First Panel: The Law Schools' Response to Professionalism Issues

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It occurred to me, after listening to this morning’s speakers, that a transition is needed before I begin my presentation. So here it is. When my daughter was fourteen or so we caught her doing something she should not have been doing. During our conversations about this she asked, as I am sure your children have asked of you at some point, “Why shouldn’t I lie?” If she had been listening this morning the answer she would have heard is: “Because you will be punished.” The answer my wife and I gave her, however, and the answer you have given your children is: “Because you would be a liar.” You give this answer, and you then hope that your child has been raised in such a way that it is persuasive.

My understanding of professionalism is that it is concerned with the latter response to unethical conduct. There is no doubt that the errant members of our profession, of which there are many, are very much in need of punishment, and I applaud the efforts of those who bring them in line. Professionalism, however, is about a different way of understanding and of motivating ethical conduct within a profession. The ethical motivation of legal professionalism is the desire to be a good lawyer and the internal reward that comes from being one. And now for what I was prepared to say.

I would like to start with a story, well known in certain circles, about one of my intellectual mentors, Stan Hauerwas, a theologian at Duke Divinity School. It is important to the story to know that Stan is a Texas theologian, but not a George Bush “Why Don’t We All Just Get Along” Texas Nice Guy. As a theologian, he is more of a John Wayne straight shooter. And, as with Wayne, he is charming enough to get away with it.

Stan was walking across the Quad at Notre Dame one morning when he spotted some friends, a married couple, both Jewish, walking nearby and joined them. Knowing that they had a son about to be of age he asked, “When is the Bar Mitzvah?” The couple replied, “Well, we are not sure. We want Jacob to
decide for himself that he wants to be Bar Mitzvah’d. He hasn’t decided yet.” Stan retorted, “So, there have been 5750 years of Jewish history, Jewish suffering, so that this twelve year-old can make up his mind? Could he have a mind worth making up if he does not know his parents stand for something?” As I said, Stan can get away with comments like this. And not only get away, but succeed. Jacob had his Bar Mitzvah.

If after 2600 years or so of lawyering, dating, as I see it, from the pre-Socratics, and if after my own almost thirty years in the practice of law and almost twenty-five years of teaching legal ethics, I had nothing more to say to my students than “it is up to you to make up your own mind about what good lawyering requires of you,” something, I think along with Stan, would be very wrong.

Why do I tell you this story? Why do I make this point? Because it explains why I have eliminated from my presentation today all of those developments in law school courses and curricula that have increasing student self-reflection as their explicit goal so that students will see that the ethics of our practice are a matter of their own personal choice. I do not think these developments, as interesting as some may be, have much to do with professionalism. In the simplest of terms, there is surely nothing wrong with encouraging people to stop and think about what they are doing, and this is what most of these developments claim to be doing, but, I would suggest, what the students think, when they stop and think, matters greatly if the goal is increased professionalism.

Rather than courses teaching self-reflection and personal choice, I looked instead for courses based, at least in part, on the authority of the tradition of the practice we are in together, the authority of that ongoing conversation that the practice has had about itself over time in which each generation of lawyers comes to know what it means to be a good lawyer. This form of authority is, of course, definitional of the term “professionalism.”

2. I did not put too fine a point on this in the talk, but, to be sure, I want to add now that I am always puzzled how professionalism, which by definition must involve some recognition of the moral authority of a profession, is improved by asking twenty-somethings to choose what good lawyering requires based on the values they bring with them to law school, values that are, of necessity, inadequate to the task. It would be like going to a four-year conservatory and not expecting your musical judgment to change for the better (in the only way in which we can understand what “better” might be). Yet, you find exactly that argument made over and over again in the literature on teaching legal ethics.

