicing with professionalism that they heard during orientation. By itself, however, the structure will not be enough to begin the process of ensuring that students will adopt these values as part of their professional identities. The students next must understand why compliance

42. In *Teaching and Learning Professionalism*, the ABA included among its essential characteristics of a professional lawyer “[z]ealous and diligent representation of clients’ interests within the bounds of [the] law.” *Teaching and Learning Professionalism*, *supra* note 15, at 7.

43. <http://www.youtube.com> (search and select hyperlink “texas style deposition”).

44. *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 54 (Del. 1994).

45. For other examples of incivility, see Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH. L. REV. 3 (2002).

46. See, e.g., AM. BAR ASS’N, SECTION OF LITIG., GUIDELINES FOR CONDUCT, available at <http://www.abanet.org/litigation/conductguidelines/>. See also *Teaching and Learning Professionalism*, *supra* note 15, at 7 (noting that one of the essential characteristics of a professional lawyer is “appropriate deportment and civility”).

with professionalism matters so much—both to individual clients and society. They need to care about professionalism as well as understand it. That is the next step in the Legal Profession course.

2. Why Professionalism Matters. All aspects of lawyer professionalism are important to individual clients and to society. Start with competence. The importance of competence to the individual client is obvious. The need for expert assistance is, after all, what led the client to seek a lawyer in the first place. An incompetent lawyer at best will do the client no good; at worst, he will make matters worse.

The importance of lawyer competence to society is only slightly less intuitive. A good example from recent experience would be to suppose that Terry Schiavo and her husband go to see a lawyer to do some advance planning. A competent lawyer would recommend that each sign a will, a power of attorney, a living will, and a health care surrogate designation. If the Schiavos go to an incompetent lawyer who does not know the importance of the living will or the health care surrogate, they might leave the office without them. The significance of these documents will become clear only when Mrs. Schiavo becomes disabled. The courts will have to intervene—at great cost in time, expense, and strife—into a situation that could have been resolved quietly, cheaply, and privately. The cause of that intervention (in this hypothetical) is that the lawyer was incompetent. The lawyer's incompetence thereby harmed the clients and the public. The actual *Schiavo*⁴⁷ case is a vivid example of the kind of trouble that a competent lawyer can help to avoid.

The Schiavo example shows how a lawyer with an office practice can impose costs on others by not anticipating and preventing future disputes. The point also applies to litigators. The simple truth is that an incompetent lawyer can lose a client's case, and the client may, as a result, lose his money, his freedom, or even his life. Incompetent representation in court also slows down the working of our judicial system and imposes costs on the public (through increased court involvement and delay), on adversaries, and on others who must wait their turn for judicial attention. It undermines faith in the judicial process and thereby invites people to seek other, possibly more destructive, ways of resolving their disputes.⁴⁸ Incompetence in and out of court exacts a private and a public cost.

47. *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1261 (11th Cir. 2005).

48. On the importance of faith in the judicial process, see generally Patrick E. Longan, *Civil Trial Reform and the Appearance of Fairness*, 79 MARQ. L. REV. 295 (1995).

Lack of fidelity to the client also matters because of the harm it can cause—specifically to one client and more generally to society. Lawyers can be unfaithful to clients in many ways. Primary ways include charging clients more than they should and selling out client interests to help themselves or other clients. In each case, clients suffer obvious harm. Infidelity to client interest affects the rest of society as well, once it is known or perceived to be common. There is another apt analogy to medicine. If you do not trust your doctor, you stay home and self-medicate. If you do not trust your lawyer, you either ignore problems that need attention or you tend to them in your own amateur way. Either decision poses risks to the rest of us. If you ignore a legal problem, such as by never making a will, you open the door to preventable disputes later. The public must clean up the mess by having the courts resolve them. If mistrust of lawyers leads you to represent yourself by documenting a transaction with forms downloaded off the internet, then you risk that the documentation will be ambiguous or otherwise inappropriate. When the documentation begins to unravel, it again becomes a public problem, especially if you compound the difficulties by representing yourself in court. Fidelity to the client matters because it serves the individual client best, and it promotes trust in lawyers, which in turn can prevent future disputes and ease the resolution of the disputes that do occur.

A lawyer's fidelity to the law and its institutions might seem at first to be contrary to a client's interests. Some clients undoubtedly want to take actions that would constitute fraud, either on others or on a court. However, a lawyer who refuses to assist these activities actually serves the client well, for at least two reasons. First, many of these clients want to take these actions without the knowledge that they are illegal. Lawyers are experts in the boundaries of the law, and most clients surely want to conform their conduct to the law. The lawyer who counsels a client about a proposed course of action helps the client do so. For the minority of clients who know the boundaries and still want to exceed them, the lawyer can protect them from themselves by advising them on the potential consequences or at least by raising the cost of noncompliance by refusing to help. Most clients are well served by lawyers who refuse to help them violate the law.⁴⁹

Society also benefits when lawyers act with fidelity to the law and its institutions. Society has an interest in seeing its laws obeyed. The cheapest way to achieve compliance is through voluntary obedience.

49. Although Model Rule of Professional Conduct 1.2(d) forbids a lawyer to assist with a crime or fraud, it does permit a lawyer to "discuss the legal consequences of any proposed course of conduct with a client." MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

Lawyers help achieve voluntary obedience when they counsel their clients about the boundaries of the law and refuse to exceed those boundaries. Clients who are dissuaded from violating the law will not need the coercive mechanisms of public law enforcement to adjust their behavior. In a sense, lawyers become the first line of law compliance when they fulfill their duty of fidelity to the law and its institutions. In a more particular sense, lawyers who refuse to violate the rules of the court protect the integrity of the judicial system. Cheating is a form of corruption, and a system that is or is seen to be corrupt will not command the respect or the obedience of the public. The legitimacy of the judicial system depends upon people believing in it and abiding by its results. A corrupt system in which no one believes invites self-help. One type of self-help is violence. Fidelity to the law and its institutions benefits society by encouraging voluntary compliance with the law and by preserving the legitimacy of the judicial process.

Civility matters to clients in ways that may not be readily apparent. In fact, advertisements of lawyers indicate that perhaps some clients prefer lawyers who promise or imply that they will be uncivil to their adversaries.⁵⁰ Incivility, however, is an expensive strategy, in part because it begets more incivility. Lawyers who cannot cooperate will need the court's intervention to resolve even the smallest of disagreements, such as where to hold a deposition.⁵¹ Clients who pay lawyers by the hour to fight about matters that should be resolved by agreement are not well served. Furthermore, some clients suffer when their lawyer's behavior brings about retaliatory incivility. Some clients are not good candidates for Rambo litigation. For the sake of their money, and sometimes for the sake of their psychological well-being, clients benefit when lawyers comply with the expectation of civility.

Civility matters to the public because of what incivility does to the judicial system. First, the petty disputes that incivility generates will slow down the progress not just of that case but of every other case that waits behind it. Second, incivility makes life miserable for every lawyer who does not derive independent satisfaction from nastiness. Rampant

50. One law firm in Florida advertised itself as "pitbull lawyers" and used a logo of a pitbull wearing a spiked collar. It is hard to imagine a more uncivil metaphor for legal representation than a pitbull. This marketing approach, and its relationship to professionalism, is discussed in more detail later in this Article. For background on the dispute, see the website of Pape & Chandler, P.A., <http://www.papeandchandler.com/newsite/floridabar.html>.

51. For example, one United States District Court Judge ordered two lawyers to resolve such a disagreement by playing a "game of 'rock, paper, scissors'" on the steps of a federal courthouse. See *Avista Mgmt., Inc. v. Wausau Underwriters Ins. Co.*, No. 6:05-CV-1430ORL31JGG, 2006 WL 1562246, at *1 (M.D. Fla. June 6, 2006).

incivility will tend to drive out of litigation everyone who detests incivility. In the long run, nobody will be left to litigate except uncivil lawyers. The result will be litigation that takes longer and is more expensive than it otherwise would be. Those are public costs, and civility helps to minimize them.

The private and public benefits of pro bono service by lawyers should be readily apparent. The poor person who needs a lawyer's help with an eviction notice, a restraining order, or a habeas petition benefits directly from the lawyer's services. More generally, people in need of lawyers benefit when lawyers regulate themselves in ways that promote inexpensive access to legal services. Society also benefits. Lawyers who help the poor navigate through administrative or judicial proceedings make those proceedings more efficient and legitimate. They legitimize these processes as means of resolving disputes and thereby discourage self-help in resolving them. When the delivery of legal services is organized in ways that promote access, lawyers can help avoid disputes that will be costly for society to resolve. Service, including ensuring access, matters to individual clients and to the broader society.

