



INSTRUCTOR'S MANUAL

**ESSENTIAL
QUALITIES *of*
THE
PROFESSIONAL
LAWYER**



Standing Committee on Professionalism
Center for Professional Responsibility

INTRODUCTION

This Instructor's Manual has been developed as an aid for law school professors, bar associations and other legal educators in leading discussions of the chapters of Essential Qualities of the Professional Lawyer.

Published in 2013 by the ABA Standing Committee on Professionalism, the twenty authors of the publication each address a topic of important professional development – from personal values and convictions to the transformative impact of globalization on legal practice. Correlating chapters of the Instructor's Manual include a Summary, Learning Outcomes, Teaching Notes, Exercises, and Resources that can be utilized as a discussion and teaching aid.

Our deep appreciation goes to everyone who helped to make this resource possible, including many of the original chapter authors of the publication and other colleagues who volunteered their time and talent.

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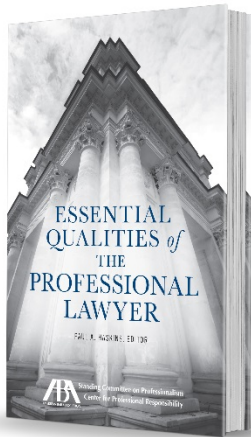
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ESSENTIAL QUALITIES *of* THE PROFESSIONAL LAWYER

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This book addresses a recognized gap in practice-focused professionalism educational materials. It explores those indispensable values, skills, habits, convictions, duties and qualities that characterize the professional lawyer, helping students and new lawyers build an authentic professional identity while engaging the larger values of the profession, such as access to justice and service to society.

Essential Qualities of the Professional Lawyer is available from the American Bar Association. Individual orders can be placed online at www.shopABA.org. Discounts are available for books ordered in bulk. Contact the ABA Service Center at 800-285-2221.

ATTENTION EDUCATORS!

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Chapter 1
THE QUALITIES OF THE PROFESSIONAL LAWYER

NEIL W. HAMILTON¹

I. Summary

- The Chapter overall is designed to “go where the students (including early-career lawyers as well) are” developmentally and engage them there by making the enlightened self-interest case that each student should seek to internalize the qualities of the professional lawyer because these qualities will help make the student an effective and successful lawyer.
- We have good data from a number of law schools that the principal goal of law students is to achieve bar passage and meaningful post-graduation employment, so this Chapter starts by looking at the values and virtues that legal employers and clients want. Since I wrote this chapter, we now have the Educating Tomorrow’s Lawyer’s data emphasizing these same values and virtues as “necessary in the short run” for new graduates.
- The Chapter then explores the profession’s understanding of the qualities of the professional lawyer. There is no one agreed-upon definition of the qualities of a professional lawyer, but we do see convergence on similar themes set forth on pages 8-9 of Chapter 1. The important point for the students to understand is that each lawyer over a career is in an on-going dialogue with other lawyers in law firms and departments and the wider profession on the qualities of a professional lawyer. The student also needs to know that the terms professionalism, professional formation, and ethical professional identity are commonly used as synonyms.
- Table 4 in the Chapter makes a comparison between the profession’s understanding of the qualities of the professional lawyer and the values, virtues, capacities and skills that legal employers and clients want. The student can see that if he or she grows toward the qualities of the professional lawyer, these are the qualities that legal employers and clients want.
- The next section of the Chapter outlines the broader benefits of each student’s and lawyer’s growth toward the qualities of the professional lawyer in terms of: (a) fulfilling the legal profession’s social contract; and (b) developing toward later stages of “moral insight,” which in turn leads to trust in the professional and the profession.
- The last section gives an overview of key lessons going forward including:
 - a. the qualities of a professional lawyer are in fact excellent qualities to differentiate the student from other students in terms of the goal of meaningful employment;
 - b. the importance of realizing that a student’s development toward these qualities is a life-long process through stages; and
 - c. the importance of the habit of actively seeking feedback and reflecting upon the feedback in terms of growth toward these qualities; the risk of excessive focus on the technical skills of lawyering; the importance of pro bono and community service; and the importance of on-going dialogue with other students and lawyers about the qualities of a professional lawyer.

¹ NEIL HAMILTON is the Holloran Professor of Law and Co-Director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law.

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II. Learning Outcomes

This Chapter can serve as an introduction to help each student “connect the dots” between the student’s ultimate goal of meaningful employment and whichever of the professional formation values, virtues, capacities and skills that the instructor has chosen as a learning outcome. See Table 1 below (Table 4 in the Chapter) where the instructor may choose any or all of the qualities of the professional lawyer on the left side as a learning outcome and show the student how those qualities are important to legal employers and clients.

Comparison of the Values, Virtues, Capacities and Skills Defining Professional Formation with Those That Legal Employers and Clients Expect in Assessing the Effectiveness of a New Lawyer

Professional Formation Values, Virtues, Capacities and Skills	Values, Virtues, Capacities and Skills Legal Employers and Clients Evaluate (Beyond Technical Legal Skills)
1. Internalized Moral Core Characterized by Deep Responsibility for Others, Particularly the Client	
2. Integrity/Honesty	1. Integrity/Honesty/Trustworthiness
3. Internalized Standard of Excellence at Lawyering Skills and Career-long Growth Toward Later-stages of Professional Formation	2. Internalized Commitment to Grow toward Excellence in All Competencies
4. Ongoing Solicitation of Feedback and Self-Reflection	3. Ability to Take Feedback and Reflect to Foster Self-Development
5. Independent Professional Judgment and Counsel to the Client	4. Good Judgment/Creativity and Innovation, and Strategic Thinking
6. Adherence to Ethical Codes	
7. Public Service	5. Community/Pro-Bono-Firm Involvement
	6. Client Relationship Skills including Responsiveness and Commitment to the Client, Strong Client Rapport, Value for the Client, Empathy and Listening Skills
	7. Effective Teamwork and Project Skills
	8. Persuasive Speaking and Writing and Negotiation

III. Teaching Notes

A number of general principles to guide curricular design to foster student development toward professional-formation learning outcomes emerge from a recent analysis of empirical research on these

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principles from four perspectives.² These perspectives include a synthesis of the five Carnegie Foundation for the Advancement of Teaching Studies of higher education for the professions; a synthesis of the empirical studies on effective curriculum coming out of the research on the Four Component Model in moral psychology; a synthesis of principles from *How Learning Works: Seven Research-Based Principles for Smart Teaching*; and a synthesis of what medical education has learned about the most effective professional-formation curriculum.

A comparison of all four research perspectives indicates agreement among them that an effective professional-formation curriculum should include the principles below.

General Agreement That An Effective Professional-Formation Curriculum Should:

1. take into account that students are at different developmental stages of growth and engage each student at the student's present developmental stage;
2. provide repeated opportunities for reflection on the responsibilities of the profession and reflective self-assessment in general;³
3. emphasize experiential learning, feedback on the student's performance, and reflection; and
4. emphasize coaching.⁴

In addition, one of the four research perspectives suggests that an effective professional-formation curriculum should also include the principles below.

An Effective Professional-Formation Curriculum Should Also:

5. provide experiences that create cognitive dissonance/optimal conflict with the student's current developmental stage on either of the professional-formation learning outcomes;
6. provide instruction that helps the student understand how new knowledge and skills are building on the student's prior knowledge and competencies (the student's existing narrative);
7. provide instruction that helps each student understand how the professional-formation curriculum is helping the student achieve his or her goals; and

² This section is taken from Neil Hamilton & Jerome Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 TENN. L. REV. 843, 874 (2016).

³ The habit of self-assessment and reflection is foundational for students and practicing lawyers to identify areas for further professional development and become effective career-long learners. Sami Shaban et al., *Factors Influencing Medical Students' Self-Assessment of Examination Performance Accuracy*, 29 EDUC. FOR HEALTH 75, 76 (2016).

⁴ "A coach is generally understood to mean a senior professional who guides a student by asking the student questions about issues important to the work, helping the student to identify goals, creating a plan to achieve the goals, and providing constructive feedback." Neil W. Hamilton, Verna E. Monson & Jerome M. Organ, *Encouraging Each Student's Personal Responsibility for Core Competencies Including Professionalism*, 21 PROF. LAW. 1, 12 (2012). A mentor is a professional who has a relationship with the student and is someone from whom the student can seek advice. "In general a mentor gives advice when asked, and a coach pro-actively asks questions." *Id.*

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8. give effective feedback that tells each student where the student is developmentally relative to the stated learning outcome and what specifically the student needs to do to improve in order to make progress toward later stages of development.

One additional principle to guide curricular design on professional-formation learning outcomes is unique to legal education. There is growing empirical evidence that legal education's paradigm for professional success tends to undermine the well-being of many students.⁵ For many students, the legal education reward system's emphasis on ranking, competitive achievement, status credentials, and money tends to undermine the key intrinsic values that contribute to a student's or lawyer's well-being: self-understanding/growth; intimacy with others; helping others; and being in/building community.⁶

This growing body of research on the negative impact of legal education on well-being for many students leads to a ninth principle for curricular design that an effective professional-formation curriculum should:

9. consider carefully the impact of the curricular design, including formative assessment, on student well-being.

IV. Exercises/Discussion Points

Each instructor can design good exercises that meet the nine principles above, but the more complicated and challenging task is to understand that a student's and lawyer's professional formation on the qualities of the professional lawyer occurs through developmental stages, and thus, the most effective curricular engagements on the qualities of the professional lawyer would occur in some sort of progression both during a single course and across the whole curriculum. It is going to take some time for law faculties both to create stage development models on each quality of the professional lawyer and to coordinate the curriculum so that the curriculum presents a progression of exercises that helps each student grow toward later stages on each of the qualities of the professional lawyer.

Using the nine principles for effective professional-formation curriculum design above, Professor Jerry Organ and I have formulated 30 reflection questions to foster each student's development in a progression of stages toward the two qualities of the professional lawyer learning outcomes below.

Each student should demonstrate an understanding and integration of:

1. pro-active professional development toward excellence at all the competencies needed to serve clients and the legal system well; and
2. an internalized deep responsibility to clients and the legal system.

We have some assessment data on the effectiveness of the first 14 questions with respect to the first professional-formation learning outcome. We are trying to design assessments of the effectiveness of the other questions with respect to the second professional-formation learning outcome.

These thirty questions are available at <http://ssrn.com/abstract=2779741>.

⁵ See Lawrence Kreiger & Kennon Sheldon, *What Makes Lawyers Happy?: A Data-Driven Prescription to Redefine Professional Success*, 83 GEO. WASH. L. REV. 554, 566-69 (2015); Lawrence Krieger, *The Most Ethical of People, The Least Ethical of People: Proposing Self-Determination Theory to Measure Professional Character Formation*, 8 U. ST. THOMAS L.J. 168, 184-86 (2011).

⁶ See Krieger & Sheldon, *supra* note 5, at 566-69; Krieger, *supra* note 5, at 184-86.

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V. Resources

Neil Hamilton, *Formation-of-an-Ethical-Professional-Identity (Professionalism) Learning Outcomes and E-Portfolio Formative Assessments*, 48 U. PACIFIC L. REV. (forthcoming 2017), <http://ssrn.com/abstract=2910795>.

Neil Hamilton, *Off-the-Shelf Formative Assessments to Help Each Student Develop Toward a Professional Formation/Ethical Professional Identity Learning Outcome of an Internalized Commitment to the Student's Own Professional Development*, 67 MERCER L. REV. (forthcoming 2017), <http://ssrn.com/abstract=2910782>.

Neil Hamilton & Jerome Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 TENN. L. REV. 843, 874 (2016).

Chapter 2

THE AUTHENTIC LAWYER: MERGING THE PERSONAL AND THE PROFESSIONAL

DAISY HURST FLOYD⁷

I. Summary

- Defines what it means to be an authentic lawyer: Authenticity is the ability to hold on to personal values and goals while integrating them with a newly-acquired identity as a lawyer. The authentic lawyer lives consistently with his or her deepest values and core beliefs.
- Makes the argument that authenticity is important for two reasons: (1) that without authenticity, the lawyer is more likely to act unethically and to be ineffective; and (2) that the inauthentic lawyer is more likely to experience anxiety and stress, preventing a life of satisfaction and well-being.
- Summarizes research regarding intrinsic and extrinsic motivations and their relationship to unethical behavior and stress.
- Summarizes research regarding both the positive effects of legal education and the ways in which legal education can challenge the goal of authenticity.
- Discusses the importance of developing habits of connection and reflection as ways in which law students and lawyers can maintain authenticity despite the challenges that are discussed. Specifically, the chapter suggests ways to maintain or develop important relationships while in law school and the importance of developing the habit of reflection.

II. Learning Outcomes

- Understand the conceptual framework associated with being an authentic lawyer;
- Become aware of the challenges to authenticity that are most frequently experienced by law students and lawyers;
- Be aware that social science research has demonstrated a connection between authenticity and ethical behavior and between authenticity and well-being;
- Understand that they can make a choice to develop authenticity; and
- Begin to develop skills and habits of connection and reflection that will result in authenticity.

III. Teaching Notes

The materials on authenticity can be taught in a variety of contexts, including a stand-alone program for law students of all levels, as part of a doctrinal course, as part of a course on professionalism or legal ethics, or as a section of an experiential learning course. The chapter is written to be accessible for law students, including first-year students who may lack experience with lawyers, but the material is adaptable for all experience levels, including lawyers. The conceptual framework is the same for all experience levels, but the examples can become more sophisticated as the experience level of the students increases.

⁷ **DAISY HURST FLOYD** is University Professor of Law and Ethical Formation at Mercer University School of Law, in Macon, GA., where she served as Dean from 2004 until 2010.

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Many students are initially skeptical of the topic of authenticity because it is so different from what they are used to discussing in a law school classroom or thinking about in their practice and because its meaning is not apparent without some explanation. However, as students better understand the concept, they usually warm up pretty quickly to the material because it is about them and their lives, both present and future. They can be expected to respond to a discussion that addresses what they are experiencing in law school or their practice, especially when it helps them realize that their experiences are similar to their colleagues, and when they learn that there is sound social science regarding what is being discussed.

Importantly, discussing authenticity in the law school curriculum gives students permission to consider their personal motivations and values as relevant to their lives as lawyers. Similarly, to imbed this discussion in a CLE provides practicing attorneys an opportunity to reflect on their personal values in the context of their work.

Because of skepticism and lack of understanding, it is helpful to make the concept of authenticity as concrete as possible. This is why the chapter includes examples and information about empirical research to support its claims. It is also helpful to be as specific as possible about what students can do to help achieve authenticity, which is why a significant part of the chapter is devoted to habits of connection and reflection. An important message to students of all ages and practices is that they have a choice about whether they will be authentic lawyers: without awareness of the challenges and means to overcome them, it will be much harder for them to do so.

One of the challenges to a discussion of authenticity is enabling students to understand what is meant by the integration of the personal and professional. Too often, students perceive that they must take on a completely different set of values as a professional from those that they have acquired in their lives before beginning law school or their practice. One goal is to help them see that they do not need to cast aside what has been important to them before law school to take on the new identity of a lawyer. For example, one could discuss with students that being an effective advocate for a client in a negotiation does not require them to compromise their personal standards of integrity and honesty.

Conversely, some students will resist discussion of integrating new professional values with existing personal values because they believe that, as ethical people, they are sufficiently prepared to make ethical professional choices. A discussion of integration can help students understand both that they do not shed what matters to them in becoming a good lawyer and that they must complement their existing values with the new professional values they are learning. Again, examples are helpful. A student may have a personal value of being kind to friends and responsive to them when in need. However, as a lawyer, one may have to refuse a request by friends who are a married couple to represent both the husband and wife in divorce proceedings because they must take into account the professional values that govern conflict of interest.

IV. Exercises

1. Self-Reflection:

a. See the exercise on page 30 of *Essential Qualities*, asking students to complete the sentence, “I decided to go to law school because...” Provide 5 to 7 minutes to reflect and complete the sentence. They may be asked to turn in the reflection, or to write only for themselves and to post the completed exercise somewhere that will allow them to see it frequently—in a notebook they take to class, on their bathroom mirror, their refrigerator door, etc.

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b. The sentence-completion exercise may be paired with another: After remembering their motivations for going to law school, students are asked to look forward rather than back and to complete this sentence: "I want to be the kind of lawyer who....." With this second exercise, students usually identify personal characteristics or traits to which they aspire and, again, it helps them focus on intrinsic motivations rather than shorter-term, extrinsic motivations that might be at the forefront on any given day. As with the first exercise, students are given about 5 to 7 minutes to reflect and complete the exercise. The first sentence-completion exercise, above, may be used to introduce the topic of authenticity, and the second to end it, with the remainder of the class conducted between the two exercises.

Because the topic of this chapter is personal to the students, they may be reluctant to open up in discussion. To address that discomfort, three approaches may be effective:

- (i) ask the students to do the exercises for their own benefit and not reveal what they write to anyone;
- (ii) have the students complete the exercises anonymously, and then either have the collected responses read aloud by the teacher, or to distribute them and have each student read one of the responses. In that way, everyone's voice is brought into the room without a specific response being attributed to any individual student; and
- (iii) if seated at tables, you may ask them to share among themselves and then have one person report an example or two to the full group—again without attribution. Expect students to be surprised at how similar the responses are, which illustrates to them that their experiences and motivations are more like their classmates' than they realized.

2. These additional exercises effectively stimulate discussion on authenticity topics:

a. Ask students to identify challenges to well-being that they have experienced in law school and ways that they have overcome them. For example, some students will talk about challenges to relationships that come with the time demands of being a law student. By reflecting upon that challenge and the importance of valuing relationships, they can then better meet the challenge by scheduling a certain regular time each week to devote to the particular relationship. Many students will discuss similar thoughts with regard to exercise, reading for pleasure, or enjoying music or the arts.

b. Ask students to describe a lawyer whom they think has achieved authenticity. This may be a lawyer whom they know personally, including a family member or friend of the family, or a lawyer with whom they have worked. It could also be a historical figure who is a lawyer. By asking students to identify an authentic lawyer and then explain why that person illustrates authenticity, the teacher guides them to apply the framework of authenticity and to concretize it. When students describe, for example, a lawyer who is authentic because he or she has made time for family or is involved in community service while also having time to meet clients' need, the teacher can guide the discussion in a way that unpacks what personal and professional values are illustrated.

c. Ask students to identify situations in which they feel the most authentic, such as when they are with friends or family or when they are exercising or in nature, and asking them how they can use that self-knowledge to make choices about their professional lives. For example, someone who feels most authentic in groups of family or friends may want to seek out a professional life that is relationship-

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focused, while someone who prefers to be alone may prefer a professional choice more focused on research and writing.

V. Resources

Refer to the resources in the back of the chapter.

Chapter 3
CIVILITY AS THE CORE OF PROFESSIONALISM

JAYNE R. REARDON⁸

I. Summary

- Defines “civility” and recognizes it as a cornerstone and a core element of professionalism within the practice of law. Although the concept of “civility” can be broadly construed, the consensus is that “civility” is “a behavioral code of decency or respect” that all lawyers should strive to adhere to, which promotes the precepts expected for the practice of law, in addition to being a necessary attribute for good public citizenship.
- Articulates the idea that civility is, generally speaking, an essential element which must be satisfied by all those seeking to be licensed to practice law.
- Recognizes the dichotomy between the lawyer being a zealous advocate for his client while attempting to maintain a level of professionalism and exhibit civil behavior.
- Discusses the challenges and consequences resulting from the decline of, and in many instances complete lack of, civility in the profession.
- Promotes the benefits of civil behavior.
- Summarizes research data which suggests the proliferation of incivility within the profession.
- Analyzes data suggesting the physiological impact of incivility on those practicing in the profession.
- Discusses possible systematic solutions to the problem of incivility.

II. Learning Outcomes

This chapter, and discussion of the material in it, should help students:

- Understand and recognize incivility within the profession.
- Understand the various manners in which incivility in the profession negatively impacts lawyers individually, and impacts the profession universally.
- Develop strategies and mechanisms to diffuse uncivil situations.
- Develop strategies to avoid becoming the subject of uncivil behavior and strategies to avoid perpetuating uncivil behavior.
- Understand how civility is linked to reputation, establishing a successful practice, and how the lack of civility can impact the lawyer’s bottom line.
- Develop plans for exposing uncivil behavior.
- Be encouraged to promote and commit to civility in their professional lives and to work to restore greater civility to the profession.

⁸ **JAYNE REARDON** is the Executive Director of the Illinois Supreme Court Commission on Professionalism, where she is responsible for programs and initiatives to increase the professionalism, civility, and inclusiveness of the legal system. She also serves as Chair of the ABA Standing Committee on Professionalism.

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III. Teaching Notes

The chapter as written is an ideal teaching tool, not only for law students and new lawyers, but is also adaptable for CLE presentations for veteran attorneys. The material in the chapter is information law students and newly licensed attorneys need to be mindful of as they enter the profession, however, the material is also well suited for CLE courses for those attorneys, who over the course of their careers have slipped into uncivil behavior, or encountered uncivil behavior during their time in practice.