3. It is very easy for legal ethicists, self-selected as they are for concern for others, to fall into the trap of thinking that respect for autonomy and for the opinions of others requires an avoidance of all authority in the legal ethics course, including the authority I have described in this talk. This trap is made even more inviting when legal ethics is taught through moral dilemmas. But is this avoidance respectful of others in any true understanding of that virtue? Oh, I know, anything other than just leaving the resolution of ethical issues up to the students can certainly come across as authoritarian, and I have a long list of my own gaucheries in trying to avoid that, but the authority offered in the kind of teaching I am suggesting here, and the kind of parenting Stan suggested in the story with which I began this talk, is not the teacher’s or parent’s authority. Instead, it is the authority of the tradition of the practice the students are entering, and it is reflected in the particular forms taken by our self-critical conversations within the practice. At
In preparing for today, I looked for pedagogical developments that would tend towards an initiation of law students into the tradition of our practice, e.g., courses teaching the history of the practice and placing it within the rhetorical tradition so that we know the story of which we are a part; courses carefully exploring the rhetorical culture and language our practice maintains and exactly what is required of us to maintain it; courses carefully explicating the social goods carried by this rhetorical culture, most specifically the good of the legal conversation itself, including the good of opposing voices being heard and being heard equally; courses developing the particular character required for excellence within our practice and the virtues, especially the virtue of practical wisdom and the intellectual virtues of recognizing opposing arguments, and moral affirmation in the face of the contingency and complexity that our practice demands of its practitioners.

I looked especially for developments that would aid our initiates in seeing our mutual dependence as lawyers in the ongoing project for which we are professionally responsible. In a nutshell, I looked primarily for courses that would help students appreciate the common goods of lawyering, the good upon which all conceptions of professionalism and legal ethics depend at rock bottom for their coherency.

What did I find? Truthfully now, since I am a lawyer? Not much. Surely not enough. There are some schools taking more seriously through orientation programs, the idea that our students are being initiated into a common project with a very long tradition through orientation programs, often with the assistance of the bar. You can also find an occasional required first-year course on the legal profession. There are also some new programs, such as the one at South Carolina that brings us together today, which seek to do more in this regard, or older programs—the Intergenerational Legal Ethics Project at the University of North Carolina, for example, in which oral histories are used to much the same effect. But these are rare, and, to my knowledge, there is no law school that takes appreciation of the common goods of lawyering seriously as a three-year pedagogical project except in extremely amorphous ways.

On a much more positive note, however, there has been one central motif to certain developments in teaching legal ethics over the past ten years that is terribly important and can be made to serve the development of professionalism as I have described it. This conception of professionalism emphasizes, as I did a moment ago, the virtue of phronesis or practical wisdom. Practical wisdom, in turn, requires, as Iris Murdoch has taught us, a moral vision, a truthfulness really, about the situations we are in as
lawyers—especially a truthfulness about their complexity. For students to learn to be truthful about the situations we are in as lawyers they must first be placed in truthful lawyering situations, and this is what has been happening in legal education over the past ten years.

This is a very widespread development, one I think best described as the contextualization of the teaching of legal ethics. Now contextualization is certainly not a panacea. Like the goal of self-reflection, it can serve many ends and can be for better or for worse. Contextualization is often justified by the professors using it as a means towards improved self-reflection and student choice because, I think, good philosophical liberals that the professors are, they are not sure what else would pass muster as a justification. I think, however, that contextualization has an inherent tendency to move students in the direction of professionalization, although I certainly will not attempt to defend that proposition this morning. I think that contextualization tends towards professionalism whether the professor is using it for that purpose or not.

Contextualization has taken very many forms: starting early on in the contextualization of the classroom discussions of the basic legal ethics course with the use of the problem method, supplemented routinely now, thanks to Professor Steve Gillers and many others, with videos and other ways of offering more complete narratives of the problems studied. The use of the problem method was followed by the organization of problems in particular substantive areas of practice as in Professor Nathan Crystal’s text, classroom simulations such as those done by Professor Robert Burns at Northwestern or the Profession of Law course at Columbia, the increasing use of practicing attorneys in classroom discussion of problems, and, with all this, the concomitant shift of focus in the course from ethical regulations to the broad panoply of regulations, rules, constitutive rules of the practice, and customs governing a lawyer’s conduct and from simplistic rule compliance to complex matters of professional judgment.

