Strategies and Techniques for Teaching Professional Responsibility

EDITORIAL ADVISORS

Strategies and Techniques for Teaching Professional Responsibility

W. Bradley Wendel
Professor of Law
Cornell Law School

Howard E. Katz
Series Editor
Elon University School of Law

ASPEN PUBLISHING

To contact Customer Service, e-mail customer.service@aspenpublishing.com, call 1-800-950-5259, or mail correspondence to:

Aspen Publishing
Attn: Order Department
PO Box 990
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-1-4548-2517-3

About Aspen Publishing

Aspen Publishing is a leading provider of educational content and digital learning solutions to law schools in the U.S. and around the world. Aspen provides best-in-class solutions for legal education through authoritative textbooks, written by renowned authors, and breakthrough products such as Connected eBooks, Connected Quizzing, and PracticePerfect.

The Aspen Casebook Series (famously known among law faculty and students as the "red and black" casebooks) encompasses hundreds of highly regarded textbooks in more than eighty disciplines, from large enrollment courses, such as Torts and Contracts to emerging electives such as Sustainability and the Law of Policing. Study aids such as the *Examples & Explanations* and the *Emanuel Law Outlines* series, both highly popular collections, help law students master complex subject matter.

Major products, programs, and initiatives include:

- **Connected eBooks** are enhanced digital textbooks and study aids that come with a suite of online content and learning tools designed to maximize student success. Designed in collaboration with hundreds of faculty and students, the Connected eBook is a significant leap forward in the legal education learning tools available to students.
- **Connected Quizzing** is an easy-to-use formative assessment tool that tests law students' understanding and provides timely feedback to improve learning outcomes. Delivered through CasebookConnect.com, the learning platform already used by students to access their Aspen casebooks, Connected Quizzing is simple to implement and integrates seamlessly with law school course curricula.
- **PracticePerfect** is a visually engaging, interactive study aid to explain commonly encountered legal doctrines through easy-to-understand animated videos, illustrative examples, and numerous practice questions. Developed by a team of experts, PracticePerfect is the ideal study companion for today's law students.
- The **Aspen Learning Library** enables law schools to provide their students with access to the most popular study aids on the market across all of their courses. Available through an annual subscription, the online library consists of study aids in e-book, audio, and video formats with full text search, note-taking, and highlighting capabilities.
- Aspen's **Digital Bookshelf** is an institutional-level online education bookshelf, consolidating everything students and professors need to ensure success. This program ensures that every student has access to affordable course materials from day one.
- **Leading Edge** is a community centered on thinking differently about legal education and putting those thoughts into actionable strategies. At the core of the program is the Leading Edge Conference, an annual gathering of legal education thought leaders looking to pool ideas and identify promising directions of exploration.

Contents

Acknowledgments

I am grateful to Sarah Cravens, Melissa Mortazavi, and Andy Perlman for sharing their recollections of being new PR teachers and their thoughts on what to include in this guide. I have tried to be objective and impartial in preparing this guide, but I do have my own convictions about how the course should best be taught. I first came to appreciate the complexity, practical importance, and inherent interest of the law governing lawyers as a result of loss prevention seminars conducted at my law firm by our insurer, Attorneys' Liability Assurance Society (ALAS). While the ALAS approach is obviously oriented toward avoiding liability (and therefore reducing claims exposure), it also has a strong best-practices component and a pervasive emphasis on prevention, procedures, and institutional checks and balances. When I began to explore the academic literature on the law of lawyering, I was strongly influenced by Geoff Hazard's and Susan Koniak's work on a number of topics, including lawyer liability for assisting client fraud, triangular relationships and "almost clients," and the tension between the nomos of the organized bar and that of other actors in the legal system. I am extremely fortunate to have joined them as a co-editor of a law of lawyering casebook, but I continue to regard them as my teachers.

Strategies and Techniques for Teaching Professional Responsibility

I. The Big Picture

A. HOW PR IS DIFFERENT FROM OTHER COURSES

> [A]t most American law schools the legal ethics course is—not to put too fine a point on it—the dog of the curriculum, despised by students, taught by overworked deans or underpaid adjuncts and generally disregarded by the faculty at large.[1]

Professional responsibility (PR), legal ethics, legal profession . . . whatever you call it, the course has a reputation problem. It has long been regarded as something of an ugly duckling by administrators, faculty, and students. Students resent additional requirements in the upperclass curriculum, particularly those they believe (wrongly) don't have anything to do with their future careers. They envision a legal ethics course as involving either preaching by earnest but clueless professors whose areas of interest are elsewhere, recycled war stories told by weary adjuncts, or a dry recitation of mostly irrelevant or hypertechnical rules. Administrators find the course a headache to staff, because few law schools have enough willing full-time faculty to satisfy student demand. Faculty often perceive (again, wrongly) that the subject isn't all that interesting or challenging. One of my colleagues actually said in a faculty meeting that staffing the course shouldn't be a problem because "anyone could teach that." Many teachers report that their evaluations in PR are lower than in their other courses, and are bothered by student resistance to or skepticism about the course.

You might be reading this guide because you have been assigned to teach the course and have heard all of the negative press about it. At the risk of sounding like I'm trying to sell you something, I want to convince you that the subject is fascinating and the course is a blast to teach. You can even wind up with decent teaching evaluations at the end of the semester. Unlike almost any other subject in law school, there is something for everyone in the professional responsibility course. If you're not a trial lawyer, you really don't need to remember all the exceptions to the hearsay rule; if you're not an estate planner, you probably don't need to know the Rule Against Perpetuities. However,

---

[1] David Luban and Michael Milleman, *Good Judgment: Ethics Teaching in Dark Times*, 9 Geo. J. Legal Ethics 31, 37-38 (1995).

whether your students go on to be prosecutors, personal-injury lawyers, tax advisors, matrimonial lawyers, commercial litigators, in-house counsel, M&A specialists, or Main Street general practitioners, they have to know about the duty of confidentiality, conflicts of interest, reasonable fees, and how decision-making authority is divided up between lawyers and clients. The law governing lawyers is complex, technical, and bound up in interesting ways with other areas of legal doctrine. That is to say, it is a fascinating area to teach *as law*—just as much as tax, administrative law, securities, or any other advanced doctrinal subject. And what lawyer hasn't asked the big normative questions underlying the course, such as whether lawyers are sleazy, amoral hired guns or whether there is moral value, even nobility, in the legal profession? Similarly, we and our students share membership in the legal profession about which important empirical work is being done. Professional responsibility is the only truly universal course in the curriculum.

Professional responsibility is unique, at least among core courses in law school, in being essentially contested in its definition. Although there might be some variation in the amount of interdisciplinary material incorporated into a course, and instructors might emphasize different features of the subject, there's not really any indeterminacy regarding the scope of a torts, contracts, evidence, constitutional law, or business organizations course. It's a very different story with PR. Consider the titles of PR courses offered at U.S. law schools: Professional Responsibility, Legal Ethics, Legal Profession, Lawyers and Clients, The Legal Profession and Society, Morality and Professionalism, Ethical Issues in Criminal [or Transactional, or International] Practice, Regulation of the Legal Profession, and so on. In the aggregate, these courses cover a lot of ground, but the content of any two courses might not overlap much. You probably know that the American Bar Association (ABA) started requiring law schools to offer instruction in legal ethics after the involvement of lawyers in the Watergate cover-up was revealed. The trouble is, the ABA didn't really specify what it meant by its ethics requirement, except to refer to "the history, goals, structure, values, rules and responsibilities of the legal profession and its members."[2] The terms in this ABA standard

[2] This language is from the current version of the ABA accreditation standard, but similar language has been used since ethics instruction was first made a requirement for ABA-accredited law schools. See ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 302(a)(5).

refer to very different subject matters. Values and responsibilities pertain to the normative assessment of the legal profession; that is, what lawyers ought to do, and why, with due regard for the interests of clients, the legal system, and society as a whole. The goals and structure of the legal profession are the subject of social scientific analysis, concerned with understanding why the delivery of legal services is organized in the way it is, with its characteristic monopoly over the provision of certain types of services. And, of course, the rules respecting the legal profession comprise a legal subject that can be studied like any other, like the rules respecting mass media or the securities industry. Thus, there is some question at the outset whether professional responsibility should be considered an interdisciplinary subject, best approached from the standpoint of law and social science, law and economics, law and philosophy, or legal history, or whether it should be regarded as simply another subject within law, alongside business organizations and environmental law.

The challenge in teaching legal ethics and professional responsibility is that the subject really encompasses all of these things. Unfortunately, it is difficult to work them all into one course, particularly if you are squeezed for time. Many schools have a three-hour slot designated for a professional responsibility course, but some schools have only two hours. As the instructor, you will have to decide at the outset which of these themes you will emphasize. Trying to construct a class with too many disparate goals, materials, and methods can create confusion, particularly when it comes time to evaluate student performance. This is a class in which you have to make hard choices and focus on some aspects of the law of lawyering, ethics, and the legal profession, to the exclusion of others. One of the themes of this teaching guide is therefore what this subject is all about, and how it can be taught.

B. STRUCTURAL FACTORS AFFECTING YOUR COURSE

No person is an island, and no law school course exists in isolation. That is particularly true of a subject so perennially fought over as ethics and professional responsibility. Debates over the content and methodology of the professional responsibility course are embedded within larger debates about the role of the legal profession and the legal system in society; the nature of competent, ethical, professional

legal practice; and, in light of those considerations, the track record of law schools at producing competent, ethical lawyers. Then there are further challenges facing the legal profession and law schools as a result of the economic downturn and the resulting tightening of the job market for recent graduates. Even if the economy rebounds eventually, many observers believe that structural changes in the market for legal services will permanently affect legal employment. Pervasive anxiety over job prospects and student debt can be exacerbated in a class that asks students to imagine themselves in the position of lawyers. These and other factors affect the professional responsibility course to a greater extent than most other subjects in the curriculum. I realize this guide is supposed to be practical, but it is important to begin with this background to make sense of more specific features of the course.

1. ABA Accreditation and State Bar Admission Requirements

Every ABA-accredited law school has had a "PR requirement" since the aftermath of Watergate, and even non-ABA-accredited schools, such as those accredited by the California Committee of Bar Examiners, generally require students to take and pass a professional responsibility course. (By the way, I am aware of the irony that professional responsibility is often abbreviated PR, which can also signify public relations. The organized bar is, to some extent, engaged in a PR strategy by requiring PR instruction in law schools.) As noted earlier, a provision of the current ABA accreditation standards requires that students receive some kind of instruction from within a broad menu of approaches to the responsibilities of the legal profession. The course can include history, values, the structure of the profession, its own ideals and rules governing members, and so on. (When the ABA first implemented the professional responsibility requirement it ran into a great deal of resistance from professors and deans, who saw the attempt to prescribe the content of the law school curriculum as an intrusion on academic freedom.) More recently, however, the ABA has added an interpretation of that broad standard to require that law schools focus, at least to some extent, on the law governing lawyers. Interpretation 302-9 to Standard 302 now provides: "The substantial instruction in the history, structure, values, rules, and responsibilities of the legal profession and its members required by Standard 302(a)(5) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the

American Bar Association." The word *includes* in this interpretation is broad, and a simulation or clinic-based course that requires students to apply the law of lawyering would satisfy the standard. There is no requirement that a course be exclusively focused on the law. Nevertheless, the combination of ABA Standard 302 and the Multistate Professional Responsibility Exam (MPRE, discussed later) creates substantial pressure on law schools to ensure that there is at least one good, solid class in the curriculum focused primarily on the law of lawyering.

State courts have admissions requirements beyond graduation from an ABA-accredited law school, and the requirements of large states could have an impact on law school curricula.[3] Consider, for example, a change in the rules for admission to practice in New York State. Applicants for admission in New York can be required to show at least two or three hours of instruction in a *freestanding* professional responsibility course; that is, not experience in a clinic or externship, and not PR instruction that is integrated into another class or pervasive in the curriculum.[4] The details regarding implementation of this requirement are not yet available, as of the fall of 2012. Because many graduates intend to sit for the New York bar, if this requirement is implemented it will have ramifications for the PR curriculum at law schools across the country. The same is true of the proposed mandatory 50-hour pro bono requirement for applicants for admission in New York, although that requirement has less direct impact on the content of PR courses.

2. Skills Training: The Academy–Profession Disjunction—MacCrate and Carnegie

If you've been around the legal academy you're undoubtedly familiar with the ongoing controversy over the content of the law school curriculum. U.S. Court of Appeals Judge Harry T. Edwards

[3] By the way, you might want to point out to your students that lawyers can loosely speak about being admitted to "the bar," but technically admission to practice is a function generally of the highest court in a state or, occasionally, of an intermediate appellate court (as in New York).