In presenting the materials of the chapter it is important to remain cognizant of the concept that lawyers have a multi-tiered role as the armor bearers of the standards of the profession. The lawyer has responsibilities as 1) representatives of their clients, 2) officers of the legal system, and 3) "public citizens" having a special responsibility for the quality of the administration of justice. The chapter discusses how lawyers experience incivility with a degree of frequency, and how "lawyers must make civility their professional standard".

The presentation should begin with an understanding of what the misconceptions of "civility" are and what the actual practice of civility requires. Teaching tools include examining the Model Rules of Professional Conduct and discussing practical application of those rules as they relate to the practice of civility in the profession.

The resources cited in the chapter are helpful to the student by presenting empirical evidence through surveys and studies which allow the students to examine the intrinsic information and draw conclusions based upon the survey results as presented.

The various references to the Model Rules of Professional Conduct, with the accompanying citations, simplify the ability of the law student/lawyer to pinpoint problematic behavior and to be able to go directly to the rule for guidance and information.

The presentation should not conclude without a discussion of what methods should be implemented to increase civility within the profession.

IV. Exercises

1. Create multiple groups and as a group project have each group create a rubric of civil behavior which should be satisfied by attorneys prior to being licensed to practice in any jurisdiction. After the groups have worked for 10-15 minutes, the groups can reassemble to present their findings. If time permits, the class can create a final compilation of all the best suggestions and each attendee should retain the final compilation as a guide to refer to when encountering uncivil situations, as well as a reminder of how to avoid creating uncivil situations.
2. Role playing activity where students must recognize the uncivil behavior and determine how to diffuse the situation. Scenarios may include: 1) opposing counsel who fails to act with civility, 2) the student role-playing the attorney acting uncivilly, and 3) a 3rd party (ex., judge, client, court personnel, etc.) who fails to exhibit civil behavior. In each situation, the student must determine how to navigate the situation. Her approach, and alternatives to her approach, can then be discussed by the full group.

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3. Ask students to list three examples of uncivil behavior they have specifically encountered in their experience in the legal profession (whether in the workplace or as a law student). Have the students identify the improper behavior, what the student/lawyer did in response to the behavior (if anything), and what steps (if any) the student/lawyer could have taken to prevent the situation from escalating to incivility.
4. Ask students to identify three contributing factors that help to encourage, promote or promulgate incivility within the profession. Examples: the excessive use of emails to communicate, which can lead to misunderstandings and misinterpretations; social media (used privately and professionally) which affords a false sense of anonymity and results in disconnection; or overscheduling, which can lead to stressful encounters, etc. Discuss ways to mitigate or defuse the power of these factors.

V. Resources

STEPHEN L. CARTER, *CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY* (1998).

Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO J. LEGAL ETHICS 137, 140 (2011).

Leo J. Shapiro & Assoc. L.L.C., *Survey on Professionalism: A Study of Illinois Lawyers* (Dec. 2007), available at https://www.2civility.org/wp-content/uploads/2013/12/surveyonprofessionalism_final.pdf.

Chapter 4

THE PRACTICAL CASE FOR CIVILITY

PETER R. JARVIS & KATIE M. LACHTER⁹

I. Summary

- Imagine a line with abject client surrender on one end and all-out legal warfare on the other. Somewhere in between would be points with labels like cooperation, communication, compromise and the search for creative solutions. Many members of the public, many clients, and at least some lawyers believe that what lawyers do, and the way that lawyers assure the best possible outcomes for their clients, is to get as close to, if not go beyond, the point at which total legal warfare is so extreme that it becomes illegal in and of itself.
- We do not deny that there are causes and situations which deserve, and which may benefit from, maximum permissible legal warfare. We believe, however, that for most lawyers, most clients and most matters, such an approach is counterproductive. In those situations, lawyers who want to do their best by their clients need to look at other methods and means of behavior.
- Civility and professionalism can, of course, be supported on grounds that these qualities are morally superior and display better manners. While we agree that this is generally so, our point is different. It is that the study and implementation of principles of civility and professionalism will, more often than not, produce better results for clients and lawyers.
- We base our argument not only on years of experience as lawyers, but also on years of experience as human beings separate and apart from the practice of law. For example:
 - Legal warfare costs clients money and takes their time and energy away from potentially more productive endeavors.
 - There very often is more than one side to a story.
 - Many, if not most, clients prefer certainty to risk.
 - For matters in litigation, a judge or jury may see things differently than the client and the lawyer do.
 - For transactional matters, adversaries that are pushed too hard or that believe they are being poorly treated may dig in their heels or refuse to agree to a transaction that could benefit both parties.
 - Clients have to weigh their decisions not only against the background of the present matter on which a lawyer may be working, but also with regard to their future interests.

⁹ **PETER K. JARVIS** is a partner in Holland & Knight's Portland office, where he practices primarily in the area of attorney professional responsibility and risk management and is Co-Leader of the firm's Legal Profession Team. **KATIE M. LACHTER** is Associate General Counsel in the New York office of Proskauer Rose LLP where she counsels the Firm's lawyers on matters of professional responsibility and cross-jurisdictional and compliance issues in support of the Firm's commitment to excellent client service.

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II. Learning Outcomes

In the everyday terms of agency law, clients are principals and lawyers are agents. The job of the lawyer, however, is not simply to accept what the client says at face value, but to consider different means by which client objectives can be achieved. We hope that readers will come away with the view that even the client who insists on proceeding "as a matter of principle" and "with no expenses spared" may be far better served by a more thoughtful and objective approach.

III. Teaching Notes

We find that a very good way to teach the ideas expressed in this chapter is to tie them to the students' lives before or outside of law school. Practicing law is a subset of living one's life. Both involve dealing with human beings and what motivates them. Both can benefit from much the same methodologies and experience.

Students might also be asked what they believe would happen to client interests and the practice of law as a whole if it was treated to the same degree of partisan gridlock as our present political system.

Students might also be asked to identify situations in which they encountered difficulties, and in which they, or someone else, came up with a creative solution. They could then be asked how this creative solution emerged and was presented. They could also be asked whether that creative solution could have been reached if, instead, the parties had just yelled at each other.

IV. Exercises/Discussion Points

The six benefits of civility identified under the heading "The Benefits of Civility" and the three hypotheticals under the heading "Civility as a Strategy" can serve as a useful starting point for discussion. In each instance, the class might be asked to identify the possible options that it sees for the lawyers in each circumstance as well as the possible resulting outcomes. In addition, the class should be asked to consider whether there is any downside to at least trying more civil approaches before deciding to move on to overly aggressive ones.

The point should also be stressed that properly implemented, civility is neither a sign of weakness nor a sign of surrender. Listening carefully and respectfully to what the other side has to say, attempting to find out what the other side really wants or will accept, making sure that one's own conduct has not inadvertently contributed to misunderstandings, and seeking to keep lines of communication open are, and always have been, proper parts of the legal toolkit that will generally improve the chances for positive outcomes.

Students might also be asked how often they believe that opposing lawyers and clients simply fold their tents and concede when treated uncivilly or unprofessionally. The point here is that in real world legal practice, one of the most common results of uncivil or unprofessional behavior is to cause the other side to dig in its heels and fight harder—not to give up or give in.

Students might also be asked about situations in which former adversaries or enemies on one matter

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became allies or friends on others, and about the circumstances which contributed to or inhibited this change.

V. Resources

ROBIN FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 3rd ed. 2011).

Chapter 5
SUCCESSFUL LAWYER SKILLS AND BEHAVIORS

TRACY L. KEPLER¹⁰

I. Summary

- Core messages of this chapter are that (1) successful lawyers draw upon a diverse array of skills and abilities that are often not learned or cultivated through the law school curriculum or experience; and (2) emphasis on academic credentials in recruitment of candidates for legal positions is misplaced, as they are not indicators of future success and should not be relied upon to determine performance potential of lawyers.
- Discusses the correlation, or lack thereof, between innate, objective intelligence (GPAs and test scores) and other personality driven characteristics in the determination of lawyer effectiveness.
 - Argues that high performance as a lawyer requires a confluence of three factors:
 - Intelligence/cognitive ability
 - Motivation, drive, personality and other non-cognitive abilities
 - Quality of the education received and time to practice/develop the craft
- Examines the history of the LSAT, law school rankings, and their effects on the hiring practices of various elite law firms creating a “credentials-based” legal labor market.
- Debates the impact and meaning of the *U.S. News & World Report* law school rankings, and argues that such a strict focus on the various and mechanical input factors used to devise the rankings (reputation scores among academics and practicing lawyers; educational resources; library size; employment and bar passage rates; and quality based on GPA, LSAT scores and admissions) hinders the ability to weigh and consider other relevant factors which impact a student’s and future lawyer’s success.
- Reviews empirical evidence suggesting that academic ability and LSAT scores are not reliable predictors of successful lawyer behavior. Specifically, the “26 Lawyer Effectiveness Factors” suggested by Schultz & Zedeck in their 2008 study, national trial advocacy competitions results suggesting that high LSAT and undergraduate grades do not correlate to winning teams, and disparity in elite law school graduates being promoted to partner and later dissatisfaction with large firm practice.

II. Learning Outcomes

This chapter, and discussion of the materials in it, should help students:

- Understand the “26 Lawyer Effectiveness Factors” identified by the Schultz & Zedeck study.
- Identify and evaluate additional qualities, behaviors, traits and skills that determine and promote effective lawyering.
- Question the reliance by law school admissions, ranking reports, and the hiring practices of law firms on academic credentials as a predictor of future success and effectiveness as a lawyer.

¹⁰ **TRACY KEPLER** is the Director of the ABA Center for Professional Responsibility which provides national leadership in developing and interpreting standards and scholarly resources in legal and judicial ethics, professional regulation, professionalism, client protection, and specialization.

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- Be aware of the social science and empirical evidence that supports looking to other, non-academic indicators as predictors of future success as a lawyer.
- Be mindful of and begin to cultivate and develop those skills and habits identified by the Schultz & Zedeck study that will result in being or becoming an effective lawyer.

III. Teaching Notes

The materials on lawyer effectiveness can be taught in a variety of contexts, including a stand-alone program for law students of all levels such as a law practice management course, which would include components of workload and staff management, marketing, financial management, technology, and the like, or as part of a course on professionalism or legal ethics when discussing MRPC 1.1, Competence. The chapter is written to be accessible for all law students, including first-year students who need to be mindful of the factors that make lawyers effective and to work to develop some of those essential skills, as well as those students reaching graduation and contemplating their practice settings. However, the material is also beneficial for those already in practice, as a reminder that being a successful lawyer requires many innate character traits and behaviors which are often overlooked or considered unimportant to the practice setting.

Given that most students may be in a particular law school setting based on solely academic factors, proposing the argument that their prior academic success may not correlate to being an effective lawyer in the future may cause an unreceptive audience. Further, promoting and attempting to get the students to engage in a dialogue related to innate personality traits or other, more subjective skills that make lawyers effective may be difficult. However, as students better understand the concept, as well as its application to the ethical framework within which they will have to adhere upon graduation and licensure, they will engage in the dialogue because it is about their lives, and influences their ability to be effective in their own practice setting.

Importantly, discussing psychological, organizational, and entrepreneurial factors that lead to being an effective lawyer gives students in the law school setting the ability, and most importantly, the time to reflect inward, look at themselves, their own motivations, behaviors and skills that may have been overlooked while meeting the demands and rigors of the law school curriculum. It will also help the students develop, or hone and refine, these same skills before they graduate.

Because this subject matter is a bit more abstract and outside the normal law school curriculum, it is important to focus on the empirical data and studies discussed in the chapter itself to have a firm base, as well as those listed in the “Sources/Reading” section.

IV. Exercises

1. Reviewing the Effectiveness Factors

Ask students to look at the Schultz & Zedeck “26 Lawyer Effectiveness Factors” as identified in Figure 3 (page 26 of the book), and identify ways in which each of these factors might come into play in the day-to-day law practice setting.

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2. Digging Deeper

Ask students to “dig deeper,” and identify other possible “effectiveness factors” that may come into play in making an effective lawyer. Some suggested topics/factors to discuss are as follows:

- **Collaboration Skills:** No longer just the ability to work well in a team, but the ability to function in a multi-party work environment such that the process and outcome transcend the collective contribution. In addition, suggest to the students that they need to cultivate an environment where the lawyer is required to be cognizant of his/her skill in suppressing his/her own ego and position, identification and encouragement of other voices, etc.
- **Emotional Intelligence:** Clients come to lawyers for advice, but also for their empathy, perspective and a personal connection. Refer students to the Clark D. Cunningham law review article, *What Do Clients Want from Their Lawyers*, 2013 J. DISP. RESOL. (2013).
- **Financial Literacy:** The ability to actually run a business, from HR issues, to accounting, tax concerns, profits/losses, explaining the rationale behind fees. Ask students to reflect and consider all that is required in running a business.
- **Technological Affinity:** Discuss with the students their competence with e-mail, internet, mobile devices, Metatdata, instant messaging, Adobe Acrobat, etc., as well as their potential staff and prospective clients' affinity.
- **Cultural Competence:** Provide a definition and a defined set of values and principles, and demonstrate behaviors, attitudes, policies, and structures that enable the lawyer to work effectively cross-culturally, a skill which develops and evolves over an extended period. Consider proposing the following hypothetical:

*Esmeralda, your new client, walks in for her intake meeting. She is accompanied by her sixteen-year-old son, who explains that he is there to translate as his mother speaks only Spanish. From the prescreening process, you know that Esmeralda is seeking your advice related to a domestic violence incident involving her husband, who is also her son's biological father. In such a sensitive situation, how should you proceed?*¹¹

Have students identify similarities and differences between themselves and prospective clients, and how these factors may influence or jeopardize the attorney-client relationship. It is important to focus and lead the students to understand how possible cultural biases and misunderstandings may affect the way in which they ask questions or address the case. Also, have the students examine shared connections which may assist them in becoming a better advocate for the client.

- **Attorney Wellbeing:** Encourage a dialogue with the students to reflect on various ways of managing stress and anxiety so that they can remain productive and not fall into many of the pitfalls of lawyer practice. This may also be an appropriate time to discuss lawyer assistance resources such as various state confidential lawyer assistance programs.

¹¹ Serena Patel, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISC. 140 (2016).

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- **Issue Spotting:** Ask the students to consider what happens when a client presents a whole host of issues – legal and otherwise – and begin to determine what kind of legal problems a situation may involve, and whether it is a legal issue at all, a skill that necessarily transcends any particular specialized knowledge.
- **Time Management:** Ask the students to reflect on the ability to prioritize tasks and manage their time, delegation of work, work-life balance, implementation of office procedures, etc.

3. Practicing the Effectiveness Factors:

- **Communication - Speaking & Listening:** Divide the class into two groups: one group is the “prospective client” who has been injured as a result of a car accident; the other group is the “attorney.” Instruct the prospective client group to develop their narrative: how the accident happened, who was involved, physical and emotional damage as a result of the accident, financial harm, etc. The prospective client group then pairs off with one member of the attorney group who will actively listen to the story. However, instruct the lawyer group to stop listening to the client (looking at cell phone, fiddling with papers, looking outside the window) after about 30 seconds and have the rest of the class watch. Have the next group engage in the dialogue, but this time, have the attorney ask follow-up questions to further the client’s story and demonstrate active listening. Following the exercise, facilitate a discussion on the impact of active listening/how to listen, etc.
- Ask the students to identify a person that they know fairly well who is not a lawyer (a family member, neighbor, friend) who has used a lawyer in the past and was dissatisfied in some respect. Ask that person why and for what reason he/she was dissatisfied, and have the students report on their results.¹²

4. Self-reflection

Ask students to identify challenges to the lawyer effectiveness factors and develop protocols for overcoming them. For example, some students may talk about the stress and anxiety that comes with increased multi-tasking in the digital age. By considering the effect of the stress-producing activities and identifying ways to overcome it, they can better meet the demands of a high volume and stressful practice setting.

V. Resources

Livingston Armytage, *Client Satisfaction with Specialists’ Services: Lessons for Legal Educators*, in *SKILLS DEVELOPMENT FOR TOMORROW’S LAWYERS: NEEDS AND STRATEGIES* 355, 365 (1996).

Ruthe Catolico Ashley, *Creating the Ideal Lawyer*, available at http://www.americanbar.org/content/newsletter/publications/new_lawyer_home/ideal.html (last visited Feb. 13, 2017).

¹² See Clark D. Cunningham, *What Do Clients Want from Their Lawyers*, 2013 J. DISP. RESOL. (2013).

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Karen Barton, Gregory Todd Jones & Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1 (2006).

George E.P. Box, *Robustness in the Strategy of Scientific Modal Building*, in ROBUSTNESS IN STATISTICS: PROCEEDINGS OF A WORKSHOP (R.L. Launer & G.N. Wilkinson eds., 1979).

Clark D. Cunningham, *What Do Clients Want from Their Lawyers*, 2013 J. DISP. RESOL. (2013).

Neil J. Dilloff, *Law School Training: Bridging the Gap between Legal Education and the Practice of Law*, 24 STAN. L. & POL'Y REV., no. 2, 2013, at 425-456.

Nancy Faber, *An Irreverent Best-Seller by Nobel Laureate Richard Feynman Gives Nerds a Good Name*, PEOPLE MAG., July 22, 1985, available at <http://www.people.com/people/archive/article/0,,20091337,00.html>.

Marc Galanter & William D. Henderson, *The Elastic Tournament: the Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 102 (2008).

JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR (2005).

William D. Henderson, *A Blueprint for Change*, 40 PEPP. L. REV. 461 (2013).

William D. Henderson, *The Bursting of the Pedigree Bubble*, 21 NALP BULL., no. 7, 2009.

WILLIAM D. HENDERSON, LAW FIRM STRATEGIES FOR HUMAN CAPITAL: PAST, PRESENT, FUTURE IN LAW FIRMS, LEGAL CULTURE AND LEGAL PRACTICE 73-106 (Austin Sarat ed., 2010).

William D. Henderson, *Three Generations of Lawyers: Generalists, Specialists, Project Managers*, 70 MD. L. REV. 373 (2011).

William D. Henderson, *The LSAT, Law School Exams and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 TEX. L. REV. 975 (2004).

Ann Hurley, *The Prodigy Puzzle*, N.Y. TIMES MAG., Nov. 20, 2005.

ARTHUR R. JENSEN, BIAS IN MENTAL TESTING (1980).

Jeffrey Joyner, *Personal Qualities Needed to be a Lawyer*, CHRON, <http://work.chron.com/personal-qualities-needed-lawyer-4148.html> (last visited Feb. 13, 2017).

DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Reports Ranking of ABA Law Schools* (Feb. 18, 1998), <http://www.lawschool.com/aalsstudy.htm>.

Jack Ladinsky, *Careers of Lawyers, Law Practice and Legal Institutions*, 28 AM. SOC. REV. 47 (1963).

Chapter 6
INCLUSIVE THINKING: ESSENTIAL PROFESSIONAL VALUE/POWERFUL
PROFESSIONAL ADVANTAGE

BENJAMIN K. GRIMES¹³

I. Summary

- Describes inclusive thinking and differentiates the concept from principles of organizational diversity or anti-discrimination practices.
- Demonstrates that inclusive thinking—the practice of integrating different perspectives, experiences, values, expectations, and modes of thought—can lead to both greater knowledge and more effective development of solutions.
- Notes the business case for pursuing more inclusive thinking practices, in light of shifting demographic trends, as competition increases for both the increasingly diverse population of attorneys and a savvier client base that recognizes the advantage that inclusive thinking provides.
- Acknowledges the impact of implicit bias.
- Offers seven steps to develop inclusive thinking as a practice.

II. Learning Outcomes

This chapter, and discussion of the materials in it, should help students:

- Develop a greater appreciation for inclusive thinking as a personal and professional asset;
- Understand how inclusive thinking differs, conceptually, from diversity and anti-discrimination;
- Recognize the difference between inclusive thinking and that which fails to incorporate alternate perspective, experiences, values, expectations, and modes of thought; and
- Understand that they can develop inclusive thinking as a habit and become familiar with ways to do so.

III. Teaching Notes

Conceptual Framework / Intended Audience: The materials on inclusive thinking can be taught in a variety of contexts, including a stand-alone program for law students of all levels, as part of a doctrinal course, as part of a course on professionalism or legal ethics, or as a section of an experiential learning course. The chapter is written to be accessible for law students, including first-year students who may lack experience with lawyers, but the material is adaptable for all experience levels, including lawyers. The conceptual framework is the same for all experience levels, but the examples can become more sophisticated as the experience level of the students increases.

¹³ **BENJAMIN K. GRIMES** retired from the Army Judge Advocate General's Corps after a 20-year military career; he currently serves as the Deputy Director of the Department of Justice Professional Responsibility Advisory Office (PRAO) and has been a member of the ABA Standing Committee on Professionalism since 2014.

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Receptiveness of Student Audience to the Subject: Many students are initially skeptical of the topic of inclusive thinking because it is so different from what they are used to discussing in a law school classroom and because its meaning is not apparent without some explanation. Moreover, the implications of implicit bias on attorney decision-making can create significant personal concern over the rationality of past decisions. However, as students better understand the concept, they usually warm up pretty quickly to the material because they can see the impact and value of inclusive thinking by working through the suggested exercises.