Beyond these changes in the basic course, several schools have developed course progressions from basic to advanced legal ethics courses exploring very particularized practice contexts. The work of Professors Bruce Green, Mary Daley, and Russ Pierce at Fordham is the best known model of this, but there are others, for example, the specialized ethics offering at the University of Texas and Duke University. Another contextualization approach is to teach legal ethics through clinical or skills offerings. The clinic, of course, has been the home of a truer form of professionalization for a long time, but now this is being done in a much more conscious and rigorous fashion in programs such as Professor Jim Moliterno’s at William and Mary or the clinical legal ethics classes at Notre Dame or the Ethics/Lawyering Skills offerings at Loyola.

A few schools have developed a sequence of skill-based offerings, focusing on a particular role of the attorney, in which the sequence is designed to produce a progression towards a professional conception of the role. The best example I found of this is the fledgling Moore Advocates Program at Fordham now growing its feathers under the good direction of Professor Ian
Weinstein. But perhaps the most common of contextualization methods is teaching ethics through what is called the pervasive method, in which legal ethics are integrated into existing substantive offerings in one fashion or another. Our own Professor Deborah Rhode is one of the champions of this approach, and the success of the effort is indicated by the fact that the schools attempting some form of the pervasive method are far too numerous for me to mention this morning.

There are also a few schools in which contextualization, as a foundation of teaching towards the profession, occupies a much more central role in the overall design of the curriculum. My own school, Mercer Law School, I am pleased to say, has been a leader in this effort, with a curriculum designed backwards, that is, starting from an agreed upon conception of the professional lawyer we wanted to produce.

I hope that this motif of contextualization spreads, and I think it might. I hope we can see, in what I have described so briefly today, a beginning tendency or, at least, the hint of a beginning tendency to move concerns with professionalism from the periphery of pedagogical decision-making toward the center from which they came and to which they belong.

Some of the developments I have described, in fact, all of those that extend beyond the ordinary course offerings, are extremely difficult to accomplish. This is not news to the academics in the audience. More than half of the ones I mentioned came about through the prompting of outside monies, primarily the Keck Foundation. This will come as no surprise if you are at all familiar with the politics of curriculum reform. Without outside sources, curricula changes are always battles for limited resources. Because such battles can be personal, fierce, and unpleasant, and because there is a tacit agreement among law professors not to rock the boat too much since we are all floating very high in the water these days, the kind of structured curriculum, progression of courses, increased requirements, and sectionalization that professionalization requires are damn near impossible to achieve. Add to this the disastrous notion, encouraged by some hiring partners who are very confused about the requirements of good lawyering, that law students should begin specialization while in law school, and you can see the enormity of the problem facing any proposal for change.

One way of avoiding the problem, however, is to establish programs outside of the ordinary curriculum, and as I have said, to do so with outside monies. There are now, thank goodness, a rather large number of these outside programs—we recently created one at Mercer under the direction of Professor Pat Longan—and Professor Tony Alfieri of the University of Miami will now tell you about professionalism developments within them.
ANTHONY ALFIERI, Professor and Director of the Center for Ethics and Public Service, University of Miami School of Law:

*Activities of Law School Centers on Professionalism*

Thank you, Jack. Let me address three points on the subject of law school-based professionalism centers: first, the nature of their activities; second, the impediments to their growth; and third, the extent of their impact. Both educational and aspirational in their mission, professionalism centers serve multiple constituencies: traditionally students, the bar and bench, and alumni. Descriptively, their activities encompass colloquia, scholarship, curriculum development, and community service.

In the field of colloquia and scholarship, Fordham Law School’s Stein Center sets the pace. Led by Professors Bruce Green, Mary Daly, and Russell Pearce, the Stein Center conferences have ignited a burst of energy in the ethics literature. Programs at Hofstra, Harvard, Stetson, Cardozo, and here at South Carolina add to this energy. Much of the early literature is surveyed in the fine bibliography compiled by Stanford Law School’s Deborah Rhode. However noteworthy, the more recent literature lacks thoroughgoing accounts of the function of race, ethnicity, gender, and sexual orientation in ethics and the lawyering process.

