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TEACHING PROFESSIONAL RESPONSIBILITY IN THE FUTURE: CONTINUING THE DISCUSSION*

TERESA STANTON COLLETT†

Law school applications are declining.¹ Funding for legal education seems to be a low priority for state legislators and donors, who are susceptible to the widespread perception that lawyers' contribution to the common good is far outweighed by the transaction costs that attorneys create.² Legal scholarship is reviled as irrelevant or pernicious.³ The teaching in law schools often is seen as little better.⁴ As members of "the elite" of the profession, we are accused, at best, of having lost touch with the concerns of everyday lawyers,⁵ and at worst of having betrayed our profession.⁶ It is against this backdrop that Professors Tom Morgan,

* In this Essay, Professor Collett summarizes the 1997 W.M. Keck Foundation Forum on the Teaching of Legal Ethics proceedings of the Panel on Progress. The panel convened on March 22, 1997, to discuss where the professional responsibility teaching field stands now, and in what direction it might move. Panel members included Thomas B. Metzloff, Professor of Law, Duke University School of Law; Thomas D. Morgan, Oppenheim Professor of Antitrust & Trade Regulation Law, George Washington University National Law Center; and Deborah L. Rhode, Ernest F. McFarland Professor of Law, Director of the Keck Center on Legal Ethics and the Legal Profession, Stanford University. The panel was moderated by John M. Levy, Professor of Law, Director of Clinical Education & Summer Law Programs Abroad, College of William & Mary School of Law. All remarks attributed to these participants were made during the panel discussion unless otherwise indicated.

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1. See, e.g., *Plus They'll Get Lots More Sleep*, SEATTLE TIMES, Aug. 11, 1997, at C1, available in 1997 WL 3247605.

2. See, e.g., Rodney J. Uphoff et al., *Preparing the New Law Graduate to Practice Law: A View from the Trenches*, 65 U. CIN. L. REV. 381, 403 n.80 (1997) (noting budget difficulties confronting most law schools); Paul M. Barrett, *New York Firms Called Pricey, Arrogant*, WALL ST. J., Nov. 11, 1996, at B8.

3. See Uphoff et al., *supra* note 2, at 387.

4. See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION, AMERICAN BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 4-6 (1992) [hereinafter MACCRATE REPORT]; Uphoff et al., *supra* note 2, at 381-82.

5. See MARY ANN GLENDON, A NATION UNDER LAWYERS 222 (1994).

6. See *id.* at 225-26.

Tom Metzloff, Deborah Rhode, and I were asked to discuss the future of teaching professional responsibility.

All panelists agreed that changes are in store for professors of professional responsibility; some are desirable, while others are inevitable. Some reasons for these changes are obvious. The way law is practiced and regulated is changing, as is the political environment in which lawyers operate. Most professors are acutely aware that our students will be required to respond to a more diverse professional environment than we have seen in our lifetimes. Our students and colleagues bring more varied experience, knowledge, and values into law school classrooms. The curriculum and pedagogy of law schools are evolving, albeit slowly, to meet these changes. This Essay focuses on three areas of change: practice, students, and curriculum and pedagogy.

I. CHANGES IN THE PRACTICE OF LAW

Practicing law is radically different from the professional experiences of lawyers a generation ago. Local partnerships of friends, once the norm of law firm practice, have transformed into business associations of legal services providers.⁷ Megafirms, often employing more than 600 lawyers, have emerged.⁸ Branch offices provide legal services across state and national boundaries.⁹ Yet, the structural stability of these large firms is questionable; the bar has witnessed one firm after another implode, leaving lawyers scrambling for new professional homes.¹⁰ Many lawyers lacking strong skills in attracting clients, but providing solid legal representation, have suffered dramatic changes in their life styles, expectations, and law practice.¹¹

7. See *id.* at 20-35; MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 1-4 (1994); ANTHONY T. KRONMAN, THE LOST LAWYER 273-83 (1993); Anthony E. Davis, *The Long-Term Implications of the Kaye Scholer Case for Law Firm Management—Risk Management Comes of Age*, 35 S. TEX. L. REV. 677, 679-81 (1994); Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 4-5 (1991).