Because of skepticism and lack of understanding, it is helpful to make the concept of inclusive thinking as concrete as possible. The exercises offered at the end of the chapter (and expanded here) provide an opportunity for students to develop the concrete understanding of this topic that leads to critical changes in modes of thinking. An important message to students of all ages and practices is that inclusive thinking is a skill which can be constantly developed and strengthened.

IV. Exercises

1. Seven Steps to Thinking Inclusively:

Review the Seven Steps to Thinking inclusively on pages 87-88. The following exercises give students an opportunity to apply those steps, or to envision how they can apply them, to their lives and practice. The questions below can be presented as an opportunity for personal reflection, as the jumping off point for discussion, or as journal reflection writing as part of broader coursework.

a. Personal Network. Ask students to think about their personal network.

Ask the following questions:

- How much diversity of identity, experience, perspective, and personality do you have in your personal network?
- What impact does the diversity of your personal network have on your approach to problem-solving?
- Describe one way in which the diversity of your personal network has positively influenced the solution to a problem.

Action item: Identify one concrete step you can take in the next month to diversify your personal network.

b. Professional Network. Ask students to think about their professional network.

Ask the following questions:

- How much diversity of identity, experience, perspective, and personality do you have in your professional network?
- What impact does the diversity of your professional network have on your approach to problem-solving?
- Describe one way in which the diversity of your professional network has positively influenced the solution to a problem.

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Action item: Identify one concrete step you can take in the next month to diversify your professional network.

c. Problem Solving Style. Ask students to identify/think about a current problem they are trying to solve.

Ask the following questions:

- From how many perspectives have you considered this problem?
- Can you identify at least two other perspectives that you have not considered?
- Can you think of at least five people who can help you see completely different aspects of the problem?

Action item: Talk to at least three people you identified above about your problem and listen to their perspective on your problem. (Bonus: integrate their perspective into your solution!)

d. Productive Conflict. Ask students to identify/think about their core beliefs (these could be purely philosophical, political, ideological, or otherwise).

Ask the following questions:

- Why do you believe what you believe?
- Have you had any encounters or experiences that have caused you to reexamine your beliefs?
- Think about your current problem (identified above); what would the solution to that problem look like if you applied the opposite of your core beliefs?

Action item: Identify someone you know who holds a core belief contrary or significantly different from yours. Ask them why they believe what they believe. (The goal is not a debate but rather an opportunity for you to listen to them without engaging in an effort of persuasion.)

e. Missing Perspectives. Ask students to identify a time they were unable to achieve something they really wanted to achieve.

Ask the following questions:

- What perspectives were missing from your life that could have contributed to a different outcome?
- What were three resources, relationships, or pieces of information that could have contributed to a successful outcome?
- How could you have accessed these additional perspectives, resources, relationships, or information?

Action item: Contact one person affected by the experience you identified; ask them what perspective they think would have contributed to a different outcome.

f. Surprises. Ask students to think about the last time they were surprised by something or someone.

Ask the following questions:

- What was it about that encounter that surprised you?

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- Can you identify the gap in expectation that led to your surprise?
- Do you think you might be surprised by a similar experience in the future?

Action item: Keep a 'surprise journal' for one month and record surprising encounters and experiences. Each time, try to identify the gap in expectation that led to the surprise.

g. New Connections. Ask students to think about the last new person they met.

Ask the following questions:

- Where and how long ago did you meet this person?
- How does this new acquaintance contribute to the diversity of your personal or professional network?
- What was one thing about them that surprised you?

Action item: Commit to make one new acquaintance per week. Be sure to get to know one or two details about them.

2. Implicit Bias

Dr. Reeves notes that implicit biases are a critical challenge to thinking inclusively, preventing rational decision-making without cognitive awareness. She notes that "recognizing and interrupting these cognitive biases ... is the key to becoming a more inclusive thinker." To help students recognize some of their implicit biases, have them take the Implicit Association Test, available at <https://implicit.harvard.edu/implicit/takeatest.html>. As part of an ongoing course or curriculum, have students use the IAT as an opportunity for reflective writing.

3. Implication of the Rules of Professional Conduct

The value of inclusive thinking goes beyond better decision-making and can impact whether and how attorneys meet their professional responsibility obligations. The following questions are based on the ABA Model Rules of Professional Conduct but can be adapted to the specific rules of any licensing jurisdiction. Have students reflect or discuss the impact inclusive thinking (or its absence) can have on the following:

- Rule 1.7(a)(2) and the prohibition on personal interest conflicts.
- Rule 1.14(a), when dealing with clients with diminished capacity and their caretakers.
- Rule 1.16(a)(2) and whether a known or implicit bias might be considered a "mental condition [which] materially impairs the lawyer's ability to represent the client."
- Rule 2.1 and the attorney's role as advisor, in particular the notion of counseling a client regarding "other considerations such as moral, economic, social and political factors."
- Rule 3.5(a) and (c)(2), regarding impartiality of the tribunal.
- Rule 7.3(b)(2) and solicitation of clients.

Think also about the ABA Model Code of Judicial Conduct. Have students reflect or discuss the impact of inclusive thinking (or its absence) on the following:

- Rule 1.1 and public confidence in the judiciary.

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- Rules 2.2 and 2.3, regarding impartiality, bias, prejudice and harassment.
- Rule 2.11, regarding a judge's personal biases concerning a party or a party's lawyer.

V. Resources

MALCOLM GLADWELL, *BLINK: THE POWER OF THINKING WITHOUT THINKING* (2007).

DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

ARIN N. REEVES, *THE NEXT IQ: THE NEXT LEVEL OF INTELLIGENCE FOR 21ST CENTURY LEADER* (2012).

JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (2004).

ANDRES T. TAPIA, *THE INCLUSION PARADOX: THE OBAMA ERA AND THE TRANSFORMATION OF GLOBAL DIVERSITY* (2009).

Chapter 7

WOMEN IN THE LAW: OVERCOMING OBSTACLES, ACHIEVING FULFILLMENT

KATY M. GOSHTASBI¹⁴

I. Summary

- Discusses how women are doing in the legal profession now.
- Statistically develops a foundation for the gender inequality seen in the legal profession.
- Explores and suggests best practices and strategies that a woman: a) new to the legal profession can utilize to overcome legal system obstacles b) can use to advance her career, and c) can use to be professionally fulfilled.

II. Learning Outcomes

- Empirically understand the general inequality that currently exists in the legal profession.
- Understand the issues around implicit bias in the workplace and how to overcome these biases via your substantive work product and reputation management.
- How to draft a comprehensive strategic plan including goal planning.
- Appreciating the importance of and how to ask for help and mentorship.
- The importance of self-promotion.
- Understanding and implementing a reasonable business development plan customized for the particular person.
- Understanding and appreciating the need for work/life balance and how to go about establishing such a balance early on.

III. Teaching Notes

This chapter provides more of a high-level overview of the issues and suggestions for female lawyers. It is not written to be a comprehensive and exhaustive authority on the topic. The material should be utilized with an understanding that each student is unique and thus has a unique set of challenges and opportunities in developing their legal careers. For instance, this topic may be particularly emotionally charged for some students. Perhaps they have encountered gender inequality that has impacted their trust levels in men and other women colleagues.

Some students may be more open to developing their skill-set as defined by this chapter. This could be due to:

- a) How the student processes information: highly left-brained, analytical students will have more of a challenge appreciating the necessity of professional development and the

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marketing purpose it fulfills in their growth as lawyers. They will be more wedded to being a superb substantive practitioner of the law. This will be a challenge to overcome with empirical evidence to satisfy their left-brain.

- b) Their level of experience and appreciation of marketing/branding.

For the self-promotion section, consider treating this as a stand-alone section and focus on personal branding as the overall topic. Personal branding is about healthy self-promotion and the ability for women lawyers to value themselves and exercise this muscle. Perhaps consider hiring an expert in the field of personal branding (as it relates to the individual and not their social media presence) to co-teach this section or teach it completely. Drafting of the student's story and careful review of their story with an expert is critical.

IV. Exercises

1. Self-reflection: the student must be aware of their strengths and their ability to network and gain business development ideas. To that end, ask each student to reflect on:
 - a. Whether and to what extent they have already encountered gender bias. How did they deal with it? How will they deal with it in the future?
 - b. How they balance their school "work" and personal life now. Do they find they place too much emphasis on success as a lawyer to the detriment of their families, friends and selves?
2. Ask students to:
 - a. Draft a sample strategic plan complete with goals. Explain to students that this document is always a work in progress and should be revised regularly.
 - b. Make a list of potential sponsors and mentors, and make a plan of how they would approach and interact with each person and why. This list can be based on the student's perception of those lawyers they admire based on their character and achievements.
 - c. Make a list of areas of the law that interest them and why. NOTE: this list should be based more on the students' own stories and personal interests, as they have very little understanding of the various areas of the law practically.
 - d. Make a list of the places they would like to network and why. Again, this should be tied to the student's personal strengths and story.
 - e. List hobbies and activities that they could partake in: i) once a month ii) weekly in order to stay balanced as a human.

V. Resources

Refer to the resources in the back of the chapter.

KATY GOSHTASBI, PERSONAL BRANDING IN ONE HOUR FOR LAWYERS (2013).

GRETCHEN RUBIN, THE HAPPINESS PROJECT (2015).

Chapter 8
MASTERING THE CRAFT OF LAWYERING

MARK A. DUBOIS¹⁵

I. Summary

- In the few years since this book was published, the trend which existed at that time of the profession drifting into two distinct and dissimilar worlds has only intensified. At the top were and are the “biglaw” firms which often people their ranks of new lawyers with graduates of the top 15 law schools and the very top of the class from the best of the rest. Sixty to seventy percent of the graduates of most schools (and more of some) are destined for the “solo and small firm” world. Many of those who are lucky enough to get a biglaw job right out of law school will eventually join the ranks of the mid-sized and smaller firms in a few years as the traditional pipeline to partnership in big firms is rapidly disappearing. Without a big book of their own clients, many associates will not be promoted past their fifth or sixth year.
- This chapter is addressed to the students who will find themselves hanging their own shingles or working in situations where they receive only limited supervision and development. Some will be hired in as laterals in their second to sixth years if they have been lucky enough to avoid trouble and develop a sound base of knowledge and skill.
- Beginning a career in “small law” can lead to a successful and fulfilling career, though not without its own special challenges. The chapter tries to balance the risks of venturing into the practice of law without experience, deep institutional support, or ready access to information with the reality that much of what a lawyer needs to know to successfully represent the average client in simple to moderately complex matters can be learned in time to render adequate service to most clients.
- One problem the chapter addresses is that new lawyers often simply don’t “know what they don’t know” and assume they are ready for complex matters before this is actually the case. Lawyer disciplinary authorities report that more new and inexperienced lawyers are in the ranks of disciplinary respondents; often because they have gotten in over their heads with complex matters or difficult clients and made poor choices when confronted with crises. These new lawyers sometimes fall prey to disreputable clients who manipulate them into doing their bidding, lending their names and credibility to questionable initiatives, and cutting corners, which often leads to malpractice suits and disciplinary, and sometimes criminal, complaints.

II. Learning Outcomes

- There is no shame in not landing a “biglaw” job.
- From Abraham Lincoln to Atticus Finch, history and literature are full of examples of very accomplished lawyers beginning in modest practice settings.
- New lawyers must be humble enough to admit their ignorance and understand that, at best, law school is designed to give them only the most skeletal understanding of most subjects.

¹⁵ **MARK A. DUBOIS** is an attorney with Geraghty & Bonnano, LLC in New London, CT. From 2003 to 2011 he served as Connecticut’s first Chief Disciplinary Counsel.

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- Deep learning, such as is necessary for success in most areas of practice, only happens after graduation and continues through most lawyers' careers.
- There is no shame in admitting one's limitations and seeking help and guidance from others.
- Many successful lawyers either decline or refer many matters which are outside their realm of knowledge or resources.
- Specialty bars, mentoring programs, and collegial relationships all can provide the support, guidance and knowledge necessary to become competent in many areas.

III. Teaching Notes

The author began his career in a two-person law firm, worked as a municipal attorney, litigated in a boutique trial firm, owned his own firm, taught, both full time and as an adjunct, in his state's law school, and ultimately became the Chief Disciplinary Counsel of his state's court system. Upon retirement, he became president of his bar. Along the way, he nurtured and mentored many new lawyers. As disciplinary counsel he worked to extricate new lawyers from the frightening and overwhelming disciplinary system and developed diversionary programs to be used when errors occurred out of ignorance or inexperience. Unfortunately, he also had to guide many young lawyers into periods of long suspension or disbarment when the errors were too serious. In many such cases, the new lawyer had fallen prey to much older players, both lawyers and clients, who exploited their ignorance and naiveté.

When teaching, both as an adjunct and a full-time professor, it proved very useful to bring in experienced practitioners to discuss the benefits and challenges of different practice tracks and career paths. Many shared their own life stories and explained where they had found advice and guidance as new lawyers.

IV. Exercises

All of the following are based on actual cases. Without revealing how the matters ultimately came out, the teacher should set the stage with each fact pattern and ask the students, either as a class or in small discussion groups, what the lawyer did wrong, what they would have done in his/her shoes, and how problems could have been avoided. Debriefing alternative courses of conduct and solutions helps the students to understand how others wound up in trouble and how it might have been avoided.

1. JENNIFER AND THE FRAUDULENT MORTGAGES

Jennifer graduates from a small school and immediately opens her own law office. Due to her industriousness and personality, she quickly becomes successful and develops many good sources of client referrals. One such source is a real estate agent who offers to help her become the "attorney of choice" for a group of sellers, agents and mortgage brokers who specialize in getting first-time home buyers into moderately priced homes in urban neighborhoods using lenders who are more interested in volume than quality. Some of the loans are "predatory" in that they saddle borrowers with loans that adjust to higher rates within a short period of time, making the long-term chances for success limited. Some also rely on the buyers' representations concerning assets, income and ability to pay with little effort expended checking on the truth of things on applications.

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Jennifer does 13 closings within her first six weeks working with this group. She quickly becomes concerned that the mortgage applications border on fraudulent, the appraisals of the properties seem inflated, and the closing documents don't accurately reflect such things as how much deposit was paid and the source of closing funds. She asks both her initial contact and a bank vice president if everything that she is seeing is proper and appropriate. Unfortunately, because both the agent and the banker are co-conspirators in a large criminal enterprise they assure her that everything is fine and this is how the residential real estate business works in the inner city.

Jennifer grows so uneasy about the business that within six weeks from the date of her first transaction she withdraws from further involvement. Later, she is arrested for involvement in mortgage fraud, pleads guilty to wire and mail fraud, serves two years in federal prison and is saddled with a \$2 million restitution order. She is suspended from the practice of law for six years. She now works in contract administration for a large construction firm and no longer practices law.

2. KYLE AND THE WOLVES OF WALL STREET

Kyle is a young African-American lawyer from a small city. During high school, he entered a mentoring program with a large law firm where he worked part-time through high school, college and law school. Upon graduation, he worked at the firm for two years, left to work at another firm in D.C. for a time, and then returned to his hometown to open a solo office where he planned to represent members of his community and childhood friends and acquaintances.

Soon after opening his firm, he was approached by a client who asked him for help with some simple zoning matters. The client expressed satisfaction with his work and paid him a bonus above his modest fee. Then the client asked him if he would help him in his stockbroker business. The client explained that he had lost his broker's license but was still buying and selling stocks for customers. He needed someone to act as a clearinghouse, take in money in from investors and disburse funds as instructed. He offered to pay Kyle a fee which was a percentage of the money processed through the account each month. Later, Kyle also began issuing "opinion letters" concerning certain stock sales and otherwise assisting the client in his stockbroker business.

Kyle grew successful in his own practice and after several years determined to stop working with the stockbroker client. Before he could give the client notice, the FBI raided his office with a search warrant to obtain information on the client and his stockbroker business. He now faces 5-8 years in federal prison for fraud, conspiracy, and money laundering.

3. BEN AND THE MESSED UP DEED

Ben worked in a small law firm. He was smart and a hard worker and rapidly gained the trust of the managing partner to handle matters directly with clients with little or no supervision. He was assigned to represent a significant client in a real estate transaction. He made an error in the deed, resulting in the client conveying the wrong parcel of property. No one caught the error at the closing. Later, the client called him and asked a question about the deed which led him to discover his error.

Ben was embarrassed and afraid to tell the boss what he had done wrong. Instead, he prepared a new deed and forged the signatures of all the original signatories to it. He then recorded the new deed, believing that this would correct his error. Unfortunately, the new deed came to the attention of the original buyer and a lawsuit ensued. Ben lost his law license as a result of his conduct. The original error was just that—a simple mistake that could have been fixed. Preparing the new deed and forging

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the signatures of the parties to it was a serious criminal act, and reflected poorly on his character and fitness to practice law.

IV. Resources

There are a number of lawyer bloggers who focus on solo and mall firm practice. Carolyn Elefant's "My Shingle" (<http://myshingle.com/>) is a good resource for new lawyers to learn about the many and varied issues and challenges they will be confronted with in practice.

The Massachusetts Law Office Management Assistance Program has much information and many resources relating to opening and running a law office. There are many more such resources, both on-line and in book form.

See also BRIAN TANNENBAUM, *THE PRACTICE: BRUTAL TRUTHS ABOUT LAW AND LAWYERING* (2014).

A good exercise is to have the class spend some time researching the sources of support, guidance and information and put together a resource guide.

Chapter 9

DILIGENCE

DAISY HURST FLOYD¹⁶

I. Summary

- Defines the obligation of an attorney to be diligent as “the steady application of close attention and best efforts to the task at hand” and points out that the absence of diligence is negligence.
- Addresses diligence as an enforceable professional duty, the breach of which may lead to disciplinary sanction; as a standard of care, the breach of which may lead to a malpractice judgment; and as a lawyerly virtue, which can be developed through the cultivation of habits.
- Discusses the scope of ABA Model Rule of Professional Conduct 1.3, which requires that “a lawyer act with reasonable diligence and promptness in representing a client” and the disciplinary consequences of violating the rule.
- Provides examples of lack of attorney diligence that have led to disciplinary sanction.
- Distinguishes the duty of diligence from the related duty of competence and provides examples of ways in which a diligent lawyer effectively deals with a lack of competence.
- Discusses the relationship of the duty of diligence to the duty of communication and provides examples of ways that a diligent lawyer fulfills the duty of communication.
- Relates diligence in communication to the ethical duty of promptness.

II. Learning Outcomes

This chapter should help students:

- Understand the concept of diligence as it applies to an attorney’s professional obligations to the client.
- Understand that lack of diligence may lead to disciplinary sanction and/or a finding of malpractice.
- Become aware of the challenges to diligence that are most frequently experienced by law students and lawyers, including bad habits such as procrastination, poor communication, lack of promptness, and failure to identify and properly deal with a lack of competence.
- Understand the scope of ABA Model Rule of Professional Conduct 1.3, which sets out the requirement of diligence.
- Understand the ways in which the requirement of diligence is related to the requirements of promptness, effective communication, and competence.
- Be familiar with the kinds of actions that can lead to disciplinary sanction for lack of diligence.
- Learn practical skills for fulfilling the duty of diligence.

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III. Teaching Notes

The duty of diligence often does not receive appropriate attention in programs focused on lawyers' ethical obligations because it seems self-apparent. Therefore, the greatest challenge in teaching this material may be to overcome an assumption that lawyers and law students understand what professional diligence means. By making it clear that the duty of diligence is both a professional obligation and a virtue, the teacher can help students develop a deeper conceptual framework for understanding the importance of diligence to the lawyer's work. By helping students understand the relationship of diligence to the separate but related duties of competence, promptness, and communication, the teacher can provide practical tips for developing the skills needed for diligence.

It is helpful to demonstrate for students that the absence of diligence can lead to disciplinary sanction and/or malpractice accusations and judgment. But, it is also helpful to have the students focus on diligence as an aspirational virtue that can, and should be, cultivated through the development of appropriate habits. One way to emphasize this is to discuss the examples of actions that have resulted in sanctions (on page 120) and asking students to imagine the kinds of effective habits that could have avoided that negative result.

IV. Exercises

Because the best way to avoid a failure of diligence is to develop positive habits, it is helpful to use exercises that put the student into a role. The following exercises help students to understand why some lawyers fail to be diligent and ask them to reflect on why they might fail to act with diligence. They are also helpful in getting students to see the ways in which fulfilling the duty of diligence overlaps with the separate but related duties of competence, effective communication, and promptness.

A suggested exercise is to use the list of conduct for which attorneys have been sanctioned and ask the students to identify ways in which this conduct is related to a failure of other duties, such as competence, communication, or promptness, or, more generally, to the lack of effective practice management. A discussion based on this exercise will help deepen the conceptual framework for the duty of diligence by asking the students to identify daily habits that a lawyer should develop that would have avoided the conduct that led to sanction. For example, a lawyer has been sanctioned for missing a statute of limitations or other filing deadline. The teacher could ask the students to imagine why a lawyer would miss the statute of limitations or some other deadline. For example, did the lawyer fail to have a tickler system or other appropriate calendaring system as a part of his or her law office management? Or, was the lawyer incompetent in the particular subject area, and so mistakenly assumed that the wrong statute of limitations or other deadline applied? Or, does the lawyer routinely procrastinate and therefore, while knowing the proper deadline and being competent, a habit of procrastination pushed the final work too close to the deadline so that an unexpected emergency prevented a timely filing? Or, could there have been poor communication with the client or someone else that led to the failure? This process of imagination puts students in the position of the sanctioned lawyer and makes concrete the kinds of habits or actions that can lead to a failure of diligence.