In the field of pedagogy, many increasingly heed Deborah Rhode’s call for the integration of ethics materials across the curriculum in both substantive and skills courses. Fordham faculty have enhanced this curricula diversity by fashioning advanced ethics courses in private and public law areas. Against this background, the absence of a similar jurisprudential integration into ethics courses seems inexplicable, especially given the import of feminist, Critical Race, LatCrit, and Queer theory to legal practice. For those interested in ethics integration outside of jurisprudence, Cornell’s Legal Information Institute provides an invaluable resource for academics, students, and practitioners.

In the field of community service, both Fordham’s Stein Center and the University of Miami’s Center for Ethics & Public Service are developing hybrid models that integrate teaching, interdisciplinary research, and pro bono outreach. Founded in 1996, Miami’s Ethics Center is an interdisciplinary project devoted to the values of ethical judgment, professional responsibility, and public service in law and society. The Ethics Center provides training in ethics and professional values to law school and university students as well as to the Florida business, civic, education, and legal communities. It observes three guiding principles in serving the cause of ethics, professional values, and public service: interdisciplinary collaboration, public-private partnership, and student mentoring and leadership training.

Staffed by more than 50 first, second, and third year law students serving as fellows and interns for up to fifteen hours per week, the Ethics Center operates five practice groups in the fields of ethics education, professional training, and community service. The Bar & Bench Group offers continuing
legal education training to Florida bar associations and nonprofit advocacy organizations. The Education Group teaches ethics to faculty and students in Miami-Dade County public and private high schools in weekly seminars and in periodic study circles. The Workshop & Symposium Group sponsors interdisciplinary seminars on the professions at the Law School and University. The University Group supervises a leadership seminar series at the Law School, sponsors an undergraduate ethics colloquium, and co-teaches a first year ethics seminar at the University. The Pro Bono Group administers the Community Health Rights Education Project, an integrated teaching, research, and community service program providing health rights education to underserved communities in cooperation with the Schools of Medicine and Nursing, and the Community Economic Development and Design Project, a community-based education and technical assistance program furnishing small business counseling, economic development training, and economic justice research to residents of low-income neighborhoods in collaboration with the School of Architecture.

Despite their record of achievements, law school professionalism centers confront serious impediments to their future growth and success. The greatest impediment is, of course, funding. In lieu of a law school-supplied operating budget, professionalism centers must pursue both hard and soft money fundraising strategies. Fordham and South Carolina offer instructive lessons in accumulating hard-money endowments. Miami affords a lesson in the travails of mixed strategies: annual giving, donor gifts, foundation grants, and capital campaigns. Mixed strategies require delicate maneuvering inside the law school and university among administrators, faculty, and alumni, and outside among members of the bar and bench, donors, foundations, and corporations. For those pursuing mixed strategies, the best approaches emphasize cross-disciplinary collaborations within the university and joint venture partnerships without.

Impediments common to both soft and hard money fundraising strategies stem from a culture of skepticism that oftentimes infects the media and foundations. To gain appreciation and support for their work, professionalism centers must educate the media locally, regionally, and nationally. Good media relations are an acquired skill that must be cultivated personally and professionally through networking by telephone, e-mail, mailings, and planned events. The same holds true for foundations. Cultivating foundations by regularly circulating annual reports, corresponding with in-house contacts, and visiting national offices for informational briefings on priorities and funding cycles promises constructive results for law schools at all ranks. Outreach of this kind, though strategic, also constitutes an important community-building exercise gratifying in itself.

Overcoming the challenges of financial underwriting, media outreach, foundation support, and institutional politics in building a professionalism center is often daunting and always exhausting. At the same time, the rewards of educating law school and university students, collaborating with university
administrators and colleagues in cross-disciplinary joint ventures, and forging public private partnerships in organizing innovative forms of community service are substantial and inspiring. In five short years, for example, Miami’s Center for Ethics & Public Service has helped to educate over three thousand members of the Florida bar and bench, Law School, University, and civic communities. Many other Centers represented here have accomplished equally important objectives. We urge you and your law school to join this hopeful movement in legal education. Thank you.

