# Journal of the New York State Judicial Institute on Professionalism in the Law

## Convocation on the Face of the Profession:

## Developing Professional Values in Law School

Albany, New York

November 9-10, 2004

Record of Proceedings

Volume Four Winter 2005 Number One

# JOURNAL OF THE NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

**VOLUME FOUR, NUMBER ONE**
**WINTER 2005**


25 Beaver Street, Room 1100, New York, New York 10004
Internet Address: <http://www.courts.state.ny.us/jipl/>
Cite the Journal of the New York State Judicial Institute on Professionalism in the Law as:
J.N.Y.S. Jud. Inst. Prof. Law

# JUDGES OF THE
# NEW YORK STATE COURT OF APPEALS

Hon. Judith S. Kaye, Chief Judge

Hon. George Bundy Smith

Hon. Carmen Beauchamp Ciparick

Hon. Robert S. Smith

Hon. Albert M. Rosenblatt

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# NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

# JOURNAL OF THE NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

Volume 4, No. 1 Winter 2005

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# FOREWORD

What are the core values of our profession? How should those core values be defined for law students? With perhaps some limited academy dissent, the profession acknowledges that the inculcation of professionalism during the law school experience is necessary but recognizably variable among law schools. One who recognizes this laudable goal may soon stumble on some rather basic issues. What have law schools accomplished to distill and teach these values to law students? Do their efforts generate discussion and appreciation of core values? When the student graduates, do considerations of core values resonate during the practice of law? These considerations were the subject of analysis during the New York State Judicial Institute on Professionalism in the Law's 2004 Convocation reported in this journal.

In March 1999, the New York State Judicial Institute on Professionalism in the Law was officially brought into existence by an Administrative Order of the Chief Judge. The Institute serves as a permanent commission dedicated to nurturing professionalism among members of the legal profession. In furtherance of its charge, during the fall of 2001, the Institute's Chair, Louis Craco, established the Working Group, consisting of five Institute members, to assist law schools in New York State in the establishment or expansion of professionalism orientation programs during law school. This specific charge flows from the Institute's first Convocation in the fall of 2000, "The Face of the Profession." Almost unanimous agreement was evident among Convocation participants from the bench, the bar and the academy that direct inculcation of professionalism values during law study is critical. Hence, the Institute's third Convocation, "Developing Professional Values in Law School," was born.

Professor Russell G. Pearce from Fordham Law School presented Convocation attendees at our opening dinner with a "thought experiment on the state of the legal profession and how that affects how we think about law schools." He shared two stories of the legal profession–the rosy story and the blues story. The two stories sparked a discussion ranging from how economics affects ethics in the practice of law to how to motivate law school professors to integrate professionalism considerations into their classes and ultimately during practice.

The keynote address by Judge George Bundy Smith challenged the Convocation attendees to define core values. Understanding that the license to practice law is a privilege and a responsibility, he urged that core values reflect the profession's duty to work to increase access to the profession for all who are qualified. Following Judge Smith's keynote address, two panels followed. Panel I, led by Panel Chair Peter Pitegoff, attempted to define professionalism for law students by examining the core values of the legal profession. Mr. Pitegoff, along

with the other panelists, the Hon. Jack Battaglia, Vincent Buzard, Ellen Chapnick, Nancy Maurer and Catherine Richardson, engaged in a lengthy conversation over what core values are at the heart of the legal profession, as well as how different members of society have various perceptions of what professionalism is. In addition, they discussed how these core values factors in when representing a client, and how these core values may change depending on the area of law practiced. Panel II, led by Eileen Kaufman, discussed the extent to which law school programs should attempt to inculcate these values in their students. The panel, composed of Carol Buckler, Susan Bryant, Patrick Longan, Sandra O'Laughlin, and Marjorie Silver, discussed a number of professional programs used in law schools around the country.

The inculcation of core values during the law school experience is regarded as a critical foundation to assure the continued health of the legal profession. After all, the profession of law is a vocational calling that serves the public good. It provides a systemic matrix for the ordering of the affairs of our country and for the resolution of disputes. Lawyers make it work. Law student recognition of this critical core value is a responsibility of all members of the profession, the bar, the academy and the judiciary.

In closing, it is important to note the continued support and encouragement from our Chief Judge, Judith Kaye, for the efforts of the Institute. As the architect of the Institute, it was her foresight that allowed the professional inquiries and the activities of the Institute. On behalf of the Institute and particularly the members of the committee responsible for the Convocation, Ms. Richardson, Mr. Pitegoff, Mr. Louis Craco, Ms. Eileen Kaufman, and the Hon. Leslie Stein as well as Catherine O'Hagan Wolfe, we extend our deep appreciation for their efforts. Finally, on a personal note, without the assistance of an associate of my law firm, Donna Haugen, this Convocation would not have been possible.

John M. Gross
Program Chair,
New York State Judicial Institute on
Professionalism in the Law

# EXECUTIVE SUMMARY

A Convocation on "Developing Professional Values in Law School" was held in Albany, New York, on November 9 and 10, 2004. It followed up on one of the points raised at the first Convocation on "The Face of the Profession,"[1] held in Albany, New York, on November 13 and 14, 2000, which examined, inter alia, socialization of law students into the profession. The Convocation on "Developing Professional Values in Law School" was held in the courtroom of the Court of Appeals and at the New York State Bar Center.

At the dinner session on the first day of the Convocation, Professor Russell G. Pearce of Fordham Law School suggested that the way ethics should be taught in law schools depends on whether one has a "rosy" or "blues" view of the legal profession. In the rosy view, the state of the legal profession is basically fine; hence, no fundamental change in legal education is needed. In the blues version, the legal profession is in crisis; most lawyers no longer see themselves as having a commitment to the public good in their work. If that is true, law schools must make ethics and the public good a top priority, e.g., by making ethics a first-year course equal in importance to other first-year courses, by expanding the scope of ethics so that it is not simply about disciplinary rules, and by teaching ethics pervasively (i.e., integrating it into the traditional doctrinal classes).

The Hon. George Bundy Smith, Senior Associate Judge of the Court of Appeals, gave the keynote address on the second day of the Convocation. He emphasized that law is a privilege, not a right; that it is an awesome responsibility; and that it is a trust. He posited that the core values of the profession include access to the profession for all who qualify, regardless of race; access of individuals to lawyers and the legal system, regardless of income; and protection of the innocent. He noted that the following aspects of the Hippocratic Oath are applicable to the law: commitment to the patient, i.e., the client; the confidential nature of the relationship between the doctor and the client; and the realization that a doctor has a larger interest in the protection and advancement of society in general.

The first panel, on "Defining Professionalism for Law Students," included presentations by two academics, Ellen P. Chapnick, Dean for Social Justice Initiatives at Columbia Law School, and Nancy Maurer, Clinical Professor and Director of Clinical Programs at Albany Law School; a sitting judge, the Hon. Jack Battaglia of the New York City Civil Court; and the President-elect of the New York State Bar Association, A. Vincent Buzard. It was moderated by Peter Pitegoff, Vice Dean for Academic Affairs and Professor of Law at SUNY Buffalo Law School.

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1. The proceedings of Convocation I were published in Volume 1, No. 1 of the Journal of the New York State Judicial Institute on Professionalism in the Law.

Judge Battaglia divided professional values into ends-oriented ones (e.g., justice, fairness, equality, and access) and means-oriented ones (e.g., confidentiality, candor, and loyalty). He suggested that means-oriented values, while important, can be found in many other professions; the ends-oriented values are the ones that distinguish legal professionalism from professionalism generally. However, when lawyers talk about problems or crises of professionalism, they usually talk about means-oriented values. Judge Battaglia argued that the legal profession must strongly articulate the ends-oriented values to law students.

Judge Battaglia emphasized the importance of context. For example, a professional responsibility course taught by a professor who has a background in criminal defense will look very different from a professional responsibility course taught by a transactional lawyer. However, students are not told that; they believe that they are being given a unitary and common vision of professional responsibility when, in fact, that is not always the case.

Judge Battaglia noted that formal ethical rules are designed for the adversarial system. However, that model does not fit all contexts. For example, in criminal law, both sides have interests that transcend those of their individual clients: prosecutors are concerned with upholding the rule of law, and the defense is concerned with providing a barrier against the abuse of government power. Matrimonial law is another area where there are interests besides those of the two battling sides, viz., those of the children. A third context in which rules based on the adversarial system are inadequate is the pro se litigant. Judge Battaglia suggested that unbundling of legal services might be in order.

Dean Chapnick agreed with Judge Smith that practicing law is a privilege and that with that privilege comes responsibility. Such responsibilities include confronting racism, government misconduct and other societal ills, and challenging laws when they are not just.

Dean Chapnick acknowledged the importance of zealous representation but argued that it is not always the same as promoting the public interest. This provoked a lively discussion among the panelists and the audience. Some people noted that lawyers are not obligated to accept clients with whose views they disagree; once a lawyer accepts a client, however, he or she should be a zealous advocate. Other people pointed out that zealous advocacy does not necessarily mean getting the largest dollar amount for one's client; the client might be interested in other things besides money, such as social justice.

Referring to Dean Chapnick's example where a defendant offers $100,000 for an ordinary settlement or $200,000 if the plaintiff keeps everything confidential, Judge Battaglia said that the lawyer for the defendant bears moral responsibility. Zealous advocacy does not mean that a lawyer can avoid personal moral responsibility.

Scott Karson, President of the Suffolk County Bar Association, noted that zealous advocacy and the interests of society can clash. For example, if a criminal

defendant actually did commit the crime, society's interests will be best served by locking him up. Judge Battaglia and Whitney Seymour, Jr. (a former federal prosecutor) responded that society's interests include forcing the government to meet its burden of proof.

A member of the audience pointed out that advocacy in the criminal context need not be restricted to defending the defendant in litigation. For example, Neighborhood Defenders Services assigns a civil lawyer to each criminal case because indigent people who commit crimes often have civil problems as well.

The next panelist, Vincent Buzard, mentioned various obstacles to professionalism, such as the cost of running the modern law firm, competition for clients, the pressure of billable hours, the pressure to settle prematurely if one represents a plaintiff, and the pressure to keep a big case going if one represents a defendant. However, he argued that the business of law does not conflict with the profession of law. On the contrary, if a lawyer has a well-run business, he or she will have more financial independence and will be better able to stand up to a client. Similarly, avoiding frivolous arguments does not merely constitute observance of professional values; it also is how one has a successful law practice.

In contrast to some of the other speakers, Mr. Buzard believed in the primacy of zealous advocacy. When he represents a client, he does not want to have to worry about whether that is in the best interests of society. On the other hand, he does screen the cases that he accepts. He also noted that zealous advocacy does not mean scorched earth tactics. Mr. Buzard concluded by praising those law firms that have a culture of encouraging public service. He said that, somehow, one must instill that culture in other firms.

The ensuing discussion focused on zealous representation versus promoting justice in the broader sense. Various speakers distinguished between the lawyer as counselor and the lawyer as litigation advocate. In the former role, lawyers have many opportunities to persuade their clients to do the right thing. Lawyers can do so by appealing to the client's self-interest, e.g., "If you do x (the thing that the lawyer considers to be wrong), you might end up on page 1 of the newspapers, or the SEC might come after you." By contrast, in the litigation context, especially in the criminal defense context, most speakers believed that the lawyer should be the client's champion against the whole world.

Paul C. Saunders, a member of the New York State Judicial Institute on Professionalism in the Law, said that one way to inculcate professionalism in law school students is for lawyers to represent unpopular clients. Mr. Seymour reinforced this point with an example from 19th-century New York history.

Carol A. Buckler, the Associate Dean for Professional Development at New York Law School, said that it is important for lawyers to be true to themselves and to their own moral values. She pointed out that compared to the general population law students and lawyers have worse mental and emotional health; she suggested that this is because they are taught "this is all about representing

the client, not about me and what I care about and what my values are." Judge Battaglia agreed that it is important that students understand that they have a choice. Charles Cramton of Cornell Law School said that most young lawyers do not have a choice about the cases on which they will work, but Mr. Buzard and Dean Chapnick said that, on the contrary, young associates do screen out certain types of cases.

The last member of the morning panel, Professor Maurer, said that law schools should nurture the good goals with which students come to law school, such as public service and making the world a better place. Too often, such goals are suppressed by competition for grades and status (e.g., the idea that, to be successful, one must work at a big Wall Street firm). Professor Maurer pointed to research showing that people who follow intrinsic values achieve greater personal satisfaction and professional success than those who follow extrinsic values.

Professor Maurer said that instead of focusing so much on the content of particular courses, law schools should focus on problem-solving skills. Clinical education is a good way in which to teach such skills. At Albany Law School, when students become interns in the clinical program, the Presiding Justice of the Appellate Division, Third Department, swears them in and talks about the importance of professionalism.

Besides clinical education, other ways to teach professionalism include moot court, field placements, simulations, and pro bono requirements. One can also integrate skills into traditional doctrinal courses. For example, students in a contracts class could draft contracts, and students in a trusts and estates class could draft wills for each other.

Dean Chapnick noted that a tremendous amount of on-the-job learning takes place during the summer. She suggested that law schools should help students debrief about their summer jobs.

Judge Battaglia suggested that law schools include moral reasoning (i.e., a decision-making toolkit) as part of professionalism training.

Louis A. Craco, chair of the Institute, gave the luncheon address. He argued that the rule of law is crucial in holding American society together and that it is delivered daily to clients by lawyers, in every house closing, zoning proceeding, and business contract; the administration of justice is not limited to litigation. Because the rule of law is so important, and because the rule of law is delivered through lawyers, the quality of that lawyering is also crucial. Of course, the Institute does not mean to dictate to the academy what professionalism is. However, law schools must at least discuss that topic. Mr. Craco also emphasized the importance of having good mentors.

The second panel, "Law School Programs Designed to Develop Core Values," included presentations by four academics, Professor Patrick E. Longan of Mercer Law School in Georgia; Professor Marjorie A. Silver of Touro Law Center; Professor Susan Bryant of CUNY Law School; Dean Buckler; and the

chair of the Character and Fitness Committee for the Eighth Judicial District, Sandra S. O'Loughlin. The panel was moderated by Professor Eileen Kaufman of Touro Law Center.

Ms. O'Loughlin reiterated some of the themes that had been raised so far in the Convocation, such as the need to teach ethics early and pervasively and the pressures faced by lawyers today. For example, mentoring is important, but few people have time to do this.

Professor Longan described Mercer's orientation program and its course on the legal profession. In the orientation program, which is mandatory in Georgia, students go to the courthouse and are welcomed to the legal community by both a state judge and a federal judge. They then take a professionalism pledge. Next, they break up into small groups where volunteer lawyers from the community lead discussions about various ethical problems.

In the spring semester of their first year, students take a three-credit, graded course on professionalism. The course has various components. One is a series of 30 classroom meetings in which Professor Longan and his students define professionalism and survey the profession (e.g., big firm, small firm, in-house, government). Another component is "living in the law," five sessions at which outside speakers discuss issues such as alcoholism, substance abuse, and mental illness; transformative practices; and finding a higher calling in the law. A third component is an oral history project in which students interview lawyers and write a paper. In the fourth component, students read the biography of a famous lawyer or judge. Finally, students write a paper at the beginning of the semester on their ambitions as a lawyer and a paper at the end of the semester on whether their ambitions have changed.

A member of the audience noted that, as a result of the mandatory law school and judicial programs in Georgia, partners at Savannah law firms are now having weekly meetings with their associates about professionalism and ethics.

Professor Silver described how she integrates professionalism into her civil procedure class. For example, if a student who was not able to discuss an assigned case very well says, "We were supposed to read that case for last week, and last week I was thoroughly prepared," she responds, "Can you imagine going to a judge on the day you're supposed to start trying your case and saying, 'Your Honor, I was fully prepared to try this case last week, but all this time has passed and now I just need some time'?" If a student who is marked as late protests, "But I was only one minute late," Professor Silver explains that a lawyer who misses the statute of limitations by only one day has still missed the statute of limitations. If Professor Silver tells her students to break up into groups of two or three but they form a group of four, she explains that if a local rule says that memoranda of law cannot exceed 25 pages, a 27-page brief may well be rejected. Finally, Professor Silver sets an example for her students by taking responsibility and apologizing for her mistakes.

Dean Buckler described the orientation program at New York Law School, which includes a public service day. It also includes "Dinner and a Movie": students and practicing lawyers watch a movie and discuss the ethical issues raised therein. Later on in the year, the school has a kind of "scared straight" program at which an attorney who has gone through a crisis involving substance abuse, alcoholism, or depression talks to the students about his or her personal experience. In the middle of the first year, the school has a program on career choices.

Dean Buckler emphasized the importance of having the ethics course taught by professors who specialize in that field. If the course is taught by a faculty member who specializes in another area and is teaching the course only because he or she is required to do so, that sends a negative message to the students.

New York Law School sends a positive message about ethics by having a Center for Professional Values in Practice. It is one of five academic centers; the school has an honors program in which students affiliate with a center and take a related course of study.

The school also shows that it values public service; students who devote a certain number of hours to public service get a notation on their transcripts. The public service need not be law-related; volunteering to help children read counts. The idea is to encourage not only public service, but also work/life balance.

Dean Buckler noted that students watch professors all the time, so it is important for the latter to set good examples, just as parents should set good examples for their children. Professors and staff should model professional behavior and demand professional behavior from students.

Professor Bryant described the orientation program at CUNY. In the morning, students visit three state courts in Manhattan and are asked to reflect on that experience. In the afternoon, they take an oath in the ceremonial courtroom of the federal courthouse.

Professor Bryant said that law schools need to teach students practical skills, like collaborative skills, time management skills, judgment, how to avoid burn-out, how to be argumentative and civil at the same time, and how to defuse the incivility of their opponents without taking the bait.