[4] The rule does not use the "freestanding" language, but it is generally understood to require a separate PR course, not ethics instruction integrated into a clinic or other course. See Rules of the Court of Appeals for the Admission of Attorneys, 22 NYCRR § 520.3(c)(1)(iii) (referring to "a course . . . in professional responsibility").

published an article in 1992 expressing concern about the "growing disjunction" between legal education and legal practice,[5] and since then, the profession has studied itself, and has been studied, to determine whether law schools are doing enough to prepare graduates to be lawyers. In the late 1980s and early 1990s, a task force established by the ABA investigated the skills and values that lawyers must acquire to be competent professionals. The result of this investigation was the so-called MacCrate Report.[6] More recently, the Carnegie Foundation for the Advancement of Teaching studied legal education along with the education in the professional fields of medicine, engineering, nursing, and the clergy.[7] Both the MacCrate and Carnegie Reports included discussions of legal ethics and professional responsibility. It is likely that your law school's PR curriculum has been tinkered with in response to one or both of these reports.

The MacCrate Report included a statement of the skills and values that competent, professional lawyers should have, taking into account the specialization of law practice and the variety of organizational settings in which lawyers practice (large firms, small firms, solo practice, government offices, in-house legal departments, etc.). The authors of the report disclaimed any ambition to set standards for the law school curriculum, but many of the recommendations in the report have been influential in debates about whether, and how, to reform legal education. The Report described ten fundamental legal skills and values, including problem solving, legal analysis and reasoning, communication, and negotiation. For our purposes, the relevant skill is number ten: recognizing and resolving ethical dilemmas. That skill is subdivided along a distinction that can be referred to as "knowing that" versus "knowing how." "Knowing that" refers to knowing propositions of a factual nature, including the content of the law and understanding its procedural context. MacCrate Skills §§ 10.1 and 10.2 include knowledge of primary sources such as the Model Rules, constitutional, common law, and statutory standards comprising the

---

5 Hon. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession,* 91 Mich. L. Rev. 34 (1992).

6 The formal title of the report is such a mouthful that it's practically begging to be given a shorthand name. See American Bar Association Section on Legal Education and Admissions to the Bar, Legal Education and Professional Development—An Educational Continuum, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992).*

7 See William M. Sullivan, et al., *Educating Lawyers: Preparation for the Profession of Law (2007).*

law governing lawyers, as well as some procedural norms such as self-critical analysis and the duty to report misconduct. "Knowing how," on the other hand, refers to knowledge expressed as a competency, such as cooking, playing chess, or speaking Mandarin. Propositional or "knowing that" knowledge is involved in knowing how—for example, a competent cook must know the ratio of butter and flour that makes a roux—but there is more to competent performance than recalling facts. Ultimately knowledge must enable a practitioner to do something. MacCrate Skill § 10.3 refers to the "knowing how" skill of recognizing and responding correctly to ethical dilemmas. This skill is necessarily integrated with other skills, such as client counseling or negotiation, because ethical dilemmas do not arise in isolation, but in the context of performing professional services for clients.

The Carnegie Report recognizes a similar distinction among cognitive learning (knowing that), practical skills, and professional socialization and identity formation (both a kind of knowing how). It finds that law schools do a pretty good job of teaching the practical skill of legal analysis through the tried-and-true method of case analysis and Socratic dialogue. Further skills training, however, is treated as an optional add-on. Students might participate in clinics, externships, and simulation courses (trial advocacy, negotiation, and the like), but these experiences are not required at most schools and are sometimes stigmatized, explicitly or implicitly, within a hierarchy of value. (The tacit curriculum, consisting of messages conveyed about the relative importance of classes, skills, and values, is discussed later.) The Carnegie Report further criticizes law schools for not paying sufficient attention to what it calls an apprenticeship of professional identity. One of its recommendations is for greater integration and holism in professional responsibility education:

> [I]t is possible to imagine a continuum of teaching and learning experiences concerned with the apprenticeship of professional identity. At one end of the continuum would be courses in legal ethics, in particular those directly oriented to the "law of lawyering" that students must master in order to pass the bar examination. A bit further along would fall other academic courses, including those of the first year, into which issues concerning the substantive ends of law, the identity and role of lawyers, and questions of equity and purpose are combined with the more formal, technical issues of legal reasoning. Approaches of this sort are often called

> the "pervasive method" of teaching ethics. Further along the continuum we encounter courses that directly explore the identity and roles of lawyers, the difficulties of adhering to larger purposes amid the press of practice, and the way professional ideals become manifest in legal careers. Further still fall lawyering courses that bring questions of both competence and responsibility to clients and to the legal system into play. Finally, at the continuum's other end, we find externships and clinical courses in which direct experience of practice with clients becomes the focus.[8]

The ABA Standards Review Committee considered the Carnegie recommendations carefully, and an important aspect of the new accreditation standards is a renewed emphasis on educating ethical lawyers. The idea of "professional identity," as used in the Carnegie Report, was highly influential in the formation of the new standards. In addition to the idea of identity formation, the ABA is quite keen on improving the teaching of practical professional skills, such as drafting and negotiation, in law schools. The recent economic downturn has also focused renewed attention on the question of whether the law school curriculum should be more practically oriented. More experienced lawyers often complain that recent law school graduates don't have a clue how to perform the simplest tasks, and require expensive training before they can serve clients effectively without close supervision. The idea of an ethical professional identity must include competence. The PR course is an ideal place within the law school curriculum for a conversation about the nature of professional expertise and how it should be inculcated and regulated.

3. The Tacit Curriculum

As a teacher of professional responsibility, you should also keep in mind that law schools have a "tacit curriculum" alongside the formal curriculum. Anyone who has been around law schools knows there is considerable folklore within the student community pertaining to how to prepare for class and exams, what skills and attitudes are emphasized, which classes are deemed the most valuable, and so on. For example, analytical skills ("thinking like a lawyer") are often emphasized over skills such as listening, relating, and empathy. Students also tend to value more highly courses they believe will be

[8] Carnegie Report, pp. 180-181.

useful in practice, either because of the subject itself (e.g., evidence or business organizations over legal history or law and literature) or the instructor's approach to the subject. One empirical study found that discussion courses were valued less highly than courses employing the Socratic method, and that the Socratic method tended to be used in courses "covering well elaborated, technically sophisticated legal doctrine."[9] These findings resonate with my own, obviously anecdotal observation that students respond well to a PR course structured around cases, doctrinal analysis, and an emphasis on the connection between the law of lawyering and other areas of law, such as agency, securities, criminal, and so on.

Please don't hear me as saying you should not consider a discussion or lecture-based course; the use of simulations, problems, or role-playing; or talking about matters such as ethics or professionalism in class. Realize, however, that going against the grain of the tacit curriculum increases the challenge for you as an instructor. Not only do you have to learn the material, but you have to overcome the hurdle of convincing the students that they should care about your course. I often joke that my response to student skepticism about the PR course is to scare the hell out of them, by having them read complicated cases in which a lawyer's misunderstanding of the law governing lawyers led to a disciplinary or liability fiasco. These cases tap into the tacit curriculum of law schools. They look and feel like the cases students implicitly associate with "real" law classes, not squishy stuff like … well, like anything that is nontraditional, experimental, or contrary to the prevailing orthodoxy. It's not only PR that has this problem. I'm sure a similar story could be told about feminist, critical-race, or queer theory offerings in the curriculum, interdisciplinary courses, the use of first-personal narratives in teaching and scholarship, and "perspectives" courses that try to integrate a variety of disciplines and approaches. Dedicated teachers have persisted despite initial skepticism and, in many cases, have established at least a measure of legitimacy for what was once a marginal feature of the law school curriculum. Clinical teaching, for example, is now widely respected by most students and faculty. PR seems to reside in a bit of a gray zone between full respectability and its former status as a joke.

---

[9] See Ronald Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox,* 1979 Am. B. Found. Res. J. 247, 262.

4. The Great Recession and the New Normal

As I am writing this guide, in the summer of 2012, the legal press as well as popular media are full of stories about the perceived crisis in the legal profession. The picture certainly looks bleak from the point of view of our students and recent graduates. According to the ABA, only 55 percent of the class of 2011 found full-time employment in jobs requiring bar passage.[10] The effects in the employment market are now being felt in law schools in the form of reductions in application numbers and entering class sizes. Some have argued that this is merely a cyclical downturn, and when the economy gets back on track, as it always does, the job picture for lawyers will be pretty much the same as it always has been. Other scholars contend that focusing on the recent downturn is causing us to miss the effect of long-term structural forces that are remaking the legal profession, leading to a "new normal."[11] Some of these structural factors include the following:

- *Unbundling and outsourcing.* *New York Times* columnist Tom Friedman has written that "anything that can be digitized can be outsourced to either the smartest or the cheapest producer, or both."[12] The ability to digitize information has allowed firms to decompose or "unbundle" legal services into component parts, and find more efficient ways of handling some of the more routine tasks that traditionally have been performed by lawyers. Tom Morgan notes that "information technology promises to transform lawyer work that used to be seen as complex, unique, and worthy of substantial fees into a series of 'commodities'—simple, repetitive operations that will be provided to clients by the lowest bidder."[13] A litigated matter or a deal is composed of subtasks, some of which require highly specialized training, skills, and judgment, but others of which are simply commodity work. Coding documents for electronic discovery, for example, is highly routine and standardized. If legal matters can be broken down into subtasks, clients might begin to demand (and many

[10] See Karen Sloan, *ABA: Only 55 Percent of Graduates Found Full-Time Law Jobs,* Nat'l L.J. (June 18, 2012).

[11] See Thomas D. Morgan, *The Vanishing American Lawyer (2010);* Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services (2008);* and pretty much the entire output of Bill Henderson.

[12] Quoted in Morgan, *supra*, at 90.

[13] *Id.* at 94.

have already begun to demand) that lawyers charge prices for routine tasks that are set in a competitive market with many potential service providers. Legal process outsourcing (LPO) firms emphasize cost and efficiency. As Bill Henderson observes, LPO firms "are speaking the language of value, not necessarily professionalism. It's not a profession. It is something different."[14]

- *Virtual law firms.* Digital technology enables not only outsourcing of tasks, but decentralization of legal employers. It is now possible for lawyers to work from almost anywhere, dealing with clients via voice calls or videoconferencing, and sharing documents with other professionals using cloud-based storage services. Firms like Axiom Legal and Virtual Law Partners (VLP) operate like a high-end legal temp service, claiming to provide lower cost, but still very high-quality legal work, performed by lawyers who could be working at traditional law firms but prefer, often for reasons of work–life balance, a nontraditional employment structure.[15]
- *Online competition.* A tremendous amount of information about the law is available on the Internet. Statutory law, administrative agency regulations, and the caselaw of many jurisdictions are now available on an open access model, eliminating the cost of database services such as Lexis and Westlaw. Online document depositories provide access to forms for simple transactions like wills, residential leases, and promissory notes. Lawyers who provide these sorts of documents therefore have to compete with information that is available for free. Clients who desire assistance with relatively simple legal tasks can use services like LegalZoom and RocketLawyer, which purport to be document databases but in fact are Web-based automated document preparation services. Several U.S. states have sought to enjoin the operations of LegalZoom, contending it is engaged in the unauthorized practice of law, but it continues to be a growing business.
- *Rise of in-house counsel.* Historically large corporate clients had relationships with one, or only a few law firms. They used these outside law firms for a variety of matters, and these retained law-

[14] Quoted in Drew Combs, *The Disruptive Innovation at Axiom's Legal Outsourcing Division*, American Lawyer (July 2, 2012), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1340576511765&slreturn=20120720113919.

[15] *See, e.g.,* Daniel Fisher, *New Precedent for Law Firms, Forbes (June 27, 2011),* http://www.forbes.com/forbes/2011/0627/entrepreneurs-mark-harris-axiom-law-moving-target.html.

yers in effect served as counselors in a broad sense, not only providers of technically complex legal services.[16] This pattern began to change in the 1980s as corporate clients started to bring legal expertise within the corporation itself. Illustrating Ronald Coase's point about firms minimizing transaction costs, corporations found it more efficient to maintain an internal legal department to handle routine or repeated matters. In-house lawyers also supervised the work of outside counsel more closely, scrutinizing their bills with care. As Morgan observes, "Until somewhat recently, outside lawyers have been relatively sheltered from the pressure to control their fees, but that cannot last. . . . More and more in-house counsel are cutting the number of outside firms a company retains, requiring highly detailed case budgets, early assessments, regular updates, use of specific technology, and minimum experience levels for lawyers working on their cases."[17] Lawyers therefore face considerable price competition in the most lucrative sector of the market for legal services, and also find themselves with less power vis-à-vis their corporate clients than they had traditionally enjoyed.