Once students have a firm grasp on what professionalism means and why it matters both to individual clients and to society, they know much more about what that orientation speaker was talking about. They also have the beginnings of a resolve to abide by these principles. However, that resolve, as desirable as it is, may be naïve. Students probably will not realize how hard it will be to live up to these principles. The students need to understand the ways in which the economic structure and the culture of practice can make lawyers less able or less inclined to abide by the important principles about which they have just learned. The next step in the Legal Profession course is an examination of the pressures on professionalism that flow from how law practice is changing and from the various environments in which lawyers work.

B. Lesson Two: Challenges to Professionalism

Bar leaders, judges, and other lawyers spend time talking about professionalism partly because of its importance but also because of the forces that lead lawyers away from its values. The students need to know both about the general trends that raise challenges to professionalism and the specific challenges in particular types of organizations.

1. General Trends in Professionalism. Some general trends in the legal profession have affected professionalism. They include the exponential increase in the number of lawyers in the last forty years and

the rampant commercialism that seems to permeate society generally.⁵² The increased tendency toward specialization has also taken a toll.

The expansion in the size of the profession has caused what William Sullivan calls a “desperate scramble for livelihood.”⁵³ If the profession is more competitive than it once was, and if society generally values commercial success more than it once did, then lawyers may be led to violate their professional obligations in a variety of ways. For example, financial pressure or greed may lead a lawyer to “work a file” to make sure that a matter is not disposed of before enough money is made. Such behavior violates the lawyer’s duty of fidelity to the client.⁵⁴ Pro bono work by definition is not profitable, and there may be no time for it in a financially strapped practice. The legal profession generally may resist any reforms that affect the bottom line. The temptation to “cut corners” in litigation to get or keep well-heeled clients will be greater, and the tendency to treat opposing counsel rudely will flow both from the more frenzied nature of practice and from the desire to pander to a fickle client’s baser instincts. The need for fidelity to the court and civility thus may be ignored. In all these ways, increased commercialism and the expansion of the legal profession both raise difficult challenges for professionalism.⁵⁵

The expansion has had another effect as well: the creation of a “lost generation” of lawyers. The third apprenticeship of values and ideals at one time was passed from one generation to the next by senior lawyers who served as mentors.⁵⁶ Although that still happens to some extent today, the disproportionate number of younger lawyers, at least for a generation, makes it difficult to have meaningful mentor relationships. Once such a chain is broken, it is difficult to fix it. A lawyer who has matured without the guidance of a mentor, especially in frenzied times of excess commercialism, is unlikely to recognize the need to mentor younger lawyers or have the desire to do so.⁵⁷ One primary reason why older lawyers mentor younger lawyers is out of a sense of gratitude for

52. See Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. Rev. 229, 233 n.7 (2004) (providing statistics to demonstrate how the profession has grown); see also Sullivan & Podgor, *supra* note 6, at 118 n.2.

53. SULLIVAN, *supra* note 1, at 6. For some statistics to demonstrate how the profession has grown, see Easton, *supra* note 52, at 234 n.7. See also Sullivan & Podgor, *supra* note 6, at 118 n.2.

54. See MODEL RULES OF PROF'L CONDUCT R. 1.5(a)(1) (one of the factors that makes a fee reasonable is the time and labor *required*, not just the time and labor actually expended).

55. See Easton, *supra* note 52.

56. Sullivan & Podgor, *supra* note 6, at 136.

57. See GLENDON, *supra* note 13, at 27-28.

the mentoring they received when they were young. A lawyer who never got it never gives it. Even if they do respond to the exhortations of the bar to act as a mentor, these lawyers are unlikely to pass along the right lessons to the next generation because they never learned them. This lost generation is another reason why it is so important to teach law students about professionalism.

Another general trend threatening the profession that students must recognize is specialization. Lawyers have become more specialized as the law itself has become more complex. Specialization has subtle effects on the professionalism of lawyers. In the specialist's narrow field of expertise, concentration makes the lawyer more competent, but as the saying goes, you make a knife sharper by narrowing it. Something is lost in that process if it is a general trend. One important aspect of competence for a lawyer is the ability to act as a wise counselor for a client who presents a complex problem. The provision of good judgment, or practical wisdom as it is sometimes called, becomes harder as lawyers become more specialized.⁵⁸ A stratified bar is less likely to produce lawyers who are capable of this kind of competence. Each specialist will see the problem through the prism of his or her narrow specialty, and each will be able to propose solutions only in his or her narrow field. Specialization thus is a two-edged sword: it makes lawyers more technically competent but less able to exercise broad practical judgment.

Each of these general trends makes professionalism more difficult to obtain. The inability or disinclination of contemporary lawyers to live up to the values of professionalism, however, comes not only from such trends but also from the ways in which legal practice is organized.

2. Challenges in Specific Types of Practices. To survey the different types of settings in which lawyers work, Legal Profession students have read the stories about different practice areas in Michael J. Kelly's *Lives of Lawyers*.⁵⁹ Kelly's chapters explore the pressures on lawyers in five different practice settings: a large firm, a middle-sized firm, an in-house legal department, a government agency, and a small litigation firm.⁶⁰ They also provide the students an inside look at lives that they might lead as lawyers, a peek that students understandably

58. We have had the students read an excellent short article to understand what is meant by "practical wisdom." That article is Barry Schwartz & Kenneth E. Sharpe, *Practical Wisdom: Aristotle Meets Positive Psychology*, 7 *J. HAPPINESS STUD.* 377 (2006).

59. MICHAEL J. KELLY, *LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE* (1996) [hereinafter *LIVES OF LAWYERS*]. Dean Kelly has recently published a follow-up book. MICHAEL J. KELLY, *LIVES OF LAWYERS REVISITED* (2007).

60. See *LIVES OF LAWYERS*, *supra* note 59.

crave.⁶¹ Most students do not come to law school with a broad understanding of the structure of the legal profession. Whether it comes from reading *Lives of Lawyers* or elsewhere, that background is necessary if the students are to be able to see the challenges that lawyers face in living up to the values of professionalism on a day-to-day basis.

A good example of the type of discussion that illustrates how professionalism can be challenged in practice is to take a close look at the economic structure and culture of a big firm. In *Lives of Lawyers*, the large firm of McKinnon, Moreland & Fox (a real firm with a fictitious name) is trying to play “in the big leagues.”⁶² Through one set of eyes, life at McKinnon, Moreland & Fox is attractive. The firm does high-quality, challenging work for clients who demand—and are able and willing to pay for—the best legal representation, and the lawyers are compensated well.⁶³ Once the students are equipped with the understanding of professionalism and its importance, however, they are able to recognize the pressures at such a firm that run counter to professionalism.

Start with competence and fidelity to the client. Although every lawyer at McKinnon, Moreland & Fox must be highly competent to remain employed, there is an exacerbated tendency toward specialization.⁶⁴ Young lawyers who are hired at exorbitant starting salaries can begin to repay those salaries with billable work only by focusing narrowly on a specific type of task. There is too much economic pressure to take the time to develop lawyers with broad-based understandings of different areas of the law and different businesses. In that sense, competence as practical wisdom suffers even as competence as technical capacity flourishes. Something important is lost in the rush to profitability.⁶⁵

The economic pressures also tempt lawyers to act in their own interest rather than in the interest of their clients. Among the important factors that drive the profitability of firms like McKinnon, Moreland & Fox is the number of billable hours the lawyers work. When bonuses and

61. Interestingly, a thirty-year-old casebook began the same way, with excerpted articles about different practice settings. See VERN COUNTRYMAN & TED FINMAN, *THE LAWYER IN MODERN SOCIETY* 1-46 (1966). Law school generally does not provide enough opportunity for students to envision their futures. Deborah Rhode has written that “[m]any students launch their legal careers with little understanding of what lawyers actually do and how the demands of practice are likely to affect their lives.” DEBORAH RHODE, *IN THE INTEREST OF JUSTICE: REFORMING THE LEGAL PROFESSION* 27 (2000).