Professor Bryant pointed out that the values of the legal profession were, by and large, defined by white males. She said it was important to create space for newcomers to define and help shape the profession.

Professor Bryant said that it is possible to do well and to do good; the two are not in opposition to each other.

In the question and answer session, Mr. Seymour suggested that law schools test for character instead of relying so heavily on the LSAT. Fay Rosenfeld of Hofstra Law School pointed out that law schools do ask about any criminal or academic misconduct in the applicant's past, which is one way (albeit imperfect) of judging character. Another member of the audience suggested that the

character and fitness process precede law school so that students would not risk spending three or more years of their lives and a substantial amount of money only to be denied admission to the bar. Ms. O'Loughlin said that in New York a student who has been admitted to a qualified law school can petition to have a particular issue examined by the character and fitness committee.

Professor Kaufman thanked the students from around the state who had participated in round-table discussions preceding the Convocation. Most of the students believed there was some value in professionalism pledges; some examples are included in the Appendices.

Eleanor Stein, Visiting Professor of Law at Albany Law School, had the unenviable task of summarizing the Convocation in a short period of time. She noted that although the Convocation had not come up with a single definition of professionalism, the attendees all seemed to agree that it is more than just the ethical rules or staying out of trouble. People also agreed that silence on this issue is a terrible mistake.

Professor Stein said that one thread of the Convocation was the importance of context. Another was zealous representation and (or versus) public service. A third was the personal cost of the profession to law students and attorneys. A repeated theme of teaching professionalism was that it should be done early and throughout the curriculum.

Professor Stein concluded with a moving poem, "To be of use," by Marge Piercy. It was consistent with the transcripts of the round-table discussions with students, in which the word "service" showed up repeatedly.

# CONVOCATION PROGRAM

## DINNER PROGRAM

**LOUIS A. CRACO, ESQ.**

Louis A. Craco is of counsel to the firm Craco & Ellsworth, LLP, located in Huntington and Manhasset, New York. A retired partner of Willkie Farr & Gallagher, Mr. Craco's practice centers on litigation and arbitration. New York State Chief Judge Judith S. Kaye appointed him Chair of the New York State Judicial Institute on Professionalism in the Law when she created the Institute in 1999; he also served as Chair of the Chief Judge's Committee on the Profession and the Courts. From 1982-1984, Mr. Craco was President of the Association of the Bar of the City of New York.

**RUSSELL G. PEARCE, ESQ.**

Russell G. Pearce is a Professor at Fordham University School of Law, where he teaches professional responsibility, advanced ethics and public interest law, remedies and legal process. He was a law clerk to Hon. Jose A. Cabranes, and served as an associate at Fried, Frank, Harris, Shriver & Jacobson, a staff attorney at the Legal Aid Society and General Counsel to the New York City Commission on Human Rights before turning to academia in 1990.

## INTRODUCTION AND KEYNOTE ADDRESS

**HONORABLE JUDITH S. KAYE**

Judith S. Kaye is the first woman to serve on New York State's highest court. She was appointed as an Associate Judge in 1983 and as Chief Judge in 1993. Chief Judge Kaye received her undergraduate degree from Barnard College and her law degree from New York University School of Law (cum laude). Chief Judge Kaye engaged in private practice in New York City until her appointment to the Court of Appeals. She is Chair of the Permanent Judicial Commission on Children. Among other posts, she served as Trustee of the Law Center Foundation of New York University, Director of the Legal Aid Society, Director of the American Judicature Society, Executive Committee member of the Association of the Bar of the City of New York, and member of various other committees of the New York State and American Bar Associations.

**HONORABLE GEORGE BUNDY SMITH**

George Bundy Smith is the Senior Associate Judge of the New York State Court of Appeals. Judge Smith graduated from Yale Law School and earned an M.A. in the Judicial Process from the University of Virginia Law School. His judicial service began in 1975 when he was appointed to an interim term in the Civil Court of the City of New York. Subsequently elected to the Civil Court and the State Supreme Court, Judge Smith was appointed to the Appellate Division, First Department in 1987. Governor Mario Cuomo appointed him to the Court of Appeals in 1992.

**JOHN H. GROSS, ESQ.**

John H. Gross is a graduate of Cornell Law School. He has been actively involved in representing school districts and colleges in education law, labor relations and employment law for over thirty years. He has served as an adjunct professor at New York University and as a member of the faculty of the Cornell University Industrial and Labor Relations Program. Mr. Gross has served the 3,500 member Suffolk County Bar Association in many capacities, including President. He has been a member of the New York State Bar Association House of Delegates and its statewide Nominating Committee, and has served as Suffolk County's delegate to the American Bar Association. Mr. Gross is a member of the New York State Judicial Institute on Professionalism in the Law, the Board of Directors of the New York Bar Foundation, and he is the Treasurer of the New York State Fair Trial—Free Press Conference. Mr. Gross is a member at large of the New York State Bar Association Executive Committee.

## PANEL I—DEFINING PROFESSIONALISM FOR LAW STUDENTS

**Presenter:**

**PETER R. PITEGOFF, ESQ.**

Peter Pitegoff is Vice Dean for Academic Affairs at the State University of New York at Buffalo Law School, where he has been a professor since 1988. He teaches corporation law, business transactions, community development law, and ethics. He has worked and written extensively in the areas of economic development, labor and industrial organization, non-profit corporations, employee ownership and alternative enterprise forms, welfare and employment policy, and urban revitalization, and has taught courses at Harvard Law School and New York University School of Law. Dean Pitegoff founded a clinical program in community economic devel-

opment law sixteen years ago, which has served as a model for transactional clinics at other law schools. He remains engaged in public policy, including a current initiative with the organized bar to draft a major revision of the New York Not-for-Profit Corporation Law, and he is a member of the New York State Judicial Institute on Professionalism in the Law. Dean Pitegoff previously was legal counsel to the ICA Group, a Boston consulting firm that assists worker-owned enterprises and community economic development initiatives nationwide. He is a 1981 graduate of New York University School of Law.

**Panelists:**

**HONORABLE JACK M. BATTAGLIA**

Hon. Jack Battaglia was elected to the Civil Court of the City of New York, Kings County in 2000. During more than fifteen years of private practice, Judge Battaglia was an associate and partner at Greenbaum, Wolff & Ernst, house counsel to a group of multinational companies in the vision care industry; and part of a two-lawyer firm in the San Francisco Bay area. In academia, he worked two years with the Legislative Drafting Research Fund at Columbia, and more than ten years as a full-time member of the faculty at Touro Law Center, teaching a range of substantive law courses. Judge Battaglia's continuing interest in legal education is reflected in his service on the Committee on Legal Education and Admission to the Bar of the Association of the Bar of the City of New York.

**A. VINCENT BUZARD, ESQ.**

A. Vincent Buzard is President-Elect of the New York State Bar Association and Chair of the House of Delegates. He is also a member of the House of Delegates of the American Bar Association. For the last twenty-five years, he has been a frequent political and legal commentator on local radio and television. Mr. Buzard, a cum laude graduate of the University of Michigan Law School, is a partner in the law firm of Harris Beach LLP, where he chairs the appellate advocacy and personal injury practice groups. He is a member of the Governor's Judicial Screening Committee and is a referee for the New York State Commission on Judicial Conduct. He is a former Corporation Counsel of the City of Rochester and served on the Chief Judge's Committee on the Establishment of Commercial Courts in New York. Mr. Buzard is a past President of the Monroe County Bar Association and is the recipient of the Association's Adolph J. Rodenbeck Award for outstanding service to the community and to the profession.

**ELLEN P. CHAPNICK, ESQ.**

Ellen P. Chapnick is the Dean for Social Justice Initiatives at Columbia Law School. Dean Chapnick joined Columbia as the founder and Dean of its Center for Public Interest Law and held that position until July 2003. She also co-teaches the Appellate Court Externship. Previously, she was a federal litigator at Wolf Popper Ross Wolf & Jones, where she worked on the *In re Exxon Valdez Oil Spill Litigation,* for which she and her co-counsel shared the Trial Lawyers for Public Justices 1995 Trial Lawyer of the Year Award. She also has been a staff attorney at the Puerto Rican Institute for Civil Rights in San Juan and at various labor unions. Her recent pro bono work includes serving as the Chair of the Association of American Law Schools Section on Pro Bono and Public Service Opportunities and President of the Center for Constitutional Rights. She is a member of the Planning Committee for Legal Services for New York City-Bronx and the Board of Advisors of the New York State Unified Court System Legal Education Opportunity Program. She is the author of several articles and the "Access to the Courts" chapter in the American Bar Association's *The Law of Environmental Justice*. Dean Chapnick is a graduate of Georgetown University Law Center.

**NANCY M. MAURER, ESQ.**

Nancy Maurer is Director of Clinical Programs and a Clinical Professor of Law at Albany Law School, where she teaches disability law, negotiating for lawyers, fact investigation, and legal issues in medicine. She founded and for many years directed the law school's Civil Rights and Disabilities Law Project. She co-developed the law school's "Introduction to Lawyering" program and has written and lectured in the areas of clinical legal education and disability law. She is a member of the Association of American Law Schools, Clinical Legal Education Association, and New York State Bar Association Committee on Issues Affecting People with Disabilities, and is Chair of the Board of Directors of Disability Advocates, Inc. She is a graduate of George Washington University Law School.

## LUNCHEON PROGRAM

**LOUIS A. CRACO, ESQ.**

## PANEL II — LAW SCHOOL PROGRAMS DESIGNED TO DEVELOP CORE VALUES

**Presenter:**

**EILEEN R. KAUFMAN, ESQ.**

Eileen Kaufman, Professor of Law at Touro College Law Center, received her J.D. and LL.M. from New York University School of Law. Before joining the faculty at Touro, Professor Kaufman served as managing attorney at Westchester Legal Services. Professor Kaufman is the founder and director of Touro's summer program in India, and served as Touro's Vice Dean from 1996 to 2000. She teaches torts, constitutional law, and sex-based discrimination. Among her professional activities, Professor Kaufman serves on the Board of Governors of the Society of American Law Teachers and she is the Reporter for the New York Pattern Jury Instructions Committee. She is a member of the Association of the Bar of the City of New York's Committee on Legal Education and Admission to the Bar, the New York State Judicial Institute on Professionalism in the Law, and the Bar Admission and Lawyer Performance Committee of the American Association of Law Schools. Professor Kaufman has published primarily in the areas of civil rights and women's rights. She received the 2004 Ruth G. Shapiro Award of the New York State Bar Association.

**Panelists:**

**CAROL A. BUCKLER, ESQ.**

Carol A. Buckler is the Associate Dean for Professional Development and Professor of Law at New York Law School. As Associate Dean, she has initiated a professionalism program that begins at orientation and continues throughout students' law school career. Professor Buckler has taught in the clinical program at New York Law School, and currently teaches legal ethics.

**SUSAN J. BRYANT, ESQ.**

Susan Bryant, Director of Clinical Education and Professor of Law at the City University of New York School of Law ("CUNY") at Queens College, received both her J.D. and LL.M. from Georgetown University Law Center, where she was Prettyman Fellow for two years. She began her practice as a lawyer at the Defender Association of Philadelphia. An early advocate of clinical education as a pedagogical program for teaching law students the practice of law and issues of social justice, Professor Bryant has

served as a consultant and trainer for the Association of American Law Schools, the Legal Services Corporation, and the United States Department of Education. Together with other faculty and deans of the founding schools, she developed the Consortium Project, a project designed to increase access to justice by providing resources to graduates in small and solo practices. She has played an important role at CUNY School of Law in the development of its nationally recognized clinical programs and the development of the Community Resource Network, the Consortium Project at the Law School. She also works with the Battered Women's Rights and Immigrant and Refugee Rights Clinic and teaches family law courses. Her research interests include work in cross-cultural, cross-lingual work between lawyers and clients.

**PATRICK E. LONGAN, ESQ.**

Patrick E. Longan holds the William Augustus Bootle Chair in Ethics and Professionalism in the Practice of Law and is the Director of the Mercer Center for Legal Ethics and Professionalism at the Walter F. George School of Law in Macon, Georgia. Professor. Longan is a 1983 graduate of the University of Chicago Law School and served as law clerk to Senior United States District Judge Bernard Decker in Chicago. After seven years of private practice in Dallas, Texas, primarily with the firm of Andrews & Kurth, Professor Longan joined the faculty of Stetson University College of Law in St. Petersburg, Florida, where he taught before coming to Mercer. Professor Longan teaches Legal Ethics and Professionalism and serves as a member of the Georgia Chief Justice's Commission on Professionalism, as an advisor to the State Bar of Georgia Professionalism Committee. He also is the Reporter to the Court Futures Committee of the State Bar of Georgia.

**SANDRA S. O'LOUGHLIN, ESQ.**

Sandra S. O'Loughlin is a graduate of the State University of New York at Buffalo School of Law. Ms. O'Loughlin is a partner at Hiscock & Barclay, LLP and is an Adjunct Professor and Lecturer at the University at Buffalo Law School, State University of New York. She is a member of the National Association of Bond Lawyers and the Business Law Section of the American Bar Association. Additionally, Ms. O'Loughlin serves as the Chair of the Character and Fitness Committee for the New York State Supreme Court, Appellate Division, Fourth Department, Eighth Judicial District, and is a member the Committee on Standards of Attorney Conduct in the New York State Bar Association. She has served on various other committees, including the Committee on Professional Ethics

and the Special Committee on Unlawful Practice of Law in the New York State Bar Association, as well as the Professional Ethics Committee in the Bar Association of Erie County.

**MARJORIE A. SILVER, ESQ.**

Marjorie A. Silver is a Professor of Law at Touro College Law Center, where she teaches civil procedure and professional responsibility. She writes and speaks on issues relating to lawyering, psychological-mindedness, and emotional and multi-cultural competence. In 2003, Professor Silver organized a two-day long CLE Conference at Touro entitled "Lawyering and its Discontents: Reclaiming Meaning in the Practice of Law." In January 2004, she made a presentation at the Professional Responsibility section of the American Association of Law Schools annual meeting on "Commitment and Responsibility: Modeling and Teaching Professionalism Pervasively." She is currently working on a book entitled *The Affective Assistance of Counsel: Practicing Law as a Healing Profession*, to be published by Carolina Academic Press. She is a pro bono attorney with the Immigrant Women and Children's Project of the Community Outreach Law Program of the Association of the Bar of the City of New York, and has chaired the City Bar's Committee on Sex and Law. She holds degrees from Brandeis University and the University of Pennsylvania Law School.

## SUMMARY OF CONVOCATION

**Presenter:**

**ELEANOR S. STEIN, ESQ.**

Eleanor Stein attended Columbia Law School and received her J.D. from the City University of New York School of Law at Queens College. As an administrative law judge at the New York State Public Service Commission, specializing in Environmental and Telecommunications law, she presided over the 150-party proceeding instituting New York's renewable energy program, and issued a comprehensive recommended decision in June 2004. She also presided over the first proceeding in the nation opening the local telecommunications market, and cases ranging from establishing school and library telecommunications discounts to establishing terms and conditions for high-speed Internet competition in New York. She has extensive experience as a mediator and arbitrator in both the environmental and telecommunications fields. Before joining the Public Service Commission as an appellate litigator, she was a law clerk at the New York State Court of Appeals. Ms. Stein is currently a Visiting Associate Professor at Albany Law School at Union University.

# CONVOCATION ON DEVELOPING PROFESSIONAL VALUES IN LAW SCHOOL

## DINNER PROGRAM

**LOUIS A. CRACO, ESQ.**
CHAIR, NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW

Ladies and gentlemen, I'm sorry to be so inhospitable as to tear you away from the bar and your mingling together, but we have a speaker tonight—Professor Russell G. Pearce from Fordham Law School—who has a commitment to be on the 7:15 train in Rensselaer. While our usual custom is to require speakers to sing for their supper, this one is going to sing and get no supper, but we do have an obligation to do two things: one is to release him and the other is to release the Court Reporter, Betsy Helm, who is kind enough to drive him to the station. So anything that you really want to say that's derogatory about Russ Pearce will have to wait until after he's left and the record has been closed. I'd like to thank the New York State Bar Association very much for its hospitality yet again in welcoming us to this splendid house. I must say having been President of the Association of the Bar of the City of New York, and being house proud in that role, I am impressed with what a modern facility can offer. I'm very grateful particularly to Vince Buzard, the President-elect, who is with us tonight and to our old and good friend Pat Bucklin, the Executive Director. Pat is a veteran of our Institute's events, having been with the Court of Appeals the last time we invaded Albany. I'm very happy that she's here to help us tonight. Though I will have occasion to do it before a larger audience and with a slightly different tenor tomorrow, I also want to thank John Gross who has led the Institute in the development of this Convocation. It is hard to tell you in the time that's allotted to me how extraordinary the work, the thought, and the organizational effort that has gone into this event has been. It has all been led and developed with his energy and commitment and thought. John, I am immensely grateful, as should be the profession that you serve and the people whom it serves.

The Convocation John and his working group have put together in a way epitomizes two of the important characteristics of the Institute on Professionalism in the Law. There are, I hope, other hallmarks of our work, but there are two that are important and I think on display over the next couple of days, and I invite you to reflect on what they might mean.