Taken together, these trends could lead to massive structural changes in the legal services market. Understanding that market is a task for economists and sociologists, but professional responsibility scholars and teachers must pay attention as well. David Wilkins has argued that law schools should introduce students, someplace in their curriculum, to the best available understandings of "how organizational structures, norms, and practices shape individual careers and influence the practical meaning of substantive legal rules and professional commitments."[18] It is certainly worth building at least a day or two of discussion of the economics of the market for legal services into a PR class. Even if you do not devote class time to this subject, it will be lurking in the background of many of the legal issues in the course, such as competence, fees, unauthorized practice of law, and marketing of legal services.

---

16 See Anthony T. Kronman, *The Lost Lawyer (1993)*.

17 Morgan, *supra*, at 121-122.

18 David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. Legal Educ. 76, 79-80 (1999).

5. The MPRE

If I had a dollar for every time someone asked me, "Will this course help me prepare for the MPRE?" I'd be flying around in my own private jet. For reasons I don't fully understand, but probably because it's the first bit of the bar exam they encounter, many students are freaked out by the MPRE. To make it worse, the MPRE is administered during the fall and spring semesters, so third-year students are often sitting in your class becoming increasingly nervous about a test they're going to be taking in a few weeks. Although I believe it to be completely unjustified, MPRE anxiety is a significant aspect of the background of teaching PR. I do not think that the PR course ought to be any more oriented toward MPRE preparation than courses in torts, contracts, evidence, and so on, are designed around preparation for the multistate bar exam. Having said that, it can be helpful to acknowledge that students are probably concerned about the upcoming MPRE and to discuss how your course relates to the exam. Maybe your attitude is, "You'll get all you need from a bar prep course. This is your chance to learn something that isn't tested on the MPRE." That's fine, but you should be up front about this with the students so they know what your course will be about. My own view is that a solid, thorough, doctrinal PR course is the best preparation for the MPRE, as well as offering a great deal of utility for future practitioners.

Complicating the anxiety surrounding the test is the fact that there is a lot of folklore about the MPRE among students as well as legal educators (who should know better). Like all folklore, some of it has a basis in fact, but a lot of it is complete hooey. I am a member of the drafting committee of the MPRE and am quite proud of the work we do on the exam. The committee is made up of practicing lawyers as well as academic experts on the law of lawyering, including several members who have extensive experience with the ABA and the rule-drafting process. Believe it or not, the committee aims to produce a rigorous, realistic test that is substantively accurate and challenging, and a valid measure of examinees' knowledge of the subject. Nevertheless, many myths persist about the MPRE, and as a PR teacher, you are likely to hear them from your students. Here's my attempt at responding to some of them.

Myth: The MPRE tests a bunch of Mickey Mouse rules and ignores the really important stuff.

Reality: Back in the day, the MPRE tested only questions that would be answered identically under both the 1969 Model Code and the 1983 Model Rules. That was a fairly narrow set of issues, so this might be the origin of the myth that the MPRE emphasizes minor, ticky-tacky sorts of rules. That specification is no longer valid and hasn't been for a long time. The rules in almost all U.S. jurisdictions are now based on the Model Rules (California is getting there, and will probably have switched over by the time this guide goes to press), so the MPRE relies only on the Model Rules. It is broader than that, however. It also includes aspects of tort, agency, contract, evidence, and other areas of law that make up the law governing lawyers (see earlier). In terms of areas of coverage, have a look at the subject matter outline or, as we call it internally, the test specs, on pages 12-13 of the information booklet (http://www.ncbex.org/assets/media_files/Information-Booklets/MPREIB2012.pdf). The main subject headings show the percentage of coverage given to particular areas. For example, client confidentiality (including attorney–client privilege and work product) makes up 6 to 12 percent of test questions, and conflicts of interest make up 12 to 18 percent. There are some areas, such as judicial ethics, that are comparatively less important (at least in my view, as most new lawyers aren't going to become judges right away), but are still tested. The reason for that is that the National Conference of Bar Examiners meets with state chief justices to discuss the content of the exam. If there is a demand that the MPRE test certain subjects, then they will be on the exam. Nevertheless, the test specs are weighted toward complex and important subjects.

Myth: The MPRE is easy: Just choose the second most ethical option and you'll get the right answer most of the time.

Reality: The MPRE has gotten more rigorous over the years. It's now a serious law of lawyering exam, and an unprepared test-taker would be no more able to intuit the right answer to, say, a complex conflicts of interest question than to a question involving exceptions to the hearsay rule or some tricky estates-in-land problem. Bar preparation services can only do so much, particularly in a short (often eight total hours) MPRE session. If an applicant isn't already fairly familiar with the law governing

lawyers, it's going to be a difficult test. The "second most ethical" bit is an old joke about the exam, reflecting the kind of category mistake between law and ethics that is often made about this subject. The MPRE does not attempt to evaluate ethics in the sense of the all-things-considered morally right thing to do, any more than the evidence portion of the multistate bar exam is concerned with an ideal truth-finding process. These exams are about the law—no more, no less. As a heuristic for choosing the right answer as a matter of law, picking the second-most morally appealing answer is no better than choosing randomly.

Myth: The MPRE tests rote application of rules.

Reality: There is a bit of truth to that belief, but it is important not to exaggerate the word *rote*. The one thing the MPRE cannot test is making judgment calls. If there is some question, for example, whether a conflict is so severe that it is not waivable, if an attorney's conduct satisfies the reasonable care standard, whether a client lacks the capacity to have a normal lawyer–client relationship, or whether a fee is reasonable under the circumstances, a test question cannot have two competing options, with the choice coming down to a matter of judgment. These sorts of problems often make the best essay or short-answer questions, because the student has to make the judgment call and explain why it is the right decision, even if reasonable minds could differ. The explanation is more important than the binary proper–improper evaluation. It is sometimes possible to structure a multiple-choice question so that the choice between options comes down to which is the best explanation for why the attorney's conduct is proper or improper, but in general the MPRE has to shy away from close calls. (Sometimes a question will stipulate the resolution of a judgment call; e.g., "The lawyer reasonably believed that her client lacked the capacity to protect her own interests.") This doesn't necessarily mean the test is looking for rote application in the sense of mindlessness. Determining the right answer is often a matter of fairly sophisticated reasoning. In the end, however, the resolution of this reasoning process cannot be arguable. If you believe, as many teachers do, that the essence of ethical reasoning is the exercise of judgment, you are bound to be disappointed by this aspect of the MPRE. In its defense, I would offer a more modest conception of what the MPRE is all about, namely

ensuring that applicants to the bar have a basic understanding of the principles of the law of lawyering.

Myth: Scoring must be random, because I thought the MPRE was really hard but then I ended up passing anyway.

Reality: The National Conference of Bar Examiners makes the MPRE available to the states, which can do with it what they choose. It's up to state courts to set the passing thresholds, based on scaled scores computed by the National Conference. Remember what I said before about the PR requirement having a bit of a PR—as in public-relations—purpose. It wouldn't do for state bars to tell the public that they are testing applicants on "ethics" and then have a bunch of them fail the ethics test. Thus, states tend to set the passing threshold fairly low. This accounts for the perception that the test is hard: It is hard if an applicant hasn't taken a rigorous law-of-lawyering course in law school, but most applicants pass because the threshold is generally set low.

Myth: You can't test ethics using a multiple-choice test.

Reality: If by ethics one means character, virtue, judgment, sound decision making, or personal integrity, then I agree completely. But if one means the law of lawyering, then there's no reason to think it is any more or less amenable to standardized testing than contracts or evidence. I would be delighted if state bar associations stopped telling the world that lawyers are examined on knowledge of ethics. They're not, at least not via the MPRE, which tests knowledge of the law governing lawyers.

My bottom line about the MPRE is that it figures far too much into student thinking about the PR course, and you shouldn't feel like you have to include a lot of MPRE-specific material just because your students are nervous about it. If you do a reasonably thorough job covering the law of lawyering, your class will be more than adequately prepared for the MPRE. You should be prepared to address this anxiety explicitly, however, because like it or not, it is part of your students' expectations regarding the PR course.

6. Public Perception

It is worth keeping in mind that the ABA started requiring PR in law schools after the public outcry over the involvement of lawyers in the Watergate cover-up. There is a lot of pressure on law schools, and the legal profession generally, to do something about ethics. I'm not at all persuaded that, as a whole, lawyers are any more prone to act unethically than are dentists or electricians. Many people interact with lawyers only around anxiety-provoking events such as accidents, divorce, or planning for death, so it is not surprising that the legal profession is viewed with some ambivalence by the public. To the extent there is some public mistrust of the legal profession, it is interestingly not reflected in the perceptions of clients of the trustworthiness of their own lawyers.[19] By and large, clients are happy with their lawyers and find them loyal and competent. Marc Galanter suggests that negative public opinion about lawyers is mostly driven by public attitudes toward the legal system as a whole. If it is conventional wisdom that we are living in a litigious society, that people will sue anyone at the drop of a hat, and that lawsuits are stifling economic growth and competitiveness, then it is not surprising that lawyers are not particularly well thought of. He also points out, based on a fascinating survey of lawyer jokes, that lawyers are criticized simultaneously for qualities that are incompatible, such as excessive loyalty to clients and being hired guns.

Whether or not public suspicion of the ethics of lawyers is justified, it is a fact of life. As a PR (professional responsibility) teacher, one of your roles will be to contribute to a PR (public relations) campaign by the profession and the legal academy. You and your course are being held out to the public as part of the solution, not part of the problem. But this only raises, again, the question of the content of the course, which is the subject of the next section.

---

[19] See the very interesting article by Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. Cin. L. Rev. 805 (1998).

II. Structure and Content of the Course

A. LAW, ETHICS, AND LEGAL ETHICS

Not long ago, the core content of a professional responsibility course would have been provided by the ABA's Model Code of Professional Responsibility or Model Rules of Professional Conduct. The ABA does not have any direct regulatory authority over the legal profession. Admission to practice law, grievance procedures and professional discipline, and specifying rules of conduct for lawyers are all the function of the highest court of a state in which an attorney desires to practice. Regulation of the legal profession is an aspect of the inherent authority of the judiciary. The ABA performs an essentially advisory role with respect to this function. From time to time it assembles committees of lawyers, judges, and academics to study aspects of professional responsibility and recommend rules of conduct for lawyers and judges. These recommendations have no legal force until adopted by state courts—hence the term "model" rules—but they have been quite influential. After the publication in 1969 of the ABA's Model Code of Professional Responsibility, the overwhelming majority of state courts adopted rules for lawyer discipline based on the Model Code. Similarly, after the 1983 promulgation of the Model Rules of Professional Conduct, states quickly began to change from disciplinary rules based on the Model Code to those based on the Model Rules (although sometimes retaining language or entire provisions from the older Code). Following the publication of the so-called Ethics 2000 revisions to the Model Rules, all states moved to rules patterned closely on the ABA Model Rules, with the big states of New York and California being among the latest adopters. The ABA is currently in the wrapping-up stages of another commission process, this time called Ethics 20/20, which was established to consider whether modifications to the Model Rules were required to respond to globalization and changing technology. In July 2012 the ABA House of Delegates approved a package of amendments to the rules, most of which are technical and, at most, represent only incremental changes.

If you take nothing else from this guide, please do what you can to disambiguate the term *legal ethics*. One common usage among lawyers refers to the state rules of professional conduct, patterned on the ABA Model Rules. Lawyers often call these "ethics rules"

and intend the idea of acting ethically to mean compliance with the disciplinary rules. Because there are so many other senses of the word *ethics,* I strongly suggest you not call the disciplinary rules "ethics rules." You might sound a bit pedantic, but call them disciplinary rules, or rules of professional conduct. The MPRE, by the way, uses the language "subject to discipline" to refer to violating applicable disciplinary rules.[20] There are at least four sources of confusion that can arise if you refer to the disciplinary rules as ethics rules:

1. There are numerous professional standards, advisory opinions, and other official sources of guidance that are not intended to serve as the basis for discipline in the event of violation, but should inform the ethical decision making of lawyers. Examples include the Preamble and Comments to the Model Rules, the ABA's Standards Relating to the Administration of Justice (Prosecution and Defense Functions), opinions of the ABA Standing Committee on Professional Responsibility and the myriad state and local bar committees that issue ethics opinions, and the various oaths, pledges, and codes of conduct promulgated by local courts and professional organizations. The MPRE sometimes tests knowledge of these principles by asking whether an attorney's conduct would be "proper."

2. Certain specialized areas of practice are regulated by administrative agencies having their own authority, generally conferred by statute, to promulgate rules of conduct for lawyers practicing within the jurisdiction of that agency. The U.S. Patent and Trademark Office, Securities and Exchange Commission, and Internal Revenue Service, among other agencies, have established standards of conduct for lawyers and nonlawyers practicing before them. Government lawyers are further regulated by their own agency, often in exacting detail. An ethical practitioner would surely be interested in all applicable regulations.