Another exercise is to ask students to reflect on a time that they failed to act diligently (in anything—it doesn't have to be in the context of a professional obligation) and to identify the reasons that occurred. You can even prompt the reflection with some examples: being late to pick up a friend for a movie, coming to class without adequate preparation, exceeding a budget, not writing a thank you note, etc. This exercise requires the students to think about challenges they may each have to acting with diligence and also how

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to counter those challenges; it also makes the point that things that happen in your non-professional life can have implications for the ways in which you conduct your professional life. For example, you can prompt them to reflect upon whether the particular failure was because of lack of organization, or due to misunderstanding the task so that the time required was underestimated, or because of poor communication with someone who assigned the task, or the result of a tendency to procrastinate on matters that are difficult or boring or are avoided for some other reason? In addition to asking the students why there was a failure of diligence, ask them to reflect upon the kinds of actions that could have avoided the failure of diligence in the situation they have identified. Similar to the first exercise, this gets the students to think more concretely about diligence and its relationship to certain habits or tendencies that everyone possesses, but it does so in a more personal context by putting them in a role as themselves rather than as a sanctioned lawyer. It also reinforces the message that a failure of diligence can be avoided by the cultivation of habit. For a reflection exercise such as this, it is usually best to give the students several minutes of time to reflect on the questions asked, and to write down their answers rather than just thinking about them, then to follow up with sharing their reflections with the larger group.

V. Resources

See resources listed at the end of the chapter.

Chapter 10
HONESTY, INTEGRITY AND LOYALTY

MARK A. DUBOIS¹⁷

I. Summary

- This chapter, though short, deals with some of the most difficult issues new lawyers may face, the tension between their own moral codes and values and what they are required to do to advance clients' interests and comply with the Rules of Professional Conduct.
- Study of the development of the Model Rules of Professional Conduct reveals that formal standards of lawyer conduct grew out of some thoughtful articles and addresses in the mid-18th Century which, after the Civil War, led to the first code of conduct, in Alabama in 1881, and eventually to the adoption of the first iteration of the ABA Code in 1908. To a large extent, the original code reflected the place lawyers envisioned for themselves in the then-developing industrial age and reflect Victorian notions of law as a profession in England. Law was one of the professions that wealthy members of society who did not inherit titles were expected to pursue. Others included medicine, the clergy, government and military. These professions were contrasted with commercial enterprise as pursued by the then-ascendant merchant class. This is the origin of the aphorism that "law is a profession and not a business."
- Lawyers' ethics codes have always reflected choices. While it may be morally right that someone who commits a crime is punished for it, and that an innocent person should never be made to pay the price of another's misconduct, lawyers representing guilty parties are forbidden from revealing that someone else has been arrested or imprisoned for the crimes of their clients. Similarly, lawyers can advantage their clients' interests in transactional matters if they fail to correct misimpressions that their counterparties may have, even if it results in an unfair bargain. The explanation for the divergence between what might be "right" in a given instance and what is in accord with the rules of conduct can be an engaging discussion in a classroom.
- There are many models of lawyering, which can be graphed on the continuum of client autonomy. At one end of the spectrum is the "lawyer as godfather" model, where the lawyer adopts a paternalistic approach, substitutes her values for the client's, and attempts to bring out a "just" outcome regardless of the fact that it may be less than optimal for their client. At the other end is the "lawyer as mouthpiece," where the lawyer allows the client to call the tune and simply does anything and everything the client asks, as long as it is not illegal or in violation of any rule of conduct. External standards, such as laws concerning perjury or witness tampering, and forum duties, such as the duty of candor and federal Rule 11, set performance standards which may conflict with clients' and lawyers' wants and wishes.
- Lawyers must try to balance their own moral and personal ethical standards with the clients' wants and needs and the performance standards set by laws and rules. Truly "professional" lawyers find a way to honor all three points of the triad.

¹⁷ **MARK A. DUBOIS** is an attorney with Geraghty & Bonnano, LLC in New London, CT. From 2003-2011 he served as Connecticut's first Chief Disciplinary Counsel.

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II. Learning outcomes

- Understand the various performance standards and value systems and how they interact with each other.
- Learn how clients' interests can conflict with the lawyer's own moral and personal values and institutional norms.
- Explore ways to resolve conflicts between their own values, clients' wishes and institutional rules.

III. Teaching Notes

The students will take a course in legal ethics or professional responsibility during law school, and the subject is too complex to cover comprehensively in a professionalism course. Assuming that the students have not had such a course already, outline the most important rules:

- A. Duty of loyalty
- B. Duty of confidentiality
- C. Duty of honesty
- D. Duty of candor to tribunal

If the students have already had an ethics course, refresh the rules and discuss their understanding of them.

Students should have an understanding of other standards of conduct, such as religion, moral codes, and societal expectations. Have them volunteer these various sources and list them on the board.

Engage the class in a discussion of whether one or more of the sources of performance standards "trumps" the others.

Explore what the students might do if their own moral or ethical standards are at variance with law or rules of conduct. Is it ever OK to break a law? What about an immoral or unjust law?

Discuss how a client's interests may be in tension with a lawyer's own moral or ethical standards or the lawyer's duties under law or forum rules.

IV. Exercises/Discussion points

Set up one or more of the following fact patterns and allow small groups of students a few minutes to discuss among themselves how they would resolve conflicts inherent in each one. Have each group report a different problem and have the other groups and students critique their analysis and solutions. For each problem, have the students identify the issues, the duties, the moral right or wrong, the legal right or wrong, whether these are in tension or not, and how they might resolve the conflict.

1. THE LYING CLIENT

John is accompanying an important client of the firm to court for a brief status conference on a pending case. While driving the client to court, the client volunteers that he has not told the partner in charge of the case an important fact that throws into question whether he has a viable case or,

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instead, is pursuing a baseless matter in hopes of extorting a big settlement from his opponent who cannot afford to litigate the case. When asked what the client will do if the judge asks him about this issue, the client responds: "that's easy, I will just lie."

2. THE MEAN CLIENT

Mary is asked to represent a client who wants to evict her sister from a home that she manages as trustee for their aged mother who is in a nursing home. The sister has not paid the agreed-upon rent for some time because she is ill. The mother has other sources of income and does not need the income for her own personal needs. The mother also is not aware of Mary's client's plan to evict her sister. After discussing the matter with her client, Mary comes to believe that the case is more about spite and hurt feelings among the sisters than any legal issue, even though the rent has not been paid and the client has every legal ground to evict her sister.

3. THE CANCER PATIENT

Bill is a lawyer in a state that does not allow the sale or possession of marijuana, even for medical purposes. A close friend from law school is stricken with cancer and is very sick from the chemotherapy. The friend asks Bill if he can find her some marijuana as she has read that some cancer patients get relief by using it. Bill has a client who was arrested for marijuana sales and is pretty certain that he can get him some marijuana for his friend.

4. SALLY AND THE SELF-REPRESENTED PARTY

Sally represents a client in a divorce. The client's husband is a small property landlord who supports his family with the income from a small portfolio of rental properties. The child support guidelines in Sally's state are established as a percentage of the party's income. Sally appreciates and understands the difference between gross and net income, but the unrepresented husband does not. The husband puts the gross income figure on the child support worksheet instead of the net figure, resulting in a much higher award to Sally's client and her three children.

5. MARK AND THE TAX ERROR

Mark is negotiating a settlement of a lawsuit with another lawyer. Both lawyers get together with their clients for a settlement discussion. Everyone agrees that anything said at the settlement meeting is "off the record" and cannot be used for any purpose in any other proceeding. Mark suggests that his client will take a certain sum of money to settle the case. His opponent turns to his client and says: "you know, if you pay this, it's tax deductible for you." Mark knows that this is not true. The client says: "well, if that's the case, I will pay the money."

V. Resources

There is a rich body of literature on lawyers' relationships with their clients. *See, e.g.,*

BINDER ET AL., *LAWYERS AS COUNSELORS, A CLIENT-CENTERED APPROACH* (2d ed. 2004).

Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLIN. L. REV. 369 (2006).

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Thomas L. Shaffer & Robert F. Cochran, *Technical Defenses: Ethics, Morals, and the Lawyer as Friend*, 14 CLIN. L. REV. 337 (2007).

Serena Stier, *Legal Ethics: the Integrity Thesis*, 52 OHIO ST. L.J. 551 (2001.)

Bradley Wendel, *Morality, Motivation and the Professionalism Movement*, 52 S.C. L. REV. 557 (2001).

Chapter 11

NAVIGATING THE CHARACTER AND FITNESS PROCESS

DENNIS A. RENDLEMAN¹⁸

I. Summary

“Character and fitness” is the phrase used by most all states and many other jurisdictions to describe the standard and process by which applicants for admission to practice law are evaluated to determine whether they have the individual moral and ethical qualities to be trusted to become officers of the court in the judicial system. This involves the representation of clients, handling client money, guaranteeing constitutional rights and protecting the public.

II. Learning Outcomes

Students should understand that the character and fitness process is extremely serious. Very few applicants are rejected, but those who are usually have something in their record or background that raises a red flag. Character and fitness is both an objective and subjective process that requires complete openness and honesty. But the student should also take control of their participation in the process and ensure that their information is presented in the most favorable light.

III. Teaching Notes

It is difficult to explain “Character and Fitness” without recognizing that it is both important and archaic. It was designed to prevent unsavory applicants from practicing law in order to protect the public and to protect existing lawyers. It is important to make a realistic presentation of the process and purpose to demystify the experience. For most bar applicants, Character and Fitness is a black hole into which they pour large amounts of personal information without knowing how it will be used or what will be significant.

IV. Exercises/Discussion Points

First, review the Code of Recommended Standards for Bar Examiners in the latest edition of the Comprehensive Guide to Bar Admission Requirements:

http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/ComprehensiveGuidetoBarAdmissions/2017_comp_guide_web.authcheckdam.pdf.

Second, a review of various cases of individual applicants seeking admission will provide insight into the variety of issues that may arise. For example:

In re Anonymous, 67 A.D.3d 1248 (N.Y. 2009).

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Application of G.W., 161 N.H. 401 (2011).

In re Application of Kline, 877 N.E.2d 654 (Ohio 2007).

In re Application of Griffin, 943 N.E.2d 1008 (Ohio 2011).

Third, the best practice for students is to complete the sample/uniform character and fitness form on the National Conference of Bar Examiners web page: <http://www.ncbex.org/dmsdocument/134>. A large number of jurisdictions either use this form or some adaptation of this form. No one can understand the nature or scope of the character and fitness application until completing one.

V. Resources

The material cited in IV above are the resources to be used.

See also Mitchell M. Simon, *What's Remorse got to do, got to do with it? Bar Admission for Those with Youthful Offenses?*, available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/39th_conf_Session5_whats_remorse_got_to_do.authcheckdam.pdf.

Chapter 12

REPUTATION

AVARITA L. HANSON¹⁹

I. Summary

This chapter enables individuals to define one's reputation; discusses the attributes, actions and relationships important to developing one's reputation; and describes the importance of developing and maintaining a positive reputation to the life of a successful lawyer.

II. Learning Outcomes

This chapter helps the students:

- A. Define and understand the meaning of "reputation"
- B. Understand the components of reputation relative to lawyering and professionalism
- C. Understand the importance of building and maintaining a positive reputation and avoiding a negative reputation to being a good lawyer

III. Teaching Notes

A. Conceptual Framework/Intended Audience

This chapter and the materials discussed therein are designed to help shape law students' analysis and thinking about their emerging reputation from the beginning of law school and throughout their careers. This chapter is also useful for new lawyers in "bridge the gap" or mentoring programs to extend their knowledge and practice building their reputations.

Students should look at how their close relationships – family and friends – can shape their reputations, and consider how they can (with their inner circle first) learn, shape and practice the skills and attributes necessary to a lifetime of successful lawyering.

B. Promoting a Habit of Consciously Considering One's Reputation

In this era of immediate, extemporaneous communication and sometimes knee-jerk responses to information, it is important for students to understand the importance of relationships, actions, and attributes that carry beyond the moment. Digital responses – such as Twitter remarks – may in the moment feel and sound good, but may not demonstrate the sound judgment, or reflective, knowledgeable thinking required of good lawyering over a lifetime. Verbal, written and other responses that can be captured and technologically last forever can contribute positively and negatively to one's professional and personal reputation. A response or statement can "go viral"

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and have infinite consequences to one's reputation that know no limits of time or space. Lawyers who have a positive reputation know that the appropriate response often cannot be limited to 150 characters, or provided without clarification or disclaimer.

IV. Exercises/Discussion Points

A. Exercise # 1: Define "reputation"

Ask students to define the term "reputation" individually or in small groups. They can use a dictionary.

How is "reputation" defined in the dictionary?

1. The dictionary defines "reputation" as "the beliefs or opinions that are generally held about someone or something."
2. "Reputation" can also be defined as "a widespread belief that someone or something has a particular characteristic" (Oxford University Press).

B. Exercise #2: Ask students in small groups: Can you list or define attributes, actions and experiences that are relative to a lawyer's reputation?

Ask students in small groups to brainstorm on this statement: A reputation is built on established relationships, experiences, positive attainments and actions – not hopes, aspirations and mere words. What are the attributes, actions and experiences of one's reputation relative to lawyering and professionalism?

Have students summarize the list, duplicate it and encourage them to post the list in a place they frequent.

Notes: There are a lot of references in this chapter to what attributes, actions and experiences are relative to the professional lawyer, including:

1. Reputable lawyers are known as competent, conscientious, thorough and effective.
2. Reputable lawyers:
 - have good character;
 - relate well to people of different stations and walks of life;
 - give importance to building and maintaining relationships;
 - have easily articulated and enduring qualities, like not pursuing dishonest gain, and speaking with temperance and trustworthiness.
3. Reputable lawyers perform simple acts of kindness; are the voice of reason.
4. Are seen by their peers as caring, dependable and solid.
5. Even the mere presence of a reputable lawyer gives weight and importance to the event or task.

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C. Exercise #3: Ask students: How does one build and maintain a positive reputation?

Here are several short exercises on this point:

1. You were a campus beauty queen (or star athlete). Someone has used your photo on a “dating” website. What is your reaction?
2. Ask students to Google themselves.
 - What is your digital footprint?
 - What changes, if any, would you make?
 - Should you periodically “Google” yourself?
3. Ask students to find three (3) obituaries of lawyers.
 - Are there notable characteristics that indicate the person’s reputation as a lawyer?
 - What are those characteristics?
How would you like to be described in your obituary that will go out to the entire community?
4. What lawyer in real life, movies, television or books exemplifies the best attributes of professionalism and what are those attributes?

Notes: These short exercises are designed to help students identify and appreciate the attributes of a good reputation, build the experiences to the work professionally, and identify good mentors and exemplars.

The chapter provides the following points on developing a reputation:

1. A reputation is developed throughout one’s life. Your reputation as a lawyer emerges in law school, and maybe before law school (importance of recommendations).
2. A reputation may be earned.
 - Start with close relationships including friends and family.
 - Law school relationships should be looked at broadly, and include classmates, law school administrators, professors and staff who may be future colleagues, judges, adversaries, opposing counsel and clients.
 - The larger community should see the lawyer as not just competent, but known for working in a professional way – comporting himself civilly, honoring duties to clients, opposing parties and their counsel, the profession, the public and our systems of justice.
 - A reputation can be enhanced by interactions with colleagues that show concern and nurture professional relationships, such as acknowledging life milestones (birthdays, anniversaries, family deaths and births, awards, major illnesses), dealing civilly with colleagues in the course of representing clients and interacting with colleagues in professional and social work activities.
 - A reputation can be bolstered with the bar and public by authoring legal articles

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or a legal blog, providing legal analysis and commentary online, on TV, or radio, and other demonstrably professional presentations in the community before the bench, bar, PTA, local government, civic clubs, fraternities, sororities and faith-based entities.

3. A reputation may be manufactured, consciously and deliberately.
 - A lawyer can use social media to build a reputation (i.e. LinkedIn, Twitter, Facebook, etc.); internet, TV or radio advertising (including visual images, dialogue, client testimonials); and peer rating services (SuperLawyers, AVVO, Martindale-Hubbell).
 - A lawyer can employ legal strategies with certain tribunals and types of clients to create a reputation for doing legal work in a specific or notable way.

D. Exercise # 4: What if you do something negative, stupid or careless that can harm your reputation?

1. Facts:

Your mother is not a Facebook user, but she is an experienced and highly respected lawyer. Her friend, a business owner, forwards to her in an email something you posted on your Facebook page. Your mom emails you, mentioning your Facebook posting. You respond by telling your mother that you have privacy settings on your Facebook account and send her an article on the way millennials communicate. She waits until you are riding with her in the car to explain why she thinks your posting is unprofessional.

2. Ask students to identify a situation where they responded to something in a way they ultimately did not feel was correct.
 - Was there an opportunity to change their response?
 - What would that have looked like?
 - Did they make the change?
 - Was it effective?

E. Exercise #5: What can a positive reputation add to one's career?

Facts: You use a Facebook account for your firm business and as a marketing tool.

Ask students to think about their "street cred," i.e., their reputation for communicating professionally while marketing themselves, and their practice in terms of what is appropriate to say, do and otherwise communicate when working. What forms and types of communication are appropriate for connecting professionally with clients, colleagues and the courts?

Notes for Exercises #4 and #5: These points are made in the chapter:

- A positive reputation is an asset; a negative reputation is a liability. One's reputation can be positive and negative at the same time.

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- A positive reputation matters.
- Clients may value the quality of work more than the outcome of the matter, particularly when the lawyer is faithful, competent, diligent, ethical, and shows good judgment.
- Reputable attorneys add value when they can effectively counsel clients beyond merely what the laws say.

F. Exercise # 6: Ask students: Why it is important to maintain a positive reputation and when can a positive reputation matter?

Notes: In the chapter, some examples of when and why maintaining a positive reputation is important include:

- When there is a close question about fitness, one may get the benefit of the doubt
- When a reference for a new position is needed
- When an attorney is facing a bar complaint from a client for an alleged ethical violation
- For attracting new clients and keeping established clients
- When pursuing elective office or appointments to public and private entities
- For bar leadership, judicial and public appointments
- For bar peer reviews, recommendations, and endorsements
- Situations when character and fitness are in question
- Professional performances before tribunals and judges
- When individual lawyers' reputations matter to a firm's performance and reputation
- When fees are earned or charged for dealing with difficult adversaries who are rude, unprepared, scatterbrained and unnecessarily demanding

V. Additional Discussion Points

A. An effective advocate is not always a zealot.

A lawyer who takes on unpopular causes or clients, or challenges the establishment's ways, may face disapproval or resistance – but one day those ways may become the standard. A discerning colleague who explains and defends a rogue advocate, and welcomes her into the community, may contribute to the community's understanding of the law and changing the status quo.

B. One should fight to maintain a positive reputation since perceptions may not be reality and a positive reputation is one's greatest asset.

VI. Resources

STEPHEN R. COVEY, *THE 7 HABITS OF HIGHLY EFFECTIVE PEOPLE: POWERFUL LESSONS IN PERSONAL CHANGE* (1989).

A LAWYER'S CREED AND ASPIRATIONAL STATEMENT ON PROFESSIONALISM,
<https://www.gabar.org/aboutthebar/lawrelatedorganizations/cjcp/lawyers-creed.cfm> (last visited Jan. 18, 2017).

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DONNA GERSON & DAVID GERSON, *THE MODERN RULES OF BUSINESS ETIQUETTE* (2012).

Michael B. Greenstein, *On Being A Lawyer of Good Reputation, and Why That Matters* (Mar. 17, 2011), <http://spousealouse.wordpress.com/2011/03/17/on-being-a-lawyer-of-good-reputation-and-why-that-matters/>.

Daniel L. Harris & John V. Acosta, *Conduct Counts, On Professionalism: Professionalism for Litigation and Courtroom Practice*, 67 OR. ST. B. BULL. 40 (2007).

Christopher J. Masoner, *The Importance of Perceptions*, 75 J. KAN. B.A. 7 (Mar. 2006).

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Heather Schlegel, *In Trust We Trust: Why Reputation is the Currency of the Future*, CNN (Sept. 23, 2014), <http://edition.cnn.com/2014/09/23/opinion/in-trust-reputation-currency>.

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002).

Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173 (2008).