The first is that unlike the almost constant parade of bar association committees and blue ribbon commissions addressing the issue of professionalism, the Institute, as an official organ of the New York State Unified Court System, has constitutional permanence. That isn't simply something that is a nice quality to have, it is a quality that is sort of a form of intellectual and institutional capital, by which I mean it allows us, as many other organizations do not have, a degree of continuity, persistence, and follow up on the way we learn. And so, here we come to the third Convocation of the Institute, re-addressing an issue which emerged at the first: the question of what the law schools are doing, can do, should do, might do, can't do, to consider the impact of the law school experience on what the entrants to the profession think the practice of law is; what the professional ideal is about. Our first Convocation, to which many of you came, saw us examine what the entrance policies of law schools mean, what the inculcation process during law school might be, what the exit policies in law schools might be. Out of that inquiry came some themes which, because we are permanent, could be assigned to a working party to develop. John's working group has conducted a comparative study of orientation practices in various other states. It has more immediately hosted a series of round table discussions with groups from the law schools in New York State which, in their large number, portray much of the variety that the legal academy has to deal with on this issue. And finally, John's work group has held focus groups with students around the state. So this is an example of what the continuity of the Institute can cause to happen, and it is further a promise that continuity doesn't end with the second of these affairs. We will learn from this and we will do more as a result of that learning.

The second major hallmark of the Institute's work, which I think is on display in all the Convocations and particularly I suspect in this one, is our thorough-going commitment to an engaged dialogue between the practicing bar and the legal academy, and while that has, from time to time, had a certain controversial flare to it, it had never before this moment broken dishes. The fact is that we believe that the practicing lawyers of the state, the bench, and bar are engaged in an enterprise in which the academy has a significant stake, and vice versa, and that bringing together those two major entities of the legal profession for a robust, frank, and continuing dialogue, holds some promise for learning things about what each of them can contribute to the common enterprise: What does it mean to be a lawyer in America in the beginning of the 21st century?

In that dialogue, the process, in a sense, is the outcome. The fact that it exists and exists, in non-trite terms, and exists with candor and respect and permanence, in continuity, enables us to harness the resources of both the academy and the practicing bar in what we hope is a significant contribution to the understanding of these issues. Each of these entities, if you want to call them that, brings to the enterprise their own special talents, points of view, habits of

mind: what, in church-speak, I suppose would be called charisms. All these elements are brought to the effort of trying to find common ground in a common cause.

We are lucky in opening this discussion to have with us Russ Pearce as our first speaker. Russ is a professor of law and co-director of the Louis Stein Center for Law and Ethics at Fordham University School of Law. He graduated summa cum laude from Yale College, then went on to Yale Law School where he was the editor of the Law Journal. He joined the faculty after a stint with a New York law firm in 1990 and he has published profusely, as good professors tend to do. If you look at his oeuvre as I had the occasion to do, you would discover that he is an original thinker who gets past the stereotypes in discussing what the legal professionalism notion means, where it came from, and what the instincts propelling it are. For all that work and for his teaching, he received the Sandra D. Levy Memorial Award of the New York State Bar Association in recognition of his contributions to understanding and advancement in the field of professional ethics.

Tonight he is going to do what he quite typically does. He is going to first give you some provocative analysis and some equally provocative synthesis, and then he is going to expose himself to your questions until he has to escape the jurisdiction and go back to New York. We are proud to have as our lead-off speaker, Russ Pearce.

**RUSSELL G. PEARCE, ESQ.**

PROFESSOR, FORDHAM UNIVERSITY SCHOOL OF LAW

Lou, thank you very much for that very kind introduction. I very much appreciate the opportunity to speak to you again, having previously spoken at the Internet Convocation and the Convocation on Young Lawyers. I also am very grateful for the opportunity to review the very excellent materials that were prepared for this Convocation. I have to say, after reading some of the focus group accounts, I was inspired to ask some of the same questions to my students in a professional responsibility class, so I benefitted from that, as well. I apologize that I have to speak and run, as opposed to eat and run, but I have been spending a lot of time with lawyers throughout America, as Lou was mentioning. Last week, right after the election, for a full day I was with the Ohio Bar Association. Unfortunately my obligation to teach means that I have to be back at Fordham early tomorrow morning, so my apologies before I start.

What I would like to offer you tonight is a thought experiment—a thought experiment on the state of the legal profession and how that affects how we think about law schools. I am going to offer you two very different stories and suggest that each story offers a different lesson or different solution about how to promote ethics and commitment to the public good among law stu-

dents. The first story is the rosy story. According to the rosy story, the state of the legal profession today is basically fine. True, we have our little problems. Some lawyers, especially the younger ones, have neglected their commitment to the public good, but they are outliers and do not represent the mainstream of the bar. Among the mainstream of lawyers, there is a consensus, a consensus on the commitment to professionalism, a consensus on the idea that law is a profession and not a business, a consensus that the meaning of professionalism is clear, a consensus on the commitment to core values. Lawyers, for example, agree on the core value of striving to promote justice, fairness and morality. They implement this value while advocating zealously for clients. Accordingly, lawyers counsel their clients to do what is morally right, even if it means that they have to try to persuade the clients to do so. In the rosy story, legal education provides lawyers with a unifying experience and serves as a gateway to the profession. Law schools take seriously their responsibilities with regard to the teaching of ethical standards and professional values. While some feel there is a gap between the bar and the academy, it is not a serious problem, it's basically a problem of communication. It is a problem that could be solved if academics and practitioners could appreciate more fully each other's roles and contributions. That is the rosy story. Among other places, you find it in the MacCrate Report[1], which I have quoted or paraphrased quite liberally.

Now there is a very different story of the legal profession that I will call the blues. The blues story is that the legal profession is in crisis. Lawyers, most lawyers, no longer see themselves as having a commitment to the public good in their work; and it is not just a problem for young lawyers. Many, if not most, lawyers treat law as a business and not a profession. Many lawyers are not sure what professionalism means, and those who do feel they know what it means offer different definitions. Most lawyers believe that the lawyer's role is one, to represent a client as zealously as possible, and two, to refrain from moral considerations in pursuing the client's goals. This means that striving to promote justice, fairness and morality has no place in lawyer/client conversations and, indeed, is contrary to the lawyer's role. Some lawyers believe that the only proper place to promote justice, fairness and morality is in their pro bono work. In the blues story, many lawyers are unhappy. They have difficulty finding meaning in their work, their rates of job dissatisfaction are far higher than those for other professions—for other occupations, not just professions. Their rates of substance abuse and of anxiety-related mental illness are similarly much higher than for other occupations. According to the blues story, law schools do a mediocre job of teaching ethics and commitment to the public good. Compared to important courses like those required in the first year, evidence or corporations, legal ethics courses are considered at worst a joke or at best a second-class area of study.

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1. A.B.A Task Force on Law Schools & the Profession: Narrowing the Gap, *Legal Education and Professional Development - An Education Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR REP.

Students take a class in legal ethics to learn how to avoid getting in trouble; they do not take the class to figure out how to pursue the law as a public calling. Students have a realistic understanding of the place of ethics in the public good, in the life of the law school and the practice of law. Their grades determine whether they succeed, whether they get on a journal or get a good job. Good ethics and commitment to the public good don't really make much of a difference. Bad ethics might hurt, but only in the extreme case where the student does something very bad, gets caught, and then gets disciplined in a way that impacts the student's career. This blues story is drawn from the literature beginning with Chief Justice Warren Burger's 1984 report to the ABA on the decline of the legal profession and the numerous books and articles about the crisis of the legal profession.

So what do these two different stories tell us about legal education? What they do is suggest very different strategies. What if the rosy version or something like it is true? No fundamental change in legal education is needed. The only problems we face today are really ones of clarification and communication. We need to identify the core values of the legal profession and explain them to law students. Because students are thirsting for these values, they will embrace them because law schools value ethics, and the public good the students experience at law school will only reinforce their commitment to the profession's core values. Because most lawyers, value ethics and the public good, the students' exposure to practicing lawyers, whether as mentors or as employers, will only further reinforce the students' commitment to core values. Problem solved.

But what if the blues story or something like it is true? The challenge is much tougher. The blues story tells us that there is not much agreement on core values and that many lawyers and law schools do not place a high value on ethics and the public good. Even if we clarify those values and communicate them to students, the students' experiences will teach them another lesson, that ethics and the public good are a low priority. If the blues story is true, changing legal education will only succeed as part of a larger strategy to change the values of the bar. If the blues story is true, changing the values of law students would require major changes in the law school curriculum.

For a start, law schools would actually have to make ethics and the public good a top priority. Where do you find the courses that are the top priority in teaching students what it means to think like a lawyer in the first year? Legal ethics would be a first-year course equal in importance to other first-year courses and, in terms of content, it would have to go far beyond the rules to encompass the role of the lawyer in our system of justice, to encompass values and to encompass the public good. If done correctly, this course would serve as the lens through which students viewed the rest of the curriculum and the rest of their careers as lawyers.

In addition, to follow-through with a commitment to ethics and the public good, students would have to take courses in their second and third year where they could reflect on their experiences at law school and in summer jobs and they could take courses tailored to their particular career goals such as, specialized classes in ethics and business law or ethics in public law. And, for the message to be a consistent one, all law school courses would pervasively reference ethics and the public good and in all these classes the law school would have to provide a really good explanation why ethics and the public good are actually more important to the students than they are to practicing lawyers. The school would also have to discuss honestly and openly the varied perspectives in the legal profession regarding core values and commitment to the public good.

So that is the end of my thought experiment. Two stories of the legal profession and how they relate to strategies for developing professional values among law students. At this time I have talked quickly enough that even with my time limit, I have got ten minutes to answer questions and to hear your views. Whether you see the state of the legal profession as rosy or blue or something in between, I am very much interested in whether you see any connections between the state of the legal profession and our strategies for promoting ethics and the public good. Now let me open it up. I am eager to engage with you.

**QUESTION FROM THE AUDIENCE**

Do you have thoughts on how to take professional responsibilities or professionalism and concretely make it a higher priority in the curriculum? You focus on first-year class. Exactly how would you do that in the context of the current system with the Multistate Professional Responsibility Examination (MPRE)? The only thing they are really tested on is the MPRE for the bar exam.

**PROFESSOR PEARCE**

The New York State Bar will ask them questions about ethics, but I think that there needs to be change. Having also a course in the first year that is a serious class that is given the same priority as other classes makes a big difference. It sends students a message: This is what it is about to be a lawyer. Being a lawyer is about being ethical and being committed to the public good. If it is going to send that message properly, though, it has to go beyond the scope of what is generally taught in a professional responsibility class today. The course must really start with our system of justice. Instead of starting with the ethics rules—of course it's to include the ethics rules and move up from there—start with a system of justice. Ask, "Where do lawyers fit into how our society administers justice and maintains stability?" Then talk about that role and place it within that larger context. That tells students that ethics is as important as contracts from the beginning. That sends a different message than most students receive today.

**QUESTION FROM THE AUDIENCE**

Have you considered the connection between ethics and economics. The economic situation in the practice of law, from billable hours to law school debt to all the ethical issues that lawyers face in choosing how to represent an individual or group or a corporation? How lawyers basically fund their lives, the lives of their law firm or their own individual person, and the ethics that are connected with each individual legal situation that arises?

**PROFESSOR PEARCE**

What about billing and economics in law practice? Law schools that I am familiar with do not include law office management topics like billing and other practical questions in the curriculum. I have to say I'm only a recent convert in the sense that being a graduate of Yale Law School, I was taught that if you can look it up, you do not teach it, which means when I was teaching legal ethics, I brought in only a few sections of the Code of Professional Responsibility. The practical pieces, like fees, for example, I have only started to teach recently. I have overcome my Yale training and I have come to realize that the students find it very useful to address these questions. That is one piece, but then there is also the piece of economic self-interest. And let me suggest this, as well: If you buy the story about the blues, maybe an easier way to talk to students about ethics would be to avoid labels like 'professionalism' that are very difficult for people to reach agreement on. When you talk about ethics, talk about it in a realistic way. Explain how it is okay to want to make money as a lawyer. Of course, teach how, when you make an ethical decision, you can factor your livelihood into your analysis. That is very important. To my knowledge, that is not part of the professional responsibility curriculum in terms of the case books that are available. Some of the folks can correct me.

**QUESTION FROM THE AUDIENCE**

How do you propose to sensitize law school faculties in various subjects so that they integrate ethics into their discipline?

**PROFESSOR PEARCE**

Again, you're asking questions based on the blues version. In the rosy version, I do not think that is a big problem. Assuming the blues version, how would you sensitize law school faculties? That is a tough one. There is a good text that Deborah Rhode put together which is a start. It has more on the ethics rules than on the public good aspect. It is about teaching ethics pervasively. For each class—contracts, torts, corporations—she offers faculty ways to integrate ethics into the class. I think that this book was discontinued after a couple of years because law faculty were not buying it or using it. It may be the case that

law faculty were like me and went to law school at a time where legal ethics was below being a second-class subject in their law school. It is hard to change that perception. The change has to come from the organized bar and within the institutions of the law schools. It has to come from both the leadership, deans, and the members of the faculty who care about these issues. It is a difficult challenge that you have identified.

**QUESTION FROM THE AUDIENCE**

The question that I have is whether you think conveying ethical information to students is primarily an academic issue or do you see it as an issue of mentoring or building bridges between the practicing bar and law students. I am not necessarily thinking of something so drastic like residency in medical student transition.

I am on the staff of one of the grievance committees. There is both a rosy and blues version, that often has to do with the support system lawyers have. Professionalism isn't just an issue of ethics but also of competence and capacity. People who are in larger firms have larger support networks, and seem to have fewer problems. People who are practicing alone or do not have a support network or do not necessarily have the law practice management skills or the network to help support them are the ones that seem to run into trouble in terms of what we see from client complaints There is a sense if people were to establish better connections with practicing attorneys or had a stronger support network, they would be able to avoid many of the issues they fall into.

**PROFESSOR PEARCE**

There are two versions of this question; one goes to what I presented as the student view: "How do I avoid getting in trouble?" The other question is, "How, do I work to promote the public good?" For the question directed to avoiding trouble, improved networking and mentoring is a natural answer. CUNY has a terrific program on trying to network; I don't know how it's worked out, but I know about it and it sounds great for solo practitioners and lawyers in small firms. But, if you start from the view that there is a crisis in the profession about commitment to the public good that applies to lawyers generally, then mentoring is not an easy answer. If you do mentor, it is important to select lawyers who are representative of the bar. If the mentors are not representative you have to be honest and open with students about that fact. Why don't I take these several comments and try to answer them all at once.

**QUESTION FROM THE AUDIENCE**

What is the dimension of doing the public good over and above representing clients zealously within the bounds of the law?

**QUESTION FROM THE AUDIENCE**

I think you missed one aspect of the economic problem which affects both of the prongs that you were just talking about. Law school graduates have a debt load in excess of $100,000. The debt makes it hard to focus on the public good. It is hard to be good in a corporate or a large legal firm environment when you're more afraid of losing your job than anything else because you have to cover that debt load.

**QUESTION FROM THE AUDIENCE**

My question tags onto this gentleman's question with respect to economics and Judge Ciparick's question with respect to how do you factor in law school faculty. Where do the big law firms fit into the equation, given the delicate issue of endowment?

**QUESTION FROM THE AUDIENCE**

Are you aware of any law schools that are approaching the issue from the blues strategy that you outlined or anything close to that and, if so, what has been their experience?

**PROFESSOR PEARCE**

I'll start with the last one. I think there are a number of law schools that have wonderful pilot projects that do pieces of what I talked about. In reading the materials, there are certainly a couple that come closer, but to my knowledge, no law school has undertaken a package and, to be honest, my law school invests as much in ethics faculty and ethics teaching as any law school in the country and I don't think that we would be willing to make this shift. That shows how big the challenge is.

The question about the dimension beyond zealous representation is a great question and that's what I try to raise in terms of talking about what the literature calls the "standard conception" of the lawyer's role, namely that there should be nothing beyond zealous representation. That's one of the issues that we have to talk about, and it's one of the reasons that there is no consensus in the bar.

A different view is found in the MacCrate Report, which says there is a consensus that you go beyond zealous representation or that lawyers do, and should. But many go beyond zealous representation to counsel clients morally about what is the best moral objective.

So there is a question, both descriptive and normative, about what is happening and what is appropriate and what should be appropriate in terms of what we teach students. Most of my students think zealous representation is the end and that public good should not fit in. This last point goes to the question about corporate jobs and law firms.

I'm old fashioned enough—that's why I have this white hair before I'm even 50—to think, like a lot of the commentators or like Erwin Smigel who authored the book, *The Wall Street Lawyer*, that everybody's business is in every part of a lawyer's work.[2] Up until the 1960s, we talked about public interest lawyers in the mold of Brandeis as the "people's lawyer." The lawyers serving the public interest were the Wall Street lawyers. Only in the 1960s did a separate cadre develop of public interest lawyers. Thurgood Marshall is the foremost example.

Charles Hamilton pioneered the idea beforehand, but it wasn't a separate piece. My own personal view, in every kind of law practice, in every moment of the day, there are good things that every lawyer can do to contribute to the administration of justice and the maintenance of stability.

Last question: Big law firms and the "endowment effect." If properly examined, that should be a problem and I would look to big law firms for leadership. So, thank you.

**MR. CRACO**

At the risk of his having to run the last couple of blocks, and in reliance on the fact that the train is never on time in Rensselaer, let me ask for two sentences of guidance to us as we go forward with this enterprise. The profound dissension in the bar described is also reflected in the academy. Every step of the strategy you propose, and the analysis of red and blue you describe is controversial. The literature, and your academic colleagues, have told us that espousing the red or the blue or some variation of those approaches is a matter of academic freedom. No one will tell us how to teach these things without impairing that freedom. Isn't that a genuine impediment in the work you are proposing we do and, if so, how do we get over it? If you want to get the train you have to talk fast.