8. See KRONMAN, *supra* note 7, at 273-83.

9. See, e.g., Symposium, *Ethics and the Multijurisdictional Practice of Law*, 36 S. TEX. L. REV. 657 (1995).

10. See Todd S. Lundy, *Law Firms Experience the Best of Times, the Worst of Times*, TR. & EST., Mar. 1, 1997, at 24, 24-29.

11. See GLENDON, *supra* note 5, at 20-35.

Partially reacting against the bureaucratization of the practice in large firms, and partially responding to the apparent instability of law firm membership, some lawyers began small specialty, or boutique firms, providing expert assistance in highly specialized areas of the law.¹² Such firms now thrive in all major cities.¹³

Specialization, possible in the megafirms and boutiques, has led to an increasing demand for specialized professional associations addressing issues at the depth needed to assist sophisticated practitioners in their day-to-day practice.¹⁴ Professor Morgan observed that the growth of these associations led to a struggle among groups claiming to represent the profession: "I say struggle. I don't mean a war, specifically, but in effect battle for supremacy among organizations like the sections within the ABA or particular specialized groups of lawyers and the state bars, on the one hand, versus the American Bar Association on the other hand." This struggle is evidenced by the differing formulations of professional standards promulgated by various groups; examples include the *American Lawyer's Code of Conduct*,¹⁵ the *Bounds of Advocacy*,¹⁶ and the *ACTEC Commentaries on the Model Rules of Professional Conduct*.¹⁷ Professor Morgan distinguished

12. See Dan Margolies, *Free at Last: Restless Middle-Aged Attorneys Flee Bureaucracy of Big Law Firms*, KAN. CITY BUS. J., Mar. 14, 1997, at 17, 17.

13. See *id.*

14. See John Edgar, *Smart Clients, Competition Drives Law Firms to Reach New Plateaus*, KAN. CITY BUS. J., Oct. 18, 1996, at 20, 20.

15. AMERICAN LAWYER'S CODE OF CONDUCT (Roscoe Pound-American Trial Lawyers Found. 1982), reprinted in STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 323 (1989). The American Trial Lawyers Association is an organization comprised of experienced trial attorneys devoted to improving the quality of advocacy in American courts. Professor Monroe H. Freedman was involved actively in the development of the *American Lawyer's Code of Conduct*. See Monroe H. Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685, 685 (1981).

16. BOUNDS OF ADVOCACY: STANDARDS OF CONDUCT (American Academy of Matrimonial Lawyers 1992), reprinted in 9 J. AM. ACAD. MATRIM. LAW. 1 (1992). The American Academy of Matrimonial Lawyers is an organization of approximately 1200 members who represent families in the process of marital dissolution. Professor Robert H. Aronson was the reporter during the development of the ethical standards contained in the *Bounds of Advocacy*. See Robert H. Aronson, *Introduction: The Bounds of Advocacy*, 9 J. AM. ACAD. MATRIM. LAW. 41, 41 (1992).

17. AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL, ACTEC COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (2d ed. 1995). The American College of Trusts and Estate Counsel is an organization comprised of experienced law-

this struggle from the more widely perceived competition between the American Bar Association (ABA) and the American Law Institute (ALI), with its recent initiative, the *Restatement (Third) of the Law Governing Lawyers*:¹⁸

The *Restatement* does not purport to control lawyers' conduct in the same way the *Model Rules* do. Rather, it purports to collect rules developed in non-discipline contexts and thus change the focus from the disciplinary context alone. The "control" issue is fought between licensing courts and courts imposing civil liability; the "focus" question is between the ALI and ABA. This is not a big point, but the ALI does not want to become the new House of Delegates.