Chapter 13
FINDING & GETTING THE MOST OUT OF A MENTOR

LORI L. KEATING & MICHAEL P. MASLANKA²⁰

I. Summary

- Explains why new lawyers need mentors. When lawyers begin their careers they will inevitably face challenges in the day-to-day practice of law that were largely absent in law school. These challenges range from working against more experienced opposing counsel, to handling difficult clients, to navigating office politics, to knowing and practicing within the rules of ethics. Mentors can provide essential guidance as to these topics and more. Makes the argument that mentoring is especially important to solo practitioners, who are learning how to build a practice at the same time they are learning how to practice law.
- Discusses the benefits of mentoring beyond the practical – that mentoring, when done right, transmits the values of the profession, including civility, putting the client's interests first, being a trustworthy officer of the court, and serving the less fortunate through pro bono.
- Discusses how protégés should approach the mentoring experience, including having the right mindset, preparing thoughtfully for mentoring meetings, asking smart and strategic questions, and following up periodically to ensure a lasting and meaningful connection.
- Discusses the ethical parameters of a mentoring relationship where a protégé and mentor have different employers.
- Suggests how to find mentors by looking for existing formal programs on a statewide or more local level, as well as seeking out mentors in more informal ways. Cautions against relying heavily on on-line mentoring experiences to the exclusion of in-person mentoring relationships.
- Conveys that seeking out mentors should be a career-long endeavor and that new lawyers, although initially protégés, should aspire to become mentors in future years. Argues that mentoring benefits not just protégés, but mentors as well. Through mentoring mentors broaden their experiences and find professional fulfillment by helping others succeed.

II. Learning Outcomes

This chapter, and discussion of the materials in it, should help students:

- Understand the importance of mentoring to help new lawyers navigate the many difficult challenges they will face as they begin the practice of law.
- Become aware of the opportunities for mentoring experiences through formal programs, as well as opportunities for informal mentoring relationships.
- Apply the ethical rules for mentoring discussions where a mentor and protégé do not share the same employer.
- Adopt the right mindset and create smart questions to ensure meaningful mentoring experiences.

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- Evaluate whether a particular mentoring experience is a positive experience progressing as it should.
- Understand that mentoring is not just important at the beginning of a legal career and that successful legal professionals have many mentors during the course of their career.
- Understand that as they become more experienced in the practice of law, they should seek out opportunities to serve as mentors themselves, fulfilling their professional duty to help others learn the practice of law.

III. Teaching Notes

Professionalism is ideally taught in the 2L year as part of professional responsibility or as a stand-alone course. Indeed, some states have separate CLE requirements for both ethics and professionalism. In leading discussions of mentorship, wherever it is introduced, it is important to discuss at the outset what mentorship is and what it is not. Students often arrive in class with preconceptions.

What is mentorship? What isn't it?

A mentor is:

- A lawyer who provides insight and understanding into a field of interest.
- A lawyer who may be able to assist in an introduction to other lawyers or contacts, and to provide general guidance on a student or new lawyer's professional and career development.
- A lawyer or lawyers from whom a student or new lawyer can model their behavior. Not to create a mini me but rather a better version of themselves. In short, a person to help them develop their professional identity.

A mentor is not:

- A lawyer from whom you seek employment.
- A lawyer from whom you seek a co-counsel or first chair relationship.
- A mentor is not a sponsor. A sponsor is a lawyer in a firm that helps a lawyer's professional development through developmental assignments and perhaps grooming for advancement within a firm.

An early goal of teaching this segment on mentorship is to instill a professional mindset in the student. This goal allows the instructor to introduce various concepts, such as the need for a protégé to demonstrate professionalism in the creation and maintenance of a mentoring relationship. This mindset starts when the student enters law school.

How do I find a mentor?

But before the finding comes the "why"? Students often answer on a continuum from one end ("no one would ever want to mentor me" to the merchant end point of "a mentor is crucial to my job search.") This continuum provides the instructor with a foundation upon which to generate a discussion of why lawyers want to enter into a relationship. Students need to understand that lawyers often feel a need to give back, but that lawyers do not want to be treated as a checklist on a student's agenda.

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Exercise 1 - Self-reflection

What mentors have you already had in your life? Think of people who have helped you along your path to law school or other achievements. These people can include family members, friends, teachers, or others who have helped you on your way. These may be people who encouraged you in your undergraduate studies, encouraged you to apply to law school, helped you through a difficult personal issue, challenged you to dream bigger, etc. Explain what characteristics made a particular mentor a good mentor.

Have you mentored anyone along the way? If you haven't, this may be a good time to think about ways you can help to mentor others, whether it be a sibling, a 1L, a friend in college who is considering law school, etc.

Have these mentoring experiences been important to you, and if so, why?

Exercise 2 – Aggressive Protégé

Ask one student to be the potential protégé and the other the potential mentor. Meet only with the protégés and have them develop an aggressive style of "I want a job." The mentor thinks this is just an introduction meeting. Have a class discussion on how the potential mentor felt.

IV. Exercises

1) Interconnectedness Exercise:

Ask students to reflect about how mentoring may relate to the subjects of other chapters in this book, including:

- Authenticity
- Civility
- Lawyering Skills
- Inclusive Thinking
- Honesty, Integrity and Loyalty
- Reputation
- Health and Wellness
- Mindfulness

Encourage students to also think in terms of role models in the exercise and to name individuals (real or fictional) or situations (real or fictional) that demonstrate these traits. By way of example, hockey players who have a formal ritual of shaking hands at the end of the game (civility) or Atticus Finch in "To Kill A Mockingbird" (honesty, integrity, loyalty.) Ask students to explain how a positive mentoring relationship may assist in developing each of these essential aspects of a professional lawyer.

2) Ask a series of questions using the "why" or Onion technique. This technique requires the question "why" to any answer. It is used in business to get down to a person's actual belief.

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By way of example:

Question: Do you believe you will need a mentor?

Yes.

Question: Why?

Because it is a complex legal world.

Question: Why?

Other questions may include:

What is the best way to approach a possible mentor?

Will you need multiple mentors?

What are your responsibilities as a protégé?

3) List from least important to most important the qualities of a mentor and protégé. The instructor can put on flip charts and post on wall. Students can work in groups or as individuals in compiling their lists and then writing them on the flip chart.

4) What makes for a good and effective email to a possible mentor?

What might the following look like: caption, body of email, request to meet or correspond?

Part of exercise is to make sure students are seeking a mentor rather than seeking a job.

5) Research the ethics of being a protégé. We mention some resources in the chapter.

6) Ask students to develop and practice an "elevator speech" when the student gets a request such as, "Tell me about yourself." An elevator speech tells someone who you are and what you do or hope to do. It is something to state clearly and succinctly in the time it takes an elevator to travel for a few floors.

Creating an elevator speech requires serious self-reflection by the student. A student may consider things like:

- Why did you go to law school?
- Has the answer changed since you started? If so, why?
- What are your strengths?
- What are some things that make you unique?
- What is something memorable about you?

7) Mentoring Scenario:

You are a female 3L. You are very interested in admiralty law. A partner at an established admiralty firm responds to your email asking to set up a meeting with the flowing, "I would be glad to get together. But my days packed with client lunches and depositions. How about drinks at the XYZ hotel?" The hotel is one of the nicest in the city.

(a) Should you go? How do you respond?

(b) Let's assume you choose to go. Mentor says, "This is a great hotel. My wife and I had our honeymoon here. I am on the outs with her. So, are you married? Any kids? Got to tell you there is little time for romance and family as an admiralty lawyer." How do you respond?

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8) Right or wrong track?

Instruct students to discuss the following mentoring situation descriptions and ask:

- a) Is this mentoring experience on the right or wrong track?
- b) Why do you feel that way?
- c) If a mentoring experience is on the wrong track, what might the protégé say or do to get it back on the right track?

The instructor may also consider using role play for these scenarios.

- 1) Mentor and protégé meet once a week without fail. Protégé sends mentor emails on almost a daily basis with struggles about work, personal life, etc. Mentor provides step-by-step direction of how protégé should handle each situation at their weekly meeting. Protégé does not talk much at their meetings, but is happy to sit back and take in all of the great advice. Protégé does not know how she would be able to continue working but for these meetings with her mentor, who always has the answers.
- 2) Mentor and protégé meet at time and places convenient for mentor each week. When protégé asks a question, mentor always seems to have just the story from his own life about a similar issue. Mentor spends lots of time telling stories. Protégé is always entertained.
- 3) Mentor and new lawyer meet once a month but mentor also responds to any urgent emails or phone calls from protégé. Protégé feels very comfortable with mentor but a little frustrated that mentor does not always provide a nice, neat answer to his questions. When protégé asks a question, mentor usually asks protégé questions, and it almost feels like the Socratic Method used back in law school, minus the potential for public humiliation. Protégé sometimes wishes mentor would provide more quick and easy answers.
- 4) Although not at the same firm, mentor assigns protégé a research assignment just about every time they meet. She does not pay protégé for the work. At first protégé felt challenged by the assignments but with time begins to wonder if this is for his benefit or his mentor's gain.
- 5) Protégé likes her work as a government lawyer. Every time mentor and protégé meet, mentor tries to convince protégé that private practice is the only respectable career path. Despite protégé's commitment to work-life balance, mentor says she needs to work harder, more often, and focus on career rather than family at home, especially when she is starting out.
- 6) Mentor and protégé meet once a week for coffee without fail. Although protégé always starts the conversation with a work-related question, mentor often quickly moves into protégé's personal life and talks at length about her own personal issues. Protégé feels like their conversations are tug-of-wars between his need for advice on professional topics and his mentor's need to vent about her personal life.
- 7) Mentor and protégé do not have a set schedule to their meetings but seem to get together, one way or another, once every few weeks. Protégé feels like she has a lot fewer questions for her

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mentor than when they started meeting months ago. She feels her confidence slowly building and hopes that she might serve as a mentor to someone else someday.

V. Resources

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 98-411 (1998).

IDA ABBOTT, *THE LAWYER'S GUIDE TO MENTORING* (2000).

Ida Abbott, *Come In and Make Yourself Uncomfortable*, A.B.A. LAW PRACTICE TODAY, Mar. 14, 2016, available at <http://www.lawpracticetoday.org/article/come-in-and-make-yourself-uncomfortable/>.

Ida Abbott, *Working with a Mentor: 50 Practical Suggestions for Success* (2006).

MATTHEW CRISTIANO & AMY TIMMER, *MAXIMIZING RELATIONSHIPS TO BECOME A SUCCESSFUL LAWYER: INNOVATIVE MENTORING FOR LAWYERS AND LAW STUDENTS* (2012).

Lori L. Keating & Amy Timmer, *Mentoring: No App for That*, in *THE RELEVANT LAWYER: REIMAGINING THE FUTURE OF THE LEGAL PROFESSION* (Paul A. Haskins ed., 2015).

Michael Maslanka, *At Your Desk*, TEXAS BAR BLOG (Sept. 21, 2015), <http://blog.texasbar.com/2015/09/articles/texas-bar-tv/mike-maslanka-your-desk/>.

NATIONAL LEGAL MENTORING CONSORTIUM, <http://www.legalmentoring.org/> (last visited Feb. 9, 2017).

Oregon Bar Ass'n Op. 2011-184 (2011) (Confidentiality, Conflicts of Interest: Consulting Between Lawyers Not in the Same Firm).

ROBERT MAURER, *THE SPIRIT OF KAIZEN: CREATING LASTING EXCELLENCE ONE SMALL STEP AT A TIME* (2012).

CHRIS WESTFALL, *THE NEW ELEVATOR PITCH: THE DEFINITIVE GUIDE TO PERSUASIVE COMMUNICATIONS IN THE DIGITAL AGE* (2012).

Chapter 14

HANDLING MONEY

KATHLEEN M. USTON²¹

I. Summary

There is no higher obligation that attorneys owe to their clients than to handle their money with propriety; to account for funds in their possession; to maintain detailed books and records, detailing when and from whom the funds were received and the amount and purpose of the funds being paid; and to provide a strict accounting of how those funds are disbursed.

First Principles of Lawyer Financial Responsibility: Rules and Concepts

- The applicable rule is ABA Model Rules of Professional Conduct 1.15 - "Safekeeping Property"
 - The rule details a lawyer's duty to:
 - keep all money and property entrusted to that lawyer safe and segregated in a separate account, and
 - the duty to safeguard and label any other client property held by the lawyer on the client's behalf.
 - The rules were amended in 2010 to take into consideration technological changes in the banking industry.
- Lawyers must tell their clients or third parties when funds are received, must provide a full accounting to clients or third persons of their property, and must timely pay out to clients any funds obtained on their behalf.
- Misappropriation
 - Is an egregious violation of a lawyer's fiduciary duty.
 - Includes the unauthorized or improper use of a client's funds or other property, regardless of whether or not the misuse was permanent or temporary.
 - An attorney violates this duty regardless of whether or not he realizes any personal gain.
 - A lawyer generally will be found to have misappropriated client funds when he or she *intentionally deprives* a client of money by deceit or fraud.
 - Where dishonest intent is established, disbarment typically results.
 - Intent to deprive is not a prerequisite to a finding of a violation of Rule 1.15.
 - Even sloppy bookkeeping or theft by an employee can result in suspension or disbarment.
 - Mitigating factors can be presented and will be considered, including drug or alcohol abuse or a gambling addiction.

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- Conversion and Comingling Prohibited
 - **Conversion** occurs when an attorney uses a client funds for his or her own purposes, for example paying one client out of money due another, taking an unearned advance fee, keeping unused escrow funds, or applying client funds to the client's bill without permission.
 - **Comingling** occurs when an attorney fails to segregate his or her funds from those belonging to the client.
 - There are no circumstances under which a lawyer is permitted to use money belonging to a client or third person for business or office expenses or for personal expenses or personal purposes.
- Attorney is Always Ultimately Responsible
 - The ABA Model Rules allow non-lawyer employees under the supervision of a lawyer to authorize transactions on a client trust account.
 - Lawyers should limit employee access and monitor all transactions.
 - The lawyer always remains personally and professionally liable for all transactions.
- Interest on Lawyers' Trust Accounts (IOLTA) programs
 - Lawyers and law firms turn over interest from client trust accounts to a public fund that provides legal services for low-income clients.
 - Every state, along with the District of Columbia and the Virgin Islands, operates an IOLTA program.
 - Examples of funds that generally go into a trust account are:
 - escrow funds;
 - client advances for fees until they are actually earned by the lawyer;
 - fees belonging in part to the client and in part to the lawyer;
 - court costs collected from the client;
 - fines collected from the client;
 - real estate conveyance funds;
 - settlement proceeds or awards held for disbursement;
 - any amounts held in dispute.
 - Scrupulous records must be kept, identifying client for which a particular deposit or withdrawal has been made.
 - Records generally must be maintained five years from the date a client matter is closed.
 - Read the relevant rules of your jurisdiction!

Contingent Fees

- Contingent fee arrangements must be in writing and signed by the client (MR 1.5(c)).
- Attorneys must explain the method by which the fee is to be determined, including the percentage or percentages a lawyer will collect in the event of settlement, trial or appeal.
- Many states have adopted permissible maximum fees as a percentage of recovery and other contingent fee and legal cost recovery rules.
- All settlement offers must be communicated to the client, regardless of whether the attorney thinks the offer worthwhile.
- Attorneys must abide by the client's decision on whether to accept a settlement offer.

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Forbidden Fruit: Why Some Lawyers Just Can't Leave it Alone

- Why would an attorney risk his or her license by mishandling client funds?
 - Can result from greed, irresponsibility, financial struggles, or even illness.
 - Some lawyers lapse into improper fiscal practices due to ignorance, sloppiness or just not paying attention.
- Even where no misappropriation has occurred, at least one court found a sufficient nexus between how a lawyer handled *his own* finances and the likelihood that he could cause harm to clients if allowed to continue practicing.
 - *Santulli v. Texas Bd. of Law Examiners*, 2009 WL 961568 (Tex. App. 2009) (attorney's probationary license revoked after he failed to comply with orders that he make suitable arrangements to pay or discharge a substantial amount of student loan and personal debt.)
 - See also *In re Warhaftig*, 524 A.2d 398 (N.J. 1987) (Attorney disbarred for misappropriating client funds due to a "gigantic cash flow burden" arising from his wife's treatment for cancer and his son's need for psychiatric treatment, despite no clients suffering any losses.)
- Misappropriation can also have criminal implications as well.
 - See *In re Arntsen*, 2013 WL 1110510 (N.Y. App. Div. Mar. 19, 2013) (lawyer received a 4-to-12-year prison sentence for stealing more than \$10 million from two corporate clients' escrow funds and putting them into bank accounts he controlled.)

Financial Fitness as a Pre-Requisite for Bar Admission

- How stringent should the financial fitness showing be during the bar admission process?
- Financial fitness is a standard element of character and fitness reviews, with the focus not on the presence of debt, but on signs that the applicant is handling credit and debt responsibly, and has at least a good-faith plan for retiring personal debt.
- Those applicants whose records show financial irregularities or evidence of persistent, uncured irresponsibility may face denial of admission to practice even though they have passed the bar exam.
- In one closely watched case, an applicant carrying heavy student loan and credit card debt was denied admission after the Ohio Supreme Court found that he did not have a plan in place to address the debt and was content to remain in a low-paying job after graduation. *In re Griffin*, 943 N.E.2d 1008 (Ohio 2011).
 - This case is a bit of an anomaly nationwide.
- However, *Griffin* underscores the importance of being prepared to demonstrate not the absence of debt, but a sound plan to deal with it.
- Absent a showing of "undue hardship," bankruptcy is not a realistic or responsible means of eliminating student debt.

Substance Abuse, Gambling, Depression

- The ABA has estimated that as many as one in five lawyers is a problem drinker—twice the national rate.
- According to the ABA, substance abuse is a factor in 40 to 60 percent of the country's lawyer discipline cases.

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- Courts differ in how they discipline lawyers suffering from alcoholism, substance abuse and gambling addictions. *See State ex rel. Counsel for Dis. v. Reilly*, 712 N.W.2d 278 (Neb. 2006) (A lawyer with an “uncontrollable gambling habit” whose misconduct included misappropriating client funds was disbarred by the high courts of Iowa and Nebraska.) *Cf. In re Brown*, 912 A.2d 568 (D.C. 2006) (the court stayed disbarment of an alcoholic lawyer for misconduct that included misappropriation of client funds and he was placed on probation for three years “because [the lawyer’s] alcohol addiction was the substantial cause of the misconduct and because he is substantially rehabilitated.”)
- Lawyers also disproportionately suffer from depression and other mental health problems
 - This has led disciplinary tribunals to look at that disability as a mitigating factor in sanctioning lawyers for misappropriation. (*In re Mooers*, 910 A.2d 1046 (D.C. 2006) (attorney’s disbarment stayed, conditioned on satisfactory reports every ninety days from the lawyer’s psychiatrist, where his misuse of client funds for personal and business expenses was attributed to his depression.)
- There are attorneys who, after being sanctioned for misappropriation finding its roots in drug or alcohol abuse or gambling addictions, have managed to get and stay healthy and resume the practice of law.
- However, a better course is to educate attorneys and law students suffering from addictions or mental and emotional health issues about the resources available to them at hundreds of state and local bar associations and lawyer assistance programs before a problem arises.
- On a national level, the ABA Commission on Lawyer Assistance Programs serves as a clearinghouse for educating the profession about such problems, and the availability of similar programs in individual states.

Money Management Resources for Solos and Young Lawyers

- A growing percentage of new lawyers are hanging out shingles in solo or small practices, yet most have no idea how to go about setting up or managing a firm as a business.
- Numerous resources available, both in the law schools and upon graduation, including the ABA’s Law Practice Management Section.
- The District of Columbia Bar offers a comprehensive two-day “Basic Training” course.
- Some law schools are establishing so-called solo or small practice incubators.
- IIT Chicago-Kent College of Law began a program in 2012 offering such resources, while in return requiring participants to complete just 10 hours of legal work weekly for the school’s law clinic.
- Many law schools have begun to offer such “practical” courses to their students, including financial planning that would teach them to exist on a budget in school and to set one up as they enter the legal profession.

II. Learning Outcomes

- The key learning point to be taken from this Chapter is that attorneys are held to what amounts to a strict liability standard when it comes to the handling of client funds.
 - The consequences for not doing so will be severe, despite any mitigating factors that an attorney may introduce.

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- Attorneys must familiarize themselves with the applicable rules and requirements in their own jurisdictions and adhere to those rules scrupulously.

III. Teaching Notes

- The most effective method for communicating this material to a group of law students with little to no hands-on experience in either dealing with client funds or running their own law firm is to emphasize how difficult and expensive getting one's license is . . .
- . . . and how quickly that can all be taken away with even the slightest misstep in the handling of client funds.
- As a law school professor, I have pointed out to my students that most folks really do not set out to steal – they rationalize that the electric bill is only \$150.00, and while they may not yet have earned those funds, they soon will. So they pay themselves a little early, before the work has been performed or completed – and they get away with it. No one is the wiser. The next time, it is a little bit easier, and so on and so on until someone does notice. How does this happen? Let's say a client hires this lawyer for a DUI, pays \$2,500.00, and after two weeks, the client becomes dissatisfied and fires the lawyer, demanding a full refund. The only problem is – the lawyer has floated him or herself \$2,500.00 and can't refund the client anything. The inevitable bar complaint will follow, and along with it will come a subpoena from the bar for the attorney's trust account records, going back twelve (12) months. Suddenly, those seemingly harmless "advances" all come out.
- Another effective teaching tool is hands-on exercises of real world examples, taken from actual disciplinary cases. I often find that sharing fact patterns from actual disciplinary cases that I have prosecuted is compelling – it has the ring of truth and often a "there but for the grace of God go I" component that hits home.