**PROFESSOR PEARCE**

It is not so much academic freedom as it is the autonomy of each law professor to do whatever she or he wants in the classroom, and there is a difference. Academic freedom is stating your view. Academic freedom is not, for example, deciding that I'm going to teach corporations this semester and not torts if the school needs me to teach torts. And so to me if the school says there has to be an ethics and public good component of what a professor teaches, it is a topic the professor has to integrate into the course. The professor might have a different view about it. Putting the issue on the table is what is important.

Let me close with this thought. There is a famous law story that illustrates the problem. A student in the first year raised a hand and said, "But professor, that result would not be just. How can that be?" And the professor responded,

2. ERWIN O. SMIGEL, THE WALL STREET LAWYER (Rodney W. Stark, ed., New York:Free Press 1962).

"We're not here to study justice. We're here to study law." Part of what we have to do if we want to make the change is start teaching people, including faculty members, that maybe we study justice. Thank you.

**MR. CRACO**

Thank you very much, Russ. What we really needed more than anything else was yet another division between red and blue. Thank you very much for coming to speak with us, and we'll let you go now.

# INTRODUCTION AND KEYNOTE ADDRESS

**JOHN H. GROSS, ESQ.**
Convocation Chair
Member, New York State Judicial Institute on Professionalism in the Law

Good morning. I'm John Gross. On behalf of the New York State Judicial Institute on Professionalism in the Law, I'd like to thank all of you for coming to discuss and study the development of professional values in law school. We'll hear the presentation by Court of Appeals Judge George Bundy Smith, followed by two panels of distinguished attorneys, jurists and academics. We'll adjourn to the New York State Bar Center for lunch, during which our chairman, Lou Craco, will address the Convocation. I would like to on behalf of the Institute extend our appreciation to the New York State Bar Association for its partnership in this effort, in particular, President Ken Standard and Executive Director Pat Bucklin.

My chief responsibility is to introduce the next speaker, Chief Judge Judith S. Kaye. Five years ago, she established the Institute as a permanent effort to study and nurture professionalism in the bar, the courts and the legal academy for the benefit of the public we serve.

Through this and many other efforts, Judge Kaye has endeavored to make the courts of this state the institution of the people that the courts and the legal system were designed to be. Her efforts to reform the jury system is one of many examples that led recently to her appointment as National Chair of the National Bar Association Jury Project. This wonderful historic courthouse we now stand in has been restored, by her efforts, to its intended beauty as the keystone of the rule of law in this state. These and many other efforts teach us that the law must provide for and include participation of all our citizens. Please welcome Chief Judge of the State of New York, Judith Kaye.

**HONORABLE JUDITH S. KAYE**
Chief Judge of the State of New York

Thank you, John. Thank you all. There are many members of the Court of Appeals family here in this courtroom today and on behalf of all of them, I would like to welcome you to the city of Albany, welcome you to Court of Appeals Hall, and welcome you to what I am confident you will agree is the most magnificent courtroom in the entire world. I especially want to extend this warm welcome on behalf of my Court of Appeals colleagues who are here today, Judges George Bundy Smith, Carmen Beauchamp Ciparick, Victoria Graffeo

and Susan Phillips Read. Thank you for being with us, with thanks to the Judicial Institute on Professionalism in the Law, to Lou Craco, its chair, and to each of its members, many of them here today including my esteemed Court of Appeals colleague Judge Carmen Beauchamp Ciparick, and my friend and co-conspirator in several terrific initiatives, John Gross.

I thank the Institute for its overall phenomenal work and most specially for this third biennial Convocation of the bench, the bar, and academe to explore how law schools can and do successfully develop core professional values in students.

Although we all readily embrace the concept and the ideal of professionalism, the fact is that reasonable lawyers can and do differ about how to maintain and transmit our treasured values. Indeed, how best to inculcate professional values has been the subject of endless study and analysis and reports and scholarly writings throughout the entire history of our great profession. But perhaps never before in our history has it been more important that we focus like a laser beam on the profession's enduring values, given the challenges of this rapidly and radically changing society.

We all know the new bottom line competitive pressures of law practice, the unbalanced lives many of us lead, the client scandals, the public cynicism, the growing unmet needs for legal services and access to justice. How does this radically changed world affect the core values of our profession or, more to the point, how do we today preserve, protect, perpetuate, and ensure those values that define and distinguish us as a profession, a public calling, and maybe even more to the point, what are the law schools, the gateway to our profession, doing in this regard? Should they do more and how should they do it? This Convocation hopes to find some answers to these questions.

A little background: In 1993 the court system began its reexamination of these very issues in New York by forming the Committee on the Profession and the Courts, chaired by Lou Craco. The Committee's report issued in November, 1995, nearly a full decade ago, became the blueprint for significant reform in attorney regulation in this state and we have as of this date implemented every single one of the Committee's recommendations.

The Institute on Professionalism in the Law, a co-sponsor of today's Convocation, is one of the very proudest projects and products of the Committee's work. Formed five years ago, in 1999, the Institute from its very beginnings has been ably chaired by the enormously dedicated, hardworking and creative Lou Craco. The Commission's first Convocation in the year 2000 centered on lawyers' education through college and law school, and the second looked at the first seven years of practice.

This third Convocation turns the spotlight to a more narrow and intensive focus on the definition of core values in the 21st century and methods for instilling these values in law students. I cannot imagine a more appropriate subject.

Actually the preparation for this Convocation, as you all know so well, began long before today, long before the program last evening, with the Institute's core values project including a law school survey and law student focus groups that you undoubtedly will hear more about as the day unfolds.

The first panel will explore how to identify the core values of the legal profession for law students. I'm confident it's going to be an energizing and engaging morning; and then you have your excellent program this afternoon to examine the role of law school programs in developing core values—another outstanding panel and program. I am very much looking forward, as I'm sure you all are, to the stimulating discussions and ultimately to the Convocation's report on these proceedings.

While this Convocation may not arrive at one perfect answer to everybody's questions and concerns, I know that, like the prior convocations, it will significantly advance our thinking on how to assure that those entering our profession today are well-equipped to lead exemplary professional lives. Now, mention of exemplary professional lives brings me directly to my principal task this morning, not really a task, a privilege. There is no better role model for the kind of professional life to which every single one of us aspires than your keynote speaker, whom it is now my pleasure to introduce, my Court of Appeals colleague, Senior Associate Judge George Bundy Smith.

Judge Smith's entire life has been committed to promoting justice and assuring fairness, inclusiveness, and equal opportunity, whether by his own active participation in the civil rights movement or by teaching, mentoring, and opening doors for countless others or by his long advocacy for equity in the electoral process or by his brilliant career in public service, including nearly three decades on the bench, and that's just a few examples.

His academic career will tell you something not only about his innate ability but also about his work ethic. He has a certificate of political studies from the Institut d'Etudes Politiques in Paris; a B.A. from Yale University; an LL.B., from Yale Law School; a master's degree and Ph.D. in government from New York University; and a master's degree in the judicial process from University of Virginia Law School.

Initially, Judge Smith applied his abundant skills and talents as an attorney working for the NAACP Legal Defense and Education Fund, after which he was a law secretary for three different state court judges, lucky judges, I might say. He then worked as an Administrator of Model Cities for New York City, a federally-funded program designed to improve the quality of life in urban areas, and that was followed by illustrious years on the Civil Court of the City of New York and the Supreme Court of the State of New York, both the trial and Appellate Divisions. And, on August 24, 1992, a lucky date for all of us, Governor Mario M. Cuomo nominated Judge Smith as a Judge of the Court of Appeals where he has for the past 12-plus years continued to serve with enormous distinction.

Judge Smith's several hundred opinions for the Court of Appeals are characteristically thoughtful and lucid, the product of his prodigious effort to reach the just result and express it precisely, clearly and convincingly; and I can tell you from years of personal experience alongside him that he is always consummately prepared, the last to leave the courthouse in the wee hours of the morning.

Despite a breathtaking schedule of responsibilities, Judge Smith has demonstrated his abiding commitment to law students, the next generation of lawyers who will carry forward our nation's promise of justice for all. He teaches law school courses, he judges innumerable moot court competitions, he serves on the Professional Board of Editors for the State Constitutional Commentary of the Albany Law Review, and he devotes generous time to his innumerable alma maters. And lest you think these are his main non-court activities, you should know that he also has taught college courses, published on a broad range of topics, lectures widely, and gives his time to his church and of course to his wonderful family.

It is my pleasure now to present to all of you Senior Associate Judge George Bundy Smith.

## HONORABLE GEORGE BUNDY SMITH

SENIOR ASSOCIATE JUDGE OF THE NEW YORK COURT OF APPEALS

Chief Judge Kaye, thank you for that very fine introduction. I am happy to be here today and to participate in this Convocation on developing professional values in law school. I attended law school over 40 years ago. I do not recall anything comparable to the New York State Judicial Institute on Professionalism in the Law. Certainly there were those who looked not just at what was taught in law school but also looked at and tried to assess the profession of law. The work undertaken by the Judicial Institute on Professionalism in the Law is much needed and welcome.

The topic of developing professional values or core values in law school and after law school is not an easy one. By professional values and core values, I mean standards. Standards come down to the ways of acting and approaching the law. First of all, what are the core values that should be developed in law school? Second, how can they be recognized and learned in law school. Third, do core values change over time or do the same values exist throughout a legal career?

I begin with certain assumptions about the law and the practice of law. Law is a privilege and not a right. A core value of the privilege is the recognition that it is a privilege and not a right. Law is a responsibility. A core value of this responsibility is the identification of that responsibility, a responsibility to clients and to a larger society. The third assumption is that law is a trust and with trust come certain obligations.

For a few minutes I want to talk about the meaning of professional values and core values, relate them to the three assumptions I have made about the law, and tie them to the law school experience.

My first assumption is that the practice of law is a privilege. In fact, admission of a student into law school is a privilege. Many, many highly qualified persons do not get into law school or into the law school of their choice. Those who do get in and who get the opportunity to practice law are the privileged few. But is there a professional value or are there professional values that go with the privilege? Is there some standard of acting that should characterize a person who has the privilege of attending law school and becoming a lawyer? The professional value that goes with or ought to go with the privilege of becoming a lawyer is the recognition that it is a privilege and not a right.

Lawsuits brought by persons denied entry into the profession tell us over and over again that law is a privilege and not a right. Whether the basis for keeping someone out of the practice is a criminal action or some other action which calls into question his or her fitness to practice law, the practice of law is a privilege and not a right.

The second assumption about law is that it is a responsibility. Most students recognize from the early days in law school that embarking on a legal career is an awesome responsibility. In many ways, the law school undertaking is designed to make a person knowledgeable enough to advise others about the law. If the knowledge is not readily at hand, the ability to research the law becomes paramount. Law school is thus preparation for a lifetime of giving advice. What is essential in meeting the responsibility of being a lawyer is preparation. Law changes every day. The sound lawyer recognizes this fact and attempts to stay abreast of trends and new laws. The continuing legal education requirements for lawyers and the availability of courses and seminars for lawyers and judges are essential to the continued preparation for servicing clients and the profession. To repeat: The second assumption about the law is that it is a responsibility, yet that responsibility carries with it professional values and core values.

I decided to go to law school because of a desire to help rid society of the scourge of racial segregation. Growing up in segregated Washington, D.C., I experienced firsthand the daily humiliations that went with not being able to go to certain schools or use or attend certain facilities such as libraries or playgrounds or restaurants or theaters. For me, the fact that law supported the institution of segregation meant that there was something unjust and unfair about the law itself. One of the professional standards, one of the core values of responsibility to the law is the opening of access to the law and to legal institutions to those who have been denied such access.

When I was admitted to the New York bar over 40 years ago, it was one of the greatest days of my life and yet that joy was tempered by the knowledge that many areas of the law were closed to those of African-American decent. At the

time, only one African-American judge sat on an appellate court in New York State. Harold Stevens was sitting as a justice in the Appellate Division, First Department. He was to go on to become the first African-American judge to sit on the New York State Court of Appeals for one year by assignment, but he was to lose the election in 1975 to Judge Jacob Fuchsberg.

Today the situation in appellate courts in New York State is not encouraging. No African-American has ever sat on the Appellate Division, Third Department. One African-American justice sits on the Appellate Division, Second Department. One African-American justice sits on the Appellate Divisions in the First and Fourth Departments, but these latter two justices are certificated, meaning that they are over 70 years of age and can serve for two-year periods, perhaps until their 76th year of age, as long as they are designated to sit and their health holds up. Thus, while there has been some improvement in the situation of appellate judges in New York State, there is still a long way to go. The same mixed results apply to the legal profession itself. In Albany, under the leadership of Chief Judge Kaye and several willing persons and law firms, a number of African-American and Latino law students have received opportunities to work in law firms in this and other areas of the state. Once again, much more could be done.

The point is that one professional value, one core value of the legal profession is access to the profession for all who qualify. Access to the legal profession by those who aspire to it is one core value of the legal profession, but of equal importance is the access of individuals to lawyers. For many people, the cost of legal advice is prohibitive. Access to lawyers and to the legal system must remain a core value in the practice of law. All too often, we read of persons who have spent years in jail, some on death row, for crimes that they did not commit. In New York, we even have a statute that compensates persons who have been wrongly convicted. In other words, the assumption is that our legal system is not perfect and that there will be persons who are unjustly convicted. One of the core values of our legal system must be to protect innocent persons from being convicted. Whether this is done by DNA evidence or some other means, the protection of the innocent must remain a core value of our profession.

Again, one assumption of the legal profession is responsibility and there are core values which accompany that responsibility. Lawyers by training are uniquely suited not only to assess but also to advocate for the needs of the larger society. Thus, even while lawyers are engaged in the day-to-day necessities of advising clients and representing clients, their eyes must always be on the greater needs and issues of society in general. I do not need to dwell on those greater needs and issues. It suffices to acquaint oneself with the news media and everyday life to know what they are.

A third assumption is that the practice of law is a trust. I mentioned law as a privilege and law as a responsibility and said that professional values, core

values are a part of each, but unlike the other two, trust is not only an assumption, trust is itself a core value. Clients put their trust in lawyers to advise and direct them to a resolution of the issue at hand. Society, while at times criticizing the profession, relies on lawyers and judges to resolve some of the basic issues of our society.

With these assumptions and core values, what is the role of law schools in instilling these values? Some say that if by the time a person enters law school the student does not have already a foundation for professional and core values, it may be too late. For some the instilling of professional values will be a refresher course. For others, it will be new territory, but the significance of addressing these values in law school cannot be underestimated.

Law is not the only profession which searches for standards. For centuries, many doctors have been guided by the Hippocratic Oath. While there is still dispute about the author and the content of the oath, several things about the differing versions appear applicable to the legal profession. One is the commitment to the patient, that is the client; another is the assertion of the confidential and private nature of the relationship between doctor and client; and a third is the realization and statement that a doctor has a larger interest in the protection and advancement of society in general.

These three factors are similar to a suggested oath for law students or law graduates. While an oath is one way to bring professionalism to the attention of students, there are others. One way is to have each course in law school emphasize some professional value or core value relative to that discipline, or perhaps a single course or part of a course could be devoted to professional values.

Some law schools in one way or another already emphasize some core values. Professional values, core values, must be part of the legal profession. Hopefully the realization of those values begins even before a student begins law school.

If the realization of those values is absent when the law school career begins, it is up to the law schools to plant the seeds. If those values are already there, it is up to the law schools to reinforce them. Thank you.

# PANEL I — DEFINING PROFESSIONALISM FOR LAW STUDENTS

**PETER R. PITEGOFF, ESQ.**

VICE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW
UNIVERSITY AT BUFFALO LAW SCHOOL (SUNY)
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM AND THE LAW

My name is Peter Pitegoff. Many thanks to Judge Smith for providing an excellent foundation for our discussion. Judge, you hit on many themes that we will continue to discuss in the coming couple of hours.

I will be moderating this discussion. This morning we're having a panel discussion trying to define professionalism for law students. This is a convocation about developing professional values during law school, so a threshold question certainly is what do we mean by professionalism and professional values.

Before we go any further, let me introduce the other panelists. All the way to my left is Judge Jack Battaglia. Judge Battaglia sits on the Civil Court of the City of New York in Kings County. He is a graduate of Fordham College and Columbia Law School. He brings a wonderful mix of experience, from law firm practice in different settings, to experience on the bench, as well as experience in the academy. He was in private practice with Greenbaum, Wolff & Ernst in midtown Manhattan for about 15 years. He was house counsel to a group of multi-national companies in the vision care industry. He was in a small firm in the San Francisco Bay area and he was a full-time member of the faculty at Touro Law Center for ten years.

To Judge Battaglia's right is Nancy Maurer. Professor Maurer is director of clinical programs and a clinical professor of law at Albany Law School. She teaches disability law, negotiating for lawyers, fact investigation and legal issues in medicine. She founded the Civil Rights and Disabilities Law Project at Albany Law School. She also co-developed Albany Law School's Introduction to Lawyering Program which is designed to teach first-year students to think like professionals, which we'll try to get some definition for in the coming discussion. She has also written and lectured in the areas of clinical legal education and disability law. Formerly she was in practice in South Carolina in Charleston in legal services. She then came to Albany and was an attorney with the New York State Commission on Quality of Care for the Mentally Disabled.

To Nancy's right is Ellen Chapnick. Ellen is Dean for Social Justice Initiatives at Columbia Law School. She is a graduate of Georgetown University Law Center and Cornell University. Prior to Columbia, she was a federal litigator at Wolf, Papa, Ross, Wolf & Jones, a plaintiff's firm working on, among

other things, the Exxon Valdez oil spill litigation.[1] She has also been staff attorney at the Puerto Rican Institute for Civil Rights in San Juan and an attorney for various labor unions. She has also been very active in the pro bono community. She was chair of the Association of American Law Schools' section on pro bono and public service opportunities. She is also the president of the Center for Constitutional Rights.