Professor Morgan predicted that the *Law Governing Lawyers* focus on multiple systems of controlling lawyers' conduct ultimately would prevail over the more traditional disciplinary focus of the ABA *Model Rules of Professional Conduct* or the *Model Code of Professional Responsibility*. Professor Morgan did not think that choice of direction would be without resistance. As he stated, "[t]he American Bar Association has a lot of time, effort, money and prestige wrapped up in the *Model Rules*. . . . [B]ut the reality is that there is going to be a real struggle to break free of that focus."¹⁹

This struggle for regulatory control of the legal profession extends beyond professional associations comprised exclusively of lawyers. In his article *Who Should Regulate Lawyers?*, Professor Wilkins identifies four possible regulatory systems—some controlled exclusively by lawyers, others not.²⁰ Traditional disciplinary systems adjunct to the bar have broad jurisdiction over

yers devoting a substantial portion of their practice to the trusts and estates area. Professor John R. Price was the reporter during the development of the commentaries, now in their second edition. See *id.* at 9. Revisions for a third edition are underway.

18. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (Proposed Final Draft No. 1, 1996).

19. The *Restatement's* relationship to state disciplinary codes is the subject of extensive academic commentary. See Symposium, *The Evolving Restatement of the Law Governing Lawyers*, 46 OKLA. L. REV. 1 (1993).

20. See David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 805-09 (1992).

conduct defined as unprofessional, but rely upon others for reports of misconduct before investigating.²¹ Professor Wilkins argues that this reliance upon others results in uneven enforcement because the majority of complaints are filed by individual, rather than corporate, clients seeking the bar's assistance in punishing lawyers whom the clients believe have acted unethically.²² Yet many injured clients will not complain because they do not recognize the source of their injuries. Even in the cases in which clients understand that the attorney's conduct led to their loss, compensation for client injuries is outside the jurisdiction of many disciplinary systems, giving little incentive for reporting misconduct to the bar.²³

Civil liability through expanded recognition of malpractice claims provides clients with greater incentives for pursuing relief for injuries due to attorney misconduct, but the costs of litigation make this method of regulating lawyers' conduct unavailing when the injuries have nominal economic value.²⁴ Also, this system generally fails to protect nonclients from injuries suffered at the hands of unscrupulous lawyers.²⁵ This later limitation, however, can be removed by eliminating the requirement that malpractice plaintiffs show they were in privity with the lawyer.²⁶

The third possible system for regulating attorney conduct is expanding institutional controls such as Rule 11²⁷ or the Securities and Exchange Commission's Rule 2(e).²⁸ This method ensures closer monitoring of lawyers within the context of institutional representation and has met with success in certain regu-

21. *See id.* at 822-24.

22. *See id.* at 822-30.

23. *See id.*

24. *See id.* at 830-33.

25. *See id.* at 833-35.

26. *See id.*; *see also* Geoffrey C. Hazard, Jr., *The Privity Requirement Reconsidered*, 37 S. TEX. L. REV. 967, 992-94 (1996) (suggesting replacing privity with the standard contained in RESTATEMENT (SECOND) OF AGENCY § 391 (1958)). *But see* John H. Bauman, *A Sense of Duty: Regulation of Lawyer Responsibility to Third Parties by the Tort System*, 37 S. TEX. L. REV. 995, 1030-31 (1996) (arguing that privity plays an important role in limiting attorneys' liability to foreseeable harms).

27. *See* FED. R. CIV. P. 11.

28. *See* 17 C.F.R. § 201.102(e) (1997).

lated industries.²⁹ Yet institutional controls subject lawyers and their clients to sanctions imposed for strategic reasons independent of the propriety of the lawyers' conduct.³⁰ This increase in institutional power has substantial costs to our understanding of zealous advocacy.

Political accountability is the fourth method of controlling lawyers' conduct identified by Professor Wilkins.³¹ Legislatively-created agencies could assume the responsibilities traditionally borne by bar disciplinary systems, enhanced by a grant of the independent investigative powers found in many administrative settings.³² This approach would be costly and would pose some danger of capture by the profession, rendering it virtually indistinguishable from the present disciplinary system; yet Professor Wilkins sees some benefit to this model.³³

Of the four systems that Professor Wilkins identifies, only one is controlled exclusively by lawyers.³⁴ This supports Professor Morgan's conclusion that the ALI will prevail in its current attempt to define the obligations of lawyers through the *Restatement*.³⁵ Consistent with Professor Wilkins' analysis, the *Restatement (Third) of the Law Governing Lawyers* approach recognizes that lawyers are regulated in ways beyond the traditional disciplinary system. Civil and criminal liability have emerged as alternative systems of regulating lawyers' conduct, as evidenced by the statistics reflecting increasing claims of attorney malpractice.³⁶ Federal agencies successfully have im-