IV. Exercises/Discussion Points

1. Required Books, Records and Reconciliations

Present the students with a Cash Receipts Journal, a Cash Disbursements Journal, a monthly bank statement from a fictitious IOLTA account, a Client Subsidiary Ledger Card, and Monthly and Quarterly Reconciliation forms. Work with them to fill these out for a fictional client, and then reconcile their records against the bank statement. Discuss.

2. Hypothetical Trust Account Mismanagement – No Good Deed Goes Unpunished

Respondent Attorney retained and paid \$7,000.00 for legal representation in defense of a criminal charge. Complainant was charged with embezzlement from his employer. Complainant advised Respondent that he was about to be a new father and that Respondent had his permission to "do whatever it takes to make this thing go away, so long as I don't have to go to jail."

Respondent's fee agreement states "a flat fee of \$7,000.00" will be charged, which entire fee was "deemed to be earned upon the law firm undertaking the representation . . ." Respondent deposited the entire \$7,000.00 in his law firm's trust account. Respondent negotiates a plea with the prosecutor to dismiss the criminal charge in exchange for payment

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of \$2,000.00 in restitution to Complainant's former employer.

The case is dismissed after Respondent tendered a check drawn on his trust account in the sum of \$2,000.00 to a detective involved in the case. After Respondent tendered the check for \$2,000.00, he transferred the remaining \$5,000.00 from the firm trust account to the operating account. Respondent sent Complainant a letter explaining the resolution of the case. The letter said that "even though we had agreed on a flat fee of \$7,000 for this representation, I decided to reduce my fee to \$5,000 and to pay the \$2,000.00 restitution out of my own pocket to your former employer."

Complainant filed a bar complaint alleging that Respondent "settled" his case without his knowledge or consent. Complainant further alleged that he was factually innocent of the criminal charge, and that payment of "restitution" to his former employer was prejudicial to his legal interests, as he intended to sue his former employer for wrongful termination.

Discuss.

3. Hypothetical Trust Account Mismanagement – Don't Bury your Head in the Sand

Respondent is a solo practitioner with two years of experience. Respondent bounced a \$5,000.00 check drawn on his trust account.

An initial inquiry from the Bar was sent to Respondent but he failed to respond. Before a hearing on the matter, Respondent filed a general denial of the charges. He also met with Bar Counsel, at which time he admitted to overdrawing the account, but explained that it was the fault of his bookkeeper who quit shortly before the overdraft. Respondent also advised Bar Counsel that his secretary nevertheless failed to timely deposit funds to trust several days prior to a check being written against those funds and this is what caused the overdraft.

Discuss.

V. Resources

Frank A. Thomas & Kathleen M. Uston, *Lawyers and Other People's Money* (5th ed. 2012), available at https://www.vsb.org/docs/Lawyers_OPM_electronic.pdf.

The following publications may be helpful in identifying best practices for recordkeeping essential to meet a lawyer's client trust account obligations:

HANDBOOK ON CLIENT TRUST ACCOUNTING FOR CALIFORNIA ATTORNEYS (2016),

<http://ethics.calbar.ca.gov/Publications/ClientTrustAccountingHandbook.aspx> (last visited Feb. 7, 2017); ILLINOIS CLIENT TRUST ACCOUNT HANDBOOK (revised May 2015),

<https://www.iardc.org/ClientTrustAccountHandbook.pdf> (last visited Feb. 7, 2017); NORTH CAROLINA STATE BAR, LAWYER'S TRUST ACCOUNT HANDBOOK,

<http://www.ncbar.com/PDFs/Trust%20Account%20Handbook.pdf> (revised Dec. 2014) (last visited Feb. 7, 2017).

Chapter 15
ePROFESSIONALISM

DAVID G. RIES²²

I. Summary

- Explores eProfessionalism, which is defined as the application of lawyer professionalism to a lawyer's Internet activities.
- Uses blogging and selected forms of social media, video/web conferencing, and online marketing tools as examples.
- Explains the use of online tools and platforms by lawyers "for client and business development and as a networking tool for engaging with other professionals and building a potential online referral network."
- Provides statistics from the ABA Legal Technology Resource Center's 2012 Legal Technology Survey Report to show attorneys' individual and law firm use of blogging and social media for professional purposes. Updated statistics from the 2016 Legal Technology Survey Report include²³:
 - 74% reported that their firms have a presence on social media (only 26% do not).
 - 76% reported individually using social media for professional purposes (only 24% do not).
 - 78% report that their firms maintain a presence on LinkedIn (only 22% do not).
 - Over 85% report that they individually maintain a presence on LinkedIn for professional use (less than 15% do not).

Professional use of social media is now common for a strong majority of lawyers and law firms.

- Draws a distinction between private and public communications. Many lawyers and law students have used social media for personal communications; public and professional communications present different considerations, including ethics and professional responsibility.
- Explains the premise "that those lawyers who do not learn how to use social media effectively in their practices, particularly those not in large firms, may struggle professionally given pervasive, technology-driven change in the legal marketplace." [Note: this observation may be broadly extrapolated to use of all kinds of technology for legal practice and professional communications.]
- Describes blogging as an online professional communication tool for both individual lawyers and law firms.
- Describes lawyers' and law firms' use of LinkedIn, a social media platform that focuses on professional networking, rather than sharing personal information with friends and family.
- Describes Facebook and Twitter, social media platforms that were developed for personal communications, but are increasingly being used for professional communications.
- Explores the use of email, video/web conferencing, and online marketing tools.

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²³ ALLISON SHIELDS, ABA TECHREPORT 2016, *Blogging and Social Media*, available at http://www.americanbar.org/publications/techreport/2016/social_media_blogging.html.

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- In a sidebar, cautions against pretexting – creation of a fake user account and profile to connect with another user.

II. Learning Outcomes

This chapter, and discussion of the materials in it, should help students to:

- Understand the concept of eProfessionalism – lawyers' use of the Internet and technology in professional practice;
- Be aware that a strong majority of lawyers and law firms use social media professionally, and those who do not may suffer a competitive disadvantage;
- Appreciate the difference between personal and professional communications in social media;
- Become aware of the various technology tools that are available to lawyers, including blogging, social media, email, video/web conferencing, and online marketing tools; and
- Understand the ethics and professional responsibility considerations that apply to lawyers' use of the Internet and technology – generally, if it's not permissible offline, it's not permissible online; don't publish it online if you would not want it splashed across the front page of the *Wall Street Journal*.

III. Teaching Notes

The chapter on eProfessionalism can be taught in various contexts, including as a stand-alone program for law students of all levels or as part of a course on professionalism, legal ethics or law practice. It would also be appropriate as continuing legal education for lawyers who are not experienced with the use of social media and law practice technology.

Most students will be familiar with the use of social media for personal communications, but it is important for them to understand (1) the need for its use for professional purposes and (2) the differences in content that is appropriate for professional communications. Discussion can focus on how students use social media personally and how to transition from this to professional use.

The chapter provides a good framework for discussion of the importance of networking and marketing and the need for lawyers to engage in them at all stages of their careers.

While the chapter focuses on the technology and concepts, rather than specific ethics rules, it presents a good setting for students to identify the ethics rules that apply to the various issues discussed.

While it is necessary for lawyers to differentiate between personal and professional communications, lawyers are not separate persona – one private and one public. Consider the distinction between what is appropriate for personal and professional communications in the context of Chapter 2 on the Authentic Lawyer.

IV. Exercises

1. Understanding the importance of the use of technology in the practice of law. The ABA Ethics 20/20 amendments to the ABA Model Rules of Professional Conduct added to Comment [8] to

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Model Rule 1.1 that the ethical duty of competence includes understanding “the benefits and risks associated with relevant technology.” This ethical duty provides a minimum standard. Attorneys should strive for a higher level of competence well beyond the minimum in technology as a matter of sound professional practice and client service. Discuss with students the importance of the use of technology in the practice of law, today and into the future – the evolution of eProfessionalism. Use Andrew Perlman’s article (listed below), Richard Suskind’s book (listed in the chapter), or both as the basis for discussion.

2. A core marketing concept for lawyers today, both solo practitioners and lawyers in firms of all sizes, is personal branding – establishing how a lawyer wants clients, prospective clients, colleagues, referral sources, and the general public to perceive him or her. Discuss with students the importance of establishing and maintaining a personal brand. Have students prepare a short LinkedIn biography, portraying the personal brand that they want to portray. Use Jay Harrington’s article, Katy Goshtasbi’s book (both listed below), or both as a basis for discussion.
3. Explore the ethics considerations that apply to a lawyer’s use of social media. Have students read one or more of the ethics guidelines and opinions listed below and discuss the issues covered in them – confidentiality, advertising restrictions, pretexting, etc. – and their application to social media.

V. Resources

ABA LEGAL TECHNOLOGY RESOURCE CENTER, SOCIAL MEDIA FOR LAWYERS (contains links to articles on Social Media Basics, Legal and Ethical Issues, Twitter, Facebook and LinkedIn), www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/social_media.html (last visited Apr. 17, 2017).

JARED CORREIA, *TWITTER IN ONE HOUR FOR LAWYERS* (2012).

KATAYOUN GOSHTASBI, *PERSONAL BRANDING IN ONE HOUR FOR LAWYERS* (2013).

JAY HERRINGTON, *How to Define Your Personal Brand*, ATTORNEYATWORK (Dec. 26, 2014), available at www.attorneyatwork.com/define-personal-brand.

DENNIS KENNEDY & ALLISON C. SHIELDS, *FACEBOOK IN ONE HOUR FOR LAWYERS* (2012).

DENNIS KENNEDY & ALLISON C. SHIELDS, *LINKEDIN IN ONE HOUR FOR LAWYERS* (2d ed. 2013).

ANDREW PERLMAN, *The Twenty-First Century Lawyer’s Evolving Ethical Duty of Competence*, THE PROF’L LAWYER (2014).

ALLISON SHIELDS, ABA TECHREPORT 2016, *Blogging and Social Media*, available at http://www.americanbar.org/publications/techreport/2016/social_media_blogging.html.

ERNIE SVENSON, *BLOGGING IN ONE HOUR FOR LAWYERS* (2012).

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Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2012-186 (2012) (providing specific examples of Facebook postings by lawyers who do not comply with lawyer advertising rules).

Col. Bar Ass'n Ethics Comm., Formal Op. 127, *Use of Social Media for Investigative Purposes* (2015).

Dist. of Columbia Bar, Op. 370, *Social Media I: Marketing and Personal Use* (2016).

Dist. of Columbia Bar, Op. 371, *Social Media II: Use of Social Media in Providing Legal Services* (2016).

N.Y. State Bar Ass'n Commercial & Federal Litigation Section, *Social Media Ethics Guidelines* (updated June 9, 2015).

Pa. Bar Ass'n Comm. on Ethics & Prof'l Responsibility, Formal Op. 2014-300 (2014), *Ethical Obligations for Attorneys Using Social Media* (covers a range of ethics issues concerning attorneys' use of social media and advice to clients concerning social media).

Chapter 16
PRO BONO AND PUBLIC SERVICE

ANTHONY C. MUSTO²⁴

I. Summary

- Reflects on a lawyer's professional legal duty to deliver pro bono legal services to those in need. The duty is one owed by the profession itself because only attorneys can provide such services. When society grants us the right to represent people in court, it also places upon us the requirement that we do so for those who cannot pay for these services.
- Distinguishes this duty from other forms of donated legal services. Because the responsibility to represent the poor is one that we accept as a part of our being allowed to practice, our duty is unique. Other ways of benefitting the public through legal services are commendable, and should be encouraged, but the provision of such services does not change our duty to society.
- Details the many benefits of pro bono representation. Obviously the primary benefit is assisting the poor in obtaining justice. There are also benefits to the lawyers themselves, such as personal satisfaction, gaining litigation experience, the opportunity to interact with more experienced lawyers, continuing legal education, the chance to explore and develop expertise in particular subject matters, increased networking possibilities, and professional recognition.
- Speaks to the virtues of public sector legal work as a form of public service. Recognizes the distinction between such service and the provision of legal services to the poor, but nonetheless points out how working in the public sector benefits society, while offering certain satisfactions, such as the lack of concern over business considerations, to attorneys.
- Encourages other forms of public service. Discussed are efforts to better the legal profession, political service and charitable work.

II. Learning outcomes

This chapter, and discussion of the materials in it, should help students:

- Accept that the legal profession as a whole has an obligation to provide pro bono legal services to the poor.
- Recognize the difference between providing legal services to the poor and other forms of pro bono or public service, which should be encouraged, but which do not fall within the profession's obligation.
- Understand that pro bono service helps not just the clients, but also the lawyers.
- Realize the benefits and the potential viability of a career in public service.

III. Teaching notes

This chapter seeks to have students accept that the provision of pro bono legal services is an *obligation* of the legal profession. Students will tend to fall into three categories at the outset of their discussion of

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this matter. One group will fully embrace the concept and will be very receptive to representing the poor. This will tend to be the students who came to law school at least in part to help people. Another group will take the approach that they are not becoming lawyers to work for free and that they therefore do not plan to give away the commodities (time and expertise) that they sell to make a living. These will tend to be the students who came to law school primarily for economic reasons. The third group will fall in between. They will view pro bono as basically a good thing for those who want to do it, may think in terms of doing it during their career depending on the circumstances, but won't feel an urge to get involved. An ideal result of the class discussion will be to have some of the students in the middle group shift into, or at least lean toward, the group that favors pro bono, and some of those in the group against pro bono shift into the middle group or at least begin to open themselves to possibly reconsidering their position.

The differences in the students' original orientation can make for a spirited class discussion. An underlying concept that should be stressed is that lawyers are the only persons in society who can meet the legal needs of the poor. Nonetheless, students at all points of the spectrum should be challenged. Those favoring pro bono can be asked such questions as whether grocers or restaurateurs have a similar obligation to feed the poor—the need to eat certainly being more basic than the need for legal representation. What about doctors and medical care? How often and to what extent should attorneys provide pro bono services?

Those who have no interest in pro bono could be asked how the legal needs of the poor should be met. They can be asked whether they would handle a pro bono case if they knew for a fact that it would also lead to their being retained by a lucrative client, perhaps through a referral from opposing counsel or a client's employer being impressed by and hiring the attorney. It should not be hard to find a student who will answer in the affirmative. Because such an answer inherently demonstrates that the student is not opposed to the concept of pro bono, but rejects it for personal monetary reasons, a good follow-up question would be to ask the student to explain the difference between doing pro bono with other business in mind and other activity, such as attending bar luncheons or getting involved in community activities, that are designed to generate clients. If a student can be persuaded to view pro bono as a good thing, albeit for selfish reasons, the bottom line is the same as it is when a student embraces pro bono as a good thing in and of itself—the poor client receives the needed representation. An analogy could be drawn to people who make charitable donations solely for the tax advantages or for publicity that will help their businesses.

IV. Exercises

A. **FACTS:** You represent a client on a pro bono basis in a case that presents an issue of first impression in your jurisdiction. Your research uncovers two decisions from other states that are on point. One, *Ruth v. Gehrig*, favors your position. The other, *Jordan v. Phippen*, goes against you. Your opponent has filed a memorandum that cites only cases from your jurisdiction and argues by analogy why they call for a ruling against your position. You are given the opportunity to file a response and you tell your client that you plan to rely on *Ruth* and argue why *Jordan* is wrong. Your client tells you to cite *Ruth* but not to mention *Jordan*. Despite your best efforts to convince the client of the wisdom of your approach, the client insists that *Jordan* not be mentioned.

DISCUSSION POINTS: Began by asking whether you would commit an ethical violation if you follow your client's directive. In most jurisdictions, you would not because you would only be required to disclose

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adverse legal authority from the controlling jurisdiction. Then, discuss the practical impact of the client's approach—perhaps the court does not find *Jordan*, perhaps it does, perhaps it does not but the case is appealed and the appellate court finds it, perhaps opposing counsel finds it after reading your response. While it can be assumed that not citing *Jordan* does not violate the code of ethics, is the failure to do so unprofessional? If so, does the client's directive trump your desire to be professional? What is the impact on your reputation if you follow the client's directive and *Jordan* is later discovered by opposing counsel or the court? Even if it is not discovered, how will you feel about yourself? How do you respond if the court asks you if you were aware of *Jordan*? Does it violate the attorney-client privilege if you respond that your client dictated your approach? Should you withdraw from representation rather than either disobey or comply with the client's request? If you do, what happens to the client, who may not be able to obtain other representation? If you withdraw and the client does obtain other representation, are you not just passing along the problem to another attorney (and perhaps a third or fourth if the issue continues to recur) until an attorney who does not do a good enough job to find the out of jurisdiction cases steps in? What if, instead of a pro bono client, the issue arises with your firm's biggest paying client, who tells you that unless you do what you are told, the client will pull all of his or her business from the firm? Does it matter if losing the client's business would cause the firm to go under? Are you prepared to go home and explain to your spouse that the kids won't be properly fed that week because, although you were not ethically required to do so, your sense of professionalism compelled you to refuse to do what a client wanted? What if the paying client is a regular, but not financially critical, client? A client with a single case and not likely to bring any repeat business? How do you decide at what point is the line drawn between your professionalism and your personal financial stake?

B. **FACTS:** Your first job out of law school is with a very traditional firm with a keen eye on the bottom line and with no history of pro bono representation. You have worked there for over a year, done a great job, and received nothing but positive feedback from the partners. You want to take a pro bono case and you go to the managing partner to ask for permission.

DISCUSSION POINTS: What would you say to convince the managing partner to allow you to handle the case? What concerns would you expect the managing partner to have that might cause him or her to not agree to your request? How would you argue against those concerns? Would your approach be different if you had been with the firm longer and had achieved the status of a partner? If so, how? Assume that you are allowed to handle the case. Your firm has a holiday party for its clients while you represent the pro bono client. Your client is of a much lower economic status than all the firm's other clients. Moreover, your client, while not disruptive or crude, is not well schooled in social graces. You want to invite the client and your managing partner is hesitant to do so. Discuss whether the client should be invited. Points that might be discussed include whether not inviting the client sends a message that he or she is not as important as paying clients and whether the purpose of the party (which is at least in large part to thank clients for their business and to encourage repeat business) is served by inviting the pro bono client. Does it make a difference if the client is of a different race than the paying clients—either in the sense that not inviting the client could appear to be a racially based decision even if it is not, or in the sense that injecting diversity into the client mix is a good thing independent of any other considerations, or otherwise? Does the analysis change if the firm has a racially diverse client base or if the client base is comprised primarily of individuals of the same race as the pro bono client?

C. **FACTS:** The fact that many of the legal needs of the poor (and the middle class) are not being met is clear. Pro bono representation is one way to address this problem, but it has fallen far short of resolving it. At the same time, many students coming out of law school each year are having difficulty finding

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employment. There is clearly a disconnect between all these clients needing representation and all these lawyers needing clients.

DISCUSSION POINTS: How should this situation be resolved? Discuss the possible ways of dealing with the matter and the plusses and minuses of each. Those ways might include a decision that is the civil equivalent of *Gideon v. Wainwright*, the establishment of a civil equivalent to the public defender's office, mandatory pro bono, a legal job corps, changes to attorneys' billing practices, tax benefits for the provision of pro bono services, and increased use of mediation. Many of these options would need significant funding. Where would that funding come from? Would the increased representation flood the courts with litigation? If so, would the increased funding have to include additional judges and facilities? Where would those additional funds come from? How does the need for meeting the legal needs of the poor and the middle class compare to other societal needs? How do we prioritize the use of our resources? Are there things (such as the educational system, job creation programs, health care) that with better funding might reduce the need for legal representation?

D. FACTS: A student interns in a prosecutor's office and has an epiphany that leads to the conclusion that the student strongly wants a career as a prosecutor. The idea appeals to the student, who had several years of experience as a businessperson between college and law school, not just because of great interest in the subject matter and a belief that prosecution truly serves society, but also because the student really dislikes the idea of having to deal with the business pressures of private practice. The student's spouse, a stay-at-home parent of the couple's two children, vehemently argues that such a career would not be wise from a financial perspective, given the relatively low salaries for prosecutors, the four mouths to feed, the need to have a place to live, student loans coming due, and other expenses.

DISCUSSION POINTS: Can the student reasonably pursue a career in prosecution? Considerations should include how to draw a balance between job satisfaction and economic factors. Some students will identify with the desire to simply practice law and not have to think about business matters. (If any students get caught up in the role of the prosecutor, they can be encouraged to think of the facts in terms of a student who wants to serve as a public defender, an attorney for the EPA, or in some other capacity they identify with.) Others, with a more entrepreneurial bent, will find the business challenges to be an exciting opportunity. In this analysis, several factors should be made clear. It is certainly true that any opportunity for great wealth will be limited to the private sector, and that as a general rule, attorneys in private practice will make more over the course of their careers (and in their early years of practice) than their publically employed counterparts. Students should also recognize, however, that there are benefits to a public career—such as the certainty of a set amount of income at a regular interval, loan reduction and forgiveness programs, health care, pensions, DROP programs—that can in the long-term offset some of the financial disparity. They should also realize that despite the general principle noted above, not all private attorneys fare better financially, particularly after the government lawyers have worked for a few years and received raises and/or promotions. Care should be taken not to give students the idea that a government position is a 9-5 job that leaves the lawyer free to spend evenings and weekends for nothing other than leisure or family activities. While government lawyers don't have to worry about billing a set number of hours, they have to work hard and they have to put in a lot of hours. Discussion should also include to what extent changing political values, which have over the past few decades resulted in legislatures reducing benefits for all government employees and placing little value on retention of experienced practitioners, should be taken into account in making career decisions.