To my immediate left, I'm pleased to welcome Vincent Buzard. He is President-elect of the New York State Bar Association, one of the co-sponsors and hosts of this event. He is also Chair of the House of Delegates of the New York State Bar Association and a member of the House of Delegates of the American Bar Association. He is a graduate of the University of Michigan Law and a partner in the law firm of Harris Beach. He is also former corporation counsel of the city of Rochester.

I am a professor at the University of Buffalo Law School where I've been for 17 years. I teach corporation law, business transactions, community development, and ethics. I have written in those areas and areas of urban revitalization and corporate reforms. I am Vice Dean for Academic Affairs, so I do a lot of administration and I made a point of adding professionalism and professional values prominently to the curriculum. Russell Pearce would be pleased to know that we have had legal profession and ethics as a key part of first-year curriculum for all of my 17 years. It evolves over time and keeps changing. I am a graduate of New York University Law School and Brown University.

With that introduction, I'm pleased to welcome the panel, which brings diverse experience both individually and as a group in practice, teaching, scholarship, and even the judiciary.

Let me lay out what we plan in the next two hours. I anticipate a lively exchange and encourage both exchange among the panelists and questions and comments from all of you. People in this room obviously know a lot about professionalism and have strong beliefs. We would benefit from as much participation as possible.

As for format, each panelist will present some short remarks. We welcome questions and some comments in between each individual presentation. We will save the longer soliloquies and intensive discussion for later on in the program, after each of the panelists has had a chance to put on the table some core ideas. If and when you do ask a question or make a comment for the record, please identify yourself.

With that, let me set the stage a little bit. Clearly, Judge Smith presented a very useful foundation for the discussion. I imagine we will come back to his ideas in the course of our discussion. I'd like to offer the ABA Commission on

1. *In re* Exxon Valdez, 1995 WL 527988 (D. Alaska 1995) (not reported in F. Supp.) (affirming punitive damages for plaintiffs in the amount of $5 billion and denying Exxon's motion for new trial).

Professionalism's effort in 1986 to give form and definition to professionalism.[2] I will quote from that report:

> "Professionalism" is an elastic concept the meaning and application of which are hard to pin down. That is perhaps as it should be. The term has a rich, long-standing heritage, and any single definition runs the risk of being too confining. Yet the term is so important to lawyers that at least a working definition seems essential. Lawyers are proud of being part of one of the "historic" or "learned" professions, along with medicine and the clergy, which have been seen as professions through many centuries.
>
> When he was asked to define a profession, Dean Roscoe Pound of Harvard Law School said: The term refers to a group ... pursuing a learned art as a common calling in the spirit of public service is no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.[3]

Dare I say, it's not always so simple and clear as Dean Pound's eloquent words suggest. We heard that this morning in the keynote and we'll work through the complexities of the definition of professionalism and professional values today.

The Judicial Institute on Professionalism in the Law has attempted to define professionalism and is still working on it. It is an indeterminate term in many ways. It's not just elastic. It's changing. It varies in content from context to context. We will talk about whether there is a discrete and identifiable list of core values upon which we can agree. The notion to me clearly varies with disparate perspectives, and Judge Battaglia will speak to that in a couple of moments. Professionalism certainly has a lot to do with ethics and ethical practice. It has a lot to do with civility. We hear a lot and talk a lot about civility these days. But its also about something more: it's arguably about promoting justice and furthering the public interest. Ellen Chapnick and some of the other panelists will speak about what that means and identify some of the tensions that might create.

Last night, Russell Pearce underscored the tension between this notion of serving the public or the public interest on the one hand and zealously representing one's client on the other. There is no question that those principles are in tension, but there is also no question that both of those principles are central to the notion of professionalism.

Then we factor in business reality, business pressures, loan pressures, politics, and social constraints, and defining professionalism becomes all the more challenging. I'm pleased that the President-elect of the New York State Bar Association, Vincent Buzard, will speak to that, again, as will others.

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2. A.B.A. Commission on Professionalism, "*...In the Spirit of Public Service:*" *A Blueprint for the Rekindling of Lawyer Professionalism*, 112 F.R.D. 243 (1986).
3. *Id.* at 261 *(quoting* ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (West Pub. Co. 1953)).

Given the subject of the Convocation, we'll try to link this discussion with law schools and what law schools ought to be doing. Nancy Maurer is on our panel to assure that we don't lose sight of that.

With that, I will turn the floor over to Judge Battaglia, who will raise the question about context and the importance of context in defining professionalism.

**HONORABLE JACK M. BATTAGLIA**

JUDGE, NEW YORK CITY CIVIL COURT KINGS COUNTY

First I want to thank Chief Judge Kaye and the Institute and all of you for this opportunity to talk about something that is important and something that I've thought a lot about. When I realized I would be the only sitting judge addressing you as part of the panels and in keeping with the broader theme of today's discussion of special responsibility flowing from professional role, I decided to speak to you from my particular perspective as a sitting judge. I will do that, but I also want to make some general remarks about the topic of core values and professionalism.

All professions are defined by bodies of specialized knowledge, skill sets for obtaining that knowledge, developing it, applying it in the areas of professional activity, and values that guide the application of that knowledge. The values that we focus on as defining what we call our common calling have to be divided at least in a general way, for purposes of conception and discussion, into values that are ends-oriented or goal-oriented, and values that are more means-oriented, without at all implying that those that are means-oriented are somehow of subordinate significance because there clearly is not a clear delineation between the two, and the values that are means-oriented are very important and intertwined with the ends-oriented values.

Without going into great detail, by ends-oriented values I'm talking about the kinds of things that we heard this morning from Judge Kaye and Judge Smith, things like justice, fairness, equality and access. Means-oriented values are more along the lines of those values that are reflected in our professional code, such as confidentiality, candor, and loyalty. The reason for this distinction is that if we're going to be talking about legal professionalism as opposed to professionalism generally, we have to determine and distinguish what we do as lawyers from what other professionals do. As a general proposition, the ends-oriented values are those that distinguish the legal profession and legal professionalism from professionalism generally. The more means-oriented values can be found in many if not most other professions. While extremely important in any broader discussion of core values, they are not what define our common calling.

Perhaps out of self-preservation, we have as a profession hung tenuously to the notion of a single unitary profession in pursuit of that common calling, sometimes notwithstanding clear evidence from the realities of practice that that might not be so. Part of the reason, if not the major reason why we cling to that notion of a single unitary profession, goes back to an important theme of Judge Smith's comments, and that is privilege. I am not talking about the privilege that we enjoy socially or culturally as lawyers, but the privilege that we have been given by the body politic and society generally to regulate ourselves and to determine for ourselves who will be among our number and what will be the terms under which they will be allowed to continue to serve among our number. We can't do that without a conception of the profession as a single, unitary profession, and we certainly can't do it without a set of core values that justifies the privilege that we have been given, because without those values, there's no reason why we should have that privilege. Now I say that we hold onto this conception notwithstanding realities, and we do that in each of the three areas that I have spoken about: knowledge, skills, and values.

With respect to knowledge, while we all recognize the de facto specialization of professional practice, we have strongly resisted any attempt along the lines of the medical profession to have defined certified specialties. We maintain that there is a canon of legal knowledge that has to be transmitted in law school. Despite all of the changes that have taken place in legal education and the very important and legitimate changes to the first year curriculum, the required body of law school courses has stayed fairly consistent historically and remains fairly consistent among the 190-plus accredited law schools. And, of course, the bar exam is the perfect example of the canon.

In the skills area, Bob MacCrate and his committee's incredible effort to define the fundamental lawyering skills of the profession in the early '90s took place at the same time another committee, a section of the American Bar Association, the Committee on General Practice, was defining what it called lawyer competencies in a very different way. The Committee on General Practice listed, for example, lawyer competencies for general practice, civil dispute resolution, private law, including property, business, wills, trusts and estates and family, noncontractual private civil wrongs, public law and criminal law. One can disagree about the boundaries, whether there are others that should be there, maybe some that should not, but those categories fairly reflect the general context of specialized practice.

As we move to the values realm, at the same time as we cling to the importance of the common calling and the core values, we have to recognize that as with knowledge and as with skills, there are differences. I learned in my very first week in law school that differences are at the heart of our enterprise: recognizing that some of those differences are real important and some are not so important or not important at all.

In terms of the core values, in addition to making a distinction between ends and means, we have to recognize that what we colloquially refer to as professionalism in most cases refers more to the means oriented values than the ends. Particularly when we talk about the problems or crises in professionalism, we are more likely to be talking about those things that implicate the means values rather than the ends. But I'll suggest to you that if this enterprise does not take sufficient account of and strongly articulate the ends-oriented values as core values as part of any body of any value system that would be transmitted to law students, it is doing a great disservice not only to the profession but also to the broader society.

The academy and, to some extent, the profession itself has recognized that context is significant to the definition of core values. Our body of disciplinary rules includes a set of rules, Part 1400 of the Rules of the Appellate Division, for attorneys involved in domestic relations matters. We accept it now, but at the time it was somewhat and still is somewhat unusual in that it is the only separate body of official ethical rules that govern professional conduct. The American Academy of Trial Lawyers has a lawyers' code of conduct. The American Academy of Matrimonial Lawyers has its Bounds of Advocacy. The American College Trusts and Estates Counsel has its commentaries on the disciplinary rules, how they are of particular importance and how they play out particularly in the context of those areas of practice.

Even in the law schools—I say even in the law schools because the law schools are generally still not where they should be in incorporating professional values into the total curriculum—there are schools that have professional responsibility courses specifically focusing on these various contexts of practices. The most common area when there is a course is in the area of criminal law prosecution and defense. There are four professional responsibilty courses among the New York law schools directed to criminal defense. Public interest is second. There are also business courses. Fordham, which is in the forefront of this effort, has a professional responsibility course on lawyering for the individual. Of all of the ethics courses, the one at Fordham carries the greatest credit allocation, four credits, which if you remember back to your law school days, means this is something that's really important. That's important. It goes back to something Professor Russell Pearce said yesterday, that the law schools send very clear messages to law students about what is important when they decide to make a course a required course and when they allocate credits to it.

However, virtually every professional responsibility course is, in fact, a contextual course, although it's not necessarily labeled that way. The course is different depending on who is teaching it. The particular professional experience, background and value system of the professor is important. For example, a professional responsibility course taught by a professor who has experience and background in criminal defense is going to look very different from a profes-

sional responsibility course taught by a transactional lawyer or someone who comes from a different practice orientation. Now of course students aren't told that. They believe they're being given a unitary and common vision of professional responsibility when, in fact, that is not always the case. So, going back to the question of why these contexts are, in fact, different and why we should look at the definition, articulation and application of professional values with a view toward the practice area, the answer goes back to the starting point and that is the core values. The reason these areas are different is because they implicate the core values in ways that are different. One way, or perhaps the most important way, the various practice areas implicate those core values differently is because they operate in circumstances where the assumptions upon which the entire body of formal ethical rules are based don't quite apply. The assumptions don't apply because the model on which those rules are based doesn't fit. That model is the adversarial system in which parties are separately represented by attorneys and those attorneys representing their individual clients work towards and, the assumption is, achieve. a "just result," to pick one of the core values.

One of the ways in which these practice areas are different is that they implicate interests that transcend the interests of the individual clients, such as constitutional interests in the criminal law area, on both sides of the table. Prosecutors are concerned with the constitutional interests of upholding the rule of law and the defense is concerned with the constitutional interest of providing a barrier against the abuse of governmental power. Another example where there are interests of third parties is the matrimonial area. The most important third parties are children, who are not formal parties and in most cases are not formally represented but whose interest is very much affected by the operation of the system.

Another area where this model that is at the base of our entire conception and articulation of values, particularly as reflected in the professional rules, simply breaks apart is when one party is represented by counsel and the other is not. So now we come to the part where I talk about my particular perspective and where this is all leading.

The self-represented litigant presents to lawyers a unique context of practice. There has to be an examination of the professional responsibility of lawyers in dealing with people who are self-represented, not only within the litigation system or context, but outside it, as well. I am going to talk a little bit more about the litigation, but I want to emphasize the point that the responsibility of lawyers is not limited to their responsibility as counsel in a litigated matter, but it extends to whatever their professional role might be. A great number of lawyers operate in non-litigation contexts where self-represented persons are involved. Where there is an impact on self-represented persons, whether in the transactional context or where lawyers work for business entities drafting documents that will have wide impact in consumer transactions, say financing trans-

actions, particular attention should be paid to the effect of those documents on self-represented persons who will be affected.

In the litigation context, the Civil Court of the City of New York last year had in excess of 800,000 filings representing approximately one fourth of the total filings of all courts in the State of New York. A couple of years ago, 90-plus percent of those cases involved at least one self-represented party. That's not entirely true today because we have had a major influx of no-fault first party benefit cases that now comprise a large chunk of that caseload. Still, in many parts of the Civil Court, as well as other courts, self-represented litigants are a substantial majority of the parties, at least on one side. I'm talking about housing, consumer, and family matters. Just in terms of numbers, the self-represented account for a substantial percentage of the litigated cases in the state of New York. And, again, that doesn't include transactions and other non-litigation areas.

If only for that reason, the type of examination that I'm suggesting needs to be undertaken. One area that examination should focus on is the responsibility of lawyers when they're dealing with a self-represented litigant in terms of the manner in which that representation is conducted and the goals or ends of the representation.

Right now, there is only one subsection of the disciplinary rules that recognizes that self-represented litigants exist. Section DR 7-104 which says a lawyer during the course of representation shall not give advice to a party that is not represented by counsel except to advise that party to get counsel when there is an adversarial relationship. I do not think that is quite enough. That certainly doesn't reflect the reality of the negotiations that go in on my court day in, day out, in the Housing Court and outside the other pro se parts between lawyers and self-represented litigants. Might the professional responsibility be defined somewhat differently to allow for lawyers to provide legal services to self-represented litigants where that access is not practically available today because of the economics? In other words, shouldn't we look at defining a subcategory of professional practice that is the equivalent of Southwest Airlines, the frills-free version, but that includes enough of the core professional values that it keeps the plane in the air?

Some suggestions have been made by my own Administrative Judge. Judge Fern Fisher has advocated and written about unbundling of legal services and ghost writing, another term that's used to suggest something less than full service representation that will make legal representation available to those to whom it is not currently practically available, in the service of the interests of access that Judge Smith so eloquently addressed.

**DEAN PITEGOFF**

Thank you, Judge. I appreciate the notion of looking at different disciplinary contexts as you did. I've taught corporation law, and for the last several years I can't keep track of how many times the word Enron came up in class discussion, and it was not just about transactional matters, it was about ethics and professionalism and the roles people play.

Context is relevant in other ways, too. Besides disciplinary distinctions, and unrepresented parties is a critical gap that we might think about addressing, but there are other kinds of contexts, different constituencies, different classes of clients, different socioeconomic status of clients. Judge Smith talked about access of African-Americans to both the bar and to legal services. There are a variety of ways to look at context and a variety of ways to look at core values in those contexts.

I would like to turn the panel over to Ellen to talk about how those core values might differ, how perhaps we might stretch or expand the notion of core values to apply in different settings.

**ELLEN P. CHAPNICK, ESQ.**

DEAN FOR SOCIAL JUSTICE INITIATIVES, COLUMBIA UNIVERSITY SCHOOL OF LAW

First I want to say that I am honored to be here and humbled both by this room and by Judge Smith's presentation. Following not one but two judges is not an easy thing to do.

Shortly after the brutal attacks of 9/11, I heard one of my students in the corridors at Columbia Law School say to one of his friends, "Oh my God, I wish I could do something to help. I wish I were a doctor or an iron worker or something other than a lawyer." Well that student was premature because only a few weeks later there were thousands of lawyers ringing a square block in Manhattan and other places to get training and then to represent countless families and individuals and small businesses who were the first generation victims of that attack. Many of us think that that was one of our profession's finest moments.

I mention it today, not only so we can all have a feel-good moment, although we do hard things sometimes because they make us feel good, but also because it provides a good platform for some of my thoughts that were inspired or maybe even provoked by the law student pledge of commitment to professionalism. That student's remarks highlight a few of my concerns. First, over three years later I remain haunted by this student's yearning for a way to be helpful and his immediate assumption that his chosen profession, the law, would be irrelevant. What is it about us that let that student leap to that conclusion? Fortunately, as I said, maybe we did some things for at least one generation of law students almost immediately that will change that, but maybe not.

Second, I think we need to contrast the profession's response to the first generation of victims with that of its response to the second generation of victims which was really not so pretty. The Asian-American Legal Defense Fund and the Asian-American Family Support Unit cried out for help in hate crimes cases; they went unheard for the most part. Immigration organizations called for lawyers and law firms to represent the hundreds of men who were rounded up nationwide and jailed in New Jersey solely in most instances because they were Arabs and were heeded by law schools and by a few lawyers but mostly they were not heeded.

Third, the Center for Constitutional Rights, of which I'm no longer president but was until recently, sent out cries for help with the constitutional challenge to Guantanamo Bay that went totally unheeded until the United States Supreme Court said we were right and now we have hundreds of lawyers and law firms who are representing individuals incarcerated at Guantanamo because the Supreme Court said it was okay.

If we really are a profession and one with a monopoly on our services, then Judge Smith certainly is right. Practicing law is a privilege and with that privilege comes responsibility. We have to take matters in which we confront racism, government misconduct and other societal ills, not just those with innocent victims and the deserving poor.

A small aside: Pro bono, of course, will never ever substitute for fully funded legal services and court-appointed lawyers programs, not only because those people deserve representation, but because students get the message of what is important and they know that society pays for what it values.