29. See Wilkins, *supra* note 20, at 835-44. See generally *In the Matter of Kaye, Scholer, Fierman, Hays & Handler: A Symposium on Government Regulation, Lawyers' Ethics, and the Rule of Law*, 66 S. CAL. L. REV. 977 (1993) (exploring the implications of the *Kaye, Scholer* dispute); Symposium, *Lawyer and Law Firm Liability to Regulators and Shareholders*, 12 REV. LITIG. 513 (1993) (examining the impact of failed financial institutions' litigation on the law of professional responsibility and the regulation of lawyers); Symposium, *The Attorney-Client Relationship in a Regulated Society*, 35 S. TEX. L. REV. 571 (1994) (presenting eight views on the role of the lawyer in regulated society).

30. See Wilkins, *supra* note 20, at 838.

31. See *id.* at 844-47.

32. See *id.* at 844.

33. See *id.* at 844-47.

34. See *supra* notes 20-23 and accompanying text.

35. See *supra* text accompanying notes 18-19.

36. See *Developments in the Law—Lawyers' Responsibilities and Lawyers' Respons-*

posed millions of dollars of fines for attorney misconduct and have extracted agreements concerning the future management of cases.³⁷ State legislatures routinely threaten the independence of the bar with the creation of an administrative agency to oversee the delivery of legal services.³⁸ Lawyers, or law professors, believing the only risk from unethical conduct is discipline by the state bar, are out of touch with the reality of contemporary practice.

Finally, in addition to the changing organizational and regulatory structure of the practice of law, the legal profession is struggling to respond to the technological revolution resulting in access to massive amounts of information and almost instantaneous worldwide communication. One small example of the issues our students will face in practice is the application of the duty of confidentiality and attorney-client privilege to communications transmitted via new technology. Is the privilege waived if the client and attorney converse via cellular telephones?³⁹ If a lawyer communicates over the Internet with a client, must the message be encrypted to protect the privilege?⁴⁰ On a more fundamental level, what is the effect of technology on the quality of legal advice given to clients who may electronically communicate their request and demand a response by the end of the day? Can lawyers really issue considered opinions within two hours? Good judgment depends, at least in part, on adequate time for deliberation.

es, 107 HARV. L. REV. 1547, 1558-59 (1994); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 101-02 (1995); Manuel R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1663 (1995).

37. See Monroe H. Freedman, *Kaye Scholer—Overzealous or Overblown?*, 35 S. TEX. L. REV. 577, 581 (1994); Carolyn B. Lieberman et al., *Professional Conduct in Representing a Regulated Industry: The OTS Experience*, 35 S. TEX. L. REV. 607, 619 n.56, 629 (1994).

38. See Wilkins, *supra* note 20, at 844-46.

39. See David Hricik, *Confidentiality and Privilege in High-Tech Communications*, PROF. LAW., Feb. 1997, at 1, 19 (indicating that privilege should be afforded communications via cellular telephones but acknowledging no clear precedent exists on the issue).

40. See *id.* at 22-24 (suggesting the prudence of encrypting e-mail communications).

II. CHANGES IN OUR STUDENTS

Almost as dramatic as the changes in the structure and regulation of legal practice are the changes in the students entering law school classrooms. Known as "Generation X,"⁴¹ "Twentysomethings,"⁴² "Thirteeners,"⁴³ or "Slackers,"⁴⁴ these young adults born between 1960 and 1975 now comprise the majority of law students. Popular press descriptions of this generation as "lazy, cynical all-but-illiterate whiners,"⁴⁵ have been echoed in literature describing current law students.