3. The most important source of *binding* legal standards for most lawyers, most of the time, is not the disciplinary rules of the lawyer's admitting state court, but other law that applies to lawyers just as it would to anyone else. For example,

[20] See http://www.ncbex.org/multistate-tests/mpre/what-key-words-or-phrases-are-included-in-mpre-questions/.

attorney–client fee agreements are regulated by contract law as well as by Rule 1.5. The duty of confidentiality is a part of the common law of agency, and is separately recognized by Rule 1.6. Agency law duties of loyalty give rise to potential liability for breach of fiduciary duty in cases where lawyers have a conflict of interest, in addition to the possibility of professional discipline under Rule 1.7 or another conflicts rule. Much of the complexity (and interest) in the law governing lawyers arises from the existence of parallel schemes of legal rules that regulate the same matters, sometimes reaching different results. For example, until the ABA amended the confidentiality rule in 2003 to add Rules 1.6(b)(2) and (b)(3), the ABA rule would have required a lawyer to remain silent in some circumstances that would have subjected the lawyer to civil liability for fraud. Even if there is no divergence in the substance of the rules, different remedies might be available. Suppose a lawyer represents two clients under circumstances that create a conflict of interest. The same conduct could subject the lawyer to professional discipline for a violation of Rule 1.7(a), might prompt a trial court to exercise its inherent authority to disqualify the lawyer from representing the client, and could create civil liability to one or more of the clients for breach of fiduciary duty. Keeping all of the sources of law straight and understanding the difference it makes in practice is a major challenge for students.

From the point of view of teaching the course, a major contribution was the publication in 2000 by the American Law Institute (ALI) of the Restatement (Third) of the Law Governing Lawyers (LGL).[21] The Restatement sought to integrate all of the different sources of the law and organize the law functionally. It does an outstanding job (particularly in the comments and illustrations) of incorporating all of the various sources of law into a unified body of the law governing lawyers. I can't imagine teaching the PR course without making frequent references to it.

[21] There was no first or second Restatement of the law of lawyering, but since the ALI was on the third series of Restatements in areas such as torts, the LGL restatement was considered part of the third series.

4. A persistent critique of PR classes focused on the law governing lawyers is that they teach "legal ethics without the ethics."[22] Only the most impoverished conception would identify ethics with nothing more than identifying and complying with legal requirements. For one thing, ethics in some cases might demand *refusal* to comply with the law. Some of the most difficult cases in legal ethics involve conflicts between legal duties and the requirements of morality. Even if there is no conflict between law and morality, interpreting legal rules might sometimes require moral judgment. Numerous provisions of the Model Rules are permissive, not mandatory, and some expressly contemplate reliance on nonlegal considerations, including morality. Consider, for example, Rule 1.16(b)(4), which permits the lawyer to withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant." On the flip side, lawyers have virtually unlimited discretion to choose which clients to represent. This discretion arguably makes this decision one for which lawyers are morally accountable (or so Monroe Freedman has strenuously argued).

As an instructor, you are probably going to want to ask your students what the *ethical* thing to do is, without having them collapse the analysis into a parsing out of the disciplinary rules. For example, imagine that a lawyer's client confesses that he had committed a homicide for which another person had been wrongfully convicted and was currently serving a life sentence. The client dies. The lawyer diligently researches the applicable law and concludes that it prohibits disclosure of the client's confession, even after the client's death.[23] What is the ethical thing to do? If you have been using the word *ethical* to refer to compliance with the disciplinary rules, then it is ethical to keep the secret. Most teachers, however, want to be able to ask the further question: Given that the disciplinary rule on confidentiality prohibits disclosure, what does ethics, in the sense of critical morality—generally applicable rational standards of right and wrong—require in this case? Perhaps the right thing to do, all things

[22] *See, e.g.*, Deborah L. Rhode, *Into the Valley of Ethics: Professional Responsibility and Educational Reform*, 58 L. & Contemp. Probs. 139 (1994); William H. Simon, *The Trouble with Legal Ethics*, 41 J. Legal Educ. 65 (1991).

[23] *See, e.g.*, Adam Liptak, *When Law Prevents Righting a Wrong*, New York Times (May 4, 2008).

considered, is to disclose and take one's lumps with the state bar grievance process. Uncritically following the law is not necessarily the right thing to do. It is important to be able to draw this analytical distinction between ethics as law and ethics as morality.

The extent to which you engage with critical morality in the course is a personal choice. Some instructors believe that it is too late to do anything about students' values, character, or ethical decision making (which are different things). There is some evidence suggesting this commonly held belief is not true.[24] The process of moral identity formation continues throughout adulthood, and new lawyers' attitudes and commitments might change as a result of what they experience in law school and early professional socialization. Even if a student's moral identity is relatively well established, however, there is still room for exploring how that identity interacts with the new environment of the legal profession. Many difficult issues in legal ethics do not involve the formation of a new professional identity, but the application or extension of preexisting values and commitments to new situations. Other teachers resist taking a critical moral perspective because they worry about "imposing their values" on students, although I don't see how there is any difference between asking (1) in professional responsibility, whether a disciplinary rule prohibiting disclosure of confidential information to rectify a wrongful conviction is unjust, and (2) in torts, whether the absence of a duty to rescue a person in peril is unjust. Law teachers engage in conversations about values and ethics all the time, but ironically there is often more resistance to doing so in an ethics class. Finally, some teachers are concerned that they do not have sufficient background in philosophy to conduct a rigorous discussion of ethics. Most teachers should be competent to facilitate a *nontechnical* discussion of ethics, however. The kinds of questions that arise naturally in a PR course generally do not implicate hard-core metaethical issues. I have taught PR for years and have never once had to deal with anything like the difference between realism and antirealism in ethics. If I can run a half-baked (but nevertheless illuminating … I hope) discussion in my torts class about the Coase Theorem, having no training whatsoever in economics, then teachers without any specialized background in philosophy can conduct some discussion of ethics, recognizing, as I

[24] *See, e.g.*, Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. St. Thomas L. Rev. 366 (2008).

do about economics, that there are many complexities that must go unaddressed in that type of basic overview.

Having said that, it can be difficult to integrate extralegal perspectives in a course predominantly focused on the law governing lawyers. At the very least you should be prepared for the dreaded question, "Is this going to be on the exam?" Students have expectations about how law school courses are structured, and they will probably come in to a PR course assuming that they will eventually be required to demonstrate knowledge of the subject on a conventional issue-spotting essay exam, short answer or multiple-choice questions, or some combination of these traditional approaches. And, as any experienced teacher knows, the level of focus and attention drops dramatically if students perceive that a subject will not be tested, so you might want to figure out a way to test the nonlegal material.

Arguably the theoretical and policy issues encountered in a PR course are no different from the policy issues in torts, contracts, or constitutional law. The "ethics" in the PR course can be seen as the immanent rationality of the legal doctrine.[25] On the other hand, you might see things very differently. As discussed later, in connection with the different approaches to teaching PR, many instructors and PR scholars argue that this subject is unique because of what might be called its first-personal orientation. In other law school courses, students might envision themselves as advising clients, but at the end of the day it is the client who has to act, subject to the requirements of law. In PR, by contrast, the resolution of the analysis is a decision by the lawyer that he or she will do, or not do, something. That means you might want to use a form of examination different from the conventional law school issue-spotting essay. In any event, thinking through in advance the way you will require students to demonstrate their knowledge will help you address their anxiety when you introduce nontraditional approaches and material. The

[25] This term is borrowed from Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949 (1988). Simplifying somewhat, the idea is that an area of law can be understood as having normative content that is elaborated from within. One can speak of the overall sense or purpose of the law governing lawyers without necessarily referring to external ethical ideals such as justice, loyalty, confidentiality, efficiency, and so on. On this conception of the ethics of lawyering, the relevant values are those that are intelligible when one grasps the law governing lawyers from an internal standpoint. Although I disagree very much with his account of the immanent rationality of the law, Daniel Markovits's book *A Modern Legal Ethics (2008)* follows Weinrib's methodology.

inherent first-personality of the PR course might call for a radically different approach to teaching, in which you try to put the students, to the extent possible, in the role of deciders and actors. One of the challenges in teaching PR for the first time is deciding how traditional you would like to be, and how much you care about establishing the legitimacy of your approach within the law school tacit curriculum. The following section provides an overview of some of the methods that are used in PR courses, starting with the most traditional.

B. DIFFERENT APPROACHES, PERSPECTIVES, AND INTERDISCIPLINARY METHODS

Before getting to the specific methods that can be used in teaching PR, I should raise an issue of perspective that is orthogonal to the question of teaching method: What are your students going to wind up doing, career-wise? In what kind of practice settings do your modal graduates wind up? Borrowing from Heinz and Laumann's famous study of the Chicago bar,[26] I think the most important distinction is between lawyers who serve corporations and other institutional clients and those serving individual clients.

The practicing bar can be divided up into two "hemispheres" that differ in many ways, including race, ethnicity, religion, class, and educational experience. At the risk of exaggerating or essentializing the differences, I sometimes refer to these hemispheres as the Main Street sector, for individual clients, and the Wall Street sector, for organizational clients. Lawyers in these hemispheres practice in

[26] John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar (1994)*.

different settings, with lawyers for corporations concentrated in large and medium-sized firms and corporate legal departments, and lawyers for individuals working as solo practitioners or in small firms. These settings cut across substantive areas of law. Both individuals and organizations can violate the criminal law, for example, but criminal defense lawyers who predominantly serve individuals are different—in terms of the setting in which they practice (solo or small firm practitioners), their educational background and demographics (generally less elite), and their income—from criminal defense lawyers who mostly represent organizations.

Your school's graduates might predominantly serve Wall Street or Main Street clients, or there could be some variation among your graduates in who their clients will be in practice. The important point is that the ethical problems that predominate in practice can vary to a significant extent by hemisphere. For example, lawyers representing individuals are much more likely to handle client funds, and also to be working in smaller practice settings in which it is more likely that they, as new lawyers, are directly involved in bookkeeping and billing, as opposed to delegating those tasks to professional office administrators. Main Street practitioners are more likely to advertise in print and electronic media, whereas large-firm lawyers rely on more "genteel" forms of advertising such as professional networking. Lawyers for corporations are more likely to have to deal with issues such as the tension between representing entity clients effectively and dealing with individual constituents. The client fraud problem can occur with clients of any size, but massive losses such as those associated with the savings and loan crisis are a particularly acute problem for Wall Street firms. Many issues occur in both hemispheres but can take different forms. Conflicts of interest are a problem for all lawyers, but Wall Street lawyers are more likely to seek broad advance waivers from clients or encounter specialized conflicts problems such as those arising from the representation of affiliated corporate entities. I do not think, by the way, that Wall Street problems are necessarily more sophisticated, difficult, or interesting than Main Street problems. Conflicts of interest in insurance defense practice are more common for lawyers in small to medium-sized firms that do a lot of insurance-defense work. These can be extremely subtle because of the relationship between underlying insurance law (including duties of good faith) and the law governing lawyers.

Keeping this distinction in mind, the following is a tour of various teaching methods that have been employed in law school PR courses, along with the conventional wisdom concerning the advantages and disadvantages of each method.

1. Survey Doctrinal Course

Pros: Feels like a "real" law school course and is thus responsive to tacit curriculum messages that tend to delegitimize PR; conveys the law of lawyering in all its complexity—good for coverage; well adapted to large classes; defuses MPRE anxiety.

Cons: Tends to omit first-personal perspective; not really about judgment or ethical decision making; students are passive learners, not active doers; might tacitly convey message that ethical analysis is exhausted by legal reasoning, that ethical lawyering is merely rule-following, or that ethics is about avoiding liability.

This is probably the most common approach taken in law school PR courses, and for good reason. It is comfortable and familiar for teachers and students alike, conveys a great deal of information in limited time, and is focused on the law of lawyering, which students need to know for the MPRE and for their future careers as practicing lawyers. If you are a traditional "stand-up" classroom teacher, this approach will require no methodological retooling, just learning new substantive law. In addition, familiarity with the approach might minimize some of the resistance you could otherwise experience from students who worry that an ethics course is going to be touchy-feely, unstructured, and not useful to them in practice.