If we are a profession and not just a business, we must be willing to take a critical look at our laws and challenge them when they're not just; otherwise we will live in a nation that has the law of rules and not the rule of law. It is part of our professional code to push the envelope and be creative if that's what's required, and we have to do that on behalf of underserved people and unpopular causes and not just our paying clients. And it needn't be esoteric.

I have a friend who lives in Kodiac, Alaska, population 9,000 to 5,000 if you don't count the bears. In my snotty New York way I said to him once, "What do you do? How do you practice law in Kodiac, Alaska?" He said, "Well, I do what comes in the door." In my snotty federal litigator way, I asked, "Well, isn't that boring?" and he said, "No, it all depends on how you view what comes in the door." I said, "Well give me a for instance." He told me the story of a client who came to him to get custody back of her children from her much more powerful and wealthy husband. Matt looked at the facts, looked at the law and knew that no matter how much he pounded on the table, he was going to lose.

Now an obvious option would have been for him to tell the client, "Nothing I can do for you." But, Matt looked at the law again and realized that with a bit of a change, the law would benefit not only his client but other simi-

larly-situated women. So he said, "I know this is painful for you, but you have to wait," and he went to the Legislature, in coalition with other people that he had pulled together, and they changed the law and he filed the case and that woman has custody of her children and so do other women who benefited from Matt looking at what came through the door differently than many of us might have.

Isn't that what zealous representation is all about? It's a mistake though to equate zealous representation with "promoting the public interest" as the pledge does, much less the rule of law. Sometimes too much is too much and sometimes the interests of a particular client are antagonistic to justice and/or the sound use of the legal system.

Three examples: Product liability lawyers are often confronted with an offer from the defendants for settlement. "To settle the case, $100,000, but if you agree that you and your client will never ever talk about the product, never ever talk about what you discovered, never ever talk about the settlement and never ever say the manufacturer did something wrong, then you get $200,000." One view of zealous representation is that the lawyer is bound to urge the client to take the $200,000—isn't that what it's all about? Well, maybe that's not what it's all about. Maybe it's not about withholding information from people who will be hurt or made sick by this product that's still on the market and maybe it's not even what the client totally went to court for. Maybe the client wants to do justice, as well as get just compensation.

Another example: Peter mentioned that I was one of the lawyers who worked on the Exxon Valdez case. In 1994 we won $250 million in compensatory damage and $5 billion in punitive damages.[4] In 2004, ten years later, our clients have not seen a penny. Exxon's lawyers have made full use of the appellate process to raise every motion. I get emotional about this. Is it their right to do that? Is the system set up to let them do that? Of course. But when the plaintiffs recognized that $5 billion gives you a lot of wiggle room and persistently have offered to settle so that our clients can see some of the money instead of closing their businesses and suffering other harms, is it really the just thing to do and is it really the best use of our system's resources?

A third example: Lawyers at the Department of Justice, the Department of Defense and the White House are very busy crafting arguments in support of official torture of detainees in Iraq and elsewhere, including abrogation of the Geneva Conventions. Is that really zealous representation of their client and, in fact, who is their client? But if it were zealous representation of their client, if we defined the incumbent government as their client, is it really just or is there, in fact, a contradiction? If I were asked for a title for this talk I would call it "Postcards From the Edge of Professionalism," with due apologies to Carrie

4. *In re* Exxon Valdez, *supra* note 1, p. 19.

Fisher. I hope that I've shown some of the threads that connect the snippets. Maybe it will be clearer if I end with the words of Professor Quiggley who heads the Gillis Law and Poverty Law Center at Loyola University. He was speaking about faculty and students who work with community organizations, but I think they're just as applicable as a pledge for all students and all lawyers. He said, "It is incumbent on us to be vigilant about our strategic roles, to be humble, to do no harm, and to understand that working for justice is a long haul process."

**DEAN PITEGOFF**

Any reaction?

**MARC WALDAUER, ESQ.**

MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

The first example you gave could be separated from the second and third examples—the first one being a client taking $100,000 or taking $200,000 and keeping a shut mouth. Professionalism would be leaving that up to the individual client and that would not be affected by your particular political orientation.

In the other two examples, I hear those arguments and the flip sides all the time on the radio. The point really is lawyers have to internalize their own professionalism and not take positions that they personally feel opposed to before they even go into the first client meeting. There are plenty of lawyers on either side of all of the issues you mentioned and all of the other issues we can formulate, and the beauty of our profession is you can choose whether or not to enter on one particular side or the other at the initial meeting with your client. If it's a position you won't take and you let your client know at the beginning, "I won't take that position," your client then has the freedom to either choose you or choose somebody else to represent their interests. So I'm not really sure if it's really our position to try and define a specific side of an issue as being professional or not. In the Valdez example, what you feel is papering an issue to death may be the economic vitality of a particular corporation that feels the verdict and punitive damages are unjust and they are going to fight it until hell freezes over.

**DEAN CHAPNICK**

Yes. Obviously I picked the examples that I like because I got to talk about it, but my point was not just a political point. On the *Exxon Valdez* case, yes, I recognize that that's zealous representation of the client, but I'm questioning whether zealous representation of the client is always that, the intentions and the contradictions.

The questions don't only arise when you take on a client. How many of us have gotten into something only to wake up and say, "Oh my God! To do this case the best I possibly can, I have to do something with which I am not particularly comfortable." The rules on withdrawal are pretty stringent and that is a tightrope. It is a tightrope for all of us no matter what kind of work we are doing.

Some of the strategic issues are, in fact, lawyer questions and it may be that the lawyers are making calls that aren't in the interests of their clients, as well. In Exxon, I know for a fact that the lawyers are doing what their clients want them to do, so, it's not always the case, but I am just saying it is much more complicated than that. I did not mean to be saying that the angels are all on one side. I figured somebody would stand up and say what you did. I am happy you did.

**NANCY M. MAURER, ESQ.**

CLINICAL PROFESSOR AND DIRECTOR OF CLINICAL PROGRAMS
ALBANY LAW SCHOOL

I tend to agree with Ellen's broader view of what zealous advocacy means. It's not simply doing what your client initially instructs you to do. You fail to be a zealous advocate if you do not consider all implications, including those social justice issues that, as Ellen mentioned, may, in fact, be something that the client wanted, had he or she thought of it or the company thought of it. If you are going to be a zealous advocate, you have to bring all of those issues, facts and social justice considerations to bear and involve your client in the decision making process. Ultimately, it's client-centered; but, part of your job as a zealous advocate is to make sure your client has all of that information, including those issues of what is right, just, good and how it may affect a broad number of constituencies, including their own family relations, companies, shareholders, whomever.

**PAUL C. SAUNDERS, ESQ.**

MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

I would like to follow up on Marc's question for Dean Chapnick in connection with the Exxon Valdez example that you used. I would like to bring that example back to what we are here talking about, which is how we inculcate core values in law school.

If you were teaching law students about the Exxon Valdez case and the question that was posed was how should a lawyer representing Exxon react when his or her client comes to that lawyer and says, "I want you to use every means

available under the law to represent me to the best of your ability in this case," what do we say to the students who are being taught how they ought to respond to that question from a client in those circumstances, and what does professionalism have to do with that?

**DEAN CHAPNICK**

I would pick up on what Nancy said. It is incumbent upon the lawyer faced with a client who wants to use a strategy and wants the lawyer to employ the legal system in a way that the lawyer thinks is possibly not the best use of the system toward an end, to argue with that client to the best of their ability. I would advise the student when the client says, "This is what I want to do," unless the lawyer can find that it both in the Code of Professional Responsibility and their courage to withdraw, they have to do what the client wants them to do. That is our job, that's what we sign on for. I don't disagree with that.

**KEITH SEALING, ESQ.**

ASSOCIATE DEAN FOR STUDENT SERVICES, SYRACUSE UNIVERSITY COLLEGE OF LAW

I actually use the *Exxon Valdez* case in my civil procedure class in the first week. To a certain degree, it is a bad example of excess on the big corporate defendant side because the $5 billion punitive damage award was found to be excessive by the Ninth Circuit,[5] and that ten-year period you are talking about where Exxon continued to litigate the punitive damages was at a time when the U.S. Supreme Court was reexamining punitive damages as being a due process violation if excessive, in the *Gore* and *Leatherman* cases.[6]

That particular case is a bad example because, so far at least, the Ninth Circuit agrees with the Exxon attorneys who tried to reduce that sum. That goes against the grain for me because my natural empathies are on the other side, but the realities are that they did the right thing, particularly in light of changing law of how large punitive damages can be, and not be a due process violation.

**DEAN CHAPNICK**

The Ninth Circuit reduced the punitive damages to $4.5 billion. Had Exxon spent its time responding to the plaintiff's request for settlement negotiations, it might have achieved a better result.

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5. *In re* Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001) (granting motion for reduction or remittitur of the punitive damage award); see *also In re* Exxon Valdez, 296 F. Supp. 2d 1071 (D. AL 2003) (granting motion for reduction or remittitur and remitting $500 million of the $5 billion jury award, reducing the total award to $4.5 billion).
6. BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Cooper Indus., Inc., v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001).

**JUDGE BATTAGLIA**

I want to go back to Mr. Waldauer's comment, which addressed Dean Chapnick's example about the confidentiality agreement in the context of a settlement. There were two lawyers in that situation. Mr. Waldauer commented on the responsibility of the lawyer who is counseling the claimant with respect to the settlement, but we also have to focus on the responsibility of the lawyer for the defendant, the manufacturer, that was imposing as a condition to the settlement the confidentiality agreement and the appropriateness of that from a standpoint of core values and professional values.

Taking what Dean Chapnick said one additional step, an important point beyond the specifics of the merits of one side or another is that the lawyer has to accept personal, moral responsibility for the consequences of that lawyer's conduct during the course of the representation. Zealous representation and client-centeredness, which is a relatively new approach to clinical pedagogy, is not a free pass to avoiding accepting that personal moral responsibility. If lawyers could come to the point where they recognize that, then many of the things that we talk about as problems or concerns or crises of professionalism would disappear.

**SCOTT M. KARSON, ESQ.**

PRESIDENT OF THE SUFFOLK COUNTY BAR ASSOCIATION

I frequently talk to lay people about lawyering and the question I'm asked probably more than any other is, "How can a criminal defense lawyer represent the defendant he or she knows to be guilty?" I explain about the duty of zealous advocacy and the fact that the adversarial system will ultimately make the determination of who is guilty and who is not guilty. Now I'm hearing that there is another value which is implicated, which is this societal interest element. In many of these cases society would be best served by having the client go to jail and throw away the key, lock the door and forget about him. In the criminal context, which is perhaps the most graphic example, how do we reconcile the duty of zealous advocacy with the lawyer's obligation to serve the societal interests as well?

**JUDGE BATTAGLIA**

That is a perfect example of where the institutional interests at play have to be taken into account and where the institutional interest on the defense side is the need to require that the government do what it has to do under the Constitution before a person is deprived of liberty. The broader core values of the profession would include that institutional interest and would allow the

lawyer to take that institutional interest into account. That is not to say that in your particular case, as you say, society might not be better off if that were ignored, but it does provide a way to reconcile these perhaps diverging concepts of a calling and zealous representation. In other words, zealous representation in this context may very well lead to the public good.

**DEAN N. PITEGOFF**

MEMBER, SPECIAL COMMITTEE ON JUDICIAL INDEPENDENCE,
NEW YORK STATE BAR ASSOCIATION

I was counting on Judge Battaglia to mention the word "context" yet again. It is an example of how different contexts matter. The criminal law context is very different from many others.

**WHITNEY SEYMOUR, JR., ESQ.**

I have spent a good part of my career as a federal prosecutor. I want to say, "Amen" to this doctrine. The real purpose served by effective defense counsel is to keep the prosecutor on his or her toes and to do the job right. Making sure the law enforcement agencies are very careful in collecting evidence and taking statements and so on is what keeps law enforcement straight and honest. Without an effective defense bar, we would all become lazy and pretty soon we'd have a lot more of the innocent convicted.

I would like to add to the folklore of confidential settlements, an example which you might like to take back to your law school class. Barbara Gelb wrote a biography. Some years ago, Warren Beatty did a film, quite popular, called *Reds*, and in the course of it he used quite a lot of Barbara Gelb's book without getting her permission, so she got counsel to represent her. They had some litigation started and they reached a settlement. One term of the settlement provided that Barbara was to keep confidential how much she was paid. What she did—which shows you should never underestimate your clients—was she got the check, she went out and bought herself a beautiful Persian lamb stole. Because her husband, Arthur, would get seats on the aisle at theater openings, she often would go and sit on the aisle with her Persian lamb stole and people would come up to her and say, "Barbara, what a beautiful stole; wherever did you get it?" She would say simply, "Warren Beatty gave it to me."

**MARJORIE A. SILVER, ESQ.**

PROFESSOR OF LAW, TOURO LAW CENTER

Although I agree that putting the prosecution to the proof is the appropriate role, there's a new and different paradigm to look at. Movements like

restorative justice and therapeutic jurisprudence are appealing to lawyers who would much rather work with a defendant to get to the roots of the defendant's problems and find services appropriate to deal with those problems. Clearly, if someone can be rehabilitated in connection with these court proceedings, that serves the individual and society as well. I just want to throw that out as an alternate and growing paradigm.

**COMMENT FROM THE AUDIENCE**

I wanted to follow up on Marcy's comments with another new paradigm. At places like Neighborhood Defender Services in New York, civil lawyers are assigned to each case along with the criminal lawyers because all too often indigent people accused of crimes have committed those crimes because they were unable to solve their civil law problems because they didn't have access to lawyers. So NDS and places like that are providing civil representation to people as a way of solving the criminal case along with providing criminal representation to people.

**A. VINCENT BUZARD, ESQ.**

PRESIDENT-ELECT, NEW YORK STATE BAR ASSOCIATION

Thank you, Peter, I also want to welcome everybody on behalf of the State Bar. This is very important work, and I'm very excited about it. I am somewhat humbled about being here. Professionalism hadn't been invented when I graduated from law school 37 years ago, at least by name. It is wonderful that you all are taking time out from your busy lives to come here to discuss this aspect of our profession. Also, I congratulate all the professors who teach professionalism.

Just to give an example of the State Bar's commitment to their project. We have a number of members here from the Executive Committee and from the House of Delegates. We were all here Thursday, Friday and Saturday, so we turned around, got some clean clothes and came back, and I welcome all of my State Bar colleagues and I congratulate Lou Craco. I was in the house when he first gave his report in '95, and what a wonderful continuation of his work in this area this Convocation is.

This is my year to look for new ideas, things I might implement, during my tenure. Lou, John Gross, and I are going to meet to talk at length to figure out specifically what I am going to be doing next year.

There certainly are economic pressures. It is a very changed world now than when many of us started practicing law. Certainly in the common laundry list of those changes would be that there are a lot more lawyers. Let me tell you a little bit about my background. I was with Harris Beach which, in those days,

was a big firm, 35 lawyers. I came to them in Rochester from Michigan Law School. Then I left after three years, worked for the City and had my own firm for about 20 years. I tell young associates I was on the 30-year partnership track. I went back to Harris Beach as a partner after having been gone 30 years.

Certainly we have all seen the economic changes. One of the things that strikes me particularly now is the increasing overhead. It is just so expensive to do business. Technology is expensive. It supposedly saves labor, but it's expensive to install. Another aspect of a modern big firm—I'll talk more about this in a minute—that differs from my solo practice is Harris Beach has numbers on everything. We can tell you anything, how much it's costing everybody to be there, and it's really quite staggering.

There is also competition for business. It's a huge change. When I started practicing then, Rochester was a medium size town. Every big firm had as clients a commercial bank and a savings bank, a few carriers, a few large corporations, and that was all, bolted down. Nobody would think at all about one of those clients leaving. You didn't have to worry about it. Some would argue that those were more ethical times, but I would also remind you that all the firms made sure one of their partners was on the board of each of those banks and corporations, made sure that nobody had any radical ideas about changing law firms. But certainly the pressure to try to find and keep clients and ward off other people from taking one's clients was not there.

One result of the economic pressures we now face is this huge hour requirement. The billable hour requirement weighs disproportionately on young lawyers, but it affects all lawyers. The pressure to bill hours creates an incentive to pad a little bit. And, there's pressure not to stand back and say, "Is that young associate really adding value?" Sometimes when one evaluates a young associate, even if a person had 2,000 billable hours, one has to stand back and ask, "How good are they? Does what they're doing matter? Is it helping to advance the case?"

On the plaintiff side, there is sometimes pressure to settle prematurely. For example, the plaintiff's lawyer might have college tuition payments. If the defendant makes a reasonable offer, the lawyer has to lay aside his or her own economic needs to say, "No, we are going to press on with the trial rather than settling, even though we may lose everything." That said, there have been many people who have made a career out of settling.

We had a fellow in Rochester who advertised himself as Jim "The Hammer" Shapiro. His line was, "We'll get you maximum cash." He was finally sued for malpractice. It turned out that he had never even so much as conducted a deposition, let alone a trial. He made a ton of money, even though he was settling claims 20 cents on the dollar or less.

There is also pressure to not settle. If you have a case that has been going on for a long time, there's pressure, some people feel, to continue that case. Even

in smaller cases, there are some defense lawyers who are known for wanting to get at least a day of jury selection. You know they are going to settle, but they are going to put everybody through a lot of trouble because they want to be able to bill for a day of jury selection. I suggest that's not just a small firm practice. Some big firms would be horrified if their big, multi-year, big team case all of sudden settled. Those are all pressures which we see. Are there answers? Sure.

One I would like to know more about is what is done at law school. Is there a course on law practice management or the business of law? It makes me crazy, like everybody else, when we call the practice of law a business. We have an accountant in my firm who continues to refer to "industry practice" and I tell him, "Stop doing that." The fact is, though, that there has always been a business component in the practice of law. I don't think this is new, it's just bigger.