62. See *LIVES OF LAWYERS*, *supra* note 59, at 25-52.

63. See *id.* at 27.

64. See *id.* at 32.

65. See GLENDON, *supra* note 13, at 29.

partnership potential are tied to the number of hours billed, and especially when the expectations become inhuman, the temptation to cheat is very strong. Lawyers will have reasons to do unnecessary work, to double-bill, or even bill for work that was never done at all.⁶⁶ All of these practices violate the lawyer's professional duty of fidelity to the client, but the students see that living up to that virtue takes great character and discipline in the face of these economic pressures.⁶⁷

The big firm presents other professionalism challenges as well. Pro bono service is a duty of professionalism,⁶⁸ but if it does not count toward the required billable hours for the year, the big firm lawyer will have every incentive to shirk his or her duty. The question of fidelity to the court in a big firm can be a subtle one. There is some incentive firm-wide to safeguard the reputation of the firm for fair play and not to put it in danger for any one client. However, decisions like these are made by individual lawyers in the trenches, and often these lawyers are rewarded handsomely for their connection to the business of a particular client. To be the "client lawyer" in the firm's accounting system can be lucrative. That lawyer's economic interest is narrower than the firm's if the question presented is whether to cheat for that client. Keeping that one client happy, even at the quiet risk of embarrassing the entire firm, is all too often an economic gamble worth taking. Finally, civility may be less of a problem in big firms than it once was, if only because clients have become sophisticated about the costs of such representation. Nevertheless, civility may take a back seat if the lead lawyer perceives the need to please a particularly important and obstreperous client by copping the right attitude.⁶⁹

Other practice settings present other challenges to professionalism. In-house lawyers may feel pressure to assist their employers in unlawful activities because of the lawyer's economic dependence on the one client.⁷⁰ Lawyers in public service may find it difficult to exercise fidelity to the client when they perceive that their long-term interests

66. For a description of this temptation in practice see Easton, *supra* note 52, at 258.

67. To help the students understand why any lawyer would be tempted to cheat on their billable hours, I walk them through the billable hour exercise made available by the Yale Law School Career Development Office, available at http://www.law.yale.edu/documents/pdf/CDO_Public/cdo-billable_hour.pdf. It gives the students a realistic picture of what their lives will look like when they try honestly to meet billable hour targets.

68. MODEL RULES OF PROF'L CONDUCT R. 6.1.

69. See generally LIVES OF LAWYERS, *supra* note 59.

70. See LIVES OF LAWYERS, *supra* note 59, at 85-115 (describing the situation of in-house lawyers for a large development company); see also Balla v. Gambro, 584 N.E.2d 104 (Ill. 1991) (discussing an in-house lawyer who was fired for reporting a company's plan to sell defective dialysis machines).

will be better served working for the entities they are regulating.⁷¹ Conversely, a fervent prosecutor may be tempted to violate his or her duty of fidelity to the court because of the desire to win—and thereby protect the public—at all costs. A lawyer who is practicing in service to a cause may be tempted to sacrifice a client's interests in the name of the cause, thereby violating the duty of fidelity to the client.⁷² Lawyers in high-volume, low-margin practices have economic incentives to turn a blind eye to complexities in matters they are handling on modest flat fees.⁷³ Pressures on professionalism are everywhere.

The students look at each practice setting through their new prism of understanding about professionalism. In each, they discover that there are economic and cultural pressures on lawyers to violate one or more of the values of professionalism. They learn what professionalism means and how important it is, but they also learn that lawyers commonly feel pressures to violate these important principles.

In our experience, students do not like this part of the course. They learn things that they did not know before and that they wish were not true.⁷⁴ Some blame the messenger. Others have had parents call the Dean to complain about the “negativity” of the course. We make no apologies for exposing them to the hard truth that living up to the value of professionalism sometimes will be difficult. The student reaction, however, has highlighted the need to help the students realize that, despite these pressures, it is still possible to live a life in the law of

71. See LIVES OF LAWYERS, *supra* note 59, at 117-44.

72. Justice Harlan described such a possibility in a case involving the right of the National Association for the Advancement of Colored People (NAACP) to solicit parents for school desegregation litigation:

But in a particular litigation, it is not impossible that after authorizing action in his behalf, a Negro parent, concerned that a continued frontal attack could result in schools closed for years, might prefer to wait with his fellows a longer time for good-faith efforts by the local school board than is permitted by the centrally determined policy of the NAACP. Or he might see a greater prospect of success through discussions with local school authorities than through the litigation deemed necessary by the Association. The parent, of course, is free to withdraw his authorization, but as his lawyer, retained and paid by petitioner and subject to its directions on matters of policy, able to advise the parent with that undivided allegiance that is the hallmark of the attorney-client relation? I am afraid not.

Nat'l Ass'n for the Advancement of Colored People v. Button, 371 U.S. 415, 462 (1963) (Harlan, J., dissenting).

73. See LIVES OF LAWYERS, *supra* note 59, at 25-52.

74. One reading I have had the students do in some years but not all is Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999). The students find this article to be particularly distressing, perhaps because it reaffirms many of the disturbing things they learn in class.

which they can be proud and in which they will be happy. The efforts we have undertaken in this regard are described below.

The next logical lesson in the students' professionalism education is to examine how professionalism is enforced and promoted. The students need to begin to understand that professionalism, as important as it is, cannot be assured by rules, regulations, punishments, or other forces that are external to the lawyer. Professionalism is rather a question of personal identity and individual choice. It fails unless individual lawyers choose to make its values part of who they are. That lesson emerges first indirectly, from an examination of the limits of external enforcement.

C. Lesson Three: The Inherently Incomplete Enforcement of Professionalism

Most courses that touch on professionalism focus almost exclusively on enforcement. Many deal just with the Model Rules of Professional Conduct. Others also cover malpractice, ineffective assistance of counsel, and other remedies. Students will see the various means of enforcement of professionalism differently when they approach them with a specific understanding of what professionalism means, why it matters, and how it is challenged. They should approach this lesson with some uneasiness, looking to make sure that these important values will be upheld despite the pressures against them. Although part of this lesson is simply an introduction to these various means of enforcement, its primary purpose is to exacerbate the unease: it turns out that there are enormous gaps in the regulatory and punitive enforcement of the values of professionalism. This part of the course looks much like other law school courses, with class discussions that focus on cases and other materials in a leading casebook on professional responsibility.⁷⁵ The Legal Profession course starts with economic issues, including fees, pro bono service, and the organization of practice. Regulation of competence and character follow, with a final unit devoted to special problems of the advocate and fidelity to the court.

1. Professionalism, Money, and Access to Legal Services. The economics of practice present some of the most common issues of professionalism. They include fees, pro bono service, unauthorized practice of law, the delivery of legal services, and advertising. All of

75. In our Legal Profession course, we have used Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (7th ed. 2005) (1985). We use this text for the third-year Law of Lawyering class and have found it to be a rich enough resource to fulfill the purposes of both courses. Other popular casebooks may also be able to do so.

these issues relate to professionalism and illustrate the inevitability of some gaps in enforcement.

Everybody understands money, and most law students believe correctly that being paid for the services that they render will be important to them. They will know from previous discussions that charging an excessive fee is a violation of the lawyer's duty of fidelity to the client. They may take some initial comfort from the existence of Model Rule of Professional Conduct 1.5,⁷⁶ which requires lawyers to charge no more than a reasonable fee.⁷⁷ They need to hear about Webster Hubbell's conversation with his wife. Mr. Hubbell, who did prison time for overcharging clients, was asked by his wife whether it was true that he overcharged them. His reply was that he did and so did every other lawyer in the country.⁷⁸ That shocking statement requires a closer look at fees and fidelity to the client.

The students will already have seen the pressure that lawyers are under to meet billable hour quotas, and they will be able to appreciate the temptation to over bill. Clients, of course, will have great difficulty in detecting over billing. Most clients do not know what work is appropriate or how long it should take. Lawyers, therefore, are in a position to take advantage of clients unless somebody else is watching. The only people in a realistic position to detect over billing, however, are other lawyers in the firm. The students are interested to learn that the Model Rules of Professional Conduct contain a provision that requires lawyers to report other lawyers for serious misconduct.⁷⁹ The students may initially conclude that the rule should be all that is necessary. Because the tempted lawyer knows that other lawyers in the firm will be required to report him, the lawyer will be disinclined to cheat clients on their fees. A professionalism problem is met with an apparently reliable enforcement mechanism. The students will accordingly be dismayed to learn how rarely this rule has been enforced.⁸⁰ Given that

76. MODEL RULES OF PROF'L CONDUCT R. 1.5.

77. *Id.*

78. This exchange is quoted in RHODE, *supra* note 61, at 171.

79. See MODEL RULES OF PROF'L CONDUCT R. 8.3(a) (providing that "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority").

