# Professional Responsibility Training in Law School and its Philosophical Background

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Professional responsibility training in law school presents problems of three sorts—first, should law schools provide training; second, if so, what method should be used; and third, what, if any, monitoring should be used to assure its effectiveness. Past proposals for dealing with these problems have threatened unwelcome incursions into the independent academic status of law schools and law professors, and intrusions upon the professor-student mentor relationship.[1] In particular, a separate professional responsibility class may permit a professor to impose idiosyncratic views on students.[2] Yet, the alternative "pervasive" method, where professors discuss professional responsibility as it affects their courses' subject matter, risks unskilled instruction in delicate questions and the temptation to sacrifice professional responsibility for substantive coverage.[3]

In many jurisdictions, the pervasive method will meet the professional responsibility training standards set by state bar associations for membership for students and by professional associations

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1. Fellman, *Academic Freedom in American Law*, 1961 Wis. L. Rev. 3 (1961); Stone, Legal Education and Public Responsibility 295, 298, 304-05 (1959).

2. Smedley, *The Pervasive Approach on a Large Scale—The Vanderbilt Experiment*, 15 J. Legal Educ. 435 (1963). "In the [use of the pervasive method] . . . the students are afforded the opportunity to see the professional responsibility issue in proper perspective, together with the legal issue to which it pertains and the practical situation out of which it arises. Thus, the matter is freed of the Sunday-School-Class atmosphere that may inhibit expression of opinion in Legal Ethics or Professional of Law Classes—an atmosphere that tends to forewarn the student that when asked the questions, 'Is it proper for the lawyer to do this or that?', the answer expected is probably 'No.' Furthermore, for the instant, at least, matters of professional responsibility are viewed as being on a par with matters of substantive law in the life of the practicing lawyer." *Id.*

3. *Id.;* Covington, *The Pervasive Approach to Teaching Professional Responsibility: Experiences in an Insurance Course*, 41 U. Colo. L. Rev. 355, 356-57 (1969); Stone, *supra* note 1 at 244-48.

for accreditation standards for law schools. However, some jurisdictions presently require, and the trend is toward, more specific course offerings and training programs in professional responsibility.[4]

This paper shall deal with the question of whether, and to what extent, professional responsibility should be taught in law schools. In this connection, the message that law schools' treatment of these issues implicitly sends students about the law schools' feeling of importance of professional responsibility will be discussed.[5] Second, the paper will review some of the major methods of teaching professional responsibility by describing the techniques involved and discussing their relative merits and demerits. Third, suggestions will be provided for what should be taught about professional responsibility, with some specific suggestions for

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4. The American Bar Association [ABA] is considering a specific course requirement in professional responsibility training for law school accreditation purposes, *The Proposed Discussion Draft of the Model Rules of Professional Conduct* put forth by the ABA Kutak Commission [ABA Kutak] (1980); *See also* THE HASTINGS CENTER, THE TEACHING OF ETHICS IN HIGHER EDUCATION 39-40 (1979) (a report).

5. Weckstein, *Watergate and the Law Schools*, 12 SAN DIEGO L. REV. 261 (1975); Covington, *supra* note 3 at 356-57. In this regard, Judge M. Stecher's comments at the Bar Association of the City of New York [NYCBA] symposium on *Professional Responsibility of the Lawyer, The Murky Divide Between Right and Wrong*, 155 (1976) are of interest: "[Most] attorneys are familiar with those elements of the Code of Professional Responsibility which go beyond what has been called the 'Ten Commandments type of ethics,' which [they] know instinctively, without having been exposed to professional training, that [they] should abide by . . . . [But] there is this great area which is technical and limited to the profession itself. Most lawyers are not familiar with [this area of professional responsibility] and it would seem to me that it is the obligation of the law schools . . . to do two things for its students: one is to make them familiar with the codes themselves and the other is, on a principled basis, to establish the sense of priorities . . . as to what a lawyer's obligation is to his profession. When [lawyers] join [the bar, they] do not assume the morals of the market marketplace. [They] are obligated to assume a higher sense of morality . . . and to maintain a [high] standard of integrity. And it is a philosophy of this character which I think is uniquely suited to the law schools. I would not offer a suggestion at this moment on the technique of teaching—whether it should be just to give the canons of professional responsibility, or to go through them on a case by case basis. I suspect the latter would be more desirable. But I definitely believe that the earlier this can be brought to the attention of the prospective lawyer the better off the profession will be. Because in most cases it is merely a question of making certain that they understand their obligations at a very early stage."

professional responsibility training for various areas of law practice.

In dealing with these issues we will consider professional responsibility training to encompass training in the specific codes of professional responsibility that lawyers are bound to follow under the penalty of their sanctions. Professional responsibility will also encompass training in the sense of priorities as to a lawyer's obligation to his or her profession, to the public, to his or her clients and to the courts.[6]

## I. The Decision to Provide Training and the Specifics Involved

The threshold question is whether or not to provide professional responsibility training in law school. Assuming an affirmative answer, the article considers the efficacy of specific course work versus the pervasive method; second, the most effective time for specific professional responsibility course work, if adopted, and the optimum course size or structure; and third, the credit to be allotted.

### *A. The Decision to Provide Professional Responsibility Training in Law School*

For many years the prevailing view was that professional responsibility could not be taught.[7] If law students did not know the difference between right and wrong by the time they reached law school, nothing law professors could do would make a difference.[8]

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6. *Id.*

7. Carlin, *What Law Schools Can Do about Professional Responsibility*, 4 CONN. L. REV. 459 (1971). Dr. Jerome Carlin's 1966 survey of the New York City Bar Association entitled *Lawyer's Ethics* is a major contribution to the subject. It argues that law schools' efforts to inculcate appropriate values in law students are doomed to failure "because it assumes that professional norms and values can be 'internalized' during law school, and fruitless also because it assumes that ethical conduct is determined mainly by the strength of the lawyer's moral or ethical commitments."

8. Jones, *Lawyers and Justice: The Uneasy Ethics of Partisianship*, 23 VILL. L. REV. 957 (1978). "The political and social morality of John Ehrlichman or John Mitchell would have been improved by the study of the *Code of Professional Responsibility* about as much, I fear, as study of Robert Louis Stevenson's *Essay on Sportsmanship* would improve the tennis court behavior of Ilye Nastase. But whether or not it was relevant to the occasion that brought it forth, I warmly welcome the insistence of the organized bar that the duties of the profession and specifically the CPR, be required as an integral part of university law study. [One

This view has given way to an increasing sense of the importance of professional responsibility codes and of the importance of educating members of the legal profession in the specifics of such codes.[9] This was in response to concern in the public and in the legal community during the last decade about the status of professional responsibility and the importance it is given, or not given, in attorneys' professional lives.[10] Many felt there was a moral vacuum in the legal profession because of the lack of vigorous training in professional responsibility.[11]

By the early 1970s states had begun to require professional responsibility training by law schools as a prerequisite to bar membership.[12] This movement toward reform and more stringent standards was accelerated by the Watergate trauma in the 1970s[13] and more states began to require formal training in professional responsibility.[14] Presently many of the states require professional responsibility training of some sort and the American Bar Associa-

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of my] reasons for being happy about this 1974 intervention of the organized bar [ABA requiring professional responsibility training in law schools, is] that it will put the emphasis in one course, at least on lawyers' operations as distinguished from law in the books, on what lawyers do and can do with legal theory. We can stand a little less abstract appellate decisions and profit from a little more schooling in the realities of the lawyers' functioning. Whatever else may or may not be accomplished by law school instruction in 'the duties and responsibilities of the legal profession,' the byproduct cannot but be a clearer awareness on the part of law students that law is not only what courts and legislatures say, but also, in its retail phases, what lawyers do." *Id.*

9. Weckstein, *supra* note 5; Watson, *The Current Status of the Lawyer Professional: Some Implications for Legal Education*, 24 QUADRANGLE—U. MICH. L. REV. 17 (1980) [hereinafter cited as 1980 Watson]; Clark, *Teaching Professional Ethics*, 12 SAN DIEGO L. REV. 249 (1975).

10. Jones, *supra* note 8 at 959.

11. Watson, *The Watergate Lawyer Syndrome: An Educational Deficiency Disease*, 26 J. LEGAL EDUC. 441, 443 (1974); Pincus, *One Man's Perspective on Ethics and the Legal Profession*, 12 SAN DIEGO L. REV. 279, 280 (1975).