That sound you hear emanating most often from law schools these days is not the hum of fevered intellectual activity. It is the den of collective whining. Whining is a special kind of communication—it is an expression of generalized dissatisfaction, usually by children who feel trapped by their unfortunate circumstances, but want to make their misery known to others nevertheless. Such sounds can also be emitted by adults, however—those who are unwilling to analyze and resolve their underlying sense of frustration. The reluctance of adult whiners to confront their difficulties is usually based in the fact that if they did, they know, deep down, they would get news they do not want to hear. Whining is also therefore self-centered and self-indulgent—it is what you do when you don't get what you want, as opposed to what you need or deserve.⁴⁶

Commentators accuse this generation of law students of viewing legal education from the vantage point of "consumers," rather than "participants."⁴⁷

Yet it may be that the sounds that have been interpreted as

41. Bob Filipczak, *It's Just a Job: Generation X at Work*, TRAINING, Apr. 1994, at 21.

42. *Id.* at 22.

43. *Id.* Those born between 1960 and 1975 constitute the thirteenth generation since the ratification of the Constitution. *See id.*

44. *Id.*

45. *Id.*

46. Timothy P. Terrell, *A Tour of the Whine Country: The Challenge of Extending the Tenets of Lawyer Professionalism to Law Professors and Law Students*, 34 WASHBURN L.J. 1, 1 (1994).

47. *See, e.g., id.* at 7.

whining are in fact something very different—a legitimate, though inarticulate, expression of frustration. These students challenge us to establish the relevance of what we teach. Although the oldest members of Generation X remember Watergate and helped put Ronald Reagan in the White House, “[t]hey don’t remember where they were when President Kennedy was shot, and references to Woodstock and the Summer of ’68 are a quick way to start them looking for the nearest exit.”⁴⁸ Appeals to long-term success through single-minded commitment to career ring hollow to the generation that

grew up watching their parents work themselves to death, only to be down-sized and restructured out of their chosen careers. Moreover, this is the first wave of latchkey kids to hit the work force, and they resent the amount of time their parents spent at work. They also watch their Boomer bosses turn into workaholics, and they don’t like what they see.⁴⁹

Motivators for prior generations of law students—“liberal” appeals to social justice or “conservative” promises of financial success—seemingly fall on deaf ears.

The key to gaining the attention of these students may lie in recognition of their positive qualities. Studies have shown that “[w]hat they hold dear are family life, local activism, national parks, penny loafers and mountain bikes.”⁵⁰ They are very spiritual, identifying their own needs as:

1. The need to believe that life is meaningful and has a purpose;
2. The need for a sense of community and deeper relationships;

48. Filipczak, *supra* note 41, at 22. A similar point has been made in the context of legal education: “In the 1960’s the faculties were conservative and the students were liberal. In the 1980’s, the students were conservative and the faculties were liberal—the professors having spent their formative years as members of the Grateful Dead entourage.” James D. Gordon III, *How Not to Succeed in Law School*, 100 *YALE L.J.* 1679, 1688-89 (1991).

49. Filipczak, *supra* note 41, at 24; see also Laura Zinn et al., *Move Over, Boomers: The Busters are Here—And They’re Angry*, *BUS. WK.*, Dec. 14, 1992, at 74 (including in this group the “first generation of latchkey children, products of dual-career households, or, in some 50% of cases, of divorced or separated parents”).

50. David M. Gross & Sophronia Scott, *Proceeding with Caution*, *TIME*, July 16, 1990, at 56, 57.

3. The need to be appreciated and loved;
4. The need to be listened to—to be heard;
5. The need to feel that one is growing in faith;
6. The need for practical help in developing a mature faith.⁵¹

A life in the law can satisfy, at least in part, the first two of these needs.

I often tell my students of an exchange that occurred in a small professional responsibility class. We had just engaged in a role play based upon the facts of *Spaulding v. Zimmerman*,⁵² a case in which defense counsel learns that the plaintiff is suffering from an aortic aneurysm, yet settles the case without disclosing this fact to the plaintiff.⁵³ The student, acting as defense counsel with knowledge of the plaintiff's aneurysm, called me, in my role as client, for permission to disclose this condition to the plaintiff and his lawyer. I refused on the basis that causation was too speculative to justify the increased settlement cost if the information was revealed. The student indicated her disagreement with my decision, but said she would complete the settlement negotiations according to my directions. When I asked if she would keep me as a client after the conclusion of the matter, she replied, "Sure. Most of what lawyers do is helping people do things that [the lawyers] believe are immoral." "If that is what lawyers do, then why do you want to spend the rest of your life being one," I immediately responded. "Isn't your life more valuable than that?" After a brief pause, the student said she had never been asked that question, and she would have to think about it before answering. The entire tenor of the class changed for the better.