80. The one famous counterexample is *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). *Himmel* is famous because there are so few cases in which a lawyer is disciplined for not reporting a fellow lawyer. The point could also be made by pointing to variations on Model Rule 8.3 such as Georgia Rule of Professional Conduct 8.3, which states that lawyers "should" report other lawyers but explicitly provides that "[t]here is no disciplinary penalty for a violation of this Rule." GA. RULES OF PROF'L CONDUCT R. 8.3 (2007).

rarity, and the natural reluctance to report a colleague (which students who are bound to an honor code will readily understand), there is an obvious gap in the enforcement of the rule against over billing. This gap turns out to be the first of many.

Regulation of pro bono service raises further questions about enforcement. One can usefully start from the proposition that there is a huge gap between the need for legal services to people of limited means and the supply of such services.⁸¹ Despite the professional expectation that lawyers will do pro bono work, the statistics indicate that few actually do so.⁸² Enforcement of that obligation could of course come from a rule that mandated a certain number of pro bono hours, as was proposed years ago in New York.⁸³ Yet no state has instituted mandatory pro bono service. Lawyers remain free to choose to do pro bono service or not to do it, even though such service is an integral part of professionalism. No external enforcement mechanism forces lawyers to fulfill this expectation.

Another way to close the gap between supply and demand, of course, would be to increase the supply of those rendering legal services by allowing people with a modest amount of legal training to render simple legal services, much like a nurse practitioner can be a cheaper but often adequate substitute for a medical doctor. Another option would be to permit large organizations like Wal-Mart to hire lawyers to provide inexpensive legal services for their customers. These possibilities open the discussion of professionalism and service beyond pro bono and raise some fundamental questions about access to legal services and self-regulation by the bar. If lawyers will not require other lawyers to close the gap through mandatory pro bono, then what is to be done?⁸⁴

The central idea here is that part of professionalism is regulating the profession for the benefit of the public rather than for the benefit of lawyers. That commitment is part of the "service" component of legal professionalism. Yet the bar has resisted efforts to allow nonlawyers to provide some services for which fully trained and fully licensed lawyers may not be necessary.⁸⁵ In Georgia, for example, nonlawyers may not oversee the closing of real estate transactions.⁸⁶ To prevent the

81. See DEBORAH RHODE, ACCESS TO JUSTICE 3 (2004).

82. *Id.* at 17.

83. See FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (1990), reprinted in 19 HOFSTRA L. REV. 755, 768 (1991).

84. For background on the structure of the market for legal services, I usually have the students read Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531 (1994).

85. See MODEL RULES OF PROF'L CONDUCT R. 5.5.

86. *In re UPL Advisory Opinion 2003-2*, 277 Ga. 472, 473, 588 S.E.2d 741, 742 (2003).

possibility of multidisciplinary practices from arising, the ABA has repeatedly disapproved of the administering of legal services by for-profit entities owned by nonlawyers.⁸⁷ The courts and the bar have legitimate professionalism concerns relating to lay participation in the provision of legal services.⁸⁸ Lay people may not have the competence that is needed. Lay control of lawyers might lead lawyers to violate their duties of fidelity to clients. The fact, however, is that the combination of inaction on pro bono and vigorous enforcement of the profession's monopoly on legal services has allowed the gap between supply and demand to remain.⁸⁹ Service and ensuring access are part of professionalism too, yet these values are not enforced in any meaningful way.

The students also take a look at the ways in which lawyers market themselves. Many lawyers of a certain age trace the decline in professionalism to the decision of the United States Supreme Court in *Bates v. Arizona*.⁹⁰ That decision was by its own terms a decision about professionalism,⁹¹ and it makes for interesting reading with the benefit of thirty years of experience and thought about lawyer professionalism and the marketing of legal services. At one extreme, advertising promotes access to legal services by making it easier to find a lawyer and by driving down prices.⁹² At the other extreme, it is clear that face-to-face solicitation of potential clients is fraught with the possibility of violating the duty of fidelity to the client.⁹³ The Model Rules of Professional Conduct are consistent with these basic notions of professionalism, as advertising generally is permitted but solicitation is not.⁹⁴ The truly provocative discussions of marketing relate to the effects that some of the more colorful advertising might have on the values of professionalism. For example, Pape & Chandler, a law firm in

87. See ABA Center for Professional Responsibility: Multi-Disciplinary Practice, <http://www.abanet.org/cpr/mdp/home.html> (providing background on the multi-disciplinary practice debate and ABA actions regarding multi-disciplinary practice).

88. See *id.*; see also MODEL RULES OF PROF'L CONDUCT R. 5.5.

89. See generally CRAMTON, *supra* note 84.

90. 433 U.S. 350 (1977).

91. See *id.* at 368-72.

92. *Id.* at 370.

93. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (holding that a bar association could ban face-to-face solicitation).

94. Compare MODEL RULES OF PROF'L CONDUCT R. 7.2(a) ("Subject to the requirements of [Model] Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media") with MODEL RULES OF PROF'L CONDUCT R. 7.3 ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain [with some limited exceptions]").

Florida specializing in representing motorcycle riders, advertised itself as the “pitbull” law firm and used a corresponding phone number and web address.⁹⁵ The advertisement marketed malevolence, which in professionalism terms means that it sought to sell incivility. The Florida Bar disciplined these lawyers,⁹⁶ but the comments to the Model Rules of Professional Conduct indicate that under the Model Rules, the firm should have been left alone despite the unprofessional message.⁹⁷ The public marketing of incivility would go unpunished.⁹⁸ This example demonstrates another gap between the enforcement regime and the values of professionalism.

In each of these areas—regulation of fees, pro bono service, the delivery of legal services, and advertising—the means of enforcement of professionalism either come up short in order to serve other values or they are still evolving. The pattern continues in the regulation of competence and character in the legal profession.

2. Regulation of Competence and Character. As already described, lawyer professionalism requires a lawyer to be competent.⁹⁹ Other aspects of professionalism, especially fidelity to the client, require lawyers to have a particular character, one that is capable of resisting temptation and of putting the interests of others first. Students should know how competence and character are regulated and where this regulation is likely to fall short.

Bar admission provides a first screening mechanism. As noted above, competence for a lawyer includes knowledge, skill, diligence, and judgment. The bar exam typically includes multiple choice questions, essay questions, and some exercise in “lawyering,” such as writing a memorandum based upon a closed set of materials.¹⁰⁰ Multiple choice tests can survey an applicant’s knowledge of the basic branches of law.

95. See Pape & Chandler, P.A., <http://www.papeandchandler.com/newsite/floridabar.html> (providing background on the dispute with the Florida Bar).

96. *Id.*

97. See MODEL RULES OF PROF’L CONDUCT R. 7.2 cmt. 3 (stating “Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment”). Ironically, the only way under the Model Rules to discipline Pape & Chandler for its advertising might have been to prove that in fact they were quite civil and therefore the advertising was misleading under Model Rule 7.1; see MODEL RULES OF PROF’L CONDUCT R. 7.1.

98. For an argument that bar authorities have gone too far in regulating advertising, such as that used by Pape & Chandler, see Rodney A. Smolla, *Lawyer Advertising and the Dignity of the Profession*, 59 ARK. L. REV. 437 (2006).

99. MODEL RULES OF PROF’L CONDUCT R. 1.1.

100. See, e.g., Georgia Board of Bar Examiners, <http://www.gabaradmissions.org/pages/Message20Exam.htm>.

Preparation for the bar exam requires diligence, to be sure. The fit between those components required for professionalism and those tested by the bar exam begins to come apart, however, with respect to skills. Essay exams can yield information about writing ability, but they can do nothing about other skills the applicant may need, such as how to interview a client, counsel a client, negotiate for a client, or represent a client in court.¹⁰¹ Furthermore, no written examination can adequately test an applicant's judgment under conditions of uncertainty. The bar exam reaches certain parts of competence but not others.¹⁰²

Bar admission also requires approval by the Board to Determine Fitness of Bar Applicants (Fitness Board).¹⁰³ This screening is intended to be a means of keeping out of the profession people who have displayed character traits that enable us to predict that they will violate their responsibilities as lawyers.¹⁰⁴ Applicants spend a great deal of time and effort to complete detailed, intrusive questionnaires, and bar officials peruse each one individually looking for indications of character deficiency that might later lead to a lack of professional conduct.¹⁰⁵ Almost everyone, however, eventually makes it through the character and fitness review.¹⁰⁶

Civil litigation provides some check on lawyer competence and fidelity. A lawyer can be sued for malpractice if he represents a client incompetently, and his client can sue for breach of fiduciary duty if the lawyer violates a duty of fidelity.¹⁰⁷ A convicted criminal defendant can seek relief for ineffective assistance of counsel if his lawyer was incompetent,¹⁰⁸ and if nothing else the reputational effects of such a finding should deter incompetent work. Each of these remedies, however, falls short of enforcing the values of professionalism completely.