12. L. LAMBORN, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY, A SURVEY OF CURRENT METHODS OF INSTRUCTION IN AMERICAN LAW SCHOOLS (1963).

13. Jones, *supra* note 8. "In the post-Watergate summer of 1974, the ABA, amended its legal education standards to add a mandatory provision that all accredited law schools must 'offer and require for all students . . . instruction in the duties and responsibilities of the legal profession,' which covers 'the history, goals, structure and responsibility of the legal profession and its members including the *Code of Professional Responsibility* of the ABA.'" *Id.; see also* Clark, *supra* note 9 at 259; Weinstein, *Educating Ethical Lawyers*, 47 N.Y.B.J. 260, 308 (1975).

14. Weckstein, *supra* note 5.

tion [ABA] requires professional responsibility training in accredited schools.[15]

The trend for the ABA and the state legislatures is to make increasingly specific requirements for individual courses, teaching methods, and the subject content for professional responsibility training.[16] Indeed, the ABA is presently considering a specific course requirement for professional responsibility and many states are deciding to make professional responsibility testing part of their bar admission requirements.[17] Although the provisions for this sort of professional responsibility training is commendable, there is concern among law schools and faculty about the status of academic freedom should specific courses and course content become mandatory.[18] To avert inordinate incursion by national, state, and local bar associations and legislatures upon the academic freedom of legal educators, law schools should consider adopting vigorous programs for professional responsibility training.[19]

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15. Jones, *supra* note 8; *see* ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS, Standard 302(a)(iii).

16. Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools,* in TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS AND PROCEEDINGS FROM NATIONAL LAWYERS CONFERENCE 23 (P. Keenan ed. 1979).

17. ABA KUTAK COMM'N, MODEL RULES OF PROFESSIONAL CONDUCT (Proposed Discussion Draft, 1980). Additionally, the National Conference of Bar Examiners began providing in 1980 (through the American College of Testing [ACT], Iowa City, Iowa) a *Multi-State Professional Responsibility Examination.* The examination covers the ABA's CPR and Code of Judicial Conduct (CJC) by using 50 multiple choice questions. According to the ACT, 13 states have either adopted the requirement of passing the examinatin or plan to do so. Those states are Ill., Kansas, Ala., Cal., Conn., Ga., Mass., Minn., N.H., Oregon, Okla., S.C., and Wyoming. Other states, for example Florida, already have non-standardized bar examination sections on professional responsibility.

18. Goddard & Koons, *Intellectual Freedom and the University,* SCIENCE, (1971). "Academic freedom as we know it dates back to the 1870s when the German universities had such a marked influence on American higher education. In the German view, academic freedom was the 'distinctive prerogative of the academic profession and the essential condition of all universities.' " R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE U.S. (1955). "One had to be free to examine bodies of evidence and to report his findings. There had to be freedom of teaching and freedom of inquiry. . . . Without academic freedom the search for and dissemination of knowledge becomes more shadow than substance." P. Kurland, The Politicization of the Academy (June 4, 1970) (speech before the Women's Bar Association of Illinois).

19. 1980 Watson, *supra* note 9 at 24; Clark, *supra* note 9; Campbell, *Toward*

Further, there are many issues in the area of professional responsibility that are not yet resolved as to what action, in the close difficult cases, would be the officially recognized professionally responsible solution. A course in the specifics of the various codes of conduct would provide guidance to attorneys who want to act in a professionally responsible manner but who, in these cases, literally do not know and find it almost impossible to determine what classifies as officially recognized "proper" conduct.[20] An example of this would be a discussion of the issues involved in the case where an attorney's duties to his or her client conflict with his or her duties to the community. (*e.g.* A client discloses an intended or ongoing illegal activity to his or her lawyer. Is the lawyer required to disclose either or both of these confidences to the court or law enforcement officers?)[21]

*B. The Specifics of Professional Responsibility Training*

Since the provision of professional responsibility training is a necessity for law schools, a consideration of the specifics involved in providing such training is in order.

*1. The Pervasive Method Versus Course Work.*

For the purposes of most national, state, and local bar requirements, the pervasive method of providing professional responsibility training (where each professor discusses professional responsibility as it affects the subject matter of his or her course) is adequate.[22] The trend, however, is toward requiring specific courses covering specific subject materials.[23]

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*an Improved Legal Education, Is Anyone Out There,* 43 SASK. L. REV. 81, 117 (1979).

20. Rogers, *An Approach to the Teaching of Professional Responsibility to First Year Law Students,* 4 OHIO N. L. REV. 800 (1977).

21. Kaufman, *A Critical First Look at the Model Rules of Professional Conduct,* 66 ABA J. 1074, 1077 (1980); "Under the present ABA Code of Conduct, Disciplinary Rule 4-101(C)(3), an attorney 'may' on a discretionary basis disclose the intended crime no matter whether the client intends to commit a parking violation or murder. Rule 1.7 of the Discussion Draft for the Model Rules of Professional Conduct would require disclosure to prevent a client from committing acts that would result in death or serious bodily harm to another and leaves the other on a discretionary basis.

22. Smedley, *supra* note 2; ABA KUTAK COMM'N, *supra* note 17.

23. Weckstein, *supra* note 5.

The possibility that some professors might subjugate students to their personal moral codes with no tolerance for opposing views rather than provide true professional responsibility training may cause the law schools to opt for the pervasive method.[24] Unfortunately, with the pervasive method many professors do not spend adequate time dealing with the aspects of professional responsibility involved in their substantive course materials such as torts, contracts, criminal law, and constitutional law. Instead they relegate professional responsibility to a minor portion of their courses, if they cover it at all.[25] The concern here is that the pervasive method will be pervasively negligent[26] in conveying a true knowledge and cohesive compehension of the various concepts and codes of professional responsibility.[27]

One problem with this method is that the only way to assure that professional responsibility is taught under the pervasive method may be to review professors' course materials and visit their classes. Review and quality control of the pervasive method create a risk of impinging on the academic independence of the professors in their course work.[28] It is hardly appealing to professors to have review and inspection of their course and materials even if it is merely to assure that they provide adequate professional responsibility training.[29]

An alternative to surveillance is that the faculty could vote on the content of professional responsibility training that professors must provide. This would help to assure that training is provided and help to guard against a particular professor's moral prefer-

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24. Smedley, *supra* note 2, at 437.

25. 1980 Watson, *supra* note 9. Watson attributes reluctance on the part of professors to cover the subject to an emotional reaction to the sense of discomfort they feel with the subject; Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1 (1963) [hereinafter cited as 1963 Watson]. In this article Watson argues that professors are psychologically uncomfortable in teaching professional responsibility and may, therefore, either avoid the subject or convey their discomfort to their students thereby inhibiting open meaningful discussion.

26. Rogers, *supra* note 20.

27. Samad, *The Pervasive Approach to Teaching Professional Responsibility*, 26 OHIO ST. L.J. 100, 105 (1965); Thode & Smedley, *An Evaluation of the Pervasive Approach for Professional Responsibility of Lawyers*, 41 U. COLO. L. REV. 365 (1964).

28. Fellman, *supra* note 1.

29. Rogers, *supra* note 20 at 365.

ences being imposed on students without tolerance for differing ideas. However, this again would impinge upon academic freedom because the faculty, to an extent, would usurp the professor's prerogative to determine course content and materials.[30] Finally, although the pervasive method may be sufficient for present training requirements in most jurisdictions, the trend is clearly toward more specific course work.[31] In considering training to meet both present and future standards as well as to avert the imposition of more stringent requirements by authorities outside the law school, specific course work increases in appeal.[32] Thus, specific course work in the basic professional responsibility codes (supplying a framework in which it would be difficult for professors inordinately to impose their own moral judgments) would be the most viable solution to the dilemma.