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V. Resources

George Ballman, Jr., *Amended Rule 6.1: Another Move Towards Mandatory Pro Bono? Is That What We Want?*, 7 GEO. J. LEGAL ETHICS 1139 (1994).

Judith Billings, *That Thing Called Pro Bono*, 11-SEP UTAH B.J. 23 (1998).

Debra Burke, Reagan McClaurin & James W. Pearce, *Pro Bono Publico: Issues and Implications*, 26 LOY. U. CHI. L.J. 61 (1994).

Roxanne J. Medina-Solomon, *Variety Is The Spice Of Pro Bono*, 78 MICH. B.J. 1312 (1999).

Deborah L. Rhode, *Pro Bono In Principle And In Practice*, 53 J. LEGAL EDUC. 413 (2003).

Jason M. Thiemann, *The Past, The Present And The Future Of Pro Bono: Pro Bono As A Tax Incentive For Lawyers, Not A Tax On the Practice Of Law*, 26 HAMLINE J. PUB. L. & POL'Y 331 (2005).

Melissa H. Weresh, *The Chicken Or The Egg? Public Service Orientation and Lawyer Well-Being*, 36 U. ARK. LITTLE ROCK L. REV. 463 (2014).

Chapter 17
HEALTH AND WELLNESS

DEBORAH M. GARSKOF & FREDERICK S. URY²⁵

I. Summary

- Explains the overall significance of mental and physical health and wellness to professional and personal satisfaction.
- Makes the argument that ignoring work/life balance is detrimental to success, both professionally and in one's personal life.
- Informs about the prevalence of depression, drinking, and drug problems affecting members of the profession.
- Offers suggestions regarding healthy lifestyle choices, including diet, exercise, sleep and time off as effective tools to counteract the stress that can lead to depression and substance abuse.
- Offers information regarding Lawyer's Assistance (LAP) and other treatment programs.
- Suggests that by taking control of one's life and doing everything in moderation (including work) the law can provide a rich and satisfying career balanced with a fulfilling personal life.

II. Learning Outcomes

- Be aware that the profession is a demanding one that can lead to elevated levels of stress and depression.
- Be aware that maintaining a healthy lifestyle is an important tool to manage stress and avoid depression.
- Be aware that studies show alcohol and drug abuse affects the legal community more prominently than other professions.
- Understand that programs exist to assist members suffering from depression or alcohol abuse in a safe and confidential manner.
- Understand that practicing in an impaired fashion can lead to catastrophic results.

III. Teaching Notes

Although the authors are practitioners, not teachers, suggestions and insights based on the authors' experience with the material note the following:

The materials on health and wellness can be taught in a variety of contexts. The material is appropriate for law students as well as for current practitioners and is appropriate for continuing legal education courses and for courses on professionalism and ethics. Because the material directly addresses the stressors associated with the profession and instructs on healthy ways in which to

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avoid/manage/treat depression and substance abuse, the materials are relevant to all ages and at all levels of practice.

Most students are receptive to the topic. Some find the studies regarding the extent to which substance abuse affects the legal community more prominently than other professions to be especially important and often alarming. Many students are unaware of LAP programs and the programs available for early and ongoing prevention and treatment. Because the topic is so pertinent to everyday life, most people are engaged by the topic.

Because the topic is so personal and affects not only the student, but also his or her family, the subject matter directly promotes self-examination both of the student's current health and wellness levels, as well as the way health and wellness can affect the student's career and family. By instructing students that maintaining a work-life balance is important not only to physical health but also to mental, it allows students to evaluate whether they are doing enough to ensure the type of balance which promotes quality personal and professional choices. Student self-examination and a potential change in lifestyle can be a primary positive outcome of exploring this chapter.

IV. Exercises

1. Ask students if they have a personal connection with or knowledge of any lawyer suffering from depression or substance abuse (they need not divulge the name of the person(s)). Discuss the fact that research suggests that lawyers are at a higher risk of developing substance abuse issues than other professions, including doctors (See Resources, 2016 ABA-Hazelden Betty Ford Study). Why is that? Discussing the ways in which lawyers they know have faced real life problems impacting their personal and professional lives can be instructive and a lesson on the importance of preventing and treating depression and substance abuse quickly and effectively.
2. Discuss students' own health and wellness routines. Do they exercise? If so, what is it they do and how do they fit it into their busy lives? What kind of diet do they have? Do they/how do they find time to cook/shop? What is the average number of hours they sleep-and is it a restful or fitful sleep? If fitful, do they have ways of improving the quality of their sleep? By sharing routines and suggestions for easy/healthy meals, shopping, and the like students can improve their own mental and physical states of personal health and wellness.
3. Discuss students' own stress levels. What stressors do they face on a daily, monthly, annual basis? How to they deal with them and where do they find support? Is it from family, friends, or professionals? Do they have suggestions for minimizing stressful situations at work/school and for effective time management? Discuss ways in which stress reduction can lead to greater job/school satisfaction.
4. Discuss whether students are aware of the resources available to them through LAP or twelve step programs as well as how to locate these programs and the benefits that can come from early utilization of their services.

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V. Resources

ABA COMMISSION ON LAWYER ASSISTANCE PROGRAMS (COLAP),
http://www.americanbar.org/groups/lawyer_assistance.html (last visited Feb. 6, 2017).

Patrick R. Krill et al., *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICTION MEDICINE 46 (2016), available at http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.aspx. Joint study undertaken by ABA Commission on Lawyer Assistance Programs and Hazelden Betty Ford Foundation with approximately 15,000 attorneys in 19 states participating. Researchers determined that 21% of licensed, employed lawyers qualify as problem drinkers, 28% struggle with some level of depression, and 19% show symptoms of anxiety. Study finds that younger attorneys (within first 10 years of practice) experience highest rate of problems.

Lawyers' Alcohol-Use Study: Implications, Next Steps Discussed, AMERICAN BAR ASS'N (Feb. 26, 2016), http://www.americanbar.org/news/abanews/aba-news-archives/2016/02/joint_study_identifi.html.

Local Twelve Step Program Identification: SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, <http://findtreatment.samhsa.gov> (last visited Feb. 6, 2017).

James Podgers, *Younger Lawyers are Most at Risk for Substance Abuse and Mental Health Problems*, A New Study Reports, A.B.A. J., Feb. 7, 2016, available at http://www.abajournal.com/news/article/younger_lawyers_are_most_at_risk_for_substance_abuse_and_mental_health_prob/.

Michael Serota, *A Personal Constitution*, 105 NW. U. L. REV. COLLOQUY 149 (2010), available at <http://www.northwesternlawreview.org/online/author/374>, discusses the prevalence of stress (or, as he calls it, distress) within the profession and suggests ways in which law schools can educate students on stress avoidance and reduce professional dissatisfaction.

Robert Stein, *Help is Available*, A.B.A. J., June 28, 2005, available at http://www.abajournal.com/magazine/article/help_is_available/. One in four lawyers suffers from stress, and, out of 105 occupations, lawyers rank first in depression.

Chapter 18
MINDFULNESS AND PROFESSIONALISM

JAN L. JACOBOWITZ²⁶

I. Summary

- Discusses the difficulty of a precise definition of professionalism, but concludes that universal elements of professionalism are honesty, civility, loyalty and a service orientation. Adds that the habits necessary for professional conduct include the ability to refrain from acting out of impulse, anger, and without reflection.
- Explains the importance of ongoing discussion about professionalism and understanding the components of decision-making. Points out that each individual's decision-making process is a combination of past emotional experience and logical analysis. When a stressful situation causes emotions to overwhelm an individual, thinking may become "clouded." When thinking becomes clouded, an individual may become unable to gather and process the analytical data sufficient to make a reasoned decision that considers both the long-term and short-term consequences in order to act in a certain manner. In other words, an individual may act based upon emotional reactivity, which in turn results in unprofessional conduct.
- Characterizes decision-making based upon emotional reactivity as evidence of a lack of mindfulness, then provides Kabat-Zinn's definition mindfulness with further explanation. Jon Kabat-Zinn, the founder of the Mindfulness Based Stress Reduction Program, defines mindfulness as "paying attention in a particular way, on purpose, in the present moment, and nonjudgmentally." *In other words, the idea of the practice of mindfulness is that it provides a heightened awareness of whatever event is occurring in your life in the present moment, and how you are thinking, feeling and experiencing the event.*
- Explains that mindfulness is a tool that provides a "pause" between the action or event that an individual is experiencing (e.g. an opposing counsel's hostile behavior) and that individual's response such that the individual may be able to thoughtfully respond.
- Summarizes research that provides "evidence" that mindfulness creates positive changes in the physiology of the brain.
- Briefly explains how to engage in a mindful meditation. *Fundamentally, spending a few minutes sitting quietly, lowering, or closing the eyes, and concentrating upon the breath may begin a mindfulness practice. When the mind begins to wander, which it will, just gently bring concentration back to the breath. The process is not about attempting to have the mind go "blank," but rather about noticing thoughts, emotions and bodily sensations, without judgment, and sending them on their way, perhaps to be revisited at a later time, while returning the focus to the breath.*
- Discusses the value of mindfulness in decision-making, provides examples of mindfulness being used throughout the country, and mentions resources for assistance in learning mindfulness.

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II. Learning Outcomes

- Understand the conceptual framework associated with being a professional lawyer.
- Become aware of the psychological process of decision-making and the challenges to acting in a professional manner.
- Understand the definition of mindfulness and its value in decision-making.
- Understand the process of mindfulness meditation.
- Understand that mindfulness may be a tool that will enable them to make more thoughtful decisions and thereby maintain a professional demeanor.
- Have the opportunity to begin to develop a mindfulness practice and understand that they have a choice in enhancing their own abilities to pause and reflect in the moment such that it will enhance their decision-making abilities and thereby render them better lawyers.

III. Teaching Notes

The materials on professionalism and mindfulness can be taught in a variety of contexts, including a stand-alone program for law students of all levels, as part of a doctrinal course, as part of a course on professionalism or legal ethics, or as a section of an experiential learning course. The chapter is written to be accessible for law students, including first-year students who may lack experience with lawyers, but the material is adaptable for all experience levels, including lawyers in a CLE context. The conceptual framework is the same for all experience levels, but the examples can become more sophisticated as the experience level of the students increases.

Students generally are willing to engage in animated debate on the distinction between ethics and professionalism—often a good manner in which to introduce professionalism. However, on the topic of mindfulness the receptivity of students runs the gamut from those who have been exposed to the topic and are intrigued to find it in law school, to those who are highly skeptical. The skeptical often become engaged through both the exercises and the scientific evidence of mindfulness meditation's positive impacts on the brain. Class discussion and sharing experiences of challenging events and emotional reactivity promote the receptivity of the students.

Discussing decision-making and mindfulness in the law school curriculum provides students with the opportunity to develop awareness of how their thoughts, emotional feelings, and bodily sensations impact their reactions to or responses in a challenging situation. The ability to recognize and explore the thoughts, feelings and bodily sensations that occur in any particular moment and how those elements influence conduct also provides the opportunity to gain deeper insight into one's values and biases. For example, students will likely discover certain personal triggers that set off an emotional spiral thereby inhibiting their ability to make reasoned decisions. Moreover, employing self-awareness to understand and modify one's behavior may positively impact all aspects of an individual's personal and professional life. Similarly, to imbed this discussion in a CLE provides practicing attorneys an opportunity to reflect on how their emotions and values may inhibit thoughtful, productive decision-making in the context of their work.

IV. Exercises

Scott Rogers has developed a number of creative exercises that assist in teaching the material. We included many of them in our book, *Professional Responsibility and Mindfulness—A Guide Book for Integrating Mindfulness into the Law School Curriculum*, which describes our innovative course and is

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listed in the resources below. Among students' favorites are, THE SNOW GLOBE, THE SPIRAL and THE LEARNED HAND exercise. I have included the description of those three from our book, but encourage anyone who would like a deeper exploration of teaching mindfulness, ethics and professionalism to consult the other exercises in the book.

1. THE SNOW GLOBE

Overview:

The snow globe exercise is one that students find extremely helpful. It offers a compelling metaphor for the distracted mind and of the benefits to flow from a mindfulness practice. It also illuminates the power of the imagination to elevate feelings of distress as well as to tone them down.

Instruction:

Most students know what happens inside a snow globe when it is shaken. The snow flies. In this exercise, we have students imagine a snow globe with a snowy scene in which a snowman (i.e., snow person) rests in the center.

Invite students to pick up an imaginary snow globe. Describe the scene inside. Students will tend to look confused at first but if you look serious and hold your imaginary globe confidently in your hand, they will catch on and follow your lead. Have them shake up the globe. Then ask them to stop shaking it and describe what it looks like having been shaken.

They will often talk about how the snow is swirling around. Share with students the insight that the swirling snow is akin to the "mind" when it is caught in afflicted emotions, and in reactivity -- not getting what we want, learning news we don't want to hear, and even just being surprised by the unexpected. You can speak of the tens of thousands of thoughts we have each day and how the flurries symbolize reactive thinking and mental chatter.

Ask your students to look closely at the center of the globe and notice who the snow person is. They will often realize this themselves. The answer is, "it is them."

Insight:

a. Everyone has a snow globe. It can be very helpful to take time to check in with our snow globe. By simply doing so, we bring awareness to our inner experience. Once aware, we have a choice and can either continue to lose ourselves in reactivity, or practice a mindful exercise (e.g., breathing) and slow down the reactive activity with the snow globe.

b. It can be helpful to check in and notice other people's snow globes. Theirs too is constantly changing --picking up and settling down. And because we are social creatures, and our brains are social organs, the activity of our snow globes can be contagious. Without awareness, we run the risk of having another's busy snow globe shift ours into greater reactivity or having our busy snow globe generate reactivity in another. This can include our client, colleagues, a judge, family and friends.

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- c. As we learn to notice and calm our snow globe, we offer to those around us a less reactive snow globe to offer them a little relief as well.

In Class Exercises:

You can help your students cultivate awareness into their own mind by asking them to check in with their snow globe. Ask them to close or lower their eyes and sense the (re)activity of their mind and body. As they turn inward, ask them to identify, on a scale of one to five -- with one being "great calm and clarity" and five being "overwhelmed and emotionally flooded" -- where they sense they are in the moment. When students use the snow globe to bring awareness to themselves, they can then practice a mindfulness exercise, like mindfulness of the breath, to help calm down the snow globe. It can be helpful to suggest that each time they exhale, they sense the snow settling a little bit.

Professional Responsibility Application:

When we find ourselves moving into ethically risky terrain, or feel a general sense of urgency, hesitation or doubt, it can be especially helpful to check in with our snow globes. Many professional and ethical missteps might have been avoided if the intense snow flurries had been noticed and an exercise done to help settle the snow.

2. THE SPIRAL

Overview:

Life is a never-ending series of events. Our experiencing of these events takes the form of thoughts, feelings, and sensations in the body, which, when ignored or resisted, often lead to distraction and reactivity.

This distraction can take the forms of more thoughts, feelings, and sensations-- and lead to action. As the illustration that is developed in the class as part of this exercise makes clear, things can easily spiral out of control, leading to mistakes, overreactions, and unfulfilling interpersonal exchanges.

Instruction:

Because of the highly interactive element to this demonstration, teacher training is most effectively accomplished by watching a video or listening to an audio recording, available on *The Mindful Law Student* website (<http://themindfullawstudent.org/>). Once learned, you can introduce this teaching tool using any of a variety of real life examples. Students can read about the insight and exercise in the book, *Mindfulness for Law Students* (2009) by Scott L. Rogers.

Insights:

- a. The drama that plays out again and again when we become agitated and lost in reactivity is brought on by a benign force -- the event that didn't go the way we wanted it to go or expected it to go. Nothing more than an event.
- b. Life is filled with a never ending series of events. Most don't register or make their way onto the radar screen -- the person ordering coffee as we walk by a café, the pencil positioned on a colleague's

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desk. But, when the event involves something threatening – generally falling into one of three categories – the unwanted, the undesirable, and the unexpected, we react to it as much more than life's natural unfolding in the moment. It becomes a problem.

c. Our overreaction, including our words, gestures, and actions, often becomes someone else's unwanted or undesirable event. This insight emerges when we realize that our thoughts, feelings, and sensations are themselves reactions.

Professional Responsibility Application:

The adversarial nature of the law, coupled with the unprofessional and sometimes unethical actions of other lawyers, continuously trigger the confusion of events, to which we will want to respond wisely, into outrageous actions which quickly leads us into reactivity and the host of associated afflicted emotions. Our snow globes start swirling faster, as does our opponents, and the interaction tends to become less productive and functional than it might otherwise be. Because we are caught in the spiral, and because we cannot see clearly with all the snow flying, we become more likely to make professional and ethical missteps.

3. LEARNED HAND EXERCISE: “4---7--- 8 HANDS”

Overview:

This exercise is a basic mindfulness practice that incorporates awareness of breath and body. Referred to as a “Learned Hand” exercise, students find the exercise memorable and one that can be learned in a few minutes. It can be practiced both during times of calm and when in the midst of challenge. As discussed above, unprofessional and unethical conduct often is a byproduct of being caught up in a stressful spiral or snow globe situation.

The breathing portion has been found to be effective in the medical community in dealing with anxiety and panic, and we share with students that this exercise may be useful for everyday stress reduction. Many students find this a strong incentive to practice the exercise and over the years many have reported it to be very helpful when they found themselves in challenging and stressful situations. This exercise is best taught by first describing it to your students, then demonstrating it to them, and then guiding them through it. Unlike other exercises, it is helpful if students keep their eyes open while learning it.

While we practice it sitting, it is one that can be practiced in any position. Separate instructions are given for the hands and the breath so you can describe and then practice each first before putting them together. As noted below, the movement of both breath and hands follows a 4 —7—8 count.

a. The Breath:

Inhale to the count of four. Hold your breath to the count of seven. Exhale to the count of eight.

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b. The Hands:

Begin with your hands in a loose grip and fully extend your fingers to the count of four. Hold your fingers stretched open to the count of seven. Close your fingers, returning to a loose grip to the count of eight.

c. Instruction:

- Sit in a chair—hands resting on your lap, palms face up in a gentle grip.
- Bring awareness to your hands and to your breathing.
- Inhale and extend your fingers fully to the count of four.
- Hold your breath and keep your fingers extended to the count of seven.
- Exhale and close your hands to the count of eight.
- Repeat this exercise two times.

Note: If comfortable, inhale through your nose and exhale through your mouth, as if blowing through a straw. On the exhalation, place your tongue on the roof of your mouth just behind your front teeth.

V. Resources

Jan L. Jacobowitz, *The Benefits of Mindfulness for Litigators*, 39 A.B.A. J. SECTION OF LITIGATION, no. 2, Spring 2013.

Jan L. Jacobowitz, *Cultivating Professional Identity & Creating Community: A Tale of Two Innovations*, 36 U. ARK. LITTLE ROCK L. REV. 319 (2014).

Jan L. Jacobowitz & Scott Rogers, *Mindful Ethics--A Pedagogical and Practical Approach to Developing Professional Identity, Enhancing Legal Ethics and Encouraging Civility*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 198 (2014).

SCOTT L. ROGERS, *MINDFULNESS FOR LAW STUDENTS: APPLYING THE POWER OF MINDFULNESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL* (2009).

Scott L. Rogers, *Mindfulness in Law*, in *THE WILEY-BLACKWELL HANDBOOK OF MINDFULNESS* (Amanda Le, Christelle T. Ngnoumen & Ellen J. Langer eds., 2014).

SCOTT L. ROGERS & JAN L. JACOBOWITZ, *MINDFULNESS AND PROFESSIONAL RESPONSIBILITY—A GUIDE BOOK FOR INTEGRATING MINDFULNESS INTO THE LAW SCHOOL CURRICULUM* (2012).

Scott L. Rogers, *What Do We Want? Mindfulness in Law!*, 62 LA. B. J. 268 (2015).

Scott L. Rogers & Jan L. Jacobowitz, *Mindful Ethics and the Cultivation of Concentration*, 15 NEV. L.J. 730 (2015).