Civil malpractice plaintiffs must show an act of incompetence.¹⁰⁹ They may not, however, recover in malpractice for a mere error in

101. The medical profession has recognized the need to screen for some basic skills by implementing the Clinical Skills Exam, in which prospective doctors must interact with actors who play "standardized patients." For more information, see United States Medical Licensing Examination, http://www.usmle.org/Examinations/step2/Step2cs_content.html.

102. The recent report of the Clinical Legal Education Association describes a radically different method of licensure for precisely these reasons. See STUCKEY ET AL., *supra* note 18.

103. See *e.g.* Georgia Bar Admissions, <http://gabaradmissions.org/pages/braun.html>.

104. See *id.*

105. See *id.*

106. See RHODE, *supra* note 61, at 152.

107. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 49, 52 (2000).

108. *Id.* § 110.

109. *Id.* § 53.

judgment.¹¹⁰ As a matter of tort law, this limitation makes sense because of the chilling effect any other rule might have on lawyers and because of the difficulties of proving when a judgment was negligent. Nonetheless, judgment is a part of competence, and it is a part of professionalism that will not be addressed by malpractice litigation. Similarly, malpractice plaintiffs must be able to demonstrate that the incompetence caused damage, often by showing how they would have won the “trial-within-a-trial.”¹¹¹ Lawyers who demonstrate incompetence by being negligent are not living up to their responsibilities of professionalism regardless of whether the negligence causes damage. Again, the requirement of damages has deep roots in the policies that underlie tort law, but it still leaves a gap between the incidence of incompetence and liability for malpractice. Breaches of fiduciary duty likewise require a showing of damage, although fee forfeiture has emerged as a partial remedy to the inability to do so.¹¹²

Coverage of misbehavior is no more complete on the criminal side. Criminal defendants often must show they are innocent or be exonerated or both before they can recover for their lawyer’s malpractice.¹¹³ The policies behind this rule are sound. We do not want criminals to profit from wrongdoing just because, by happenstance, their lawyers represented them incompetently. The spectacle of criminals being awarded malpractice damages would also undermine faith in the system. Nevertheless, these policies come at a cost to professionalism. The incompetence of lawyers who represent guilty defendants will not be deterred by the prospect of malpractice liability. The doctrine of ineffective assistance of counsel will likewise fall short of deterring incompetence in criminal defense. Petitioners under this doctrine must show incompetence under a standard that is highly deferential to strategies that lawyers choose.¹¹⁴ Again, there are sound reasons for the doctrine, but it allows some incompetence to go unpunished. A petitioner who claims ineffective assistance also must demonstrate that the outcome of the trial would have been different but for the incompetence.¹¹⁵ Defendants who are dreadfully represented have no recourse under ineffective assistance if, for example, there is overwhelming

110. *See id.* § 52 cmt. b.

111. *See id.* § 53 cmt. b.

112. *See, e.g.,* *Hendry v. Pelland*, 73 F.3d 397, 401-02 (D.C. Cir. 1996) (holding that fee forfeiture is a remedy for breaches of fiduciary duty even if the client cannot show damage); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 6, Reporter’s Note to cmt. d.

113. *See, e.g.,* *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 495 (Tex. 1995).

114. *See* *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

115. *Id.* at 694.

evidence of guilt.¹¹⁶ There is no sound policy reason to give these defendants a new trial, but that does not make the representation any less dreadful. Even defendants who are represented by lawyers who have conflicts of interest must show that the conflict—an instance of violation of the duty of fidelity to the client—adversely affected the counselor's performance.¹¹⁷ In each situation, these remedies for incompetence or infidelity fall short, and some instances of a lack of lawyer professionalism will go unredressed.

The disciplinary system and court sanctions are also available to deter unprofessional conduct, but they do so incompletely. Some breaches of fidelity to the client, such as trust account violations, are easy for disciplinary authorities to prove. Others, such as the unreasonableness of fees, are rarely addressed because of the problems of detection noted above. Issues of competence also seldomly find their way to disciplinary enforcement, except for cases of abandonment (a violation of the duty of diligence). Although there is of course a rule that a lawyer must be competent,¹¹⁸ bar officials usually leave complaints about competence to be redressed by malpractice suits, which as noted above, have their own limitations. No rule of conduct directly addresses civility, although in a few instances lawyers have been disciplined or sanctioned for violation of the general duty not to interfere with the administration of justice or for violation of a discovery rule.¹¹⁹ Courts can use their inherent power to control litigation conduct to address incivility, but for the most part, civility is the concern of voluntary, aspirational codes of conduct.¹²⁰ Again, there is a gap of enforcement.¹²¹

116. *See id.*

117. *See* *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).

118. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1.

119. *See, e.g.*, *Mullaney v. Aude*, 730 A.2d 759 (Md. Ct. Spec. App. 1999) (sanctioning a lawyer under discovery rule for sexist remarks directed at opposing counsel during a deposition); *see also* *Matter of Schiff*, 599 N.Y.S.2d 242 (N.Y. App. Div. 1993) (censuring a lawyer for sexist comments at a deposition under a general rule relating to actions that reflect adversely on the lawyer's fitness to practice law).

120. *See* *Dondi Props. Corp. v. Commerce Sav. & Loan Ass'n*, 121 F.R.D. 284 (N.D. Tex. 1988). *Dondi* is an interesting example of combining these approaches. In this case, the United States District Court for the Northern District of Texas, sitting en banc, invoked its inherent authority to sanction what it called "sharp practices" by lawyers. *Id.* at 286-87. The court adopted the Dallas Bar Association's Code of Conduct, an otherwise purely aspirational document, as a set of obligations to the court. *Id.*

121. For a discussion of the difficulties in enforcing civility with punitive measures, see Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 294-302 (1995).

3. Advocates and Fidelity to the Court. The duty of fidelity to the court would seem to be covered well under Model Rules of Professional Conduct 3.1 to 3.8.¹²² However, even with the detailed guidance provided by the rules, it is possible for a lawyer to violate his duty of fidelity and escape punishment. One reason is that so much of what an advocate does occurs privately. The Dallas law firm of Baron & Budd inadvertently gave the world an inside look at how it prepared its witnesses.¹²³ The instructions arguably went over the limit on a lawyer's assistance to a witness. The lawyers told the witnesses what to remember and gave specific instructions on how to answer particular questions.¹²⁴ The instructions may have been, therefore, assistance for the witnesses to testify falsely if need be. These instructions happened to find the light of day, but only because the Baron & Budd lawyers accidentally produced the instructions to defense counsel at a deposition. Almost all witness preparation takes place in private and as a consequence will never be subject to external review and enforcement. Attempts to invade those communications would understandably be met with objections based upon the attorney-client privilege. Another example is the rule against presenting false evidence. Model Rule 3.3(a)(3)¹²⁵ requires a lawyer to "know" that the witness is testifying falsely.¹²⁶ The standard of requiring actual knowledge is understandable, but is ultimately workable only as guidance. A lawyer who is inclined to violate it has almost the perfect cover—"I didn't really know for sure"—if things go wrong. There are undoubtedly enormous gaps between the expectations we have for fidelity to the court and the ability of the bar to enforce them with sanctions.