I might as well lay my cards on the table at this point and state that this is my preferred method of teaching PR, at least in a large, required, survey course. Any student skepticism about the class lasts only a few weeks, because from the beginning they are immersed in complex legal doctrine involving overlapping sources of law and significant downsides for lawyers who misunderstand the law. For this reason I sometimes describe my approach as "scare the hell out of them." (I am indebted to the loss prevention seminars given by our insurer at my law firm when I was in practice, which had the effect of scaring the hell out of me, and making me realize that I had to take the law of lawyering very seriously.) The idea is to find a case in which (1) a lawyer is performing the kind of work the students envision themselves as doing in their own careers;

(2) the lawyer misunderstands a legal-doctrinal issue; and (3) really bad things happen as a result. Then I can drive home the point that this is a legal subject, and lawyers have to do their research and treat law-of-lawyering issues just as seriously as they would a legal issue affecting their client—going by gut and consulting moral compasses is not a research strategy. My school has a student population skewed a bit in the direction of Heinz and Laumann's organizational client hemisphere, so I tend to use cases involving big deals or complex litigation, but there are plenty of Main Street–type cases involving, for example, insurance-defense litigation, estate planning, criminal defense, the representation of small businesses, or matrimonial matters.

Focusing mostly on the law might send tacit messages about what it means to be an ethical lawyer. Students might come away from a law-of-lawyering course thinking that legal ethics is nothing more than following the law. You have some pedagogical options for dealing with the implicit communications about ethics, but at the very least you should acknowledge that there are analytically separate questions one can ask. First, what are lawyers legally obligated to do? Second, what constitutes ethical lawyering? You can address the second question directly in a course otherwise focused on the law governing lawyers, but you might not have that much spare time. I tend to leave the issues of critical morality to a specialized seminar (which I also teach), because in my judgment they warrant extensive analysis, not passing mention in a class that is mostly about something else. I do, however, take an "immanent rationality" approach to legal ethics, asking at various points what vision of ethics and professionalism is presupposed by the legal principles we are studying. In my view, the law of lawyering is structured by a pervasive tension between ideals that cannot always be reconciled—for example, of loyal client service versus fidelity to law; a fiduciary responsibility to carry out the client's stated objectives versus professional prerogatives to control the means of representation; and a conception of lawyers as just another actor in the marketplace versus some conception of professional distinctiveness. None of these are external or critical moral approaches, in the sense that they arise independently of the law structuring the lawyer–client relationship. Rather, they are aspects of the law of lawyering—the *internal* ethics of the profession.

2. Specialized Doctrinal Course: "Ethical Issues in ____ Practice

Pros: Emphasizes the interrelationship between the law of lawyering and the law governing specific client situations; enhances engagement by students who are interested in the underlying practice area.

Cons: Generally must be part of a package of course offerings to appeal to the range of student interests. Some topics do not arise in certain practices.

A variation on the survey course situates the law of lawyering within some specialized practice area.[27] Popular versions include ethical issues in criminal practice (sometimes differentiated by defense and prosecution roles), civil litigation (or complex litigation), transactional practice and negotiation, and public interest lawyering. These courses situate problems within ethics and "lawyer law" within the full legal and factual complexity of some area of "client law." In a transactional practice course, for example, students can see more clearly the relationship between the law requiring clients to disclose certain material facts and the duties of lawyers not to assist client fraud. It can be quite challenging to ensure that everyone in a survey PR class has the same familiarity with the underlying substantive law. I find myself doing quite a bit of background lecturing on criminal procedure, securities fraud, bankruptcy, and other areas outside the law of lawyering, to ensure that students fully appreciate the PR issues. The need for this backfilling can be lessened in a class comprised of students who have interests in a particular subject, because they are likely to have taken courses on the relevant area of client law. An instructor might even list these courses as a prerequisite. If students are up to speed on the underlying client law, the professional responsibility issues can take on immediacy that might be lacking in a survey course.

One problem with specialized courses is related to the perennial trade-off between depth and coverage: Some ethical issues arise frequently in certain areas of practice, whereas others come up hardly ever, if at all. Take criminal defense practice, for example.

---

[27] *See generally* Mary C. Daly, Bruce A. Green, & Russell G. Pearce, C*ontextualizing Professional Responsibility: A New Curriculum for a New Century*, 58 L. & Contemp. Probs. 193 (1995).

The client perjury issue is more acute here than in any other area of litigation, because of the constitutional entitlements of the client (to take the stand, self-represent, etc.). Most experienced criminal defense lawyers have had to deal with a client whom they believe or know to be lying. A teacher can thoroughly cover Rule 3.3, *Nix v. Whiteside*, the tension between duties of competence, confidentiality, and candor to the tribunal, state responses to the perjury problem, and so on, in a criminal practice course. Many important problems cannot be treated in the same depth in a criminal practice class, and some might not arise at all. Some conflicts of interest do occur in criminal practice; consider cases like *Cuyler* and *Mickens*.[28] Criminal defense lawyers are unlikely, however, to encounter conflicts problems such as advance waivers, corporate families, migratory lawyers, and positional conflicts. Transactional-practice courses, on the other hand, are unlikely to present the problem of client perjury at all, although they will cover the ethics of negotiation in much greater depth than is possible in survey courses.

3. Problem Method

Pros: Puts students in the position of decision makers; stresses indeterminacy of facts, which often isn't apparent from appellate cases; illustrates centrality of judgment to lawyering.

Cons: Some topics are better suited than others to the problem method; hard to use in large courses without doing something innovative like breaking into small groups; nonpreferred teaching style for many stand-up doctrinal teachers.

Conceptually speaking, PR is different from other courses in taking a first-personal perspective on the subject. More than any other law school course, PR invites teachers to ask students, "What would you do?" Many familiar cases can be used as the foundation for a question from the first-person point of view. Take, for example, the classic case of *Spaulding v. Zimmerman*, which can readily be turned into a hypothetical in which the defendant directs his lawyer not to disclose to the plaintiff that he sustained a potentially life-

[28] In this discussion and what follows, I might cite some standard or canonical cases that are likely to be in most PR books, and with which you probably should be familiar. At this point, you might not be familiar with them, however, so I provide a short list of case citations in the bibliography at the end of this study guide.

threatening injury in an automobile accident with the defendant. The reported case turns on whether the nondisclosure would be grounds for vacating the settlement. (It was, because the plaintiff was a minor and the court treated nondisclosure as a fraud on the trial court, which was required to evaluate the fairness of the settlement.) That holding is arguably less important than the experience of making a decision. Suppose the confidentiality rule in effect at the time does not permit disclosure of this information, and the defendant refuses to give consent to disclose. From the students' point of view, the question in this case becomes, "What do *you* do?" instead of "What did the lawyer do?" Teachers can even role-play to some extent, portraying the outraged client who hears (let's say) the student say that she would disclose the full extent of the plaintiff's injury despite any legal obligation to do so, and notwithstanding the client's contrary instructions.

The problem method is designed to put students in the position of decision makers, not observers or critics. Rather than working through a case, asking about the governing law and arguments of counsel, an instructor begins with a situation in which a lawyer is deciding how to proceed: Do I disclose the full extent of the plaintiff's injury? Do I put the criminal defendant on the stand given what I know regarding the veracity of the testimony? How do I have the conversation with the client about my own interests in the transaction that might be in conflict with the client's? Answering these questions requires the students to know the background law, but that is only the beginning. Students must also deliberate, exercise judgment, and commit to what might be the least-worst alternative. Problems can be gripping, with an element of immediacy that is lacking in the usual, detached analysis of cases. Also, as lawyers know, the sterile recitation of facts in appellate cases often belies the complexity and ambiguity of facts in the real world.

> [W]e all tell stories in class, whatever we teach. We call them "fact patterns" or "hypotheticals." Perhaps we use these terms because our stories are often so puny. They are not true stories at all. "Lawyer Jones is retained by Clients Smith and Green, who ask her to … " You have heard that one before. We end with, "Now, Mr. Miller, what would you advise?"
>
> That does not cut it. It is not real. It does not go far enough toward duplicating the clutter and complexity of real professional

> dilemmas. Life is messy, ambiguous, harder to describe. And there are no people in these "hypotheticals," only names. (And usually the wrong names, too; they should be "Hawkins" and "Wong" and "Martinelli.") There are no relationships. There is no pain, no suffering, no anxiety, no threat to lawyer or client. No mortgage to pay, credibility to assess, partners to worry about, courts to appease, authority to confront. Nothing personal.[29]

Problems can do much better at conveying the message that the facts are often more important than the law to the resolution of dilemmas in practice. The first-personal perspective also might help foster the students' sense of their own identity as ethical professionals.

The problem method should not be seen as a stand-alone approach, but as something that can be integrated, to a greater or lesser extent, into a standard doctrinal class. Some teachers use problem-oriented casebooks, of which there are numerous excellent options on the market. Others design problems that can be used to supplement a more traditional book, structured around a series of cases. Even in my very traditionally structured survey PR course I use problems, and class discussions seem to go very well on those days.

One downside to the problem method is related to its upside—namely, it is intensely first-personal. That means in a large class, one student will be trying to decide what to do while the others are in a more passive role. Calling on other students at random to take the role of "decider" will keep the rest of the class on its toes, but even so, there is only so much you can do to involve 120 students in the resolution of a problem. This is a problem with large lecture-style classes in general, only partially mitigated by the Socratic method, but it tends to undercut the principal benefit of problem-method teaching. One response to this challenge is to divide the class into numerous small groups, and ask the students to debate the resolution of the problem with their classmates. Some PR teachers use the small-group method very effectively,[30] but it does require a fair bit of work on the part of the instructor. If you are feeling adventurous and are prepared to do something nontraditional, using problems along with small-group discussions could liven up a large class significantly.

---

[29] Stephen Gillers, *Getting Personal*, 58 L. & Contemp. Probs. 62, 65-66 (1995).

[30] A shout-out here is due to Lisa Lerman at Catholic University, who gave an excellent presentation at a recent legal ethics conference on the use of small groups in professional responsibility courses.

4. Interdisciplinary Seminar

Pros: Connects the subject with the rich resources of another discipline; imparts rigor to what can otherwise be an unstructured conversation about ethics, the legal profession, or anything other than a standard legal-doctrinal discussion.

Cons: Requires an instructor with training or at least a lot of background in the other discipline; hard to integrate with learning the law on its own terms, therefore probably best suited as a supplement to, not a substitute for, a law-of-lawyering course.

As noted earlier, ABA Standard 302(a)(5) requires law schools to require all students to receive instruction in "the history, goals, structure, values, rules and responsibilities of the legal profession and its members." The broad wording of that standard invites law schools to offer courses focusing on the history of the profession and its role in American society; sociological approaches to the organization of the delivery of legal services; critical analysis of the so-called standard conception of legal ethics; and so on. Interdisciplinary seminars can be a fantastic way of stimulating specialized, focused, rigorous discussion of some of these issues without getting bogged down in the complexities of the law of lawyering. I enjoy teaching a seminar in the moral and political philosophy underlying professional ethics, and over the years I have benefitted as a scholar from class discussions and many of the papers submitted by my students. I'd like to think they benefit as well from the external critical perspective the seminar offers on the ethics of their profession.

Remember that the ABA standard cited here comes with an official interpretative comment that states that "[t]he substantial instruction in the history, structure, values, rules, and responsibilities of the legal profession and its members required by Standard 302(a)(5) includes instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association." See Interpretation 309-2. One interpretation of this interpretation is that, somewhere along the line, a law school must require that students be instructed in the law of lawyering. Seminars on history, philosophy, social science, and so on, are a great thing, but they can only supplement, not replace, a course focused on the law governing lawyers. This is really an issue for your school's administration more than for individual instructors, but it probably can't hurt to ensure

that no one is expecting your course to satisfy the ABA standard when you intend the course to be about sociology or philosophy, not the law.

5. Simulations

Pros: Realism enhances credibility; learning process is active, in contrast with the passivity of classroom learning; simulations are even better than the problem method at making the exercise of judgment, dealing with complexity, and perceiving ethical dilemmas the central features of PR.

Cons: Quite resource-intensive and time-consuming; requires instructors who themselves are fully competent in the underlying legal skills (advocacy, drafting, negotiation, etc.); hard to design realistic simulations unless using carefully developed materials; coverage generally sacrificed for depth.

As noted earlier, in connection with the problem method, many PR teachers believe this subject is unique because it, alone among courses in the law school curriculum, asks students to imagine themselves as decision makers. Even the problem method has an inevitable third-person aspect, however, because the student is talking to the professor, describing what he or she would do. Simulations and role-playing exercises, by contrast, require the student to actually *do* something, and do it within the context of performing other professional tasks, such as advising clients, trying a case, or negotiating a transaction or settlement. Proponents of simulations argue that they enhance the skill (or disposition) of dealing empathetically with human problems.[31] They provide space for reflection and the exercise of judgment. They also teach students to perceive ethical dilemmas, which in the real world do not come readily labeled as such.[32] Although problems help convey some of the complexity of practical ethical dilemmas, simulations do even better on the dimensions of realism, immediacy, and active learning.

---

[31] *See, e.g.*, Barbara Glesner-Fines, *Teaching Empathy Through Simulation Exercises: A Guide and Problem Set, available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304261.

[32] Robert P. Burns, *Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism*, 58 L. & Contemp. Probs. 37 (1995).