Perhaps we engage our students by convincing them to answer the same question: "Is the practice of law worthy of your life?"⁵⁴

51. Robert A. Ludwig, *Twentysomethings: Struggling to Find a Meaningful Life*, CATHOLIC WORLD, Sept.-Oct. 1995, at 196, 202 (citing a 1992 Gallup survey report); see also *God's Own Country*, ECONOMIST, Aug. 19, 1995, at 77, 77 ("Corporate America has begun to take notice, especially as research indicates that members of the post-baby-boom generation, the so-called Generation x, are more religious than their parents were at their age.")

52. 116 N.W.2d 704 (Minn. 1962).

53. See *id.* at 708.

54. A word of warning may be in order here. If we ask our students to answer

III. CHANGES IN CURRICULUM & PEDAGOGY

How have the changes in law practice and students affected law school curriculum and pedagogy? Professor Morgan stated the panel's shared conclusion:

First, it may be obvious to us, but I don't think it is self-evident, that there is going to be more focus in law schools on professionalism and professional responsibility. . . . I don't think it will happen without resistance, but the *MacCrate Report* already has had, and it is inevitably going to have, an impact in the future that even those who want to resist its conclusions are going to have to come to grips with it. So, I don't think the question is whether there is going to be movement in this area. It is how much and what directions, and how can we motivate it to be in the right direction?

Buttressing the *MacCrate Report's* call for the teaching of the professional values⁵⁵ is *Teaching and Learning Professionalism*, the recent report of the Professionalism Committee of the ABA Section of Legal Education and Admissions to the Bar.⁵⁶ The Professionalism Committee joined the members of the MacCrate Commission in their call for law schools to "[e]levat[e] legal ethics and professionalism to the same level as the other major components of the curriculum."⁵⁷

Yet neither Professor Morgan nor Professor Rhode supported the idea of incorporating the suggestions of these committees into accreditation standards. Professor Rhode expressed concern about the ability to develop sufficient consensus around standards that could be enforced and monitored systematically across all law schools. Professor Morgan agreed, stating:

I am deeply skeptical that an accreditation process can get reliable criteria which it could enforce consistently to insure quality teaching of professional responsibility. Accreditation

that question, then we must be prepared to explain why teaching law students is a worthwhile way to spend our lives.

55. See MACCRATE REPORT, *supra* note 4, at 330-34.

56. PROFESSIONALISM COMM., AMERICAN BAR ASS'N, *TEACHING AND LEARNING PROFESSIONALISM* (1996).

57. *Id.* at 19.

committees are good at doing certain things. They are good at getting law schools to spend x amount of dollars, or things you can measure quantitatively. . . . [Instead] I think showing people what can be done with limited resources in a whole variety of different innovative ways . . . is the right way to go.⁵⁸

*Professional Responsibility: Ethics by the Pervasive Method*⁵⁹ is an example of the second approach. Professor Rhode's collection of materials to incorporate professional responsibility issues into every class makes adoption of the pervasive method much more attractive than any command by accreditation authorities. As Professor Morgan observed, however, even with materials readily at hand, uniform use of the pervasive method is unlikely:

I think we ought not view the pervasive method as requiring universal assent on our faculties. If we demand universal assent, we almost certainly are going to be disappointed. . . . In the regulated industries we call this the last 10% problem. That is, it is often true that if you have a problem, you can solve 90% of it with relatively little investment and struggle. When you try to solve the last 10% is when you have the most cost and the most resistance. I am not meaning to say that we ought to acquiesce in less than our best. I am simply saying that the pervasive method, in my judgment, ought to be seen as a direction rather than an outcome that is defined by universal acceptance.