This third part of the students' instruction in professionalism will expose them to the various ways in which lawyers' professional lives are regulated. It thus will serve as good background for a course on the rules of conduct or a course on the law of lawyering. The primary purpose for this instruction in professionalism, however, is to demonstrate that punitive enforcement will not by itself ensure lawyer professionalism. Lawyer professionalism, if it is to occur, will have to be inspired by something other than fear of liability or discipline.¹²⁷

122. MODEL RULES OF PROF'L CONDUCT RS. 3.1-3.8.

123. PREPARATION FOR YOUR DEPOSITION (on file with the Author).

124. *Id.*

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

126. *Id.*

127. My colleague Jack Sammons has given the best description of what legal education must aspire to do: to inculcate the students with the elements of professionalism and convince the students to choose to live their lives in accord with those elements. He writes

D. Lesson Four: The Connection Between Personal Fulfillment and Professionalism

The first three lessons on professionalism thus can be summed up as follows: professionalism has a particular meaning, and it matters to clients and to society; it is challenged pervasively in contemporary practice; and all of the enforcement mechanisms inherently fall short to some extent. That is a sobering set of lessons. The fourth and last lesson provides a solution to this gap between what we need to expect from lawyers and what we seem likely to receive from them. The solution turns out to be surprisingly simple. It should leave the students not just with an understanding of professionalism and a resolve to abide by its principles but also with an understanding that their own happiness as lawyers is linked to professionalism and to the development of a professional identity that includes a commitment to professionalism.

The news needs to get worse before it can get better. Part of any study of lawyer professionalism must confront the unhappiness of many members of the profession. In her book about the legal profession, Professor Deborah Rhode entitles one of the chapters "Lawyers and Their Discontent."¹²⁸ She recites evidence, as do others, to indicate that lawyers are more depressed than members of any other profession and are more prone to abuse alcohol and other substances than those in other professions.¹²⁹ Many lawyers seem to be deeply unhappy in their professional lives. These statistics, especially when they are combined with the gap between enforcement and the need for professionalism among lawyers, brings the students temporarily to a point of grave

the following:

When properly inculcated the moral norms upon which they depend become self-enforcing, as the motivation needed for compliance is acquired in the inculcation. No need, then, to rely upon the inefficiencies of discipline or to put up with the troubling, even corrupting, effect that discipline can have on the activities toward which it is directed. Could any form of ethical training be more valuable in a practice like ours, built as it is, upon a central relationship of trust, and with intentionally discretionary, seldom enforced, and mostly self-interpreted rules and regulations—a practice whose ethical performance is heavily dependent upon the simple personal desires of its practitioners to be good lawyers?

Jack L. Sammons, "Cheater!": *The Central Moral Admonition of Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 IDAHO L. REV. 273, 274 (2003).

128. RHODE, *supra* note 61, at 23-48; *see also* SUSAN DAICOFF, *LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* (2004) (noting discontent in chapters 1, 5, and 6).

129. RHODE, *supra* note 61, at 25; *see also, e.g.*, CARL HORN III, *LAWYERLIFE: FINDING A LIFE AND A HIGHER CALLING IN THE PRACTICE OF LAW* 23-48 (2003).

concern for themselves and their chosen profession. More complaints about the “negativity” of the course and more calls to the Dean seem to inevitably follow this discussion. This part of the course, however, should move the students beyond that point and to an appreciation of the relationship between lawyer satisfaction and fulfillment of the expectations of professionalism.

Professor Lawrence Krieger has persuasively made the case for this connection.¹³⁰ He concludes that “[t]hose values and motivations that promote or attend professionalism have been empirically shown to correlate with well being and life satisfaction, while those that undermine or discourage professionalism empirically correlate with distress and dissatisfaction.”¹³¹ The argument begins with an understanding of what kinds of things lead people to be happy with their working lives.¹³² One type of motivation is extrinsic.¹³³ Extrinsic rewards are external—separate from the work itself but earned through the work—and include such rewards as money and prestige.¹³⁴ Another type of motivation for work is intrinsic.¹³⁵ These are rewards that come from doing the work in a particular way and are internal to the work.¹³⁶ One who is motivated by intrinsic rewards “need not look beyond his work to discover its point or find a reason for continuing, but finds reason enough in the work itself, and in the excellences he needs to do it well.”¹³⁷ John F. Kennedy once described the real satisfaction in being president as “the full use of your powers along lines of excellence.”¹³⁸ He was describing intrinsic rewards.

130. See Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005).

131. *Id.* at 427 (emphasis omitted).

132. See *id.* at 428.

133. *Id.* at 429.

134. *Id.*

135. *Id.*

136. *Id.* Michael J. Kelly described this view in his description of the work of Ian McIntyre:

The crucial distinction relating to a practice, in MacIntyre’s view, is the difference between goods internal to the practice and goods external to the practice. Internal goods are the sense of satisfaction and excellence in performing the practice well that can only be identified and recognized in terms of the practice and through the experience of participating in the practice External goods are things like prestige, status, influence, and money, which may come from success in a practice but are also generated in other ways “by accidents of social circumstance.”

LIVES OF LAWYERS, *supra* note 59, at 198 (quoting ALASDAIR C. MACINTYRE, *AFTER VIRTUE* 81 (1984)).

137. Kronman, *supra* note 23, at 874.

138. See *Thank You, Mr. President* (Worldvision Home Video 1984).

Lawyers, like everyone else, might be motivated by extrinsic rewards or by intrinsic ones. Certainly anyone who has been in the profession for any length of time will know lawyers who sought money and prestige. Dean Anthony Kronman has written that “[a] large number of lawyers undoubtedly believe that the life they have chosen is a desirable one because it offers great opportunities for wealth and prestige, for a disproportionate share of society’s material resources and high professional status.”¹³⁹ Just as surely, there are lawyers who do what they do because of the intrinsic rewards they derive. Lawyers in public service are good examples. Lawyers who render significant pro bono service to the poor may also fall into this category. All lawyers who delight in the craft of practicing law are deriving intrinsic satisfaction. The law is well populated with both kinds of lawyers.

The crucial link to make is that one’s sense of happiness and fulfillment in an activity, including the practice of law, is closely related to the underlying motivation for engaging in that activity.¹⁴⁰ There is psychological research to show that people are much more likely to be happy if they are motivated by intrinsic rewards.¹⁴¹ Externally motivated people are more apt to experience anxiety, distress, a sense of disconnection from themselves, and a lack of personal integrity (in the sense of “wholeness”).¹⁴² Intrinsically motivated people are more likely to experience joy, contentment, persistent satisfaction, and fulfillment.¹⁴³ The two experiences that are most likely to contribute to happiness are self-esteem and relatedness to others.¹⁴⁴

The general lesson of this research, of course, is that one will be happier if one can seek and find intrinsic rewards from work. The specific lesson for law students, however, is at first to see the connection between intrinsic satisfaction in how they will practice as lawyers and the fulfillment that they will derive from those practices.¹⁴⁵ There is another important link for the students to make, however, and that is to see the connection between intrinsic motivations and the values of professionalism. For an extrinsically motivated lawyer, competence is a means to an end. For the intrinsically motivated lawyer, competence

139. Kronman, *supra* note 23, at 838.

140. Krieger, *supra* note 130, at 429.

141. *Id.*

142. *Id.* at 429-30.

143. *Id.*

144. *Id.* at 430.

145. In his “last lecture,” Professor Easton made the same point when he wrote that “[t]oo many lawyers try to maximize their incomes, instead of their happiness.” Easton, *supra* note 52, at 260. He urges students instead to look for intrinsic rewards, to “[f]ind [w]ork [y]ou [e]njoy, [t]hen [e]njoy [y]our [w]ork.” *Id.* at 259-63.

is an end unto itself and brings its own rewards. Lawyers who are motivated by money and prestige will view fidelity to the client as an obligation to fulfill only if they will lose money or prestige if they do otherwise. In other words, they will display fidelity to the client only to the extent that they fear being caught and punished for not doing so. The same point is true with respect to fidelity to the law and its institutions. Extrinsically motivated lawyers will observe the limits only if they are likely to be caught. In contrast, intrinsically motivated lawyers will comply with fidelity to the client and fidelity to the law and its institutions to ensure their own sense of personal identity and integrity whether or not there is a threat of punishment.

Additionally, civility and service may only get in the way of the extrinsically motivated lawyer. These lawyers derive no satisfaction from the relationships that are broken or foregone when they use antagonism as a tactic or when they refuse to take the time to help nonpaying clients. Victory and billable hours are what matter because these are means to the desired ends of money and prestige. Lawyers with intrinsic motivations value relationships with others and are thus more likely to be civil. As for service, intrinsically motivated lawyers are much more inclined to ask what they can do for others rather than what is in it for them. As to each value of professionalism, lawyers are more likely to comply if they are intrinsically motivated.