Chapter 19

THE ORGANIZED LAWYER

L. STEVEN EMMERT & THERESA M. GRONKIEWICZ²⁷

I. Summary

- This chapter describes and discusses the value of organization in a law practice. The discussion emphasizes the practical and strategic benefits of organizing one's practice, ranging from daily preparation all the way to long-term career objectives.
- Law students and lawyers should be proactive in implementing practice management tools to prevent disorganization and maintain organization.
- Disorganization can negatively impact clients' cases or result in an inability to meet professional obligations and may lead to charges of misconduct and disciplinary sanctions. Oftentimes allegations of neglect, lack of diligence or communication, or mishandling of a client trust account resulting in lawyer discipline can be traced back to some elements of disorganization.
- Organization empowers lawyers to have a stronger command of their workspaces and work flow and promotes efficiency resulting in enhanced performance, client satisfaction, and reputations as legal professionals.
- The heart of the chapter is its framework for organization, summarized in this excerpt:

There are four fundamental elements to becoming organized. The first is to perform tasks before they become urgent. The second is time management. The third is a dependable filing system. The fourth is planning.

- The chapter explores each of these four components in turn, and recommends ways in which lawyers can achieve them.

II. Learning outcomes

- Formulating an organizational plan is a highly individualized process that has both visual and conceptual elements that realistically suits one's natural preferences. Organization is not a "one size fits all" approach. It is not enough that a lawyer *be* organized. A lawyer must also *appear to be* organized.
- Far too many lawyers engage in what may be termed "working to the deadline." That is, they note the time within which a task must be performed, and assume that it can and should be done at the latest possible time, presumably to free up their immediate schedules for other tasks. This chapter exposes the danger in this deadline-driven thinking, and encourages lawyers to perform activities before they become urgent.

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- It is important for law students and lawyers to understand the benefits of time management. Busy law practices almost always include a host of interruptions and distractions, each of which distracts the attorney from more important tasks. The chapter explores how to minimize those disruptions and improve the lawyer's efficiency.
- A good filing system is essential to maintaining a successful and effective law practice. Students and lawyers should be made aware of the dangers of a cluttered desk. Lawyers are encouraged to work with a good legal assistant or develop a good system to address incoming messages quickly, rather than postponing action.
- Students and lawyers are encouraged to plan their weeks, their years, and even their careers, in order to better focus their individual tasks. This avoids the problem of a reactionary practice, where the lawyer acts reflexively to a stimulus – a pleading, a letter, or some other new demand on his or her time – instead of figuring out where it fits in the lawyer's overall strategy, and acting with the longer term in mind.

III. Teaching Notes

- The materials on professionalism and organization can be taught in a variety of contexts, including as part of a law practice management course for law students of all levels and lawyers in a CLE context. Impress upon law students and lawyers the importance of implementing good organizational skills and developing an organizational plan at the onset as well as updating the plan throughout their professional careers.
- Students and lawyers should understand that there is no “one size fits all” approach to organization. Different people look at things differently and work differently in various environments, all of which affects an individual's organizational style.
- A discussion about organization should include time management, financial management, organization of files and projects, entrepreneurial skills, marketing and technology.

IV. Exercises

1. Engage the students in a self-assessment exercise: In her book, *The Organized Lawyer*, Kelly Lynn Anders, this chapter's author, identifies four organizational styles: “Stacker,” “Spreader,” “Free Spirit,” and “Packrat.” Have students identify their organizational style and discuss what it means to be organized? In considering their own organizational style, students and lawyers should consider the following questions: how does their desk look? Is it clear or cluttered? What does the floor space and surrounding areas near the desk look like? Is there a place to sit? Could they send anyone into the their individual workspace and find anything quickly? Are things stacked or jumbled? How are notes and files maintained? Do the students feel overwhelmed when they walk into their office or workspace due to the clutter? Discuss the best approach to ensure efficient use of physical or office space and storage.
2. Discuss what constitutes effective law practice management. Have the students or lawyers formulate the goals and principles for effective practice management, including calendar, filing,

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conflict checking and timekeeping systems. This should include a discussion of the effective use of technologies and strategies to store, retrieve and analyze information. Identify tools and procedures to ensure that time and resources are allocated efficiently.

3. Discuss the types of disorganization that could impact a lawyer's professional obligations under the Model Rules of Professional Conduct and lead to disciplinary sanctions. E.g., commingling or conversion of client funds, poor recordkeeping, lack of communication, competence, diligence, and lack of cooperation with disciplinary authorities.
4. Prepare hypotheticals based on disciplinary cases where lawyers have been sanctioned for conduct that includes an element of disorganization. See e.g., *Disciplinary Proceedings Against Smith*, 841 N.W.2d 278 (Wi. 2013), *In re Elgart*, 999 A.2d 853 (Del. 2010), *In re Smith*, 998 So. 2d 449 (La. 2004), *Sneed v. Bd. of Prof'l Responsibility*, 37 S.W. 3d 8866 (Tenn. 2000), and *Lawyer Disciplinary Bd. v. Beveridge*, 459 S.E. 2d 542 (W.Va. 1995). Identify and discuss what organizational plan, skills or system could have been implemented to avoid disciplinary charges.

V. Resources

Time-management and organization literature is plentiful, and so are educational programs that show lawyers – and anyone else – how to master their lives and their time. Here are a few of the major modern books on the subject:

- STEPHEN COVEY, THE SEVEN HABITS OF HIGHLY EFFECTIVE PEOPLE (2013). *The Seven Habits* is the best-known book on this subject, and might just be the owner's manual for an effective life. It's not an easy read, but it's well worth the effort.
- BRIAN TRACY, GOALS! (2010). This book's immodest subtitle is *How to Get Everything You Want – Faster than You Ever Thought Possible*. While that may over-promise just a bit, the book is a step-by-step guide to brainstorming, selecting, and refining your goals, and then planning and carrying out the steps necessary to achieve them.
- DAVID ALLEN, GETTING THINGS DONE (2015). Allen emphasizes the importance of a relaxed mind, showing the reader how a stressful environment can impair decision-making. The book offers guidance on how to get the mind operating most efficiently, without the drain of nagging worries and unaddressed obligations.
- ALLISON SHIELDS & DAN SIEGEL, HOW TO DO MORE IN LESS TIME: THE COMPLETE GUIDE TO INCREASING YOUR PRODUCTIVITY AND IMPROVING YOUR BOTTOM LINE (ABA Publishing 2014).
- RICHARD KOCH, THE 80-20 PRINCIPLE (1999). This book is based on the Pareto Principle – that 80% of output comes from 20% of input – and applies it to daily activities. The reader is encouraged to identify the 80% of input (clients, tasks, meetings) that are of low value, and to delegate or eliminate them in favor of the higher-value input.
- KELLY LYNN ANDERS, THE ORGANIZED LAWYER (2009).

In addition to books, there are consultants who work specifically with lawyers on streamlining their practices and improving their lives. One prominent example, Atticus, Inc. (www.atticusonline.com) has been in business since 1989. The company has over a dozen "Certified Practice Advisors" who meet with lawyers and firms to evaluate their practices and recommend improvements.

Chapter 20
THE GLOBALIZATION OF PROFESSIONALISM

ROBERT E. LUTZ²⁸

I. Summary

- Identifies current issues in the global legal profession: (1) choice-of-law entanglements; (2) spotty rules of law; (3) the corrosive impact of corruption on professional ethics; (4) the possible repercussions of technology, social media, and global outsourcing on the international legal profession; and (5) the need for global corporate responsibility.
- Explains the impact of globalization on the legal profession. Recent developments suggest that needed global standards are starting to emerge, especially in the areas of social responsibility and corruption-fighting.
- Defines “professionalism” in several ways. The term can be:
 - a personal commitment to perform with *honesty, integrity, and civility*;
 - what lawyers do on a daily basis, and the standards to which they hold their fellow lawyers (i.e., the best practices of the profession);
 - how lawyers comply with the conduct rules promulgated and enforced by regulatory authorities, AND/OR
 - individual lawyer self-respect among one’s peers and within the bar generally, as well as engendering public goodwill toward the legal profession.
- Notes that the international practice context frequently involves different types of lawyers (e.g., educated and trained in a variety of legal systems and traditions), and is subject to cross-cultural issues.
- Describes the international practice as being divided into three general types: compliance (operational, regulatory), litigation (dispute resolution), and transactional (consultation, counseling, negotiating, contracting, etc.).
- Specific challenges that lawyers face regarding corruption of rule of law in foreign countries are highlighted (e.g., in developing countries where investment takes place and there is not adequate infrastructure to resist the corruption).
- Discusses the role of lawyers in advancing human rights and promoting corporate social responsibility.
- Presents the role of the UN Human Rights Council’s Guiding Principles (“Ruggie Principles”) that elevate corporate/business responsibility to a global standard of expected conduct for all business enterprises, beyond the responsibility to comply with national laws and regulations protecting human rights.
- Addresses challenges such as corruption, human-rights, social media, technology, social outsourcing on professional lawyers.

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- Proposes effective corporate social responsibility by calling on business to (1) adopt and communicate a high-level commitment to respect human rights; (2) employ a due diligence process to assess, integrate, track, and communicate about actual and potential human rights impacts; and (3) remediate negative human rights impacts linked to businesses.
- Presents the common values of international/transnational practice, the future of legal professionalism, and the pivotal role that the next generation of international lawyers will have.
- Makes the point that it is not realistic to agree to a single rule of professionalism. Although there is reason to agree to a universal norm of professionalism, there is no universal body available to pronounce or enforce such norms. Nonetheless, norms of conduct (“best practices”) are emerging from practice that will serve to guide practitioners in the future.

II. Learning outcomes

- Understand what is meant by “legal professionalism” when applied globally.
- Be aware that lawyers’ integrity and civility are needed to advance the rule of law across borders.
- Be aware of the forces causing global change, and how they are challenging the rule of law and the ability of the private and public sectors to rely on a steady and consistent enforcement of law.
- Be informed of the prevalence of corruption and consider how different policies have sought to combat corruption.
- Understand the current trends and attempts to incorporate corporate social responsibility to advance human rights and professionalism abroad.
- Understand the ‘Guiding Principles’ and their effect on corporate/business responsibility on an international level.
- Be able to consider different professional solutions to international disputes and conflict avoidance.
- Appreciate the demands that professionalism and ethics impose upon lawyers who seek to apply and implement modern technology, social media, and global outsourcing in their international legal practices; and
- Begin to recognize what professionalism might mean and develop a personal notion of professionalism.

III. Teaching notes

The idea of professionalism applies to all those involved in the international legal field, especially now with the growing utilization of social media, technology, and global outsourcing. The material is applicable to practicing attorneys, law students, paralegals, and many others working in the international legal setting.

Although professionalism may often be likened to or synonymous with ethics, the concept of professionalism can and should be a stand-alone subject. The subject matter is well suited as a Continuing Legal Education seminar or course because it would serve as a reminder to those working in the general legal field of the need for professional conduct.

More often than not, the concept of professionalism is introduced in legal ethics courses. In many instances, professionalism is interpreted simply as adherence to the Model Rules of Professional Conduct, and professionalism notions are perceived to have a domestic practice application—not an international one. Although ‘professionalism’ and ‘professional conduct’ are interrelated, they cannot

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be considered one and the same. However, many students assume this is the case and the subject of ethics is one that is generally approached with some caution. The law student today comes from a multitude of different cultures, circumstances, and experiences. A good approach to the introduction of the subject may be a survey of what professionalism may mean to students from their various backgrounds.

One of the goals is to help each student develop an understanding of professionalism in the broader context of the international legal environment. Since the subject matter is directly applicable to when students begin to practice in the field, students may be engaged by this issue. One exercise that students might find helpful is to imagine scenarios where their perceptions of professionalism may be challenged or questioned and consider how these hypothetical situations can be addressed.

IV. Exercises

1. Self-reflection and Testing

- Issues concerning global professionalism related specifically to the legal profession may arise daily in the news. You can recommend that students read a major daily newspaper covering international news (perhaps via the Internet), and start the class with five minutes discussing events identified by students (if the student has fluency in a foreign language, assign him or her to monitor events via foreign newspapers; the PressReader app offers daily access to foreign sources to which your library might subscribe).
- A slightly different approach to make students more responsible could be employed: appoint one student per class to be in charge of bringing news into the class. You or your Librarian may come up with some recommended sources for students to monitor, depending on your class focus.
- Students could reflect individually on what “professionalism” in the context of law practice might mean to them. The students can then confer with their peers and attempt to reach a general consensus on ideas and values deemed essential to professionalism, especially in a transnational legal practice.
- Students, divided into discussion groups of five to seven students, may be asked to create a list of major countries in the international sphere with which there is substantial transnational business activity. Pose the following questions to the groups for discussion and instruct them to achieve some degree of agreement amongst group members regarding the answers: Do these countries have legal systems and principles similar to the U.S.? To what extent does the transnationality of possible business legal issues (e.g., a breach of contract) complicate the decision making? Will the professionalism exhibited by lawyers from the different countries involved be the same?
- Complete a chart of differences and similarities between domestic practice and international-transnational practice.
- Ask students to draft their own professionalism code. What influenced their list? What was their number one objective?
- Assume that a student is a U.S. law school professor and is representing a foreign country that retained him as counsel in a case concerning a territorial dispute before the International Court of Justice in The Hague. Your client, without your prior involvement, annexes to its memorial an ‘historical document’ previously unknown to historians and emanating from its own archives to substantiate its claim. The veracity of those documents is challenged by the opposing party, and your client ultimately admits that they are false and withdraws them. Your client asks you to construct a new claim as a consequence of withdrawing of the false documents. See ARMAN

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SARVANI, PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR, 1 (2013). What should the law professor do? Are there issues of professional ethics here? If so, which jurisdiction's rules should govern? Could this involve concerns about international ethics? Do the questions raised go beyond professional conduct code concerns to something less codified, but still relevant?

2. Group exercises

- Student interaction is another approach to teaching global professionalism. Another is to use a variety of teaching modes. In 1-2 classes (1.5 to 3 hours) it is desirable to use a smorgasbord of methods and media. But in one class, a professor might show excerpts from a lawyer – client movie or from an ethics teaching video and invite students to identify and analyze the global lawyers' ethical standards (norms) that do or could arise.
- Small groups of students could be invited to prepare skits playing out particular problems. The professor might, 'become' an international client or the respondent in a problem and invite students to conduct an interview with him/her, or to counsel him as to a course of action.
- The students could be divided into groups of 3-5 to discuss examples of professionalism codes from the 1990 Florida Bar, the American Board of Trial Advocates, the Code of Conduct for European Lawyers (1988), the 1990 UN Basic Principles on the Role of Lawyers.
- Students (in groups) can make a list of guidelines or standards as examples of possible starting points of the discussion of global professionalism development. Students can use the examples on pages 258 and 259 of Chapter 20 as reference. The students can then reference the following sources to compare and contrast their standards of professionalism with provisions of previously implemented human rights/anti-corruption/corporate social responsibility policies such as:
 - i. the UN Convention Against Corruption (2003);
 - ii. the OECD Convention on Combating Bribery of Foreign Officials (1996);
 - iii. the Inter-American Convention Against Corruption (1996);
 - iv. the UK Bribery Act (2010);
 - v. the U.S. Foreign Corrupt Practices Act (1977);
 - vi. the OECD Guidelines for Multinational Corporations 1976, further revised in 1979, 1982, 1984, 1991, 2000 and 2011;
 - vii. UN Guiding Principles on Business and Human Rights (2011).

One of the challenges of using a group exercise may be that some of the group will not actively participate and "free-load" on the work of the others in the group. To make sure that everyone in the group is participating, assign a different country to each student. That student will effectively advocate for the represented country and make sure that the legal principles of the respective country are discussed.

Keep in mind that since the topics of this chapter are more intricate and developed than most basic introductory law courses, these exercises might require prior research by the students before engaging in qualitative discussion.

3. Additional Exercises (to stimulate discussion of globalization of profession)

- **Both sides toward the middle** – this exercise will ask students to agree on what is ethical behavior in foreign countries (for example, when violating a client's confidential information may not be prohibited under the law of Country X, but in the U.S. the lawyer is obligated to keep such

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information confidential). You have been called to be witness in a foreign court to testify against your client with respect to confidentially-held information, what will you do?

You are a U.S. lawyer in an ICSID arbitration concerning lucrative mineral rights. During proceedings, your client informs you that private meetings have recently taken place between its representatives and a senior member of the legal team for the opposing party. In those meetings, the latter disclosed confidential information concerning his client's legal strategy and proposed a corrupt bargain whereby he would persuade his client to accept a settlement favorable to your client in exchange for a bribe. Your client insists that you keep your knowledge of this information confidential.(scenario from Sarvanian)

Students can be pushed to think more deeply by shifting the facts toward the gray areas: When does the promise to not breach confidentiality change to allowing a breach of confidentiality under certain circumstances? Are there ways for party representatives and arbitrators to agree on a single set of professional conduct rules? Does it require full disclosure and informed consent of the parties? See ABA Model Code of Professional Responsibility, Section 8.5 ("choice of rule Rule").

- **Writing a policy** – This exercise starts with asking students: *How do you deal with certain cultural phenomena in other countries, especially when they can interfere with certain legal relationships?*

An example is when a counselor has a case in Italy and the lawyer or client on the opposite side brings him/her very expensive gifts as a gesture of friendship, despite the potential adversarial nature of the case. What is the counselor's policy toward the gifts, taking into account the fact that in Italy it is a custom to bring such expensive gifts for lawyers? Will the situation change radically if the counselor would be a judge or a defense attorney in the US (or prosecutor in Italy)?

This exercise will try to help students think more carefully about 'all-or-none' policies and build exceptions and gray areas into their thinking. (The audience might be divided in groups and to role play the above mentioned case).

- A **"jigsaw activity"** is a cooperative learning technique where students work in groups to teach each other.

Each group of students is given an assignment, problem, or theme. In each group, the students in the group are each assigned a specific issue or subject to which he/she becomes an 'expert'. For example, each student might be assigned to determine how a Professional Conduct Code addresses conflicts of interest. One student might be assigned to analyze New York's Code of Professional Responsibility, another California's Rules of Professional Conduct, yet another the Rules of Professional Practice of the Federal Republic of Germany (2011), and a student might examine the French National Rules Applicable to the Profession of Attorney ("*Règlement Intérieur National de la Profession d'Avocat - RIN*"). Each student shares what he/she knows to the others in the group. In a sense, the collective understanding is put together—much like a jigsaw puzzle.

- The **'Fishbowl'** method is one approach in which the professor and/or some students perform a role-play, observed by other students and then discussed. A role-play assignment is given to small

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groups, in which everyone in the group is assigned a role and no one sits out. The role-playing is followed by a discussion with those who watch and those who participate.

A logical extension of the use of the 'fish-bowl' method is to use role-plays in class to explore a particular problem. You can engage in mock counseling interviews. Simulated negotiations where there is the suggestion of a bribe. One might develop a number of role-playing situations by combing the "60 Minutes" TV show or YouTube for ideas of cross-cultural, transnational legal matters. A recent "60-Minute" episode, for example, introduced a German businessperson/facilitator who purportedly was representing a former government agency head (specific country was not mentioned) from Africa. The African, via the German representative, was shopping NY law firms to see which one would help him launder millions of dollars by buying a house, aircraft and luxury yacht in the U.S. This raised many potential ethical and professionalism issues, which could be examined with this format.

V. Resources:

In addition to the articles and books contained at the end of Chapter 20, the author recommends the following sources as further references relatable to the topic of global professionalism.

Basic Principles on Role of Lawyers, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (1990), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>.

LAURA EMPSON, DANIEL MUZIO & JOSEPH BROSHAK, *THE OXFORD HANDBOOK OF PROFESSIONAL SERVICES FROM SERVICE FIRMS* (2015) (especially see Chapter 4, *Internationalization of Professional Service Firms-- Drivers, Forms and Outcomes*, at 73-90).

Robert Klitgaard, Ronald Maclean-Abaroa & H. Lindsay Parris, *Corrupt Cities—A Practical Guide to Cure and Prevention*, WORLD BANK INSTITUTE (2002), <http://documents.worldbank.org/curated/en/709171468743399124/pdf/multi-page.pdf>.

LISA G. LERMAN & PHILIP G. SCHRAG, *TEACHING ETHICS IN AND OUTSIDE OF LAW SCHOOLS: WHAT WORKS AND WHAT DOESN'T* 57-66 (2005).

Robert E. Lutz, *An Essay on the American Perspective on Lawyer Conduct and Discipline: New Norms and Challenges for the International Legal Profession*, TRANSLATED into French: *La conforme: Nouvelles regles et nouveaux defies pour professions juridiques internationales—Une perspective americaine*", LA SEMAINE JURIDIQUE ENTREPRISE ET AFFAIRES (2012).

Robert E. Lutz, *The Future of International Law*, 18 SW. J. INT'L L. 1 (2011).

THE 10 PRINCIPLES OF THE UN GLOBAL COMPACT, <https://www.unglobalcompact.org/what-is-gc/mission/principles> (last visited Jan. 25, 2017).

CATHERINE A. ROGERS, *ETHICS IN INTERNATIONAL ARBITRATION* (2014).

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ARMAN SARVARIAN, PROFESSIONAL ETHICS AT THE INTERNATIONAL BAR (2013) (especially see Chapter 1, *The Role of Counsel Ethics in International Litigation*, at 7-28; Chapter 2, *The Historical Development of National Ethical Traditions*, at 29-58; Chapter 10, *Towards the International Bar*, at 265-280.)

United Nations Human Rights Office Office of the High Commissioner, *Guiding Principles on Business and Human Rights* (2011),
http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.