Involving everyone in the class obviously requires either small classes or a large team of teachers. Some schools have established simulation-based programs employing numerous adjunct faculty members (usually local practitioners).[33] If you are reading this guide, you are probably not working within such a program, because all of the decisions concerning the content and format of the PR course will have already been made by school administrators. Your question is probably whether it is possible to integrate simulations into the course you have been assigned to teach. It might be possible to make limited use of simulations, but it would probably be better to stick with something less ambitious, such as problems or a few role-playing exercises. The Burns and Liebman articles cited here convey well the enormity of the task of designing the materials for the class, including the background readings as well as the exercises themselves. Another problem with the simulation approach is that the exercises must be situated within some substantive area of law and present only a few ethical dilemmas for resolution, thereby limiting the coverage of the course. My own view is that, unless you are working within an established program, a fully simulation-based course is too big a challenge to take on for a first-time teacher.

6. Integrated into Clinical Experience

Pros: It doesn't get any more realistic than this.
Cons: Not all law of lawyering issues will arise—a community legal aid clinic is unlikely to present corporate–family conflicts, for example; clinicians may not know their way around PR issues outside their area of clinical expertise.

The subject of clinical legal education deserves much fuller treatment than I can give it here. Clinics enable students to learn from experience, function in the role of lawyer, encounter clients as real human beings instead of abstracted narratives in appellate opinions,

[33] Robert Burns, in the article just cited, reports that Northwestern uses three faculty members and eight practicing lawyers for a class of 80 students. Carol Liebman, the faculty coordinator of Columbia's Profession of Law course, notes that the third of three simulation exercises requires "thirty-two teachers, most of whom are practicing lawyers who volunteer their time; five walkie-talkie equipped high school and college students who help manage logistics; a faculty coordinator; and two support staff." Carol Bensinger Liebman, *The Profession of Law: Columbia Law School's Use of Experiential Learning Techniques to Teach Professional Responsibility*, 58 L. & Contemp. Probs. 73 (1995).

understand the ambiguity of "the facts" in the real world, and accept responsibility for making decisions about the representation of clients. Professional responsibility can be seen as inherently practical: "Professional responsibility, as a subject, has always been about what lawyers do and how they interact with clients, each other, supervisors, law office organizations, the courts, and the public interest."[34] If that is the case, then what better way to learn professional responsibility than to *do* the representation of clients in real matters?

I won't say much about integrating PR into clinical education here. Not only is it a big and important topic, but as with the simulation method, if you are reading this guide you are probably trying to figure out how to teach your own freestanding PR course, not integrating PR into your teaching as a clinician.

7. Pervasive Method

Pros: Shows how PR issues arise in the context of other legal problems.

Cons: Nonspecialists sometimes are not familiar with the technical PR analysis; might delegitimize the subject if it seems like an add-on; many topics don't arise in a way that's integrated with other legal issues—again, conflicts of interest is an example.

In a sense this last method is not your concern, because if you are teaching a professional responsibility course, your law school has already decided that the pervasive method is insufficient. The theory behind the pervasive method—with which I have considerable sympathy—is that ethical issues arise and can be fully understood only in a specific legal and factual context. The underlying law, pertaining to the lawyer's representation of the client, is likely to make a difference to the law pertaining to the lawyer herself. Consider a relatively simple issue concerning the allocation of decision-making authority in the attorney–client relationship. The client in *Jones v. Barnes* wanted the lawyer to raise a bunch of appellate issues that the lawyer believed were at least extremely weak, if not frivolous. To really feel the tension between the lawyer's professional judgment in this case and the client's asserted interest in making decisions about

[34] James E. Moliterno, *On the Future of Integration Between Skills and Ethics Teaching: Clinical Legal Education in the Year 2010*, 46 J. Legal Educ. 67 (1996).

the representation, it would be helpful to know what the legal issues were on which the lawyer and client disagreed. Teaching the Rule 1.2(a)/*Jones* problem in a criminal law or criminal procedure class would add texture, realism, and even urgency to the analysis of the ethical issue. If ethical issues were integrated across the curriculum into the teaching of other areas of law, students would appreciate the interdependence of client law and lawyer law as well as begin to experience ethical decision making from a first-personal perspective.

Unfortunately the pervasive method has remained mostly an aspiration. One problem is that ethical issues can remain invisible to students unless flagged and discussed. As a teacher of mine once observed, air is pervasive, too, but no one notices it. Obstacles to discussing PR issues in client law classes include concerns about coverage (what teacher hasn't struggled with what to cut to fit a class into a three- or four-hour block?), unfamiliarity with the law of lawyering or even disdain for it, or concern that introducing new topics will cause the discussion to spin out of control. There is no point rearguing for and against the pervasive method here, because most law schools have accepted the necessity of including at least some stand-alone PR courses in the curriculum, and you are teaching one of them!

C. THE IRREDUCIBLE CONTENT

Rather than listing rules or classic cases, this statement of the essential content of professional responsibility is given in terms of principles of the law of lawyering. A detailed annotated outline of the content of the law governing lawyers is provided at the end of this guide. From the proverbial 30,000-foot perspective, these are the essential ideas that, in my view, students need to understand by the end of the course:

- The lawyer–client relationship is an extremely demanding one. Lawyers owe a lot to clients. Clients place a great deal of trust in lawyers and rely on their competence, loyalty, and hard work. Although the relationship is created by agreement and is thus contractual in nature, it is not an arm's-length bargain, but a stringently fiduciary relationship. Courts and disciplinary authorities are intolerant of any overreaching by lawyers. That said, there is some room for lawyers and clients to vary the content

of the duties owed by lawyers. Any divergence from the default rules requires the informed consent of the client, which means consent given after full disclosure of all material information bearing on the client's decision.

- Lawyers owe duties to clients—competence, confidentiality, undivided loyalty, diligence, communication, and so on—but they also owe duties to courts and to third parties. Many interesting issues arise from conflicts between these obligations. Moreover, lawyers often get into trouble when they are mistaken about the priority of their duties; for example, thinking the duty of confidentiality trumps the duty of candor to the tribunal. The little maxim of "zealous advocacy within the bounds of the law" tends to get truncated by lawyers to zealous advocacy alone. That is a gross misstatement of the applicable law.
- The law gets messy and dangerous in the gray area between true, formally established clients and strangers. Many difficult problems in professional responsibility involve "almost clients," such as corporate officers and other agents of organizational clients, affiliated corporate entities, partners or shareholders in closely held corporations, liability insurance companies where the lawyer is defending the insured, third parties to whom the client owes fiduciary duties, and so on.
- The Model Rules, and state versions thereof, are well and good, but the law of lawyering is also comprised of bits and pieces of tort, agency, contract, evidence, criminal, and other law, and a careful analysis of your obligations might quickly take you beyond the four corners of the rules of professional conduct.
- There is a difference between ethics and legal ethics. Consulting your moral compass is not a sufficient research strategy when dealing with the law of lawyering. You might be a good person and have no intention of taking advantage of your client, but if you don't comply with the disclosure requirements of Rule 1.8(a), the little loan you made to your client can get you in big trouble. Casebooks are littered with stories of lawyers who tried to improvise their way through a PR problem. The law governing lawyers can be as complex and technical as any area of the law governing clients, and lawyers must treat it with the same degree of respect.
- Understanding the structure of the legal profession and the market for legal services is important in its own right, but it

> is also essential to a full understanding of the meaning of the law governing lawyers. It is hard to fully grasp unauthorized practice of law (UPL), for example, without appreciating how the organized bar uses UPL restrictions to protect its own turf. Similarly, the long and tortuous history of confidentiality and client fraud can best be understood as a manifestation of the struggle by the bar to define a conception of professionalism in opposition to competing visions advanced by other institutions.[35]

Notice that there's nothing here about ethics from the standpoint of external, philosophical morality, as opposed to the immanent rationality of the law governing lawyers. Unless you are specifically teaching a theory or philosophy course, you'll be surprised how little occasion you will have to discuss the academic debates over the standard conception, between its defenders in various forms (Freedman, Pepper, Dare, myself, Markovits, and others) and its critics from a variety of perspectives (Luban, Rhode, Simon, Postema, Shaffer, and others). If you are teaching from the standpoint of normative ethics, you'll be immersed in this literature, but otherwise it can be hard to integrate philosophical legal ethics into a survey PR course. I once taught a well-known book on theoretical legal ethics alongside the usual law-of-lawyering content, and found that the students were perplexed by how the different parts of the course fit together. I told them they should see the theoretical readings as illuminating the law, and that it would be tested somehow on the final exam, but that only increased their anxiety because this was not a typical approach to a doctrinal subject. If you can pull this off, good for you, but I have found it extremely difficult to integrate the law governing lawyers and external critical perspectives on the morality of lawyering.

III. Preparing a New Course

A. CHOOSING A CASEBOOK AND OTHER MATERIALS

The good news is, there is a wide selection of casebooks available for PR courses. The bad news is, there is a wide selection of casebooks available for PR courses. I have 26 hardcover casebooks on my

[35] See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389 (1992).

bookshelf from the major legal education publishers; there might be more stuck away in a corner of my office someplace. By the way, if you are new to law school teaching generally, not just a new PR teacher, don't be shy about asking publishers to send you samples. I'll never forget talking to one publisher's rep who said he would send me the "starter pack" of materials. A few days later an enormous box arrived in my office, weighing about 50 pounds, full of casebooks, rules supplements, study guides, and other assorted materials. To an academic geek like me it was like Christmas in July. You really shouldn't have any trouble getting your hands on examination copies of all of the available educational publications.

The differences among available casebooks roughly correspond to the styles of courses discussed previously, with the most important distinction being between straightforward doctrinal versus problem-method books. Many PR books look quite familiar, with principal cases followed by notes and other material. Others are structured around problems, to a greater or lesser extent (meaning, in some books the problems can be considered optional, for enrichment purposes, whereas in others it would be very difficult to disentangle the law from the problems). Thus, the first step in choosing a casebook might be to decide whether you would like to use a relatively traditional approach, such as lecture or Socratic dialogue to analyze cases, or whether you intend to make the classroom experience more first-personal, by asking the students what they would do if they were in a situation described in a problem. You certainly do not want to teach against the book, by trying to use a teaching method that does not match up well with the book's structure.

You actually might want to consider reversing this decision-making approach. Grab a couple of books and flip through them. Think about how you would tailor your teaching method to the presentation of materials in the book. Few things are more frustrating than teaching against a casebook. If you have strong views about how best to teach the subject, then by all means try to find the book that best fits that approach. If you are a bit methodologically agnostic, however, you can let the book guide your pedagogy to some extent. If an approach does not work well, you can try something different the next time. I tend to switch around frequently among casebooks to avoid falling into a rut, and although I would not say I am particularly good at problem-method teaching, I have enjoyed using problem-based books and have learned a great deal from them.

1. Rules Supplements

If you are planning to teach a doctrinal law-of-lawyering course, you will probably want to refer frequently to the text of the Model Rules and the Restatement. Because the ABA is extremely strict about the copyright it asserts in the Model Rules (unreasonably so, in my view), casebook editors cannot include lengthy extracts from the rules. Although the ALI is a bit more generous, many important parts of the Restatement, particularly the comments, are too long to reproduce in casebooks. The Model Rules are available online from the ABA Center for Professional Responsibility Web site (http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html), but access to the Restatement requires using a database services such as Westlaw or Lexis. Thus, it is useful to assign a rules supplement.

All of the legal education publishers offer one or more rules supplements, the contents of which vary a bit. I tend to use only the Model Rules, Restatement (with comments), and the SEC's Sarbanes-Oxley regulations, but other teachers might use the ABA Model Code of Judicial Conduct, the ABA Standards for Criminal Justice, the Federal Rules of Civil Procedure, or even the 1969 Model Code of Professional Responsibility (when reading older cases). Some supplements are almost encyclopedic in their coverage, whereas others are limited to the most frequently used primary sources. Different publishers' supplements might also contain extensive annotations showing the drafting history of rules and state variations, comparison charts showing divergences among state rules, the full text of state rules, or other explanatory material. How much use you make of this material is a function of the trade-off you make between depth and coverage in particular areas.

2. Study Guides

Your students might ask you to recommend commercial outlines and study guides. Here, as with the selection of casebooks, the determining factor is the content and emphasis of your course. Some study guides take a quite theoretical approach to the subject, whereas others are more focused on black-letter law or the complexities of legal doctrine. Some books are studiously neutral and others

unabashedly represent the author's point of view. Again, because the MPRE happens during law school as opposed to after graduation, study guides in PR can sometimes be oriented more toward bar-exam preparation than supplements in other courses.

