

The Roles of Law Schools and the Judiciary in Promoting and Maintaining Civility, Ethics and Professionalism

by G. Marshall Mundy and Vicki L. Wiese

Watergate was a turning point in American law. The nation bore witness to the President being brought to the verge of impeachment, and then resigning. But President Nixon was not forced to suffer for his transgressions alone—government attorneys were also caught in the act. One author noted that Attorney General John Mitchell and Counsel to the President John Dean were sent to prison as a result of their “excessively loyal service” to Nixon.¹ The attendant negative publicity surrounding the scandal brought the concept of attorney ethics to the forefront of the public’s interest.² Attorneys would soon be scrutinized as never before, and the price for failure now included the very real threat of criminal prosecution aside from disbarment.

The volume of publications which have addressed ethics and professionalism³ in the law since Watergate is nothing short of staggering. However, most articles address ethics and professionalism for *practicing* lawyers. Obviously, lawyers are an integral part of the legal system. But some scholars

argue that these concepts are being neglected in a setting where they could have the greatest impact—law school.

The Role of Law Schools in Ethics and Professionalism

Although the Commonwealth of Virginia is unique in that it allows persons to sit for the bar exam without attending law school, most of Virginia’s lawyers are the products of law schools. Bearing this in mind, it logically follows that law schools should be leaders in educating tomorrow’s lawyers regarding ethics and professionalism.

While Watergate may have caused law schools to re-focus on professionalism, the first attempts to include ethics and professionalism in the law school curriculum actually began in the 1950s in what was known as the “clinical education movement.”⁴ The movement became fairly comprehensive as of 1968 with the founding of the Council of Legal Education for

Professional Responsibility and its efforts to integrate clinical education into the law school curriculum. Shortly thereafter, the American Bar Association mandated law schools to require “instruction in the duties and responsibilities of the legal profession.”⁵

Despite the fact that most law schools were teaching ethics by the early 1980s, one of the first attempts to determine how professional responsibility was being taught did not take place until 1985. It was the American Bar Association that undertook a comprehensive survey on the teaching of professional responsibility and ethics.⁶ At that time, only ten percent of the 176 ABA approved law schools offered courses in professional responsibility to first year students.⁷ Of the survey respondents, only 3% indicated that the “basic” professional responsibility course should be taught in the first year in an effort to generate more interest in the topic.⁸ The survey also addressed methods used to teach, areas of emphasis (such as the *Model Rules of Professional Conduct* or

“Now Watergate does not bother me.

Does your conscience bother you, tell the truth.”

Lynyrd Skynyrd, *Sweet Home Alabama*

state ethics codes) and recommendations relating to the teaching of ethics.

While many of the details of the survey are beyond the scope of this article, a few results bear mention. At that time, only 3% of the law schools offered an advance course in professional responsibility.⁹ A mere 15% of schools discussed philosophical-social issues, and less than 1% supported the idea of teaching state ethics rules, opinions and case law in addition to the ABA standards.¹⁰

Recent writings suggest that not only should it be required that all first year students enroll in an ethics class, but that all students should have an ethics course for each year of study.¹¹ Others maintain that students should also be required to read a book such as *One L*,¹² *To Kill a Mockingbird*¹³ or *The Moral Compass of the American Lawyer*.¹⁴ The anticipated goal of such programs is to ensure that all students have comprehensive exposure to the concepts of civility and professionalism prior to bar admission.

Perhaps one of the more recent and major concepts involving professionalism is the theory of “pervasive ethics.” Pervasive ethics is generally defined as a framework that integrates professional issues throughout the core curricula.¹⁵ One proponent of the pervasive ethics model explains that this teaching methodology should be the norm because “legal ethics deserves discussion in all substantive areas because it arises in all substantive areas.”¹⁶

As of 1996, it was estimated that two-thirds of the 48 law schools responding to an ABA survey had already implemented a pervasive ethics program. It was also noted that most of the programs relied on voluntary participation of the students and faculty.¹⁷ It is unknown how many of these programs remain today and if they remain voluntary or compulsory.