In furtherance of that direction, Professor Rhode observed that her upcoming term as president of the Association of American Law Schools (AALS) provided some opportunity to support efforts to engage all law professors in discussions about teaching professional responsibility in their courses. She asked for assistance in updating the *Annotated Bibliography of Educational Materials on Legal Ethics*:⁶⁰

58. For a call to seriously consider the use of such institutional power, see John M. Levy, *Comment on Rule, Story, and Commitment in the Teaching of Legal Ethics*, by Roger C. Cramton and Susan P. Koniaak, 38 WM. & MARY L. REV. 207 (1996).

59. DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* (1994).

60. Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal*

I urge you to send me new items that either you have done or that you know of that seem to work well in the class. I wrote down a number of ideas that people have at this conference, but I think one of the things that we can usefully do when we are together is share what we do in our classrooms.

Teaching professional responsibility has matured. People who have taken innovative approaches now feel that those approaches have at least produced enough evidence that they can discuss their experiences. They talk about what they have tried, how it worked, what problems remain with the approach, and what successes recur every time. Although these discussions are not empirical studies, they are the beginning attempts to determine the best methodologies to achieve particular objectives in teaching professional responsibility.

Yet clear definition of those objectives seems illusive. Debate still rages between advocates of the moral philosophy, law of lawyering, and practical judgment approaches.⁶¹ Many of us want to embrace all three, yet in the two-to-three credit hours allotted in most law schools doing one well is difficult enough.

The changing nature of practice makes the challenge even greater. The skills young lawyers need to make it alone or in small firms differ from those needed by an "organizational man," the ideal employee of the megafirm.⁶² Should every student be introduced to principles of law office management and required to understand the difference between cash flow reports and profit and loss statements? Should the curriculum be designed to encourage the development of skills necessary to serve individual clients, those most likely to seek the services of a newly-admitted solo practitioner? Or should students be encouraged to begin specialization by studying particular bodies of law in great depth? Must students emerge from law school capable of self-

Ethics, LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 361.

61. See, e.g., Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 145, 169-89 (1996).

62. See generally Margolies, *supra* note 12, at 17 (discussing big firm expatriates' disenchantment with "bureaucratic imperatives" and emphasizing solo practitioners' degree of control).

sufficiency, or should they be poised for integration within a large organization? The answers to all of these questions lie within the context of a particular school with a particular faculty and student body. Professor Metzloff illustrated the task that lies before us in attempting to answer these questions with his closing hypothetical fact pattern.

IV. WHAT IS OUR RESPONSE?

Let's use our imaginations that we are in a special session of our curriculum committee, a very rare session on a Saturday. We are dealing with what do with our ethics curriculum and we have a presentation being made by our ethics professor, Professor Polly Professional. Polly is short for Pollyanna, I think. She just attended this conference at William and Mary and others like it last year, and she has concluded that what we really need is to upgrade our program significantly.

She recommended a mandatory two-hour course taught in small sections of no more than forty people. This would require at least three or four members of the faculty teaching these sections. A mandatory additional credit of ethics would be taken anytime thereafter prior to graduation. Hopefully the law school would have four or five such courses being offered regularly, or another advanced course that would have "special emphasis on ethical issues." Examples of the advanced course included the course Polly teaches in professional liability that deals with both medical and legal malpractice, courses in dispute resolution that often deal quite extensively with ethical issues, or the new course that she just taught this fall on mass torts with a look at the Dalkon Shield cases and *A Civil Action* by Jonathan Harr.⁶³ The students in this new course looked at ethical, procedural, and product liability issues.

Also, she advocated an aspirational voluntary use of the pervasive method throughout the school, encouraging the dean's office to provide stipends to faculty to attend ethical seminars and programs in their own fields. Your curriculum committee at your hypothetical law school could come up with something else. The

63. JONATHAN HARR, *A CIVIL ACTION* (1995).

point is to do more than you are doing, whatever it may be, and do it in a creative way.

Let's anticipate some of the dialogue that we will hear:

Professor Uni Versitatas: There is a lot of ethics going on in the university. There is a new ethics program within the main part of the university. Why don't we capture that a little bit? Why don't we get some of the folks from philosophy and sociology and create networks and faculty lunch meetings? Let's really make this into an interdisciplinary approach. Let's not reinvent the wheel here at the law school but create the networking. We have been too narrow in thinking about legal ethics. You teach rules, not really ethics.