### 2. *The Most Effective Timing and Optimal Class Size and Structure if Course Work is Chosen.*

Some legal educators argue that law students cannot understand the intricacies of attorneys' responsibilities to the community, to other professionals, to their clients and to the judicial system until they have acquired some knowledge of substantive law. Therefore, course work in professional responsibility should wait until the second or third year of law school when students have studied substantive law.[33]

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30. D. Bok, Reflections on the Ethical Responsibilities of the University in Society (March 7, 1979) (an open letter to the Harvard Community from University President Derek S. Bok). "On a campus where positions are constantly being taken on issues arousing passionate feelings and heated debate, a junior faculty member hoping for tenure, a young administrator seeking a promotion, a full professor worrying about a raise in salary may feel inhibited, however, slightly, from openly espousing a view contrary to the official doctrine of the university. At the very least, individuals in the university will be offended by the creation of official doctrines that conflict with their personal convictions while deeply resenting the implication that an orthodoxy prevails in a community that almost invariably contains a variety of differing views." Stone, *supra* note 3 at 249-53.

31. Goldberg, *supra* note 16; Jones, *supra* note 8.

32. Clark, *supra* note 9 at 255: "[We must do something effective about the teaching of professional responsibility.] Congress is now exploring the necessity of regulating the profession. Several state legislatures have done this in the past, and, come January, more will do so. We must act quickly and definitely if we wish to retain the right of self-discipline."

33. Weckstein, *supra* note 5; Kelly, Legal Ethics and Legal Education (1979)

In contrast, others argue that law students should be imbued with the basics of professional responsibility and professional responsibility codes from the outset of the legal education career.[34] In this way, students would have the concepts of professional responsibility in mind while learning other facets of the law.[35] Also, law learned during the remaining law school career could be related, be it implicitly, explicitly, consciously, or subconsciously, to these tenets learned in the beginning of law school.[36]

In this connection some argue that the large lecture class covering the basics of the applicable codes is most useful in the first year[37] when students are oriented toward learning substantive law in large classes through the semi-socratic semi-lecture method.[38] Law students need at least some instruction in the basic tenets of professional responsibility in order to know how to comply with them.[39] In a sense, the codes of professional responsibility are similar to black-letter law and as such need to be a basic legal course in the same way that contracts, torts, civil procedure, and criminal law are treated.[40]

Large traditional lecture classes during the first year would provide a basis of ethical concepts to be applied to other substantive law courses and to be used throughout the entire legal career.[41] This course should be mandatory in the first year because law students need this sort of basic training to apply to their legal education and to give them guidance in their professional careers.[42] This

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(prepared for Hastings Center); *see* Stone, *supra* note 1 at 343-48 (the opinion of Lon Fuller).

34. Rogers, *supra* note 20; see Stone, *supra* note 1, at 343-48 (the opinions of Cheatham and Johnson).

35. Costigan, *The Teaching of Legal Ethics*, 4 AM. L. S. REV. 290, 292 (1917).

36. Clark, *supra* note 9; Weckstein, *supra* note 5.

37. Stone, *supra* note 1 at 273-75.

38. Rogers, *supra* note 20; Stone, *supra* note 1 at 300-01.

39. Rogers, *supra* note 20.

40. Wirtz, *Training in Professional Competence and Responsibility*, 13 J. LEGAL EDUC. 461, 467 (1961).

41. E. CHEATHAM, CASES AND MATERIALS ON THE LEGAL PROFESSION. (2d ed. 1955); KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY, (1976); V. COUNTRYMAN, I. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY (2d ed. 1976); SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION (1979); M. PIRSIG & K. KIRWIN, CASES & MATERIALS ON PROFESSIONAL RESPONSIBILITY (3d ed. 1976) would make fine textbooks for such a course.

42. Clark, *supra* note 9, at 249.

will help the lawyer who wants to make professionally responsible choices but who, without guidance, particularly in the close cases, cannot determine what those choices are.[43]

In contrast, some advocate that teaching professional responsibility in a small class discussion session, for example, a seminar of 15 to 25 students in the second or third year, would be the most effective and manageable method of providing training.

Both methods of professional responsibility training are effective and, therefore, voluntary two to five credit seminar courses in the second and third years should be offered in addition to the mandatory first year professional responsibility course.[44]

### 3. *Credit Allocation for Specific Professional Responsibility Course Work.*

In allocating credit, legal educators often fail to consider professional responsibility a substantive subject and therefore decide not to allot sufficient credit hours for course offerings in the subject. In contrast, others believe that since credit allocation clearly although implicitly indicates the faculty's sense of importance (or lack of importance) about a course, professional responsibility should have several course offerings.[45] Some assert that when the subject of professional responsibility earns only one or two credits and has only one course offering, the faculty has implicitly stated that it does not consider the subject important.[46]

The best solution would be to provide a mandatory one credit lecture course in the first semester of the first year, which is interspersed with the socratic teaching of selected cases illustrating fundamental principles of professional responsibility.[47] In this way law students would receive at least a modicum of training in professional responsibility. During the second and third years, there should be additional course work offered on a volunteer basis for two to five credits in the form of a seminar using the problem method, a clinical program, or both.[48] These programs would allow

43. Clark, *supra* note 9; Weckstein, *supra* note 5.

44. *Id.*

45. 1980 Watson, *supra* note 9; 1963 Watson, *supra* note 25.

46. *Id.*; Pipkin, *Law School Instruction in Professional Responsibility: A Curricular Paradox*, 1979 A. B. F. Res. J. 247 (1979).

47. Weckstein, *supra* note 5.

48. *Id.*

free discussion and in depth consideration of the various issues involved in professional responsibility and relate to students the message that the faculty considers professional responsibility to be important.

## II. Methods of Teaching Professional Responsibility

The major methods for teaching professional responsibility are the problem method; the clinical method; the class lecture method; and the method of analyzing the philosophical and ethical concepts buttressing the national, state, and local professional codes. Each method has virtues to recommend it and negative aspects that make it troublesome or ineffective. After a discussion of each of these methods, consideration of a course blending the most positive aspects of each of these methods may be in order.

### *A. The Problem Method*

The problem method is similar to the case method of teaching law in that it presents fact situations to students. Unlike the case method, however, students are given the facts and new materials of information and are asked to resolve the problems involved in the fact situation as they would in a law office.

A course on professional responsibility using the problem method structure would allow students to derive lessons about the important issues defining the lawyer's role in a variety of situations.[49] In the context of problem solving, the class could discuss the conflicts involved in the attorney-client relationship, the advocate-advisor role of an attorney, the role of the government attorney, and where those conflicts arise. The close questions growing out of these role definition problems are generally not decided in court cases nor bar association opinions.[50] While the various codes of professional responsibility provide guidance for the resolution of some questions, they do not always serve as a complete teaching tool that would deal effectively with the close, difficult cases.[51]

Often the classroom problems dealing with such roles and relationships would not have clear answers and the students and the

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49. Jones, *supra* note 8.

50. 1980 Watson, *supra* note 9; Mathews, *Problems Illustrative of the Responsibilities of the Legal Profession*, Introduction to NATIONAL COUNCIL ON LEGAL CLINICS (1966).

51. Kelly, *supra* note 33.

professor may differ on the issues they pick out.[52] The problems do, however, serve to provoke discussion, and raise the students' awareness of the issues that lawyers must face in understanding the nature of their roles and responsibilities.[53] Therefore, a need not covered by the black-letter professional responsibility codes and interpretive cases is met through the use of the problem method.

The difficulty with this method is that problem solving cannot be handled effectively in a large class because real dialogue or exchange of ideas on the ethical questions raised are difficult in large classes. A smaller class, for example a seminar, would be the optimum structure for a course in professional responsibility using the problem method because it would permit more direct encounters and discussion of the ethical issues involved.

In this connection, role playing in a small seminar using the problem method could be quite useful in emphasizing the particular problems involved in professional responsibility or in deciding the proper behavior.[54] Each student could assume the roles of individuals involved in a situation and act out the problems raised in their roles.[55] This has great potential for graphically illustrating and helping students to experience the real tensions of the professional responsibility issues involved.[56]

Additionally, problems in the form of quizzes with cites to the ABA or other jurisdictions' codes of conduct could be a useful teaching aid in learning professional responsibility.[57] Alternatively, in the context of a problem method seminar setting, a panel of experienced practitioners could gather for a special session to discuss actual problems they have encountered in their practices.[58] However, there is a danger of these sessions digressing into recounts of "old war stories." Therefore, the issues discussed by the panel in their recounts should be dealt with at a fairly rapid and

52. Redlich, Preface to PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (1976).

53. Barnhizer, *Clinical Method Legal Instruction,* 30 J. LEGAL EDUC. 67, 73 (1979).

54. *Id.;* Stone, *Legal Education on the Couch,* 85 HARV. L. REV. 392 (1971).