Despite the many attempts to teach professionalism in the law schools, other scholars believe that no program will ever be completely effective because, oftentimes, law school faculty are resistant to teaching ethics. The teaching of ethics and

professionalism from the perspective of a practicing lawyer is often lost on law professors who, more often than not, are pure academicians and not actual practitioners. Other professors who have been teaching for a significant amount of time may not be inclined to invest the time and effort to change a curriculum that has proven successful for them in the past.¹⁸

While ethics and professionalism are certain to remain in the core curricula at most American law schools, it was surprising to discover that Canadian law schools rarely offer classes on these topics. A 1990 report completed by Brent Cotter, a former Canadian law professor and deputy attorney general of Saskatchewan, found that only one of the 21 Canadian law schools surveyed offered a course in legal ethics on a regular basis.¹⁹

The Cotter Report also addressed the implementation and success of the pervasive ethics method. The report concluded that there was little commitment by Canadian law schools to teach professional responsibility, and in the few schools that did it was found to be “unsuccessful as a teaching strategy or philosophy.”²⁰

But law schools do not need to undertake sweeping reforms to better address professional responsibility. A common method used to teach legal writing is referred to as the “IRAC” method—issue, rule, analysis and conclusion. Law schools could simply amend this to become the IRACE method, in which the “E” stands for ethical or professionalism issues.²¹ A law student would be unable to avoid considering ethics in every problem, and professors would be reminded to incorporate an ethics component in issues already raised in the classroom.

While theories may have changed, almost every article written about ethics and professionalism concludes that our law schools can and should be doing a better job in their instruction in these areas. A common and long-standing suggestion has been that law schools should recruit judges to teach these courses as adjunct or part-time faculty. How do judges view the

teaching of professional responsibility and civility and what is their role in this facet of law?

Judges and Civility

Some attorneys have heard of, or experienced firsthand, a judge who has acted less than civility in the courtroom. Those lawyers bristle at the notion of law schools seeking judges to teach tomorrow’s lawyers about professional responsibility and civility. Thankfully, most judges are appropriate candidates for an adjunct position teaching professional responsibility.

Judges, like lawyers, are not immune to public scrutiny. They know their words and actions are reviewed by legal watchdog groups and members of the public. Not only are Virginia judges subject to disciplinary action by the Judicial Inquiry and Review Commission, but participants dissatisfied with a judge’s behavior can contact any number of other organizations to lodge their complaints, including Americans for the Enforcement of Judicial Ethics.²²

Because of the attention that is inherently cast upon judges, most do not need to be reminded that professionalism and civility should be a concern in all aspects of a judge’s life. Nonetheless, judges have taken an active role in ensuring that these areas are considered by the judiciary.

The Virginia Supreme Court, by order entered on September 7, 1987, approved a *Mandatory Course on Professionalism*, stating that “. . . any active member licensed after June 30, 1988, and any other member who changes his or her membership to active status shall complete the required course within twelve months of becoming an active member . . .” The program is taught by a select faculty of prominent Virginia lawyers and judges appointed by the Virginia Supreme Court Chief Justice and focuses on the Virginia *Rules of Professional Conduct* and lawyers’ broader ethical obligations to their clients, to the judicial system and to society. Of the 72 faculty members for the

2003–2004 *Course on Professionalism*, 58 are attorneys (most in the private practice of law), 12 are judges and two are law professors.

The 2003–2004 *Professionalism Course* includes a lecture titled “Judicial Responsibilities and Involvement in Professionalism Issues,” with the following as topics:

- Leadership from the top down,
- All judges in Virginia were lawyers before they were judges and understand the challenges and rewards of professional conduct,
- The courtroom as the crucible of professionalism—the necessity of doing the right thing in a tough spot, and
- The value of a lawyer’s reputation as professional—value to the court, value to the bar and value to the clients.

The 2003–2004 *Professionalism Course* emphasizes the “Principles of Professional Courtesy,” adopted by the Board of Governors of the Virginia State Bar Litigation Section in June 1988, which states:

“Civility and manners, no less than a deep-rooted, broad respect for the law, are the mark of an enlightened and effective system of justice. Courtesy, then, emanating from all quarters, extending in all directions, becomes an indispensable ingredient in the orderly administration of the courts. Thoughtful, courteous conduct, manners and attitudes, constantly practiced by the bench and the bar in a symbiotic relationship, will improve both the reality, and the public perception, of the legal system . . . ”

The importance of the judiciary in the foregoing is apparent, and greater involvement of the judiciary will be to everyone’s benefit. The professionalism course is, of course, for newly licensed lawyers, and ongoing emphasis on professionalism must continue on a day-to-day basis with all other members of the bar.

One of the most thorough and recent reviews of judge’s perspectives on professionalism was completed in 1999. Three years earlier, the Conference of Chief Justices (CCJ) adopted a resolution calling for a study of professionalism and how the courts could assist in providing support and leadership for professionalism initiatives.²³ The study ultimately contained specific recommendations that comprise the National Action Plan as adopted by the CCJ.

The first premise identified in the National Action Plan proffered that the appellate court of the highest jurisdiction in each state should establish a commission on professionalism or other agency to be under the direct control of the appellate court.²⁴ The CCJ enunciated that the commission on professionalism’s sole goal should be to promote professionalism in the legal profession and the judiciary. It also highlighted the fact that such a commission would allow a state’s professionalism efforts to be centralized and thus simplify coordination of events.