NATHAN CRYSTAL, Professor, University of South Carolina School of Law:

I know other people have things to say, and I am sure members of the audience have questions they want to ask, so I will limit my remarks to three sentences, not including this first sentence. First, the professionalism movement has been a major topic in the profession for at least ten years. Second, the New York Times of August 17, 2000, reported a dramatic decline in the number of pro bono hours by major national law firms; the top firm declined from 220 hours to 105 hours. Third, if the professionalism movement ignores market forces, it is doomed to be irrelevant.

RICHARD E. CARTER, Executive Director, ALI-ABA Committee on CLE, and former Director, ABA Division for Professional Education:

Although I am tempted to take Roy’s admonition that one need not make any response, I would like to make a couple of observations. One is just to say how overwhelmed I am at the number of offerings and the different things going on in law schools. As someone who is a law school graduate pre-Watergate, this is a phenomenal change. The only activity that I can remember in my three years of law school was an intervention by the faculty shortly after graduation—an intervention in the admissions process when one of the members of my class was about to be turned down by a lawyer who was part of the mandatory interview process for admission because this graduate had a beard. That was the most we dealt within the issues of ethics and professionalism. I suppose this is in keeping with the topic someone mentioned this morning about outlandish dressing in the courtroom. This is another example of professionalism rather than ethics.

Just a couple of observations that are really questions. I am not sure I heard Professor Alfieri correctly when he talked about what was happening in the clinical area. There seemed to be a greater diversion from using ethics in the clinical setting. It has always seemed to me to be one of the best settings in which to work with students on ethical problems. So I hope I heard that wrong. I have one other observation with regard to Professor Sammon’s mention of the pervasive technique. You do not know how lucky you are to make a decision about what you are going to cover and how you are going to cover it based on
your educational needs rather than on some regulation that says you must separate out ethics for one hour or whatever, which is the reality of the world in continuing legal education.

ALFIERI: I will respond to the good question on clinics. I am speaking as a former clinical teacher or perhaps a current clinical teacher, given the hybrid nature of the Center for Ethics and Public Service. The clinical movement and individual clinical teachers are running nonprofit shops, for the most part, and are busy at it. The focus on ethics tends to be secondary to the primary matter at hand, direct services and law reform activities, whether it is in a clinical setting or legal service/legal aid setting or a public interest nonprofit advocacy setting. One of the questions that should be on our agenda is how to conduct in a collaborative way some form of empirical and anecdotal studies to get a sense of what is going on in the teaching of ethics, legal aid and services offices, and in nonprofit and public interest law firms whether they be great or small. To the extent that there is an absence of well-developed ethics and professionalism programs, this is a wonderful opportunity to develop innovative programs.

THE HONORABLE ROGER K. WARREN—President, National Center for State Courts

Let me stir the pot a minute—I have not heard anyone address the underlying issue: Exactly what problems and conduct on the part of lawyers are all these efforts trying to address? I would like to follow up on Martha Barnett’s comments last evening.

Martha Barnett talked about the need for an outside, public perspective on this issue and the need to build and improve public respect for lawyers and the justice system. I am president of the National Center for State Courts. Our mission is to improve court performance and improve public trust in the courts and the justice system. Therefore, I, in effect, represent an outside perspective. I have not toiled in the field of lawyer professionalism. The fact of the matter is that the public does not distinguish between various elements of the justice system. First, it does not distinguish between lawyers and other institutions and actors in the justice system. Second, public distrust of lawyers is much, much greater than that of any other element of the justice system. Third, and more importantly I think, public attitudes about lawyers are one of the two or three significant drivers of public attitudes about the justice system. It is their attitudes about lawyers, more so than most other factors, that account for their overall view of the justice system. That is, public distrust of lawyers is critical in looking at the issue of public trust in the overall justice system. So much so, as a matter of fact, that the National Action Plan to Improve Public Trust and Confidence in the Justice System, which the National Center for State Courts published last year as the result of a national conference co-chaired by Chief Justice Tom Zlaket from Arizona, identified re-examination of the role of
lawyers as one of the highest priority activities that had to be pursued at a national level to address the issue of public trust and confidence in the justice system.