55. *See* Dennis Thompson's characterization in the *Democratic Citizen* 60 (1970).

56. 1980 Waton, *supra* note 9, at 18.

57. Redlich, *supra* note 52, at 231.

58. 1980 Watson, *supra* note 9, at 231. Campbell, *supra* note 19.

structured pace.

In timing the seminar, the problem method would be most effective after a student has learned the basics of law such as torts, contracts, civil procedure, criminal law and constitutional law.[59] Once students have studied these basic legal concepts, they will be more able to apply the Code and the intricate questions involved in problems about situations lawyers often find themselves in during their legal careers. Also these problems need to be taught either in conjunction with or subsequent to the learning of specific professional responsibility codes. This will help students to apply those codes to the difficult cases covered in the problem method seminar.[60] For this reason a two hour course in the second or third year in the form of a seminar would be the optimum use of the problem method for teaching professional responsibility.

In conclusion, the problem method can serve to graphically and meaningfully illustrate the professional responsibility problems involved in legal practice. Additionally, dealing with specific problems will help define attorneys' responsibilities while remaining in a controlled setting inside the school and without a major outlay of funds as would be required in a clinical program.

### *B. The Clinical Method*

Clinical training involves field work where law students have the opportunity to work with professionals on actual legal problems. Clinical training is said by some to provide opportunities for raising problems of professional responsibility in a practical setting while working through legal problems.[61] As stated by a student of law concerning the professional responsibilities she learned in a clinical program:

> It is argued that ethics cannot be taught in the law school context. Certainly, by the time a person reaches adulthood, his/her basic ethical standards have been formed. Classes in legal ethics are, at best, an exercise in futility: at worst, a discourse in cynicism.
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> My own experience with the structured ethics course has borne this out. To fulfill ABA requirements, we memorized canons, rules, and cases. We learned about unauthorized practice

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59. Weckstein, *supra* note 5.

60. *Id.*

61. Barnhizer, *supra* note 53.

of the law which, despite some demonstration of loftier motive, was viewed by many students as the profession's attempt to protect its own business interests. We learned about conflict of interest, again, a legitimate rational consideration. Yet translated into case law, it meant preventing members of large corporate firms from engaging in many types of pro bono work. For example, how can a lawyer work on anti-pollution suits when his firm represents a major polluter?

Most objectional, however, were the omissions. We memorized a Code; we did not consider the validity of its measure; we considered no alternative provisions nor methods of enforcement. We did not consider the very real prospect of operating within a dishonest system.

The effect of the course, then, was somewhat less than optimum. The cynical felt justified; the self-serving felt vindicated; the pure-of-heart felt betrayed; no one felt (s)he had learned any ethics.

The futility of the classroom method, however, does not mean that ethics should be ignored in the law school context. It is in dealing with ethical considerations that clinical education can have its greatest impact. It is easy to become cynical when reading a series of canons; it is easy to question the purity of the profession's motives; it becomes easy to view eithical standards as facades behind which lie shadier dealings.

Such cynicism is far less appropriate in the clinical situation. The student is no longer insulated by the familiar classroom walls. The answers to many of his/her ethical problems are not to be found in any casebook; the import of his/her decisions goes beyond points on an exam. (S)he exposes him/herself to human dilemmas and the accompanying ethical problems.

. . . [In dealing with actual cases], I [the student in the clinical setting] became somewhat vulnerable. . . . Yet, I do not regret that vulnerability. I became more aware of the importance of ethical standards. In discussing the problems with staff attorneys and other students . . ., we all grew more sensitive to the dreadful responsibilities of an attorney. . . .

In such a manner the student discovers what ethical considerations can mean. (S)he realizes how inadequate the Canons of Ethics are. With each client (s)he is forced to evaluate and re-evaluate the import of legal ethics. No program can revive the ethically dead. Most students, however, are not dead, though some are sleeping. The heightened awareness and sensitivity acquired through clinical experience may serve to

awaken them and, in so doing, revitalize the profession.[62]

This excerpt illustrates the most positive aspects of the clinical method where professional responsibility is learned. The student obviously learned a great deal and developed a strong sense of professional responsibility to the client and toward the issues involved in public service work by participating in the clinical program.[63]

There are, however, several difficulties involved in depending solely on clinical work to teach professional responsibility. First, the student must participate in a program that calls for many hours of work to the loss of substantive legal subjects being learned in course work. Many assert that students will have the rest of their careers to spend practicing law and that they should learn the substantive and theoretical aspects of law while they are in school.

Second, the clinical method is a tremendously expensive and labor intensive way to teach professional responsibility.[64] In the clinical program, students work with the real legal problems of the public. To assure the program's quality and reputation, clinical instructors must work closely with students supervising and reviewing their work (particularly where students are working in subject areas new to them) to assure legal and tactical correctness.[65] The maximum effective teacher-student ratio for a clinical program would be one to ten, perhaps fifteen, versus the possible one to one hundred fifty teacher-student ratio in a large lecture course. Thus, the supervision required is great in the time and energy needed for one teacher and each of the several students to work together and guard against intentional malpractice on the program's

62. "Student's Essay," *The Council on Legal Education for Professional Responsibility, Inc.* Vol. VII, No. 1, July, 1974.

63. Clark, *supra* note 9, at 256: "The Council on Legal Education for Professional Responsibility [hereinafter referred to as CLEPR] and its predecessors, the National Council on Legal Clinics [hereinafter referred to as NCLC] and the Council on Education in Professional Responsibility [hereinafter referred to as COEPR] [gave] numerous grants to law schools for the organization of clinical progams, thus inducing law schools to give academic credit for clinical. . . . However, it must be pointed out that the law schools are still dragging their feet on student clinics. . . ."

64. *Id.*

65. *Id.*

recipients.[66]

Third, the second class status of the clinical faculty in most schools is a major concern. It is difficult to conceive of a practitioner in the community who would take a full time position teaching a clinical program when that position will generally not be tenure tracted, will not enjoy true faculty status, and will probably be at a significant decrease of the income that could be earned from private practice.[67]

For these reasons, a clinical program should be a second or third year option provided only after the initial year of study of professional responsibility fundamentals. It could, however, provide both service to the community and worthwhile experience to interested students.

### *C. The Class Lecture Method—Explaining the Basic Tenets of Professional Responsibility*

The major benefit of a large lecture class teaching the basic tenets of professional responsibility is that the main mass of students will be exposed to at least the fundamental aspects of professional responsibility.[68] This is not the most interesting professional responsibility training available,[69] but it assures the provision of guidance to law students not only for their law school careers but for their bar examination and law practice experience after they graduate.[70]

In this connection, many students want specific answers and concepts that will allow them to proceed in close and difficult cases in a manner that will protect them from being later disbarred.[71]

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66. Barnizer, *supra* note 53, at 72.

67. THE HASTINGS CENTER, *supra* note 4.

68. Jones, *supra* note 8.

69. Cheatham, *What the Law Schools Can Do to Raise the Standards of the Legal Profession*, 7 AM. LAW S. REV. 716 (1932).