The National Action Plan also noted that judges should endeavor to volunteer their time and efforts to law schools in their areas as adjunct professors, judging moot court competitions and serving as advisors to law school organizations.²⁵ It emphasized that judges should visit the law schools in their jurisdictions at a minimum of once a year in the event they are unable to volunteer on a more consistent basis.

Professionalism in litigation was addressed in the National Action Plan. Judges were urged to “lead by example” and make clear their expectations for attorneys and litigants. This can be done by including standard provisions in pre-trial orders or providing lawyers with a copy of the local bar’s creed regarding professionalism *and* requiring attorneys to certify that they have read the creed and agree to abide by it.

A judge in Milwaukee, Wisconsin, inserts a provision of Wisconsin’s Supreme Court Rules in every pretrial order. If the judge sees uncivil behavior, he simply says,

“You’re not complying with paragraph eight of the pretrial order” and tells them, “I can impose sanctions.”²⁶ Before the judge first began to implement this provision in his orders, he received the approval from his colleagues on the bench and also made it clear that he intended to enforce the provision for any uncivil behavior that arose inside or outside of the courtroom.

Judges should also publish or speak about professionalism and civility not only for bar activities but also for public interest groups, government officials and educational institutions. By publicly showing their interest, judges explicitly demonstrate and reinforce the importance that they place on civility and also bolster the public’s perception of law as an honorable and accountable profession.

Conclusion

Just like attorneys, law schools and judges bear a continuing obligation to ensure that professionalism and civility remain hallmarks of the legal profession. While all of us may hope that these characteristics are innate to those in or aspiring to enter the legal field, experience tells us that there is no substitute for extensive and continuing education. Law schools are powerful institutions with the unique ability to emphasize and validate the importance of professionalism and civility. Judges must continually remember that we are a self-regulating profession that does not function properly when the judiciary is passive and assumes no responsibility for teaching or enforcing professionalism and civility. ☺

Endnotes

- 1 Nelson Lund, *The President as Client and the Ethics of the President’s Lawyers*, 61 *Law & Contemp. Probs.* 65 (1998).
- 2 Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, 1997 *ABA Sect. Legal Prof.* 26 (stating that in the aftermath of Watergate, the sheer number of lawyers linked with illegal activities contributed to a sharp dip in public confidence).
- 3 While the terms “ethics” and “professionalism” are related, they are not synonymous. For the purposes of this article, ethics refers to the minimum standards of conduct required by the Rules of Professional Conduct. These authors believe

professionalism was best defined as “an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging these pursuits as part of a common calling to promote justice and public good.” *Teaching and Learning Professionalism*, 1996 ABA Report of the Professionalism Committee, 6. In addition, civility is simply defined as “professional conduct,” which is an ethic of reciprocity and is an integral component of professionalism.

- 4 *Promoting Professionalism* (ABA, Chicago, IL) 1998, at 33.
- 5 Phillip C. Kissam, *The Discipline of Law Schools* (Carolina Academic Press) 2003, at 157.
- 6 *A Survey on the Teaching of Professional Responsibility* (ABA, Chicago, IL) 1986.
- 7 *Id.* at 4.
- 8 *Id.* at 6.
- 9 *Id.* at 7.
- 10 *Id.* at 9, 10.
- 11 *Teaching and Learning Professionalism*, 1996 ABA Rep. of the Professionalism Comm, 18.
- 12 Professor Peter Dillon, Oklahoma City University School of Law.
- 13 *A Survey on the Teaching of Professional Responsibility* (ABA, Chicago, IL) 1986, at 19.
- 14 Sean P. Ravenel, *The Contagion of Example*, 49 Fed. Law. 31, 33 (2002).
- 15 Deborah L. Rhode, *The Professional Responsibilities of Professional Schools: Pervasive Ethics in Perspective*, 1997 ABA Sect. Legal Prof. 25.
- 16 *Id.* at 27.

- 17 *Id.* at 25.
- 18 *Id.* at 31.
- 19 *Ethical Challenges to Legal Education and Conduct*, (Kim Economides ed., Hart Publishing) (1998) 108.
- 20 *Id.* at 109.
- 21 Sean P. Ravenel, *The Contagion of Example*, 49 Fed. Law. 31 (2002).
- 22 <http://www.rentamarck.com/aeje>.
- 23 *A National Action Plan on Lawyer Conduct and Professionalism*, 1999 Rep. of the Working Group on Law. Conduct and Professionalism, viii.
- 24 *Id.* at 3.
- 25 *Id.*
- 26 *Incivility Takes a Toll*, 74 Wis. Law. 11 (2001).



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