Three important specific lessons follow. First, it is better for clients and for society if lawyers are intrinsically motivated because intrinsically motivated lawyers are more likely to live up to the values of professionalism. Second, this point is especially true when there are gaps in external enforcement that are necessary to ensure that extrinsically motivated lawyers behave. In fact, to the extent that there are gaps—and by now the students will know that there are—fulfillment of the values of professionalism is utterly dependent upon lawyers making the choice to live up to those values because they want to, rather than because they are afraid not to. In other words, professionalism for lawyers is dependent upon lawyers being intrinsically motivated. Third, there is a connection between personal fulfillment as a lawyer and professionalism. Lawyers who are intrinsically motivated are simultaneously more likely to be happy and more likely to fulfill the values of professionalism. Put another way, a lawyer's commitment to the values of professionalism, to leading that lawyer's life in accordance with them, is a commitment to a set of values that is much more likely to bring fulfillment than money or prestige.

Taken together, the four lessons from the classroom component of the legal profession course have specific purposes. The first lesson introduces students to what professionalism means for lawyers and why

it is so important. The second demonstrates that there will be pressures to behave unprofessionally. The third lesson shows some of the ways in which the values of professionalism are enforced, but it also demonstrates that external enforcement will never be enough. The fourth lesson seeks to close the loop by helping the students understand that making the choice to live up to the values of professionalism serves not only the interests of society but also the interests of the lawyer in finding a professional identity that brings meaning and fulfillment in the practice. The course also includes several components that take place outside of the classroom. These are intended to reinforce all four lessons, but they have particular relevance to the last one.

III. THE LEGAL PROFESSION COURSE: OUTSIDE THE CLASSROOM

As mentioned before, many students find the lessons of the Legal Profession course disconcerting. They hear and read about the pressures on lawyers to behave unprofessionally. They learn that many lawyers are unhappy in the profession. Part of the remedy for their anxiety is to teach them about the connection between professionalism and satisfaction, as just described. We have discovered, however, that more is necessary. We have sought to help students find healthy professional identities in two additional ways: by encouraging them to reflect on what their life in the law can and should be and by helping them to connect to the profession.

A. *Reflections on Living in the Law*

Students come to law school for different reasons, with different ambitions, temperaments, and abilities. Few students arrive with a true appreciation of the challenges and opportunities that await them. Without this understanding, however, lawyers are too likely to suffer from unexpected difficulties in living the life of the lawyer or to miss opportunities for intrinsic fulfillment that are not apparent to one outside the profession. This part of the course is intended to remedy this lack of understanding.

The students begin the semester with a reflective essay on why they have chosen the law and what they hope to accomplish in their careers.¹⁴⁶ There is obviously some variation in these statements, but

146. Professor Kreiger has his students engage in a similar exercise by writing their own eulogies. Krieger, *supra* note 130, at 435-38. We have had the students undertake this reflection usually in an unguided way, but we have also asked them to undertake it in reaction to their reading of one of two books. The books are DERRICK BELL, *ETHICAL AMBITION: LIVING A LIFE OF MEANING AND WORTH* (2003) and ALAN DERSHOWITZ, *LETTERS TO A YOUNG LAWYER* (2005). The advantage of using the books is that the reading forces

consistent themes emerge. Those themes include a desire to help people and to be of service to others and to a community. Many trace their desire to become lawyers to events in their lives when a lawyer was particularly helpful, such as a divorce or death in the family. A fair number mention the desire for financial security, but very few state that they entered law primarily for the money they will make. No one states that they came to law school to get the best grades and make law review.

This essay is intended to keep the students in touch with the reasons they undertook the challenges of law school. They write it just after first semester grades have been given, a time when many of them feel let down. Studies of law students show that they find the law school environment to be quite competitive and that they quickly begin to compete for the goods that law school offers: law review membership, high grades, and offers from large law firms. Since most of these “goods” can only go to a minority of students, many law students perceive themselves as failures. By requiring the students to write this essay about the particular reasons they had for choosing law, our hope is to reorient them to their own particular ambitions, most of which are still possible even without the best grades or law review membership. The essay may be a timely tonic for some.

Beginning in Spring 2009, we have sought to encourage reflection throughout the course. The four lessons just described are presented in a lecture format twice a week to the entire first year class. In addition to those lectures, however, each student also attends a small group discussion (twenty to twenty-five students) each week. Those meetings focus primarily on applying the lessons from the readings and lectures to assigned case studies.¹⁴⁷ In preparing for the discussion groups, each student is required each week to post a comment to a blog that has been set up for the small group. Experience has taught us that students have a deep need to reflect on the issues presented in this course and to discuss them. The blogs and small group meetings are intended to respond to those needs. Our preliminary assessment of this new format is positive.

the students to consider issues they might not have thought about, but we have been happy with both the focused and unfocused assignments.

147. The case studies came from DEBORAH L. RHODE & DAVID J. LUBAN, *LEGAL ETHICS: LAW STORIES* (Foundation Press 2006) and JAMES L. KELLY, *LAWYERS CROSSING LINES* (Carolina Press 2001). We also use the small group format and the blogs to discuss the oral histories and biographies. *See supra* Part II.B.

We have also hosted prominent guest speakers as part of the course.¹⁴⁸ At these events, the students have heard about life in the law, the challenges that lawyers face, and ways in which they can overcome those challenges to find meaning and satisfaction in their work. For example, Dean Daisy Floyd has spoken to students about her work for the Carnegie Foundation on the development of professional identity among law students.¹⁴⁹ Steven Keeva has visited with the students about his book, *Transforming Practices*,¹⁵⁰ which describes the innovative ways in which a number of lawyers have dealt with the pressures of practice. Judge Carl Horn came to speak about his book on how lawyers can find a calling and higher purpose in the practice.¹⁵¹ Professors Tim Floyd and Mark Jones have spoken about the integration of religious faith and spirituality into the practice of law. Professor Jack Sammons has spoken about “virtue ethics” and how that subject relates to professionalism.¹⁵² Lawyers who have overcome disabilities, including alcoholism and drug addiction, have made presentations.

The purpose of these presentations is for the students to hear that despite the many challenges that a life in the law brings, there are effective ways to meet those challenges and invest that life with deep, intrinsic meaning. These speakers are not talking just about ways of coping with the stresses and strains of practice, although learning to cope is an important skill. They are talking about something deeper, and something that in the end, the students should connect with professionalism. Early in the semester the students read a passage from William Sullivan that I refer back to on numerous occasions:

A profession is a means of livelihood that is also a way of life. Professionalism seeks freedom in and through significant work, not by escaping from it. In professional work, the practitioner expresses freedom by directing the exercise of carefully developed knowledge and skill toward ends that refer beyond the self and the practitioner’s private satisfaction. Concern for clients or patients and for the public values for which the profession stands is essential to genuine practice. The key point is that for a genuine professional the meaning of the work derives from both what it is and the ends toward which it is

148. We have held these meetings in some but not all of the years we have taught the course. Our experience has been that guest speakers such as these bring great value to the course.

149. See Daisy Hurst Floyd, *Reclaiming Purpose—Our Students’ and Our Own*, 10 LAW TEACHER 1 (2003).

150. See STEVEN KEEVA, *TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE* (1999).

151. See HORN, *supra* note 129.

152. See Sammons, *supra* note 127.

directed as much as or more than its significance comes from the return it affords. In this sense, it is always more than a job.¹⁵³

The goal is to help the students appreciate this often hidden connection between the professional values that society needs for lawyers to live up to and the meaning that lawyers are searching for in their work.

The students conclude this part of the course with a second reflective essay. They are asked to describe again what they hope to accomplish as lawyers and as people in their chosen careers, but now they are to do so in light of what they have learned in the Legal Profession course. This essay, like the first, is graded only in the sense that it is required. The students, therefore, are free to express their true feelings. Most remain faithful to the purposes that brought them originally to law school. But in different ways, many of the students express that they feel more prepared to deal with the realities of law practice because of the lessons they learned in the course. One student wrote the following:

Knowing ahead of time of the stresses, pressures, hardships, demands and tensions that I will no doubt encounter along the way will surely make them much, much easier to deal with when they do arise. More important than whether or how my ambitions as a lawyer and as a person have changed is the fact that I know a lot more about how to achieve those ambitions. I think that most people in my class, whether we could articulate it or not, essentially wanted to be all of the good things we talked about lawyers being this semester. And I don't think that anyone feels differently in that regard as a result of taking this class. The most important thing that I am taking away from this semester is that being a good lawyer and a good person at the same time is, without a doubt harder than I realized. But it is also very possible. There are probably a lot of lawyers along the way that have either given up on the profession or, worse than that, on themselves as a result of not knowing the things that we all now know. I don't think that will happen to any of us because we know what to expect.¹⁵⁴

A sense of being prepared for what is to come is a worthy outcome. After all, law school is and should be about preparation for meaningful and satisfying participation in the profession.