70. Pincus, *supra* note 11; Multi-State Professional Responsibility Examination.

71. Ehrlich, *Lawyers and Their Public Responsibilities*, 46 TENN. L. REV. 713, 714-16 (1979); Snyder, *Teaching Professional Responsibility in Tax Courses*, 41 U. COLO. L. REV. 336 (1969): "Hopefully we are not talking about teaching students to be honest, or to walk upright, or to 'turn square corners.' Nothing would be gained in this day and age by pontifically and sanctimoniously reiterating the standards that 'we think' were developed in the 1920's for county court practice by a malapportioned segment of the Bar. What we are talking about is whether there is any significant advantage to some sort of a marriage between the

Many students are very concerned about doing what is "right" in these situations. On the whole, law students and attorneys are not inherently unethical. Rather, they often find it difficult or nearly impossible, without some guidance or training in professional responsibility, to ascertain what is the proper professionally responsible resolution to a matter.[72]

A lecture course giving an overview of the tenets of professional responsibility that lawyers must adhere to, would provide background, authority, and assistance to law students once they graduate and practice law.[73] Additionally, the virtue of a lecture course in professional responsibility, especially dealing with the codes of conduct, is that it would have the popularity of students who want to take courses that will be on the bar examination. Thus, the lecture method would have greater appeal to students who are interested in acquiring knowledge necessary to pass the bar examination.[74]

The major problem with this method is that it is often not a particularly inspiring course. Some students argue that a knowledge of the codes of conduct will not impose a greater sense of duty upon them.[75] This argument is, in many cases, true. However, a fundamental course in professional responsibility will give students an understanding of what is considered legal or proper professional conduct. Thus it provides guidance in close or difficult

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teaching of tax policy and the development of guidelines to the practical problems that arise in defining 'good tax practice.' "

72. Rogers, *supra* note 20; Kinnance, *Compulsory Study of Professional Responsibility by Law Schools,* 16 ABA J. 222 (1930); Goshien, *Education in Professional Responsibility,* 21 CLEVE. ST. L. REV. 79 (1972): "The student's introduction to the Code of Professional Responsibility is at best perfunctory, with his understanding of its application to fact situations in the practice of law probably non-existent. This sorry result may be exemplified by the young attorney who graduated from a top flight law school which purported to employ the pervasive method of communicating ethics. After some years of practice he accepted an offer to begin teaching. In his first year of instruction he happened to prepare a course in ethics and professional responsibility; only at that time did he discover that the 'selling' of his practice to another attorney violated the then CPR."

73. Smedley, *supra* note 2, at 436.

74. Pincus, *supra* note 11, at 280. Many states presently include professional responsibility in their bar examinations and as discussed *supra* note 17, several states have adopted or are planning to adopt the ACT Multi-State Professional Responsibility Examination.

75. Cheatham, *supra* note 69. An example of this is the young law student quoted in *Section II B* concerning the clinical method of teaching.

cases, and warning to those who like Holmes' "Bad Man" would not comply but for their knowledge of sanctions for violation of the codes.[76]

*D. The Benefit of Analyzing the Ethical and Philosophical Concepts Involved in Professional Responsibility*

Professional responsibility training would be more effective if taught in conjunction with the philosophical background of reasoning underlying the tenets of the various codes.[77] Instruction in the history for and reasoning behind what we currently consider to be professsionally responsible conduct in law practice would convey an apparent and deep respect for the various professional responsibility codes.[78]

Under the conditions of modern practice it is particularly important that the attorney understand not merely the established standards of professional conduct but the reasoning and philosophy underlying these standards.[79] Today the attorney plays a changing and increasingly varied role in society. In many developing fields precise contributions of the legal profession are, as yet, greatly undefined.[80]

A true sense of professional responsibility can be derived from understanding the philosophical reasons that lie behind specific restraints, such as conflict of interest rules, advertising provisions, attorney-client relations, etc. Another type of important consideration is that of the "Hired Gun" concept versus the "Wise Advisor" relationship of an attorney to his or her client.[81] The question of

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76. Ehrlich, *supra* note 71, at 717; Clark, *supra* note 9, at 253; Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

77. Wirtz, *supra* note 40, at 467; Tammelo, *On the Lawyer's Search for Contact with the Philosopher*, 13 J. LEGAL EDUC. 771 (1961); Stone, *supra* note 1, at 316-17, 322-23.

78. Smedley, *supra* note 2, at 443. Weckstein, *supra* note 5.

79. *Joint Committee on Professional Responsibility, Report*, 77 ABA J. 1159 (1958); Stone, *supra* note 1, at 257-58, 316-17.

80. *Id.*

81. Jones, *supra* note 9, at 965. N. DOWLING, E. PATTERSON & R. POWELL, MATERIALS FOR LEGAL METHOD 14 (2d ed. 1952); See ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 7-3 and 7-8; Joint Conference on Professional Responsibility of the ABA & AALS, Report, 44 ABA J. 1159 (1958), *supra* note 79; Kaufman, *supra* note 21, at 1074 for discussion of different standards of professional responsibility for courtroom lawyers and office counselors; Watson, *supra* note 9, at 22.

independent counsel versus those who are permanently retained or "kept"[82] by a corporation and what independent and true advice should that counsel give in those situations is another consideration.[83] Finally, the consideration of adequacy of counsel is quite important. This concerns the issue of whether there should be a specialist involved in a specific case—the basis of the specialist lawyer versus the incompetence/malpractice[84] "I can do anything" syndrome and controversy.[85]

Other issues needing attention in this philosophically oriented course are attorneys' responsibilities to the community, responsibilities to fellow professionals, responsibilities to clients, responsibilities to strict moral standards, and obligations raised by various codes of conduct.[86] A course would need to address the problem of reconciling these obligations, if and when they are competing.[87]

There are negative aspects to teaching the codes of conduct in the philosophical setting. A professor having little or no background in philosophy could badly botch the professional responsibility training. Also a professor may feel that it is necessary to make sure his or her students completely adopt his or her philosphical or moral concepts of proper professionally responsible conduct.[88] Often such a professor would not leave room for differ-

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82. Jones, *supra* note 8, at 969; 1980 Watson, *supra* note 9, at 22; Kaufman, *supra* note 21.

83. Association of the Bar of the City of New York [NYCBA] on the *Grievance System by the Ad Hoc Committee on Grievance Procedures*, January 26, 1976, at 41; *See also* Cary, *Professional Responsibility in the Practice of Corp. Law—The Ethics Comm. of the Bar Assoc.*, 29 REC. NYCBA 443 (1974).

84. Kelly, *supra* note 33, at 49; ABA CANONS OF PROFESSIONAL ETHICS No. 6; ABA CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 6-101.

85. *Report of Recommendations of the Task Force on Lawyer Competence; The Role of the Law Schools*, of the *ABA Section of Legal Ed. and Admission to the Bar* (August 1979) pp. 9-10; Ehrlich, *supra* note 71, at 713; Wirtz, *supra* note 40, at 461; 1980 Watson, *supra* note 9, at 22.

86. Jones, *supra* note 8; *See also* Jones, *Law and Morality in the Perspective of Legal Realism*, 61 COLUM. L. REV. 799, 805-897 (1961); NYCBA Report on Grievance System, *supra* note 83; Redlich, *Lawyers, The Temple and the Market Place*, 30 REC. NYCBA (1975); Sonde, *Professional Disciplinary Proceedings*, 30 BUS. LAW 157 (1975).

87. Fuller, *What the Law Schools Can Contribute to the Making of Lawyers*, 1 J. LEGAL EDUC. 189 (1948).

88. Smedley, *supra* note 2, at 443; Weckstein, *supra* note 5; Rogers, *supra* note 20; Finman, *The Place of Professional Responsibility Discussion in the First Year Civil Procedure Course*, 4 CONN. L. REV. 462, 466 (1971); Stone, *supra* note

ences of opinion. This can lead to students resisting and turning off any ideas of professional responsibility.[89]

The problem will always remain, however, whether a course in professional responsibility could or should be taught with prejudice and whether certain ideas of professional responsibility should be given the status of dogma. This is in contrast to teaching the Codes and allowing law students to reach their own conclusions and moral judgments. With respect to the moral problems of professional responsibility former United States Circuit Court Judge (Second Circuit) and former Dean, Yale Law School, Charles E. Clark, wrote:

> To make my suggestions a bit more complete I would urge first that the problems be broadened to include those likely to stimulate independence and nonconformity with merely successful law practicing and second that the student be pressed by all the useful tutorial goals to work thoroughly and deeply to his *own* conclusions.[90]

In conclusion, teaching the codes of conduct and tenets of professional responsibility in the framework of philosophical concepts could effectively convey their underlying reasoning and give meaning and purpose to their requirements. These types of lessons should and probably will remain with the students throughout their professional careers. With respect to understanding the underlying reasons for the various codes and tenets, the Statement of the Joint Conference on Professional Responsibility reads:

> A true sense of professional responsibility must derive from an understanding of the reasons that lie back of specific restraints, such as those embodied in the Canons. The grounds for the lawyer's peculiar obligations are to be found in the nature of his calling. The lawyer who seeks a clear understanding of his duties will be led to reflect on the special services his profession renders to society and the services it might render if its full capacities were realized. When the lawyer fully understands the nature of his office, he will then discern what restraints are necessary to keep that office wholesome and

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1, at 317-320.