B. PITFALLS AND CHALLENGES

1. Pop Culture

Many instructors welcome the opportunity to engage their students using clips from any of the zillions of movies or television shows about lawyers. The David E. Kelley shows *Boston Legal* and *The Practice* often borrowed plotlines from real cases involving ethics issues. Some movies, like *The Verdict*, *Anatomy of a Murder*, and *To Kill a Mockingbird*, have achieved almost canonical status in legal ethics scholarship.[36] A group of PR teachers had proposed a casebook linked with clips from *The Practice*, but apparently the licensing fees demanded by the studio would have made the product unreasonably expensive. (Using a short clip in a class is arguably fair use, but you should check your school policy on the use of copyrighted works.) Proponents of using movie and TV clips argue that they engage students, dramatize situations in a memorable way, and highlight the first-personal aspect of exercising ethical judgment. Naysayers—myself included—worry about the messages implicitly communicated by the reliance on Hollywood. Very few instructors in antitrust, securities regulation, or administrative law courses show movies. Of course, there haven't been many exciting movies made about antitrust cases, but the concern is that students will perceive a course as fluffy and unrigorous if it frequently makes use of popular culture. Personally I think the cost of devaluing the subject in the minds of students outweighs the benefit of engaging them in a well-

[36] One of my favorite recent law review articles is Bill Simon's "Moral Pluck" piece, which argues that the popular culture portrayal of lawyers generally shows them to be worthy of admiration to the extent they are willing to work around or nullify formal law in the service of broader justice values not being served by the law. *See* William H. Simon, *Moral Pluck: Legal Ethics in Popular Culture*, 101 Colum. L. Rev. 421 (2001). By the way, good luck finding many students in this generation who have seen *Anatomy of a Murder*. That's another problem with using popular culture in class: You have to be up on what is popular among your students. For those of us who are no longer young, and never were hip, that can be a challenge.

dramatized depiction of a professional dilemma, but in the end it's entirely up to you.

2. The Law of Everything but Lawyering

One of the things I love about teaching PR is that you have to be really sharp on other areas of law, because they come up in the cases. You will either have to provide some background information on the other law to make sense of the case, or else have to improvise an explanation in class in response to a student's question. I call this the "reverse pervasive method," because instead of teaching PR issues in other classes, you're teaching securities fraud, criminal procedure, or something else in your PR class. It's one of the joys of teaching PR, but it does add to the work of preparing for class.

The intersection of PR and other law can be a problem if your school teaches PR in the first year. I have heard it argued many times that, because PR is about forming a conception of oneself as an ethical professional, it is important to reach students early in the educational process. Whatever your views about this—and as you might have gathered, I'm a bit of a skeptic—it does come at the cost of making it more difficult to take a rigorous law-of-lawyering approach to PR. If the students have not been exposed to agency law, they will have a harder time understanding how a lawyer might acquire the apparent authority to settle a case. Students who have not taken evidence might not be familiar with evidentiary privileges and thus will be more likely to mix up the attorney–client privilege and the duty of confidentiality. As with so many things, there are trade-offs here, but suffice it to say that you will spend more time on background explanations of the law in a first-year PR course.

3. Guest Speakers and War Stories

Practicing lawyers can be a valuable resource for PR teachers. Local lawyers, particularly if they are alumni of your law school, might be eager to talk to students and stay connected with their alma mater. Stories about professional dilemmas encountered in practice can usefully connect what students are learning in class with their future careers. All that said, guest speakers can be a bit of a wild card. One risk is the infamous "war story," a long, rambling, sometimes embellished account of an incident from the lawyer's past.

War stories can be vivid, memorable, and useful, or they can leave students wondering what the point is. If you have willing alumni, it is probably worth taking a chance on an occasional guest speaker, but don't overdo it.

IV. In the Classroom

A. TECHNOLOGY

As a friend of mine likes to say, "Power corrupts; PowerPoint corrupts absolutely." Top commanders in the U.S. military have become concerned that PowerPoint "stifles discussion, critical thinking and thoughtful decision-making."[37] Still, I have found myself making increasing use of PowerPoint in class over the past few years, not because I have dumbed down the content (not consciously, at least), but because my classes tend to be large. PowerPoint, for all its faults, is pretty good at maintaining organization and structure in a large, lecture-type class. I do have a tendency to clutter up my slides with too much information, which I try to mitigate by putting the slides up on the course Web site. What I really should do is take a class on good PowerPoint design.

Another bit of teaching technology I have used is the iClicker polling system (there are other competing systems). Students purchase little remote devices that communicate with a receiver station plugged into the classroom computer. (Because many of my colleagues use clickers in first-year courses, most of my students already own their clickers, so there is no additional cost to the students.) With the iClicker system. an instructor can obtain instantaneous results on quizzes or polls, asking, for example, whether the students agree with the majority or the dissent, or believe a lawyer in a hypothetical is subject to discipline. What I have found the most useful is to prepare a series of PowerPoint slides with multiple-choice, MPRE-type questions mixed in. Here is an example, admittedly quite simple:

---

[37] See Elisabeth Bumiller, *We Have Met the Enemy and He Is PowerPoint, New York Times* (Apr. 26, 2010). Marine Corps Gen. James Mattis puts it more bluntly: "PowerPoint makes us stupid."

Personal-Interest Conflicts

Larry Lawyer represents Moe, a seller of used cars, whenever premises liability (slip and fall) cases arise. Needing a quality pre-owned vehicle, Larry goes to Moe's showroom. Moe sells Larry a 2005 Volvo for $10,000, which represents fair market value of the car. The deal is documented with the usual paperwork used in Moe's business, which contains the essential terms of the transaction. Is Larry subject to discipline?

A. Yes, because Larry entered into a business transaction with Moe without obtaining Moe's written informed consent to Larry's role in the transaction?

B. Yes, because Larry did not advise Moe of the desirability of obtaining independent counsel.

C. No, because Larry purchased the car for fair market value.

D. No, because Moe generally markets used cars to others.

E. No, because the transaction is unrelated to Larry's representation of Moe.

After giving the students time to answer the question on their clickers, the teacher can display a bar graph showing the distribution of answers. The display of results can reveal common areas of confusion. For example, students might choose answer E in response to this question, thinking that the business-transactions rule is limited to a specific matter like other rules, such as Rule 1.6 and Rule 4.2. Displaying the bar graph for the class to see also reassures students that they are not the only ones making these mistakes. It takes a lot of time to prepare slides with embedded multiple-choice quizzes, but it is worth the effort, particularly in a large class.

B. REVIEW AND EXAM

PR exams present the same issues as other law school exams, and require you to make the same pedagogical judgments. Are you testing knowledge of doctrinal complexities, issue spotting, legal analysis, judgment, or some combination of all of these things? How important is covering all or most of the subjects you dealt with in class, as

opposed to treating a few subjects in greater depth? How large is your class and how much time do you have for grading exams?

Multiple-choice questions have some clear advantages. You can cover a lot of ground with 40 or 50 multiple-choice questions, and grading is a snap, particularly if you have an option to use machine-scored exam sheets. Some grading software will provide statistical analysis of the performance of the class on individual questions, allowing you to identify the items that work best in terms of difficulty and discrimination between high, low, and middle quartiles of test-takers. (A good question is one on which the strongest group of test-takers performs better than the weakest group.) You can also keep multiple-choice questions in a bank and reuse them in subsequent years. If you make use of the statistics function of grading software, you can even improve your bank of questions over time.

One caveat on the use of multiple-choice questions: They are a lot more difficult to write well than you might think. On the MPRE drafting committee we routinely throw out about half of the questions we write during the initial review during committee meetings. Sometimes further revision will improve them, but sometimes they are hopeless. There might be an option that is arguably correct, or perhaps a critical fact is missing that would enable test-takers to choose among the options. The choice among options might also call for the exercise of judgment (e.g., "Is this conflict so severe that it is nonconsentable?"), which cannot be tested using a multiple-choice format. Questions that pass that initial review are then pretested on a subsequent administration of the exam, and the statistics (difficulty and discrimination) are analyzed to see how well the item performed. In the end I'd estimate that only about a quarter of the questions we draft eventually become "live" on the exam, and these are written by people who have a lot of practice writing multiple-choice questions. Have a go at multiple-choice if you like, but be prepared to be humbled by the experience of getting back the analysis. You might need to throw out a few items if the analysis reveals that they were not well drafted. I would encourage you to use the "bank" strategy and to refine your corpus of questions over time. You might even use the MPRE approach of pretesting some items: Draft a few new ones each year, put them on the exam, but do not use them in calculating the grade until you are satisfied that they are reliable, after which they can go live on the next exam.

Many teachers use a traditional law school essay format for PR exams, and that format has the same advantages and disadvantages in PR as it does anywhere else, if you believe the subject matter of PR is the law governing lawyers. Essay exams provide students an opportunity to demonstrate their ability to perform legal analysis and exercise judgment. A teacher can pack a number of issues into a single fact pattern, requiring students first to spot the issues and then to assess them in terms of their importance and complexity. Grading is a pain, but that's just part of the job. The primary disadvantage of essay exams arises for instructors who believe the subject of PR is somehow categorically different from other law school courses. If you think one of the goals of a PR course is to foster student identity formation, then you are unlikely to be able to measure that outcome using an essay exam. Simulation courses and other approaches that emphasize the experiential dimension of learning will probably be assessed using more subjective factors, such as the instructor's evaluation of the quality of student participation.

C. CORE TOPICS: ANNOTATED

This outline attempts to cover the entire waterfront of the subject of professional responsibility, focusing on the law of lawyering. There's really no way to cover all of this material in a survey course, even with three class hours to work with (which would be a luxury at some schools). Thus, you should feel free to go through this list and cross out the subjects you regard as having secondary importance. I have provided some editorial comments on various topics, for what they are worth.

1. Formation and Termination of Attorney–Client Relationship
    a. Duty to represent. Declining clients for moral or other reasons. Refusing court appointments. Contrast with "cab rank" rule in United Kingdom and elsewhere.
    b. Implied-in-fact and quasi-client relationships (and the difference between them)—Rest. § 14. It's hard to imagine not teaching the *Togstad* case.
    c. Duties owed to prospective clients—Rule 1.18.

Perhaps to include consideration of new Ethics 20/20 rules on online marketing and formation of an attorney–client relationship.

d. Allocation of decision-making authority—Rule 1.2(a). Decisions reserved to clients in civil and criminal representation. *Jones v. Barnes*. Limitations on scope of representation—Rule 1.2(c).

It is worth pointing out that the Model Rules are at best redundant, because the lawyer–client relationship is regulated by contract and agency law. The Restatement sections on allocation of authority are helpfully structured around the agency law concepts of actual, apparent, and inherent authority. If your students haven't been exposed to agency law (e.g., in a business organizations course), you might have to provide a little primer on these concepts.

Some instructors might wish to address cause lawyering, Derrick Bell's "serving two masters" critique, and other aspects of public interest representation here.

e. Clients with diminished capacity—Rule 1.14; Rest. § 23. Perhaps considering some applications such as representing children or mentally ill clients (the Unabomber representation is a good case study).

This is one of the areas in which the exercise of informed judgment is more important than coming up with the right answer. The Model Rules do not resolve the inherent tension between having a normal attorney–client relationship and protecting a client who lacks the capacity to protect herself; the Restatement does have a resolution, but it strikes many lawyers as troublingly paternalistic.

f. Mandatory and permissive withdrawal from representation—Rule 1.16. Duties to the client upon termination.

2. Confidentiality

It is *extremely* important to differentiate between the attorney–client privilege and the ethical or professional duty of confidentiality. Even practicing lawyers tend to screw this up, sometimes with disastrous results. It can be helpful to go through a series of problems in which a bit of information or a communication is covered by one confidentiality-related

doctrine but not another, working through the elements with care.

a. Duty of confidentiality—Rule 1.6 and agency law.

Scope of protected information. Exceptions to confidentiality (including bodily harm, client fraud). Maybe discuss conflicts arising out of confidentiality-related duties (e.g., the *A v. B [Hill Wallack]* case from New Jersey, which really gets their attention).

Depending on coverage elsewhere in the course, this might be the place to briefly consider the history of the ABA's attitude toward exceptions to confidentiality, including the relatively recent controversy over whether to permit disclosure to prevent, rectify, or mitigate client fraud (Rule 1.6(b)(2), (b)(3)) and the conflict with other legal institutions such as the SEC and the courts.

b. Attorney–client privilege and work product.

Distinguish duty of confidentiality. Elements of privilege and work product. Application to entity clients (*Upjohn* or Rest. § 73 rule). Crime-fraud exception. Waiver doctrines (e.g., selective disclosure, reliance on privileged communications, inadvertent disclosure).

These subjects can become quite technical and it is difficult to avoid getting bogged down in details. It is important to at least provide an overview so the students will be able to spot the issues when they are in practice. This is one area of the PR course that will be applicable to virtually all lawyers.

c. Confidentiality and privilege issues in joint representation.