Professor Ted Nology: What about technology? We really should do more about that. What we should do is get some of these people who are well-known in this field and get them on the Internet. We could hold three or four conferences every year at the law school. Maybe we could sell videotapes of these conferences and kind of branch out that way. You are trying to create a kind of architecture that is too complicated. Let's get on the Internet and make something happen.

Professor Ain't Broke: It seems to me your present efforts are good enough. I am delighted that you have these conferences and so much work is going on. I wish the field I taught was so dynamic. It's not, but more power to you. Go out and be fruitful and multiply, but don't add any hours. Revisit your class, remake it, that's great. Use the videotapes that Steve Gillers and some of these other folks have made. That's fine, we don't mind it, but your primary job is to make sure that you cover the rules in enough details so that the students don't complain about the MPRE. The fact that you've got an exciting, dynamic field doesn't mean you get more hours. We are cutting hours in curriculum. So, good idea. I'm excited for you, but go do it yourself.

Professor Edward Erudite (He always speaks last, and has contempt for the profession he never practiced and never intended to. He never took the bar because it is beneath him. His approach is quite academic, quite widespread, and sometimes hard to follow.): Why are we doing this? Why are we giving in to the bar in dictating curriculum? (He would then cite the example from Georgia and begin speaking of academic freedom in

eloquent terms.) If we go down this road of giving in to the profession about what we teach, then the consequences are very severe. It is not what we should be doing at all, and if anything, the mistake was made in 1975 when we let the ABA, just because of this Richard Nixon issue, get us on this road. We should be deciding what we want to teach, how we want to teach it, and when we want to teach it. The dangers are all out there. North Carolina's bar is talking about mandatory mentoring, where our students are going to have to team up with an actual lawyer for a semester to travel around with them, trying to reinvigorate the old days.

Dean Gerry ("show me the money") McGuire has been listening to this and likes what she's heard, but also said things are tight: We don't know who's going to teach this; we only have you, Professor Professional. We could bring in a lot of adjuncts to teach this, but I am troubled by your suggestion, because it looks to me like we are going to need seven or eight people. Where is the money going to come from? We only have a couple of faculty members who are going to do this regularly. Keck's not in this game any more. There used to be some sources of money, but not now.

Professor Professional: What about this new campaign? Aren't we about to launch a campaign to raise a lot of money? Can't we make it a priority? Can't we get a chair for professionalism and ethics?

Dean McGuire: Well, maybe. Is there such a thing as international ethics or interdisciplinary ethics or the law of ethics and economics? (She is trying to kill two birds with one stone.)

Professor Metzloff ended his dialogue, concluding that our success in answering one question will determine the end of this, and similar, plays: How do we make ethics matter?⁶⁴

64. Professor Metzloff concluded his remarks with specific suggestions: We could revisit the Rule 11 debate. We could get judges back into the breach when dealing with lawyer ethics. We could turn up the malpractice heat. I am not troubled at all by Ron Mallen's suggestion [that our students will be subject to malpractice claims in their careers]. . . . We could make discipline meaningful. We could change the MPRE to make it

V. CONCLUSION

Perhaps that question is the best possible conclusion for an essay continuing a panel discussion. But I can't resist closing with one of Professor Metzloff's conclusions: "Until it really matters in the profession, it really won't matter to the law schools. Second proposition. Until it really matters in the law schools, it won't matter in the profession." I think he is right, and we are at the beginning of a period when it matters to the profession, beyond doing penance for corrupt lawyers doing the illegal bidding of the President of the United States. Those who have taught in this area since Watergate were the pioneers, but those who join us today join the vanguard. These are exciting times.

count. We can fight to revise some specific model rules and make those real rules. Let's revisit some of the events that happened in the eighties. We can reform some structural issues within the profession dealing with contingency fees, and some other things that we all identify with. Law schools could have symposiums on ethics. We can create an aspirational goal that every law school will have one faculty person who is committed to the area of professionalism and ethics as their primary area of interest.