B. Establishing a Connection to the Profession

Another way we can seek to remedy the anxiety students feel is to help them understand that professionalism and the special kind of life that lawyers live are parts of a long tradition from which they can draw

153. SULLIVAN, *supra* note 1, at 21.

154. Student paper #4426 (Legal Profession Spring 2004) (on file with the Author).

sustenance. They learn from one part of the course that there are high expectations of them as professionals. They know from another part that there are challenges and opportunities in the law that they did not contemplate. What they need, in light of this new knowledge and understanding, is the comfort of knowing that others have fulfilled those expectations and lived that life with success and deep joy. Put another way, students who are gaining an understanding of the importance and magnitude of what they have undertaken need role models whose examples will sustain them in times of doubt or temptation. The Legal Profession course seeks to fill that need in two ways.

First, every student meets with an older lawyer, a member of Macon's William Augustus Bootle American Inn of Court, to discuss how that lawyer has met the expectations of professionalism and found fulfillment in the law. In an American Inn of Court, judges and experienced lawyers hold the rank of "Masters of the Bench."¹⁵⁵ No member of the Bootle Inn has ever turned down our request that he or she meet with a small group of Legal Profession students. In these meetings, the students are asked to conduct brief oral histories of the lawyers and judges, and to hear directly from them about the challenges and satisfactions that they have found in the law. Those discussions are informed by the class discussions on what is expected from lawyers.

After the meeting, the students write an essay reflecting on the life of this lawyer in light of what they have learned in the course. Many of the students have returned from these meetings to express relief that the person they met with was happy in his or her profession and surprised that the lawyer or judge talked about professionalism in the same terms as we had been discussing even though the lawyer or judge had not attended the class.¹⁵⁶ It is not unusual for students to report this meeting as the best part of the course:

In my opinion, the "oral history" assignment was one of the most useful assignments in the entire Legal Profession course. The books, articles, and class lectures taught us a great deal about the profession and its inherent problems. The problem with such material is that its benefits are limited by a lack of real world context. Meeting with an attorney for an oral history is the perfect way to provide the lacking context. The oral history assignment provided added emphasis to certain areas of class discussion while providing examples and solutions to some of

155. For a description of the organization and purposes of an American Inn of Court, visit the American Inns of Court, <http://www.innsocourt.org/Content/Default.aspx?Id=2>.

156. It should be noted also that the Masters of the Bench consistently report how much they enjoy these meetings and how refreshing they find it to spend some time with young people who want to enter their profession.

the problems discussed in the class materials. Overall, it appeared that the experiences and concerns of the lawyer my group met with were very similar to the concerns discussed in class.¹⁵⁷

The essays require the students to think about the meeting, and together, the interviews and the essay help the students feel connected to their chosen profession in ways that classes and guest speakers cannot.¹⁵⁸

A second way we attempt to have the students make a connection with the profession is by reading a biography of a famous lawyer or judge and attending a discussion group. The book gives each student a glimpse of the great history of lawyers and, one would hope, might prompt them to begin a lifelong habit of reading about it. Among the subjects of these books have been Griffin Bell,¹⁵⁹ Harry Blackmun,¹⁶⁰ David Boies,¹⁶¹ Johnnie Cochran,¹⁶² Archibald Cox,¹⁶³ Clarence Darrow,¹⁶⁴ Morris Dees,¹⁶⁵ John Edwards,¹⁶⁶ Benjamin Hooks,¹⁶⁷ Frank Johnson,¹⁶⁸ Arthur Liman,¹⁶⁹ Clarence Thomas,¹⁷⁰ Michael Tigar,¹⁷¹ John Tucker,¹⁷² and Lawrence Walsh.¹⁷³ We give the students the choice of what book to read, and we alert them to this assignment near the end of the first semester so that they can read it over the holiday break if they choose to do so. We invite the students to choose the book without

157. Student Paper #3447 (Legal Profession Spring 2004) (on file with the Author).

158. The Carnegie Foundation report put the point this way: "Likewise, when students form relationships with professionals who inspire them, they can internalize new images of what they want to be like more deeply and vividly than they are likely to do through reading." SULLIVAN ET AL., *supra* note 18, at 146.

159. REG MURPHY, UNCOMMON SENSE: THE ACHIEVEMENT OF GRIFFIN BELL (1999).

160. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005).

161. DAVID BOIES, COURTING JUSTICE: FROM NY YANKEES V. MAJOR LEAGUE BASEBALL TO BUSH V. GORE 1997-2000 (2004).

162. JOHNNIE COCHRAN, A LAWYER'S LIFE (2002).

163. KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997).

164. CLARENCE DARROW, THE STORY OF MY LIFE (1932).

165. MORRIS DEES, A LAWYER'S JOURNEY: THE MORRIS DEES STORY (2001).

166. JOHN EDWARDS, FOUR TRIALS (2004).

167. BENJAMIN J. HOOKS, THE MARCH FOR CIVIL RIGHTS: THE BENJAMIN HOOKS STORY (2003).

168. JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS (1993).

169. ARTHUR L. LIMAN, LAWYER: A LIFE OF COUNSEL AND CONTROVERSY (1998).

170. CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR (2007).

171. MICHAEL E. TIGAR, FIGHTING INJUSTICE (2002).

172. JOHN C. TUCKER, TRIAL AND ERROR: THE EDUCATION OF A COURTROOM LAWYER (2003).

173. LAWRENCE E. WALSH, THE GIFT OF INSECURITY: A LAWYER'S LIFE (2003).

regard to what others in their small discussion groups are reading. The result is that every group has students who have read a variety of books, and much of the discussion consists of the students teaching each other about their subjects and how each of these people has met challenges in the profession.

With the oral histories and the biographies, the Legal Profession course seeks to help the students make a connection to the profession they are joining. Lawyers are part of a long, living tradition, and students need to know that tradition. Especially when confronting some difficult realities about the practice of law, it is helpful for them to see and read about lawyers who have led meaningful and satisfying lives in the law.

C. *A Note on Assessment*

From the inception of the Legal Profession course, we have believed that it was essential for the course to be graded on the same scale as other first-year courses. We did so in order to send the right message to the students: professionalism is as important and as worthy of study as other more traditional courses. For the first several years, the students were required to submit their papers and conduct the oral histories, but the grade was determined entirely by the exam.

We eventually realized, however, that parts of the course do not lend themselves to a written examination. In 2008, we went to a system that diluted the effect of the final exam. Students received points for attending class, submitting their papers, and conducting the oral histories. In 2009, we added points for posting to the blogs and attending their small discussion groups. They also received points for their performance on the final exam. The totals of those points were used to determine the final grade. Most students earned all or almost all of the points for the non-exam activities. The variation in grades from student to student, therefore, was attributable mostly to the exam, but the variations were smaller than they otherwise would have been. We believe this is a fairer way to assess student performance in the course.

IV. CONCLUSION

Frederick Buechner once wrote that vocation is “where your deep gladness meets the world’s deep need.”¹⁷⁴ In a sense, that sums up in

174. PARKER J. PALMER, LET YOUR LIFE SPEAK: LISTENING FOR THE VOICE OF VOCATION 16 (2000) (quoting FREDERICK BUECHNER, WISFUL THINKING: A SEEKER’S ABC 119 (1993)).

one phrase the message of any effort to teach professionalism. The world has a deep need for lawyers to live up to the virtues of professionalism. It is how individual clients are best served and how lawyers best serve society. At the same time, living a life that exemplifies these virtues brings deep gladness. The lawyers whose professional lives embody professionalism are likely to be the most deeply satisfied. The world's deep need and the lawyer's deep gladness have met, and as a result, lawyers, clients, and society are better for it.

Teaching first-year law students about professionalism is important. In the end, of course, this instruction must have a central purpose: to make it more likely that the next generation of lawyers will practice with professionalism. For that to happen, these students must know what professionalism means, and they must learn why it matters. They also must learn that in the end, it is up to them to choose to keep these values alive, as all punitive enforcement of them will inevitably fall short. The students also need to know, however, that practicing with professionalism will bring them rewards that they will value much more than money or prestige. If first-year law students learn these lessons, then we will have every reason to be optimistic about the future of the legal profession.