One way a lawyer maintains independence, one way that a lawyer can stand up to the client and say, "I'm not going to do that because it violates the rules," is to be running a practice that provides the financial security so they can do it. Therefore, the entrepreneurial spirit, the sense of running a business, reasonably well, is not really in conflict with the core values of independence, trustworthiness, zealous advocacy and all the other core values that we have. If the law firm is run on an economically sound basis, then many of these pressures will not be felt so much.

When I was practicing solo I gradually added people. I did the business side and I did the legal side and when I was successful on the business side, then I was able to do a better job on the legal side. We all, including those of you who teach, ought to pay attention to that aspect.

Caring for clients, letting the client know that you care for the client, being known in the legal community as a person who doesn't make frivolous arguments or bad arguments because you want to be an authoritative person in the courtroom, that's not only observing core values, that's also how you have a successful law practice. They are not mutually exclusive.

The concept that you need to zealously advocate for the client but always have in mind the public good is new to me. We recognize there are exceptions in the criminal area. However, to me, zealously representing your client within the bounds of law is the public good. When I represent a client, I do not want to have to worry about whether or not this is in the best interests of society, whether or not this case will ultimately benefit society. I do that when I decide whether or not I'm going to take a case. To be sure, sometimes the case can play tricks on you. The great case is the kind of case where the public good and the client's interests coincide and you get paid. That's perfect. They are out there, and when they come along, it's a wonderful thing. But the other ones are out there, also.

When I was a young lawyer at my law firm we represented Greyhound. I came from modest circumstances in Indiana, and this poor guy whom I can

relate to, had put all of his worldly goods in a cardboard box, tied a rope around it and checked it with Greyhound. Greyhound lost all of his clothes and, of course, there was a limitation of liability on his ticket of a couple hundred bucks. It was my job to go over and meet this guy. I was able to get him some money from the company, but I felt so terrible about the case. I felt that somebody's got to do this work, but it is not going to be me, and that is when I left to go with the city for a while. You can ferret that out in your own screening. There are some people who think they are protecting the other passengers of Greyhound from frivolous lawsuits and keeping fares down. They can come up with a rationale; I can't.

But once you've taken the case, zealous advocacy is really the entire principle that the country is based upon; that is, the free marketplace of ideas. If you have vigorous debate, a vigorous exchange of views, the truth will ultimately prevail, and that's your job within the bounds of the rules. That does not mean scorched earth or delaying tactics. There are prohibitions about that in the rules. You can also tell clients they're impractical. Beyond that, we as lawyers in our zealous advocacy are doing the public good by the very nature of what we do.

There is a blurring of the lines then when you blend that in with public cases and pro bono work. Zealous advocacy includes putting in a lot more time on a case than you ever hope to get compensated for. I probably have cases now where the whole recovery may be less than the value of the time I have put into it. That is part of zealous advocacy.

I do think there is this problem, however, and that is with enormous billable hour pressure and the eat-what-you-kill philosophy. The problem is, how do you balance sound law firm economics with enough time to do pro bono, to be community leaders, to do all of the other things that also are part of professionalism? That is a very difficult task. It is not that people don't want to do it, it's just that when they fulfill all their duties around the law firm, it's terribly difficult, and they're not going to get paid for them.

I have noticed that some firms have different cultures than others. I do not know if there is anybody here from Proskauer, but the Proskauer law firm in New York City has an absolutely fabulous culture. At any given time, they may have half a dozen people in leadership positions in the State Bar and working on committees and various other things because that's the culture of their firm.

Somehow we have to inculcate that, instill that culture in other law firms. After painting a rosier picture on other issues, I do believe that is a fundamental problem in fulfilling not the core work of lawyers, but all the other things that we ought to be doing besides representing clients. Thank you.

**DEAN PITEGOFF**

The question is, "Do attorneys have the ethical discretion to not simply represent their clients zealously but also to promote justice in the broader sense and, if so, what does that mean?" I just do not want to leave this opportunity behind without opening it up to the floor and to the panel for anyone who wants to take that point a little further—not just the ethical but the professional and moral discretion of lawyers in the shadow of the zealous representation ethic.

**EILEEN R. KAUFMAN, ESQ**

PROFESSOR OF LAW, TOURO LAW CENTER
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

I would just like to recall the words of Father Robert Drinan when he has tried to distinguish law from other occupations. I am not going to put it as articulately as he has, but he says that what makes law a public calling is the obligation to say to your client, "Yes, you can do this, but that would be wrong, that would be unjust." It is having that conversation that he would point to and that we all would as being a part of professional responsibility, a part of the lawyer's role.

Obviously, it is not just the initial conversation with the client and the initial consideration as to whether one wants to take the case. That is a critical juncture, but it is not all or nothing, it does not end there. You don't then become the hired gun. You continually have the opportunity and should exercise that opportunity to engage in counseling with your client and as Dean Chapnick said earlier, to talk with the client about what the ramifications of the action might be.

**MR. BUZARD**

That definition is only a part of being a professional. Part of what we are, at least in the advocacy area, is that we are independent, we are not under any instruction from anybody other than certain ethical rules, and we're professional because without government control, without any other kind of control, we are looking after and representing an individual client to the best of our ability with our knowledge, skills, training, and thoroughness and competence, and to me that is a bigger part of being a professional. Yes, there is a side duty to counsel a client, but when a lawyer is representing a client, the uppermost thing in their mind still has to be, "How do I fulfill my duty to this client to the very best of my ability as a lawyer?" Do everything possible within reason to represent that client; that has always been my moral compass, and I believe that by doing that I am fulfilling the social good.

**LOUIS A. CRACO, ESQ.**

CHAIR, NEW YORK STATE JUDICIAL INSTITUTE
ON PROFESSIONALISM IN THE LAW

Two observations. There is an unhelpful tendency to conflate the validity of the adversarial mode of the legal system, on the one hand, with the obligations of the lawyer who has to function within that system as it is, on the other hand.

A lot of the criticism about the extreme of zealous advocacy has to do with perceived deficiencies in the adversarial system as a way of achieving societal ends. It is hard to expect a lawyer who has to practice within the adversarial mode to abandon his premises when he is representing a client. This is not to say the adversarial mode ought not to be reexamined, much of the laws of segregation in the District of Columbia ought to have been examined, in order to change the predicates on which the representation goes forward. The second observation, is that there is also a terrible tendency to think of the lawyer in the adversarial setting as having a binary choice between promoting the client's interest and promoting the public good, when all of us who have served in that role know that there is a huge degree of reciprocity between the lawyer and the client about what the client's objectives ought to be and can be. While I might like to disagree with the notion that you not look a corporate CEO in the eye too often and say, "That's just wrong, you should not do it and if you want to do it, I won't," and stay profitable in the business and pay your overhead, we have come to a point particularly in the corporate culture of the late 1990s and early 2000s where it's very easy to look the CEO of Enron or of another convocation in the eye and use instrumental arguments to persuade them to do the right thing. "How much time do you have for the SEC next week if you do it this way? What really are your insurance reserves for this kind of behavior? Do you really want to be the poster boy on page 1 of *The New York Times* Business Section or the next target of Eliot Spitzer"?

There are lots of ways you can persuade clients with some degree of art to adjust their objectives and that's as much zealous representation of the client as is hacking the other side to death.

**MR. BUZARD**

You are appealing in part to the self-interests of the client and the corporation, are you not? Do you want Spitzer to come after you, or do you want to do it the way I'm telling you?

**STEPHEN D. HOFFMAN, ESQ.**
SILLER WILK, LLP

I have a lot of trouble with the representation of a client in litigation. I'm not sure it is always that easy to figure out what the public interest is in the result.

The system of justice presents two adversaries who argue and a neutral who decides. I'm very concerned, as one of those advocates, that if you try to figure out what the just conclusion is to the case and if that influences the way you represent a client in court, that subverts the model. Unless someone decides there's a better model, the highest public good, as Vince suggested, is achieved by vigorously participating in the model within the bounds of the law.

**SETH ROSNER, ESQ.**
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

There is a distinct difference when the lawyer is in the litigation context and when the lawyer is in the transactional context.

Eileen's comment referring to Father Drinan reminded me of a conversation I had about 25 years ago. A client of mine, a major manufacturing company, had a plant. We had to do a federal report on salary discrimination. The allegation was ethnic-based. In doing the investigation, I discovered that occasionally the client had women who were in clerical positions doing work on these two-story high manufacturing machines, which was fairly dangerous work. I asked the client, "Do you pay the women the same as you pay the men?" The response was, "Of course not, they're women. They work in the office and fill in here." "Well don't they undergo the same danger?" "Yeah, but we don't have to and the law doesn't require it." I said to the client, "Do you really think this is fair? Ought you not to pay them the same, because sooner or later, the federal government is going to require exactly the same thing?" He said, "I don't think so." He called me back a week later. "You know, I thought about it, you're absolutely right." They changed the pay scale for women. So we really do have opportunities to have those discussions from time to time. We have to recognize them.

**SUSAN J. BRYANT, ESQ.**
DIRECTOR OF CLINICAL EDUCATION AND PROFESSOR OF LAW
CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW AT QUEENS COLLEGE

I like to tell my students, "Think about your client and the relationship between you as an alliance. In the end you're going to put forth within the

bounds of the law the position that your client wants, but you have a responsibility to that client to push back, so when the client is taking positions that, at least from where you sit, seem as if she's going to put herself in more danger, talk to her."

The conversation is not, "I'm not going to do it." I'm not going to hold power over the client as the lawyer in that situation, but neither am I going to simply say it's totally up to the client, whatever they want.

You need skill to hold onto the client and have that conversation at the same time. Your client needs to believe that you will be a zealous advocate even if you have raised issues with her issues that require her to think differently. That is what makes our tasks as counselors and then as litigators very complex. This skill does not come easily to young lawyers.

But the people in the room who are probably the most successful, expert practitioners in fact do that kind of work all the time, both as a matter of business and as a matter of some notions of good, but they do it at a very high skill level so the client doesn't find a new lawyer.

**MR. BUZARD**

There is a common thread here emerging and I want to, in my zealous advocacy for zealous advocacy, make clear that part of zealous advocacy is pushing back. When the client wants me to make bad arguments, for example, I explain to the client, "If we go in there and make that kind of argument, I'm going to lose my credibility and you're going to lose your credibility." I do not explain the societal good of not making those arguments but, rather, that it is not in the client's self interest. As Lou was saying, you can explain to your client, "You're going to end up on the front page of the Business Section of *The New York Times*." That they understand.

Once a client determines that you're weak, then they're worried because if they can push you around, then everybody can push you around. So part of zealous advocacy is being firm with the client and that's all part of doing the best job for the client.

**MR. SAUNDERS**

We are brushing up against what has been the central debate in professionalism law practice for decades, and that is, should lawyers represent people who are not good, people whom society thinks are not good? I don't necessarily mean law breakers, but people who are not nice people. In the context of trying to figure out how to inculcate law students with professional issues, I've always thought one of the things that lawyers do and should do from time to time is to represent people whom most members of society don't like.

You have to distinguish between the lawyer as an advisor to the client and the lawyer as advocate. In the former role, during that very confidential meeting with the client, the lawyer really ought to do what Father Drinan and Lou articulated. That's one of the things lawyers can do as counsel, but once you go beyond that meeting, when the lawyer and the client are facing the outside world, that is where the profession of law is at its highest, when we are able to stand together with our clients. When I used to do criminal law in the Army, I used to say to my client, "I'm the only person in the world who is on your side. You may have done really bad things, but for the outside world, I'm on your side, and I'm going to represent you to the best of my ability, no matter what society thinks about what you did."

We have to distinguish the two; and if we're talking about how you teach young law students to do what lawyers do, it's often how do you represent or should you represent people who society sometimes thinks aren't very good.

It is too facile to say that you should withdraw if you're being asked to represent a rapscallion. We don't have the luxury of being able to do what Bill Kunstler used to say, "I only represent the people I love."

What makes the law difficult but honorable is that we sometimes are called upon to represent and should represent people whom society thinks are not lovable.

**CAROL A. BUCKLER, ESQ.**

ASSOCIATE DEAN FOR PROFESSIONAL DEVELOPMENT AND PROFESSOR OF LAW
NEW YORK LAW SCHOOL

I am wondering whether the discussion that we're having about the obligation to think about end-oriented values and justice and something beyond zealous representation is presented in the wrong terms. Students come to law school in high percentages committed to doing public interest work and they leave in low percentages committed to doing public interest work. They come relatively reflecting the mental and emotional health in the population, and they leave law school significantly impaired by comparison to the population; and those patterns get worse when you look at the practitioners of law.

Why might that be? There are lots of reasons. The pressures that we have heard about are among the reasons, but part of the reason may be that the process of legal education and the process of practicing law sometimes have a disassociative effect on students and on lawyers so that they begin to think, "This is all about representing the client, not about me and what I care about and what my values are." I wonder whether it might not be helpful to think about this in terms of the permission rather than the obligation to be true to yourself as a lawyer.

What I hear from all the experienced, successful and honorable practitioners who have spoken this morning is that they have found ways in their practice to be true to themselves and their own moral values; but, somehow once we admit that, it starts to get controversial. Once we admit that in the zealous representation of our clients, we're also being true to ourselves, we are concerned about that, so I wonder whether it might advance the conversation to think in those terms.

**JUDGE BATTAGLIA**

The way Carol has framed it is helpful and it was or is similar to what I was speaking about in terms of personal moral accountability for one's actions. I was listening to Mr. Buzard talking about his experience with Greyhound. That is a perfect example of someone who recognized his personal moral responsibility and decided he couldn't do it anymore.

On the other hand, Mr. Saunders, I can certainly understand how someone could make an assessment and decide as a matter of personal moral conviction that in the particular case it is the right thing to do to represent the person who is not a nice person. It is important that students understand they have a choice. The students whom I dealt with as a professor when I was doing a clinic and practice-oriented courses led me to conclude that for some reason people come out of their professional responsibility courses or other courses not recognizing they have a choice but, in fact, believing quite strongly to the contrary that they don't; and when they express that, they almost always express it in terms of zealous representation. Part of the solution is to recast the concept and make sure that when it is discussed with students, they recognize it is a matter of choice.

I have a question for Mr. Buzard. Do you see your responsibility modified at all when you are in a situation when you're acting for a client and the interests of unrepresented persons or self-represented persons are seriously affected.

**MR. BUZARD**

Fortunately, I haven't been placed in that position very often, but I was once in a very high-profile case which was reported every day in the newspaper and the guy decided to represent himself. My biggest fear at that point was what people would say if I lost to this guy, and I thought I could, as the facts were pretty close. My attitude, at least during a trial, was, "I'm not going to sacrifice my client because a person chooses not to have a lawyer." It's up to the judge; that's why we have a person up on the bench to make sure that person's interests are somewhat protected. I think the judge has a tougher time in a pro se litigant matter than the lawyer does. I'm not going to let an unrepresented client make speeches or do other kinds of things that lawyers know they should not just

because he didn't decide to have a lawyer. I might reserve some of my fancier moves because the person isn't represented. But again, I represent my client; let the judge protect the person who is ill-advisedly not represented. It's more complicated than other kinds of situations.

I'm sure other people want to comment. Take the people who are representing the detainees down in Guantanamo and other terrorists, are those lawyers supposed to say, "Well, if my client goes out and builds a bomb after I do this, then I'm going to feel terrible. That's bad for society"? No, their job is to represent those people, to prevail against overreaching by the executive branch, and it's up to law enforcement to keep them from building another bomb.

A lawyer cannot lose that compass. I represent the client within reasonable bounds in a practical way, which includes counseling the client.

**SANDRA S. O'LOUGHLIN, ESQ.**

CHAIR, CHARACTER AND FITNESS COMMITTEE FOR THE EIGHTH JUDICIAL DISTRICT

I heard a lot of discussion here, and I heard a lot of tension in the discussion, but I didn't hear true contradiction. I heard change of context. In the transactional context, push-back is one kind of zealous representation. Litigation is a different context. We're trying to figure out what professionalism means, and it means slightly different things to all of us. Within the definitions of justice and social good, there are ranges.

If you're taking on a difficult cause, such as representation of a sexual predator, some of us might initially say, "I'm going to screen that out. I can't do that." But, if you choose to do it, you are choosing perhaps a higher good to ensure Constitutional protection. That's what we're here for and what we're about. Some of us might choose not to; others, to their great credit, do so. We have some contradictions. It's amazing that the profession can handle these tensions as well as they do.

**CHARLES D. CRAMTON, ESQ.**

ASSISTANT DEAN FOR GRADUATE LEGAL STUDIES, CORNELL LAW SCHOOL

I'd like to bring the discussion back to the students. The young associate who has graduated, taken the bar, and been hired by a firm, depending on its size, generally is not going to have much choice, at least in the first couple of years, to determine who those clients are and the matters upon which they're working. The question is what we can do at the law school about the transition into the profession and how that plays itself out in how the firms treat some of these issues. That will have a real impact on that student.

Vince, when you did the *Greyhound* case, you said, "That's enough. I am going to go work for corporation counsel or city counsel," but not everyone has that opportunity, particularly given their debt loads coming out of law school and the implications for their career down the road.

We sometimes put the young attorney in very difficult situations. How do we best work through that transition and again bring the whole profession into a better spot?

**MR. BUZARD**

The problem with young associates is more the other way. The young associates sometimes do screen. If they don't like the client or think the case has bad facts or for some reason or another they don't like the case, they don't do a good job. They decide the case doesn't matter because, "I don't like the client. The client is difficult." Students need to learn that the only way to succeed in a law firm and one way to be a zealous advocate is to, as Mr. Saunders says, be able to represent people you don't like. I am hoping that with all this talk about screening and taking care about what you represent, we don't get a flock of associates saying, "I don't like that client, I'm not going to work on that case," because they can't exercise that choice.