89. Weckstein, *supra* note 5; 1963 Watson, *supra* note 25.

90. Clark, *How Far Can Professional Competence and Responsibility Be Taught*, 13 J. Legal Educ. 472 (1961)(emphasis added).

effective.[91]

However, adding a strong moral tinge to professional responsibility training creates the potential for abuse in the rare case of a biased professor who does not have tolerance for opposing views. See Discussion *infra* at III A.[92]

*E. A Synthesesis Program*

An optimum professional responsibility program would be a synthesis of the preceding methods. The professional responsibility training program, however, should not be relegated to one single course. I suggest a lecture class in the initial year of law school giving the basic tenets of professional responsibility codes of conduct. It would provide a basis from which a law student could relate the basic generally accepted tenets of ethical conduct to his or her substantive law classes throughout law school. The course would be mandatory.[93]

I also suggest two courses in the second and third years—one a seminar using the problem method for two to three credits; and another for two to five credits in a clinical program. This clinical program would provide the pertinent resolutions of specific problems once the student has a foundation in specific legal courses. Both the seminar and the clinical program should be on a voluntary basis.[94]

III. Suggestions for Subject Matter of Professional Responsibility Classes

There are certain concepts of professional responsibility that should be taught in any course form finally adopted, be it lecture, clinical, problem, or analysis. Additionally, there are particular professional responsibility concepts for the various areas of law practice such as teaching, private practice-civil or criminal litigation, government service, or the judiciary that need to be covered.

*A. General Substantive Concepts That Need to be Covered in*

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91. Joint Committee on Professional Responsibility, *supra* note 79.
92. Goddard & Koons, *supra* note 18, at 607-10.
93. Weckstein, *supra* note 5.
94. *Id.*

*any Professional Responsibility Training Program*

The basic professional responsibility program should cover the American Bar Association Code of Professional Responsibility [ABA Code] including the Canons of Ethics, their interpretive Disciplinary Rules [DR], and the Ethical Considerations [EC]. The Code is separated into three interrelated parts which are meant to perform the following functions. The Canons of Ethics are statements of axiomatic norms. The Ethical Considerations are "aspirational in character and represent . . . objectives toward which [practitioners] should strive." The Disciplinary Rules are "mandatory in character . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[95]

Most attorneys neither intend nor prefer to act in professionally improper ways, but rather they do not really know or understand the contents of the professional responsibility codes. On the whole, attorneys receive very little guidance on their duties to society, to the courts, or to the profession versus their duties to their clients.[96] Although they know they are responsible for adhering to the ABA, state, and other codes of professional responsibility, lawyers often are not fully aware of the guidance the codes and interpretations provide for close cases.[97] Because of this, a basic professional responsibility course is needed to cover the fundamental philosophical and legal tenets from which the professional responsibility codes are derived. As discussed, a true sense of professional responsibility must be derived from an understanding of the reasons behind specific restraints.[98]

The significant projected amendments or new codes that lawyers will very likely be subject to in the future should also at least be briefly outlined in a professional responsibility course. This will

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95. *Preliminary Statement* to the ABA CODE OF PROFESSIONAL RESPONSIBILITY, 1976; Nessen, *Rethinking the Lawyer's Duties to Disclose Information: A Critique to Some of Judge Frankel's Proposals*, 24 NEW YORK LAW SCHOOL, No. 3 (1979).

96. *Educating Ethical Lawyers* Address at Copeland Colloquium on Ethics and the Professions, Amherst College (January 31, 1975) *reprinted in* 47 N.Y.S.B.J. 260 (1975).

97. Rogers, *supra* note 20.

98. Joint Committee on Professional Responsibility, *supra* note 79; PROFESSIONAL RESPONSIBILITY OF THE LAWYER, THE MURKY DIVIDE BETWEEN RIGHT AND WRONG, *supra* note 6, at 152.

give an idea of trends in professional responsibility and thus the probable areas of future concern for attorneys. A current example of this would be discussion of the ABA's Kutak Commission Proposal, Discussion Draft for Model Rules of Professional Conduct, January 30, 1980.[99]

Additionally, a basic course should touch on the inter-disciplinary considerations involved in professional responsibility training.[100] If available, an inter-disciplinary team in a university setting would be the most effective combination.[101] If it is not available, a team consisting of private practitioners in inter-disciplinary fields would be a reasonable alternative.[102] For example, a professional responsibility course using psychiatric or psychological input from a professor or practitioner would be extremely helpful in dealing with criminal law, family law, negotiation, clinical operations, wills, trusts, tort law, and evidence subjects.[103]

A basic course should also convey the concept of heroes that new attorneys can model themselves after.[104] It has been suggested that to emphasize the importance of developing a professional self-image, students should be required (in a basic course) to write a paper on their favorite lawyer hero describing what they admired in that person.[105] However, this hero feeling can be very easily and effectively conveyed by class discussion of heroic figures in jurisprudential history. An explanation of some of the history surrounding and the people shaping the concepts of legal professionalism would be much in order. For example, a professional responsibility course could (in addition to developing an apprecia-

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99. ABA Kutak Commission, Model Rules of Professional Conduct (Proposed Discussion Draft, 1980).

100. Weckstein, *supra* note 5: "The first element of professional training should be an exploration and evaluation of what useful roles lawyers have performed and can perform in our society. This inquiry involves aspects of history and anthropology as well as philosophy and sociology."; Stone, *supra* note 1, at 255-56.

101. 1980 Watson, *supra* note 9.

102. Campbell, *supra* note 19, at 112.

103. *Id.;* 1980 Watson, *supra* note 9, at 18-19.

104. Rhodes, *The Idea of a University*, N.Y. Times, Sept. 2, 1979: "Perhaps the greatest hope for establishing an atmosphere in which personal affirmation is encouraged lies in the influence of role modes, both in the academy and out. The reluctance of many faculty members to play such roles derives from an understandable respect for the dangers of exploiting a captive student audience."

105. *Id.*

tion for his great intellectual capabilities) study Holmes' zeal and concern about law in society.[106]

As observed by legal psychologist, Andrew Watson, "Complex and difficult behaviors like 'being professional' and 'acting ethical' are mostly learned by modeling. . . . It seems clear . . . that one alternation in legal education that could be made readily would be for law teachers to be open and vigorous in their support for concepts of ethicalness." Even while vigorously analyzing "what it means [to be ethical] and to turn that meaning into a rational concept, [professors] should consciously avoid creating even the slightest intimation that they think it is a meaningless concept."[107]

With respect to the question of whether to provide a moral tinge to professional responsibility training, David Weckstein believes that:

> To be too one dimensional in value orientation would probably result in teaching counter-values by example. Restrictions would be placed on freedom of inquiry, speech, and association for both faculty and students.
>
> The teaching of values is a very difficult enterprise. We must be careful *to teach, not to preach.* Emotional acceptance may well follow intellectual understanding but cannot be coerced.[108]

In this connection Alexander Meiklejohn states that:

> Here, as in all teaching the only essential is that one's methods shall be true to one's purpose. Like teaches like. If you wish your pupil to lie, you need only to lie to him. If you wish your pupil to become cruel, be cruel to him.
>
> . . . This means for example, that the teacher of freedom cannot 'sell' it as a bill of goods. *Nor can he impose it by compulsion.* . . . And this being true, the teacher of democracy may not . . . propagandize. He may not skimp or twist evidence. He may not use the arts of salesmanship. He may not enter or delude his pupils into the truth. He must practice what he preaches.[109]

And Robert Mathews observes:

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106. 1980 Watson, *supra* note 9; 1963 Watson, *supra* note 25.

107. 1980 Watson, *supra* note 9.

108. Weckstein, *supra* note 5, at 275-77 (emphasis added).

109. A Meikeljohn, *They Were Teachers,* in a tribute to Louis Pettibone Smith and Royal France, *reprinted in* Weckstein, *supra* note 5 (emphasis added).