Joint defense agreements and common interest doctrine. Distinguish joint-client confidentiality and privilege (Rest. § 60, cmt. l is very helpful here).

3. Conflicts of Interest

a. Concurrent Representation—Rule 1.7.

i. Definition (direct adversity and material limitation)—Rule 1.7(a).

The distinction between risk rules and harm rules is absolutely essential here.

ii. Consentable and nonconsentable conflicts—Rule 1.7(b).

Advance waivers (this is a good way into the general question of whether the rules are or should be different for sophisticated clients)—see Rule 1.7, cmt. [22]. Requirement of consent confirmed in writing (maybe compare writing requirement across different rules).

iii. Definition of informed consent—Rule 1.0(e).

If it hasn't come up already (e.g., in connection with waivers of confidentiality), it is important to discuss how much disclosure is necessary before client consent will be deemed "informed." It is difficult to overstate the importance of the idea of informed consent throughout the law of lawyering.

iv. Conflicts as Sixth Amendment violation (*Cuyler*, *Mickens*, etc.).

This discussion can also be located with the discussion of competence, depending on how your course is structured. The advantage to locating it here is that you can usefully contrast the Sixth Amendment and Rule 1.7 standards.

b. Successive Representation—Rule 1.9.

i. Substantial relationship test—Rest. § 132.

ii. When does a current client become a former client? Subtopic: Hot potato rule and exceptions.

iii. Migratory lawyers, incl. *Silver Chrysler* analysis.

iv. Imputation and Screening—Rule 1.10.

c. Former Government Lawyers—Rule 1.11.

Also consider the situation of former private lawyers in government. Note special imputation rule and relationship between Rule 1.9 and Rule 1.11.

d. Personal Interest Conflicts—Rule 1.8.

Business transactions with clients (if not handled under fees, below); gifts from clients; media rights; lawyer–client sexual relationships.

4. Client Identity

I can never figure out where this should go in the course, but issues of client identification come up all the time, in many guises. Organizationally it could go under conflicts, confidentiality, formation of the attorney–client relationship, or be broken out as its own section. These problems are tricky, dangerous in practice, and extremely important. Some subtopics include the following:

a. Lawyer-for-the-deal problems.

   It can sometimes be unclear if a lawyer is representing another party in a transaction, which is why "I am not your lawyer" letters are so important in practice.

b. Corporate families.

   Will representation of one of a "family" of affiliated entities disqualify the lawyer from representing clients whose interests are adverse to those of an affiliate? See the wishy-washy approach of Rule 1.7, cmt. [34].

c. Entity-constituent conflicts.

   In the representation of corporations the classic problem arises of dealing with constituents while representing the entity client, and possibly needing to give "corporate *Miranda* warnings" to the constituent. Rule 1.13(e). A variation on this problem is the *Bevill* analysis of whether the constituent can claim an attorney–client privilege in an individual capacity.
   A variation on this problem, faced by both Wall Street and Main Street lawyers, is the representation of small, informal entities such as partnerships and closely held corporations.

d. Triangular relationships (h/t Geoff Hazard's absolutely essential article on this subject).

   An important topic to lawyers who do insurance defense work is the "eternal triangle" problem, which has a client identification aspect, namely whether both insurer and insured are to be deemed the client of the lawyer. A similar problem arises in the representation of a client with fiduciary duties to another party, formally a nonclient.

5. Competence

   a. Malpractice; tort liability.

Default rule on duty requiring lawyer–client relationship; relaxation of privity element and extension of duty to nonclients in some circumstances—Rest. § 51 (*Lucas v. Hamm* and *Greycas v. Proud* are classic cases). Causation requirement (case within a case, and application to criminal defense representation).

b. Sixth Amendment ineffective assistance of counsel (IAC)—beginning with *Strickland v. Washington* and considering recent developments (*Martinez v. Ryan*, *Missouri v. Frye*, *Laffler v. Cooper*, and other Supreme Court cases). The Supreme Court seems to have a renewed interest in IAC claims.

c. Communication—Rule 1.4.

Although this is a separate provision in the Model Rules, clients tend to consider communication an aspect of competent representation. Failure to keep clients informed is a perennial source of grievances against lawyers. Requirement of communicating settlement offers.

6. Fees

a. Reasonableness—Rule 1.5(a) and contract law; *In re Fordham* (Mass.) seems to be in all the casebooks and is a lot of fun to teach.

b. Contingent fees—Rule 1.5(c), particularly disclosure requirements; inherent conflict created by effective hourly rate considerations. Some consideration of underlying policy debates, e.g., access to justice vs. concerns that contingent fees contribute to litigiousness.

c. Business transactions with clients—Rule 1.8(a); situations in which this rule is implicated (many more than students might think). An "advanced" topic, important for many Main Street lawyers, is fee collection, attorney liens, fee disputes, and fee arbitration.

d. It can be fun to do a section here on billing fraud and timesheet padding, including a discussion of hourly billing and alternatives.

e. Handling client funds—Rule 1.15; prohibition on commingling personal and client funds; safekeeping client property; dealing with disputes over property.

What happens when the client property in question is a shotgun allegedly used in a bank robbery? See Topic 8, below.

7. Litigation Misconduct

a. False statements and witness perjury—Rule 3.3.

Prospective and remedial duties. Definition of knowledge and materiality. Priority over duty of confidentiality. Application to criminal defense and overlay of the defendant's constitutional procedural entitlements—*Nix v. Whiteside* and Monroe Freedman's "trilemma" analysis. Narrative approach where permitted.

b. Anti-contact (ex parte) rule—Rule 4.2.

Application to entity clients (e.g., *Niesig v. Team I* or *Messing, Rudavsky & Weliky*; Rule 4.2 cmt. [7]; Rest. § 100). (Not solely a Wall Street issue because it's often lawyers representing individual clients against corporate defendants who have to know this rule.)

c. Lawyer-witness rule—Rule 3.8.

d. Public statements about pending litigation—Rule 3.6 and *Gentile* case.

e. Frivolous litigation—Rule 3.1 and Fed. R. Civ. P. 11.

8. Lawyer Involvement in Client Wrongdoing

a. Classic cases, e.g., *OPM*, *National Student Marketing*, savings and loan scandal. Maybe a brief overview of the history of the confidentiality rule with respect to client fraud, including ABA's resistance to permitting any disclosure and the byzantine noisy withdrawal compromise it eventually recognized.

b. Modern approach, including Rule 1.13 and post-Enron amendments to Rule 1.6(b); Sarbanes-Oxley regulations. (Note: Even if many of your graduates aren't going to represent publicly traded companies, working through the SOX regs with a hypothetical is a very good exercise in the skill of interpreting statutes and regulations.)

c. An important "advanced" topic is liability for aiding and abetting fiduciary breach; see, e.g., *Fassihi* (although that's arguably a quasi-client case), *Murphy & Demory*.

d. Dealing with evidence or proceeds of client crimes.

Classic cases include *Belge* (New York, the "hidden bodies" case), *Meredith* (California), *Morrell* (Alaska), *Olwell* (Washington), *Ryder* (USDC, Virginia), *Stenhach* (Pennsylvania). This topic could be located elsewhere, e.g., dealing with client property or litigation misconduct. It's a lot of fun to teach.

9. Ethics for Prosecutors—constitutional standards (Brady, etc.) and Rule 3.8

Sadly there is usually a high-profile case of prosecutorial misconduct in the news at any given time, which can be used to illustrate some or all of these issues. I have used the Duke lacrosse (disbarment of Mike Nifong) case for several years, but it is growing a bit stale now. The prosecution of Senator Ted Stevens was in the news more recently.

10. "The Practice of Law"; State-By-State Regulation; Organization of Practice

a. Unauthorized practice of law (UPL).

Definition of the practice of law. Application to online services like LegalZoom. A bit of an advanced topic, but one usually generating student interest, is the unbundling of legal services and legal process outsourcing (LPO), either within the U.S. or offshore.

b. Maybe some consideration of multidisciplinary practices, Rule 5.4(a).

c. Multijurisdictional practice, *Birbrower*; amended Rule 5.5(d).

d. Supervisory and Subordinate Lawyers—Rules 5.2, 5.3.

11. Bar Admission and Discipline

a. Character and fitness screening.

If you have time it is interesting to go through the McCarthy-era cases, such as *Schware* and *Konigsberg*. The case of Matthew Hale, the violent white supremacist who sought

admission to the Illinois bar, is an excellent vehicle for bringing out the issues in bar admissions cases.

b. Disciplinary procedures.

c. Reporting misconduct—Rule 8.3—*In re Himmel* or similar case.

12. Advertising and Solicitation

a. Disciplinary rules on advertising and solicitation.

This is one area in which state rules vary quite a bit from the Model Rules and from each other. Some states are quite aggressive in regulating advertising, whereas others take a more laissez-faire approach. A few states are notorious for the complexity of their advertising rules. If your graduates predominantly practice in one state, it is useful to focus on that state's rules, particularly if many of your graduates will be solo or small-firm practitioners.

b. First Amendment analysis.

Maybe an overview of the classic cases like *Shapero* and *Ohralik*; more recent cases such as *Went For It*. A recent Second Circuit case, *Alexander v. Cahill*, considers attempts by New York to regulate advertising.

13. Access to Justice

a. Pro bono representation.

Should pro bono be mandatory? (Requirement of 50 hours of pro bono to apply in New York for all applicants in 2013 and beyond.)

b. Legal aid and other means of funding access to justice.

14. Professionalism and Civility

If you choose to cover this topic, there are numerous ways to approach it. What is civility anyway—does it mean anything beyond simply not being a jerk? (The notorious Joe Jamail deposition videotape, available on YouTube, is a good example of the tactical use of obnoxious behavior.) Are lawyers sometimes branded as uncivil when they make powerful actors mad? Isn't the role of lawyers to "comfort the afflicted and afflict the comfortable"? Are virtues such as professionalism beyond the scope of regulation somehow? Is this something that, as the

title of the bestselling book says, you should have learned in kindergarten?

15. Judicial Ethics

Judicial ethics is tested on the MPRE, although not extensively. Because most law graduates will not become judges right away, a sensible approach to the subject of judicial ethics would be to emphasize the rules for judges that may be implicated in the dealings lawyers have with judges, for example, standards for recusal and disqualification, ex parte communications, and campaign financing.

V. Case Citations

A v. B (Hill Wallack), 726 A.2d 924 (N.J. 1999).

Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010).

Belge, People v., 376 N.Y.S.2d 771 (App. Div. 1975).

Bevill, Bresler & Schulman Asset Mgmt. Corp., In re, 805 F.2d 120 (3d Cir. 1986).

Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998).

Cuyler v. Sullivan, 446 U.S. 335 (1980).

Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645 (Mich. App. 1981).

Florida Bar v. Went For It, Inc., 515 U.S. 618 (1995).

Fordham, In re, 668 N.E.2d 816 (Mass. 1996).

Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).

Greycas v. Proud, 826 F.2d 1560 (7th Cir. 1987).

Himmel, In re, 533 N.E.2d 790 (Ill. 1988).

Jones v. Barnes, 463 U.S. 745 (1983).

Konigsberg v. State Bar of Calif., 366 U.S. 36 (1961).

Lafler v. Cooper, 132 S. Ct. 1376 (2012).

Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).

Martinez v. Ryan, 132 S. Ct. 1309 (2012).

Meredith, People v., 631 P.2d 46 (Cal. 1981).

Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College, 764 N.E.2d 825 (Mass. 2002).

Mickens v. Taylor, 535 U.S. 162 (2002).

Missouri v. Frye, 132 S. Ct. 1399 (2012).

Morrell, State v., 575 P.2d 1200 (Alaska 1978).

Murphy & Demory v. Murphy, Fairfax County, Va., Chancery Court.

Niesig v. Team I, 558 N.E.2d 1030 (N.Y. 1990).

Nix v. Whiteside, 475 U.S. 157 (1986).

Ohralik v. Ohio State Bar, 436 U.S. 447 (1978).

Olwell, State v., 394 P.2d 681 (Wash. 1981).

OPM debacle, Reported in various media sources, including James B. Stewart, "Ethics and the Law: A Case History," *New York Times Magazine* (Jan. 9, 1983).

Ryder, In re, 263 F. Supp. 360 (E.D. Va. 1967).

Schware v. Board of Bar Examiners, 353 U.S. 22 (1957).

SEC v. National Student Marketing, 457 F. Supp. 682 (D.D.C. 1978).

Shapero v. Kentucky Bar Ass'n, 486 U.S. 466 (1988).

Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751 (2d Cir. 1975).

Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962).

Stenhach, Commonwealth v., 514 A.2d 114 (Pa. Super. 1986).

Strickland v. Washington, 466 U.S. 668 (1984).

Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686 (Minn. 1980).

Upjohn Corp. v. U.S., 449 U.S. 383 (1981).