Now, to take this matter a step further, I think it is important to examine what the public does think about lawyers. What are the sources of the public’s dissatisfaction with lawyers? The sources of dissatisfaction with lawyers fall into four categories. The first is what I would call commercialism. The public thinks lawyers are greedy, that they are more interested in wealth than other values, that they make too much money, that they charge too much, and that the cost of legal services is the principal reason that courts are unaffordable to the vast bulk of the American public. Secondly, they feel that there is a culture of self-promotion. The public thinks that lawyers typically promote their own personal interest above the interest of their clients and of the public. Thirdly, the public thinks lawyers are unethical—not judged by some standard of legal ethics, I am talking about real ethics—that lawyers are dishonest, deceitful, manipulative, and uncaring. In a 1993 survey by Peter Hart for the ABA, the ethical standards of lawyers were compared by the public with the ethical standards of automobile mechanics. Finally, what I would call the fourth category, the sins committed in the name of zealous representation. This is the imperative to “win at any cost.” In my view, it is not so much what happens in the courtroom, or in depositions, which is like the tip of the iceberg—one percent—it is what happens in the transactions. It is the idea that to win, someone has to lose. It is the idea that it is a zero sum game. It is paying too little attention to the whole philosophy of win-win. It is that winning means subduing the opponent rather than resolving the dispute or solving the underlying problem.

I am not saying that other issues are unimportant: issues of legal ethics, lawyer discipline, civility among lawyers, and competence. I am not saying those issues are unimportant, but I think the issues that I previously described, the issues that matter most to the American public, are paramount issues, and that the real question is: What can law schools do to address these important public issues?

Service is the criterion that distinguishes lawyers as a profession. But for the concept of service, whether it is to a client, the public, or the body politic as Martha Barnett put it, lawyers are not a profession. They are merely an occupation or a business. The fundamental challenge facing lawyers and law schools, in designing professionalism programs, is how to address the public concern that lawyers are more bound by a pecuniary ethic and one of self-promotion, than an ethic of care, an ethic of service. I think that is the fundamental issue that professionalism programs in law schools are going to have to address if they are going to address the issue of professionalism in the bar in a way that responds to public cynicism about our justice system.
CAROLINE R. HEIL, Editor in Chief, South Carolina Law Review, USC School of Law:

Just to follow up on the clinical idea of the education of ethics, and from a student’s perspective, I think one thing lawyers forget when they have been out of law school for a while is that students do understand and seek guidance and want, when we enter a professional responsibility class, to be told what we can and cannot do. It is very frustrating when you read the Model Rules of Professional Conduct to learn that they are very malleable, and you cannot get any guidance on exactly how you are supposed to behave. In addition, I think it is important for us to focus on what students fear when they leave law school and enter the profession. I think we fear three things. These are things that we discuss and actually talk about in law school.

The first fear is becoming the lawyers that we do not respect. No one in law school expects to become an unethical or unprofessional lawyer. I think we all fear the possibility of that happening without ever realizing it and without being able to control it. On that note, the second fear is losing a job because we do not know that we are doing something wrong. The third fear is not having the strength to report people we work under and whom we are taught to respect and depend on. For this reason, I think we need a top-down approach to ethics. We need to fix the legal profession to the degree that we feel comfortable reporting each other and holding ourselves to a higher standard, so that students who move into the profession are not afraid to be as professional and responsible as they can possibly be. Therefore, from a student’s perspective, I want to remind you that even with clinical programs and centers and all of the things we are discussing today, the bottom line is: You can “teach” professionalism all day long, but students already understand it. We know. I think most of us are good people and we know right from wrong. Instead, we need the tools to be the people you are “teaching” us to be.

Thank you.

SECOND PANEL: The Judiciary’s Response to Professionalism Issues
Presenters: Zlaket and Ramsey
Responders: Atkinson, Grey, Morrison, and Diminich

CHIEF JUSTICE THOMAS A. ZLAKET, Supreme Court of Arizona:

*The Conference of Chief Justices’ 1997 National Action Plan on Lawyer Conduct and Professionalism*

Thank you very much and good morning. I am honored to be with you. I would really like to talk about the subject you just introduced, but the program says I am supposed to tell you about the Conference of Chief Justices’ National Action Plan on Lawyer Conduct and Professionalism. Before I do, I would be remiss if I did not echo all the comments of my good friend, Judge Roger