> The learning process in a free country must abhor the coercion of values, of their insinuation without an understanding of espousal. We must devote ourselves to discovering a means of training in the capacity to perceive the presence of an ethical issue, to appreciate the values at stake and the considerations which must govern a choice between them. *We must hope that the choice will then be wise, but we must protect the freedom to make a choice we deem unsound, even the freedom to reject the very values we treasure most. Only in this way can we engage in a process of teaching that is consistent with the values we cherish and with the fundamental faith on which our institutions rest; only in this way can we introduce into our national life persons sincerely dedicated to the American traditions.*[110]

In contrast, Andrew Watson believes that:

> Because professional and ethical issues involving these emotional motivations are so painful to deal with, it is crucial that students be confronted with the necessity of considering them in their learning processes consistently and persistently. . . . Students who express unethical views or behaviors should draw criticism and not be permitted to go forward with the notion that ethical standards are purely a matter of personal preference. If the latter course is followed, it removes one of the primary sources of motivation for professionally responsible and ethical behavior; that of group standard setting and group reinforcement. This is to say, that the intention to behave ethically is a highly personal matter, and to hold that the standards of ethical performance always come from the group, and must not be ignored. A well-integrated and psychologically effective training institution will challenge deviants and apply great pressure for them to conform. Such a group should feel a duty to withhold certification of those who do not.[111]

As discussed in these quotes, professional ethics and responsibility must be taught through delving into the various codes, laws, and interpreting case law. Law students need desperately to learn the specific professional responsibility requirements and the philosophical reasons behind those requirements. They need to be sensitized to their various responsibilities as lawyers as well as to the

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110. Mathews, *The Lawyers as a Community Leader*, in *Conference on the Profession of Law and Legal Education*, 29, 37 (1952)(emphasis added).

111. 1963 Watson, *supra* note 25 at 17-18.

issues in the difficult cases they may encounter in practice. However, after learning the specific professional responsibility requirements and considering the various philosophical questions involved, students should be be taught to think for themselves.[112] That is, students should be left to make their own moral judgments.

Moral shunning and censure may be effective ways to assure compliance with the professional responsibility codes.[113] But each of us may use the finer shadings of morality from different perspectives, especially in the close and difficult cases where people may come to different "good faith" conclusions of what the moral solution would be in a problem. The use of a "moral tinge" may take on the aspects of a particular professor's own outlook on life rather than a true sense of morality. In the rare cases where a professor does not allow for differences of opinion in his or her class this can be counter-productive to conveying a sense of morality to students. Therefore, students should be sensitized to the important moral questions—to the provisions of the codes (and their interpretations) and the law. They should be notified of the sanctions for violations. But, they should also be allowed to make their own decisions.[114]

### *B. Professional Responsibility Attuned to Special Areas of Practice*

In addition to questions of what should be taught in a basic professional responsibility course, specialization raises questions about particular responsibilities in such areas as teaching, private practice—civil or criminal litigation, government service, and the judiciary.

#### *1. Law Teaching*

Education in the professional responsibility of law teachers should include some kind of training in legal philosophy (jurisprudence).[115] It should also include a discussion of law professors' responsibilities to cover the black-letter law plus providing profes-

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112. Stone, *supra* note 1; Wirtz, *supra* note 40, at 462.

113. 1963 Watson, *supra* note 25 at 17-18.

114. Smedley, *supra* note 2.

115. Davies et al., *Public Responsibilities of Academic Law Teachers,* 14 J. Legal Educ. 69 (1961).

sional responsibility training to their students within the subject matter of their courses. Thus legal education courses, where potential law professors discuss the different methods of teaching law, should include discussion of professors' duty to provide their students with professional responsibility training.[116]

### 2. *Private Practice—Civil or Criminal Litigation*

Private practitioners in civil practice and litigating lawyers (civil and criminal) are "trained by combat and encouraged by fee, [and thus] need no canonical instruction to pursue a client's cause zealously . . . . [the ABA Code of Professional Responsibility] endorsing the adversary mode of adjudication, approves of zeal, cautioning only that it not carry the advocate beyond the 'bounds of the law'—a term which includes the Disciplinary Rules [DRs] of the Code."[117]

In discussing the responsibilities of a private practitioner, particularly in civil and criminal litigation, it is important to cover the concepts of the CPR's Canons of Ethics' general instructions to tell the truth. For example, the minimum duty in legal matters is set forth in DR 7-106(B)(1) which states:

> In representing a matter to a tribunal a lawyer shall disclose:
>
> > Legal authority in the controlling jurisdiction known to him to be directly adverse to the decision of his client and which is not disclosed by opposing counsel.

Additionally, the duties for disclosure outlined in DR 1-102(a)(4) prohibit "dishonesty, fraud, deceit or misrepresentation." This indicates that there should be a fair and accurate rendition of authority in a case, but the ABA CPR's Ethical Considerations [ECs] interpreting this rule cloud the issue. EC 7-2 acknowledges that law is often uncertain and EC 7-3 suggests that the lawyers serving as advocates should resolve doubts in the favor of their client. Further EC 7-4 provides that an advocate may urge any permissible construction of the law favorable to his client without re-

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116. Campbell, *supra* note 19, at 112, 117; Stone, *supra* note 1, at 356-59. These pages include discussion of law school's obligation to provide professional responsibility training which can be analygized to law teachers' responsibility to provide such training.

117. Uviller, *Zeal and Frivolity: The Ethical Duty of Appellate Advocate to Tell the Truth About the Law*, 6 HOFSTRA L. REV. 729 (1978).

gard to his professional opinion as to the likelihood that the construction will ultimately prevail. In discussing this issue professors could point out that an attorney's conduct "[i]s within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supported by a good faith argument for an extension, modification, or reversal of the law." The professor should also point out, however, that "[a]n attorney is not justified in asserting a position in litigation that is frivolous."[118]

Also under the Code there are rules concerning the attorneys' position with respect to the client and the attorneys' public responsibilities that should be discussed. For example, with regard to the mandatory minimum duties of all lawyers in the area of disclosure, DR 7-102(A) provides that in his representation of a client, a lawyer shall not:

> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
> (4) Knowingly use perjured testimony or false evidence.
> (5) Knowingly make a false statement of law or fact.
> (6) Participate in the creation or preservation where he knows it or it is obvious that the evidence is false.
> (7) Counsel or assist the client in conduct that the lawyer knows to be illegal or fraudulent.

Subsection (B) requires a lawyer receiving information of a client's fraud upon a person or tribunal first to request the client to rectify the fraud. If the client refuses to do so, it is the attorney's duty to reveal the truth to the person or the tribual except where the information is protected as a privileged communication.[119] Obviously where someone other than the attorney's client has perpetrated such a fraud this should be promptly reported to the tribunal.

Further, with respect to a criminal trial, the Defense Section of the ABA Disciplinary Rules should be covered. For example, section 7.6 of the Rules requires that the interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and the legitimate privacy of the witness without seeking to intimidate or humiliate the witness unnecessarily. Additionally, the attorney should not misuse the power of cross-exami-

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118. *Id.*

119. ABA CODE OF PROFESSIONAL RESPONSIBILITY DISCIPLINARY RULE 7-102(B).

nation or impeachment by employing it to discredit or undermine a witness if the attorney knows the witness is testifying truthfully.[120]

In addition to the ABA Standards, a course in professional responsibility might cover procedural rules, particularly the federal rules for pre-trial discovery and inspection in federal criminal cases by a defendant. Criminal cases in the federal courts and those cases governed by the rules and regulations of the federal government are governed principally by Rule 16 of the Federal Rules for Criminal Procedure. A discussion of attorneys' responsibilities as provided in Rule 16 should be covered as well as the federal rules of civil procedure.

In summary, professors should convey the concept to their students that a private practitioner's main duty is to his or her client. There is a growing sense, however, of the duty of the private practitioner (be it civil or criminal litigator or civil advisor) to society.[121] Although these two duties may be conflicting, the emerging principle is to at least retain some sort of sense of duty to society. Thus professional responsibility training covering the duties of private practitioners must emphasize that while attorneys should pursue their clients' cases zealously, they may not act illegally in execution of their clients' cases.

### 3. *Government Attorneys*

Professional responsibility training should include the special obligations government attorneys have because of their duty to the public and their duty to balance the claims of competing interest groups versus their agency. For example, a problem that could be covered in a discussion of federal government attorneys is whether the obligations of a specific federal agency conflict with the obligations to society on the whole.[122]

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120. ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function and the Defense Function, § 7.6 (1971). Jones, *supra* note 8, at 965; Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge 's Viewpoint*, 5 AM. CRIM. L.Q. 11, 12 (1966).

121. Jones, *supra* note 8, at 972, 966; Frankel, *The Search For Truth, An Umperical View*, 123 U. PA. L. REV. 1031, 1052 (1972).

122. *E.g.*, FEDERAL ETHICAL CONSIDERATION [FEC] 8-1 states that: "Permanent consideration is due the public interest." This might suggest that the government lawyer's duty under Canon 8 to "Assist in Improving the Legal System" is greater than that of the private attorney. However, some would argue that the

An example of this would be of a federal agency that originally had a limited term of existence.[123] Is it the responsibility of the agency's attorneys to do research to justify the agency's continued existence? In this connection, could attorneys justify the agency's continued existence by a good faith belief that there is a need for the country to have the continued existence of the specific federal agency. Or, is it the attorney's responsibility to best serve the needs (irrespective of the question that the agency's continued existence might best serve those needs) of the public in disregard of the fight to continue the agency's existence.

Specific codes that should be covered in professional responsibility training, especially for future federal government attorneys, would include the Federal Ethical Considerations (supplementing the general CPR)[124] and the specific codes of conduct for the various agencies, (e.g., Treasury Justice, etc.). Laws that could be discussed are the various federal statutes on the subject such as 18 U.S.C. § 207 concerning the Conflict of Interest Provisions of the Former Government Employee.[125] There should also be discussion of the disqualification of decisional officials in federal government in their rulemaking capacity when it regards business or other interests they had before entering into government.[126]

4. *Judiciary*

For the judiciary, a course in professional responsibility should cover the ABA Code of Judicial Conduct [CJC] adopted in the federal and a number of the state courts and the section 301 of Title

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obligation to the "public" provides the attorney with no means of determining what that interest is." A. ARONSON & D. WECKSTEIN, PROFESSIONAL RESPONSIBILITY (1980). "Therefore, some commentators draw the client less broadly making the government lawyer primarily responsible to the agency for which he works . . . . [This] raises [Watergate like] quandries. . . ." *Id.*

123. *E.g.* Commodity Futures Trading Comm. [CFTC] 7 U.S.C. § 4a, *as amended* (Supp. IV, 1980). Many in the industry prefer the continued existence of the CFTC to perhaps the assumption of the CFTC's duties by the Securities Exchange Commission.

124. These considerations were developed because the federal bar felt there were frequent inadequacies of the CPR in addressing government attorneys' ethical dilemmas.

125. SCHWARTZ & MURRAY, LAWYERS AND THE LEGAL PROFESSION CASES AND MATERIALS (1979).

126. Strauss, *Disqualifications of Decisional Officials in Rulemaking,* 80 COLUM. L. REV. 990 (1980).

III, Judicial Personal Financial Disclosure Requirements.[127] Title III as well as 18 U.S.C. § 207 concerning disqualification of former officers and employees and disqualification of partners and current officers and employees are part of the major changes made by the Ethics in Government Act, Pub. L. 95-521 (October, 1978) as amended through February, 1980. Training should also cover the judiciary's duty to deal vigorously with the public professional behavior of lawyers as it relates to the trial process.[128]

Discussion of the judiciary should deal with the question of whether in our society the role of the judge should be restricted to that of interpreter rather than creator (to some extent) of the law.[129] Professors should consider whether a judge should be required to apply the law as it exists[130] in contrast to a government attorney to implement it or a criminal litigator to try to ferret the law out.

Finally, professional responsibility training for any area of legal practice should deal with the ABA Standards for Lawyer Discipline and Disciplinary and Disability Proceedings. These Standards deal with the responsibility of the court, the role of agency in the court, the jurisdiction of agency in the court, and the grounds for lawyer discipline. This type of professional responsibility training should show the codes' preventive "Bad Man" aspects in that attorneys or judges not following the principles of the ABA or other codes of conduct can have disciplinary or disbarment proceedings brought against them.[131] In this connection, professors should point out to students that under the ABA Standards relat-

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127. I also urge that such discussion over the current major and topical state and federal statutes or interpretations dealing with Judicial Professional Responsibility at the time the course is given.

128. Watson, *supra* note 9, at 24.

129. ABA CANONS OF ETHICS No. 3A(1) requires a judge to "be faithful to the law." In a matter somewhat related to the "interpreter role" but not completely analogous is the requirement of the *Code of Judicial Conduct* [CJC] *Canon* 3C and 28 U.S.C. § 455 (Supp. IV, 1980) that a judge with a personal bias or a preconceived view of a case's merits must recuse him/herself when impartiality may be questioned. I foresee increased use of the challenge of preconceived views when judges make reference to social policy reasons for their opinions in the future.

130. Del Vecchio, *For Moral Integration of Juridical Studies for Training of Judges and Barristers in the Field of Morals and Professional Responsibility*, 13 J. LEGAL EDUC. 40 (1960).

131. Pincus, *supra* note 11.

ing to the administration of criminal justice and its provisions concerning the prosecutorial and defense functions, government attorneys and prosecutors are cautioned by DR 7-103 which provides that:

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant or to the defendant, if he has no counsel, of the existence of evidence known to the prosecutor, or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

I note here that DR 7-103 incorporates the minimum requirement in this area set forth in 1963 in the United States Supreme Court case of *Brady v. Maryland,* 373 U.S. 83, concerning professional responsibility.[132]

IV. Summary

The purpose of this paper was to cover the most pertinent aspects of teaching professional responsibility in law by discussing the pros and cons of teaching professional responsibility and by discussing to what extent it should be taught, if at all. Additionally, the benefits of specific course work in the subject area and whether, if specific courses are adopted, they should be mandatory was examined. In discussing academic freedom, the protections against professors presenting opinions in professional responsibility questions with little or no tolerance for opposing views from the students was considered.[133]

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132. Nessen, *supra* note 9, at 685.

133. Bok, *supra* note 30. Although the freedom of universities is generally recognized today, the memory of enemies lists, loyalty oaths, and anti-subversive campaigns should remind us that our autonomy will always remain precarious and fragile. If we wish to preserve our independence, we should remember that society respects the freedom of academic institutions only because it assumes they will devote themselves to the academic pursuits for which that freedom was extended. *Academic Freedom and Tenure, 1940 Statement of Principles of American Association of University Professors and Association of American Colleges,* 53 AM. A. U. PROF. BULL. 246 (1967). "Academic freedom in its teaching aspect is fundamental for the protection of rights of the teacher in teaching and of the student to freedom in learning."

"It carries with it duties correlative with rights . . . . *Academic Freedom* (b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which

Conclusions reached for these issues were that course work should be offered and that there should be at least one mandatory course on the basics of the professional responsibility codes which allows for differences of opinion in the close and difficult cases. A new synthesis program of a mandatory basic lecture course giving the fundamental tenets of professional responsibility codes in the first year is suggested. The program would also include optional second and third year clinical and problem method seminars with two to five credits each. Professors of professional responsibility courses should be given tenure track positions. In this way the faculty would be making a statement of their opinion, and their concern for the importance of teaching professional responsibility.

It is important to remember that in order to meet the present requirements for professional responsibility training and the probable future requirements for such training, law schools need to adopt specific professional responsibility programs. These specific programs will help to avert more stringent requirements by entities outside the law school in the future. We should have two types of course work. In the first year there should be a mandatory course in the basics of the codes of professional responsibility. In the second and third year there should be voluntary clinical and problem method seminars which add interdisciplinary information to their subject materials.[134] As stated by Justice Oliver Wendell Holmes, "To be master of any branch of knowledge, you must master those which lie next to it."[135]

Additionally, course work in professional responsibility should relate itself to the issues of professional responsibility involved in the substantive law courses students will be taking throughout their law school career. In doing so, the professional responsibility course would be most beneficial if they provided a clear indication of the specific responsibilities of the various areas of law practice.

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has no relation to his subject . . . . (c) *The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline but his special position in the community imposes special obligations . . . he should at all times* be accurate, should exercise appropriate restraint, *should show respect for the opinions of others,* and should make every effort to indicate that he is not an institutional spokesman." [Emphasis Added]

134. Clark, *supra* note 90, at 474.

135. Holmes, *The Profession of the Law,* in SPEECHES (1891).

In concusion, law schools' adoption of vigorous programs of training in professional responsibility will help maintain law schools' image as standard bearers in their communities. It will also help to meet present and future standards for providing professional responsibility guidance to law students. Professional responsibility training of students is one of law schools' most important responsibilities and it provides as much substantive training in the law as any course in torts, contracts, or civil procedure.

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