**DEAN CHAPNICK**

I agree very strongly with Mr. Buzard that not doing a good job is not an option. Teaching our students otherwise would be a disservice to the profession, to them, and to their clients. But I disagree equally strongly that we can't encourage our students in appropriate matters and in a limited way to stay true to themselves.

I understand that context matters and my students may be more privileged than others both in their bargaining power and in the kinds of law firms that they're likely to work at. My students have often—maybe not as often as I actually think they should—negotiated with their law firms as a condition of their employment that there are certain very limited numbers of matters on which they will not work—not the client, but an issue. For example, I have a student who will not work in support of the gun industry. I have another student who will not defend somebody who is pretty clearly guilty of racism. They make those deals going in and there are other people to do the work and the student isn't conflicted about what they're doing with their time. They do the rest of the work of the firm. I don't think young associates any more than partners have to be hired guns.

**MR. SEYMOUR**

Going back to the basic theme of defining professionalism for law students, I want to make a suggestion from a historical event in New York State, picking up Paul's thought with reference to William Kunstler. Before Mr. Kunstler became a controversial figure, he wrote a book called *The Case for Courage*.[7] One of the chapters in that book deals with William Seward when he was governor of New York State and a practicing lawyer in Auburn, New York. He was assigned by the court to represent a murderer in probably the most notorious murder case in the mid 19th century, the Van Nest murder case.[8] If you ever go to Cooperstown, you see all sorts of printed material and paintings dealing with it.

He advanced for the first time in New York jurisprudence the defense of insanity on behalf of his African-American client, who was the defendant. The community was so aroused that he, a leading figure in New York State politics, would lend his support to such a despicable defendant that they actually marched on his house with torches threatening to burn it down to try to scare him off from representing the defendant. He continued to represent him at trial, the judge overruled his defenses, and the Court of Appeals later reversed on that basis. In his summation, Seward explained the lawyer's obligation to represent the unrepresented and the unpopular defendant. He said, "Some day some member of a despised minority will come through Auburn and they may come up to the place where I'm buried and they may say of me, "He was faithful;" and to this day if you go to Seward's grave site, the inscription on his grave is, "He was faithful," from that summation.

It's a great case to put to students about weighing whether the lawyer in the face of all of the threats to his political career, his family, and to himself should take on that representation.

**PROFESSOR MAURER**

I've been asked to be the link from this general discussion about what professionalism is to what we can and should be thinking about in terms of teaching professionalism in law schools. I'd like to touch on how and why, in my experience as a lawyer and a law teacher and in particular a clinical law teacher, we might teach professionalism at law schools. I'd like to identify some of the curricular issues we're talking about, as well as a few of the barriers that we might come up against when we're looking at how we can press towards getting this professionalism message across.

One question is, "To was to what extent can law schools instill core values? Is professionalism instruction a hedge against lawyer misconduct? Is this some-

7. WILLIAM KUNSTLER, THE CASE FOR COURAGE: THE STORIES OF TEN FAMOUS AMERICAN ATTORNEYS WHO RISKED THEIR CAREERS IN THE CAUSE OF JUSTICE (Morrow 1962).
8. Freeman v. People, 4 Denio 9 (N.Y. 1847).

thing that we should be doing to reinforce the best aspiration of young lawyers and our law students?" I think it's the latter. Many law students, as Carol mentioned, come to law school with notions of public service and making the world a better place. They see law as a profession in which social justice is very important.

So one of the first things that we need to do as law schools is to "do no harm" to that initial notion. We want to nurture those good goals with which students come to law school. We want students to leave with those same aspirations when they graduate; namely, that they want to serve the public good and that the profession is one of public service.

Too often we see that these ideals that students come to law school with end up suppressed by competition for grades, concerns about passing the bar or the economic realities of going out into practice. Students express some concerns such as, "Do I have some choices in whom I represent? How I represent them?" But then they get the idea, "There is a certain status that I want to achieve. I should want to go to a big Wall Street firm as opposed to representing people in my community." There are a number of ways we want to think about how we can propel and nurture those initial aspirations of our law students.

I'll give an example of what not to do from my own experience. On my first day when I walked into law school—this was in the 1970s—as part of my orientation as a law student, I was given a packet of stuff. On the very top page, the first bit of information that my law school wanted me to have was the range of salaries for firms in the city: large firm, real big; medium firm, medium salary; small firm. So the message I received was "I'm going to law school because I want to go to that large firm with a large salary and make the most money."

Not surprisingly, there was very little support at that time for public interest professions. The career counseling center was about matching students up with those firms. If you get the highest grades, you go to the biggest firms, et cetera. What helped me get through law school at that point, where I began to feel I really didn't belong, was to participate in clinical programs. In those programs I had an opportunity to actually apply some skill, talk to people who were interested in public service, and also just work. I had an opportunity to work for Common Cause in Washington, D.C. That helped me to stay in law school but more importantly, it gave me some context and purpose for being in school and ultimately made me a happier law student and hopefully a better lawyer.

There is, in fact, some research showing that students and lawyers who follow intrinsic values such as doing what you feel is best according to your own moral compass, and hopefully for many that is doing public good and providing public service, end up achieving greater personal satisfaction from the prac-

tice of law and greater professional success.[9] In contrast, the students who follow purely extrinsic values, such as achieving the highest status at law school, making the best grades, and getting the most money, end up being more susceptible to depression and statistically increased chances of alcohol or substance abuse.[10] So there seems to be some correlation between professional values and greater personal satisfaction and success.

Without getting into specifics of particular programs, I will discuss some of the things that law schools can do to teach professionalism and encourage the best aspirations. The first is to start early and to emphasize and discuss professionalism throughout law school. Our afternoon panel will give some specific examples about that. Many law schools offer some discussion about that at orientation, but it is something that needs to be carried on throughout law school.

At Albany Law School, for instance, our Introduction to Lawyering course changed from what had once been a standard research and writing program to one that is problem-based, in which law students represent a hypothetical client and are asked challenging questions along the way. They need to make decisions about that representation. It gives context to the study skills and gives them opportunities under faculty direction to discuss the values of the profession.

One of my clinic colleagues talks about the "tao of professionalism" in which education is really a life-long process. We take the teachings from law school, we consider our experiences, and we reflect upon them. This is something that we constantly come back to, but there isn't any reason why we shouldn't be thinking about those notions from day one.

Focusing on problem solving rather than merely learning subjects in law school, looking at outcomes rather than content. It's those kinds of skills, pushing law students to think about how to solve problems rather than solely learning the content of subject matter of the law that has been changing, anyway; and possibly even from the time you start the first year of law school until the time you take the bar. We need to focus on problem solving and the outcome.

Most important is offering opportunities for students to develop values and professional responsibility. There are personal experiences and biases here, but clinical legal education is the best place within law school to accomplish some of those purposes.

There has been a lot of discussion this morning about what zealous representation means. This is something that is discussed in the context of real cases every day throughout a law student's clinical experience, so that it's not solely about doing what the client directs you to do, but what is your job in terms of representation. It's about considering the cultural environment in which you're

9. *See, e.g.,* Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness,* 11 CLINICAL L. REV. 425 (2005); Lawrence S. Krieger, *Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do About It*, 1 J. ASS'N. LEGAL WRITING DIRS. 259 (2002).
10. *Id.*

providing this representation. It's considering the whole range of other goals that the client may wish to consider and should consider. It's allowing your students to consider the context of their decision making, examine their own professional values, and also contrast those to what your clients may perceive as professionalism. You may think it's about making the most brilliant oral argument in court, but the client may think it's, "Does this person care about me? Are they returning my phone calls? Are they going to make sure the process I go through is a fair one?" Those are things that truly are concerns for clients and they may not be on a student's radar screen, and we need to consider those and discuss those with our students as part of our educating students about professionalism and values.

There are many opportunities through clinical education because students really are representing real clients under faculty supervision to address those questions that we're talking about now.

I want to mention one thing we do as part of our clinical orientation, in the students' second or third year, which has been helpful in enabling students to see and feel the importance of what they're doing when they undertake this role. That is to have a formal swearing in of the students when they become law interns in our clinical program. Our Presiding Justice, Anthony Cardona, has come in and sworn our clinical students at the beginning of the semester. He talks about what they're doing, the importance of public service and of professionalism and their role as professionals, and it is something, because they hear it first from the Judge before they are actually going to be representing clients. This carries over throughout the year, we get to reinforce it regularly, and hopefully they carry that type of message about the significance of what they're undertaking throughout their careers in law school and afterward.

Clinical education in the law school context is the best way in which to teach professionalism because there's no better classroom than real life in dealing with the unexpected, dealing with decision making, but there are other ways to offer experience short of clinical programs, and many schools are not in a position to offer every student extensive real life clinical experience. There are many other ways in which some level of experience can be offered to students, such as moot court activities, hopefully under faculty supervision. Another possibility is field placements in which students are placed in the field and work on real matters under attorney supervision. Bring that back and study it in the context of a professionalism class. Other possibilities are simulation courses and other problem solving opportunities, as well as practice opportunities that are offered in the context of even traditional doctrinal courses. That is, offering some opportunity to present a subject in the context of your role as a lawyer in solving a problem, rather than learning a topic and passing an exam at the end.

There are also opportunities for public service to be offered as a part of the law school curriculum in general. Clinics are one obvious way, but a number of

schools are now requiring some pro bono requirement or some number of hours of public service in order to graduate. This can also be done in connection with a course. One of my colleagues at Albany Law School teaches a Law and the Disadvantaged course. As part of her course requirement, she sends students out to perform about six hours of community service and assists them in making those connections. Students have reported back to her that this has really been eye-opening. As much as it has been a wonderful discussion in the classroom, until they get out and see some of this actually happening, it doesn't have that same force of reality.

One of my courses is another example. In Disability Law, I send students out to do an accessibility study of any public place, such as a restaurant, courtroom, or movie theater, and students who have been frequenting these places without considering whether it's accessible to all of the public have come back and reported insights about just that kind of access. When we're talking about courtrooms, it's often access to the legal profession and legal system itself.

We have talked this morning about some of the impediments to accomplishing this goal of teaching professionalism throughout the law schools. Certainly the economic reality of the practice of law is one, and that economic reality is a major factor for law students, as well. Many of our students are graduating with tremendous debt, and that elevates getting the job with the greatest payout to greater importance than when I graduated from law school. So paying off my loans enters into the equation in a way it didn't in the past. Also competing for jobs, getting the best grades, getting the best job to pay off my loan. That's one of the things law schools need to consider. At the same time that we're encouraging professional values and public service, loan forgiveness is one thing that we're exploring, and a number of schools are doing that to enable students to have greater choices in the jobs which they accept. That doesn't mean that one can't work for a large firm and continue to work in the public interest and be true to one's own intrinsic values.

Another issue that I think many law schools are dealing with that also figures into how we are going to, in the context of our curriculum and student activities, promote professionalism and teach professional skills and add to the discussion of values, is the bar exam. We go through three years of law school with the idea of passing a bar exam that, to the most extent, is about remembering the subject matter of the law on a short-term basis. You take the test and then you're on your own, and that really conflicts with the skills and values that we would like to be able to focus our attention on in teaching because students really do need to meet that hurdle and pass the bar. You have to learn that subject. We need to be able to allow our curriculum to not be driven solely by the need to pass a bar exam but to redirect our curriculum to allow students to both pass the bar and at the same time learn those skills that they are going to be required to apply throughout their legal careers.

One other impediment to learning professional values is the culture of stress to which Carol alluded to earlier. That is, a disproportionate number of law students experience depression, stress, mental illness, alcohol or substance abuse to a greater degree when they graduate than when they started. We need to do something to make sure that that doesn't happen; and maybe that is focusing on giving students the permission, as you've suggested, to follow their heart and to continue to feel that their education and experiences are leading to something from which they will derive personal satisfaction rather than getting stuck on the treadmill of achieving the highest grades, highest status, the easiest access to the best-paying job afterward.

One other obstacle that I might mention, is the change in student population that we see now, which makes education in general more challenging. We're doing more remediation of some of the basic skills such as writing and analysis that students used to come to us with. Some speculate that this is because we're so used to the sound bite culture in which everybody does things in small, neatly-packaged formats. We need to be aware of the way our students are now learning and sometimes making up for past educational deficits in order to be able to make sure they have the actual technical, practical skills to be able to practice law, while at the same time we're preserving and making sure that their aspirations for public good are nurtured and protected.

**DEAN PITEGOFF**

Nancy, thank you for an excellent bridge to this afternoon's panel.

**CATHERINE O'HAGAN WOLFE, ESQ.**

CLERK OF THE COURT, NYS SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

My question is for Nancy and Ellen and perhaps even yourself. To what extent at your respective institutions do you find that your programs, the clinical program and the social justice initiatives program, are integrated by the faculty in the course of developing the regular curriculum that the students take?

**PROFESSOR MAURER**

We try to consider how our clinical programs build the first-year curriculum, in particular the introduction to lawyering course in which students start out representing a hypothetical client in the context of learning basic lawyering skills.

There could be a lot more that's done as we're examining our curriculum, and I think a lot of other law schools are doing that. We need to make sure that students are able to achieve basic practical skills in all of their courses. One can

use clinical methods both in simulation format and the most traditional doctrinal course, such as torts, or trusts and estates. Students could draft a contract, perhaps even for a real person. In trusts and estates, they could draft each other's wills. That can provide some opportunity for real experience and context in which students and faculty examine together the questions of your role, your responsibilities, and your values. This has the byproduct that students are learning the substance of the law at the same time; that will, we hope, help them pass the bar exam. But there can be much more done to integrate methodologies throughout the three years of law school and add on top of that a philosophy of social justice and pro bono service that we need, as well.

**DEAN PITEGOFF**

I can speak to SUNY Buffalo Law School where it's no coincidence that the dean, the vice dean for academic affairs, and the vice dean for student affairs are all former clinical professors who have run clinics. We clearly try to integrate practice and professionalism with the doctrinal courses. As Russell Pearce pointed out, no law school has the entire package, and in many ways it's good that different law schools are doing different things. Again, context matters. The clinical program at SUNY Buffalo has intentionally focused on areas of practice that resonate with as wide a range of faculty as possible, so when we started doing sophisticated finance transactions in the clinics 17 years ago, it suddenly integrated professors who had no inclination before that to step out of their classroom or their scholarship and into a clinic. The same thing in our family violence clinic dealing with not just representing individuals but dealing on a policy level. That has tremendous interest in the law school faculty and resonates with other departments, as well, doing empirical research on the issue. It goes on and on in some of the other clinical components.

Another thing that goes on at SUNY Buffalo is that we integrate the practicing bar and judiciary very substantially in our curriculum. We have a January term during which approximately 40 judges and practicing lawyers come into the law school, each teaching one credit course. Students mix and match up to three of those one-credit courses, get a window on practice and get a feel for what's going on out there.

I'm sure other law schools are doing other things. Things are changing in the legal academy. There's still quite a bit of focus on research and scholarship on the one hand and practical education and clinical programs and professional programs on the other hand, but there's more and more integration.

Not everybody does everything. My administrative role is to insist not that everybody does professionalism education, but that they do what they can, and to focus on those people who can.

**DEAN CHAPNICK**

I agree with Peter. At Columbia in the 11 years I've been there, they've changed drastically from a school that really didn't focus very much on clinical legal education and professionalism to one that does. Not only has the clinical program itself expanded, but Columbia is now at the point where they believe you don't have to sit within the four walls of the school and be lectured to by tenured professors to learn something. So we're actually developing externship courses where students go out and learn from practitioners and then come back into the school and attend seminars, sometimes taught by tenured professors and sometimes taught by adjuncts.

We also have created some hybrid classes. Some of our traditional faculty believe that you actually do learn by doing. Similar to the brilliant disability assessment that Nancy did in her clinic, Susan Sturm on our faculty teaches the workplace equity class in the first semester pretty much like a regular seminar but in the second semester students have research projects. It is a participatory, anthropological lawyer project where they do a very serious investigation of the workplace, applying what they learned in the first semester. They come back and report not only to the class but also to the people they've been investigating so that the latter get a benefit from the project; it's not just a theoretical law school project.

My own social justice initiative is only two years old. One of the things I've begun is a program to work with the state attorneys general across the country to help them think about and do their jobs. We have created two classes at the school that echo that. One is an externship in Eliot Spitzer's office, and the other is a seminar on multi-state litigation by attorneys general taught by a former attorney general of Maine. Jim has his students write papers for sitting attorneys general on real problems rather than writing something theoretical.

An enormous amount of on-the-job learning takes place in the summer. A great deal of what students learn about professionalism or unfortunately lack of professionalism wherever they go, whether it's public interest, government or law firms, is learned on the summer job. We do nothing to help them debrief, reflect on and capture that experience in any really thoughtful way. We should bring in people to come in and help them do that. It's an incredible missed opportunity that none of us take advantage of.

**JUDGE BATTAGLIA**

Peter, I'll make this comment at this morning session rather than this afternoon because we spent so much time this morning talking about professional values and personal moral values. I received my undergraduate degree, as Peter indicated, from Fordham College at a time when—it may still be true—at a time when Fordham delivered a very classical Jesuit education. I am increasingly

appreciative as I've worked my way through my career with that type of education in terms of the ability to understand and reason and analyze from a moral perspective about things. One thing that law schools might consider including as part of their professionalism training is some training in the process of moral reasoning and analysis, providing students with a methodology for making decisions about issues that have conflicting moral consequences. Sort of a tool chest for answering the question of how do you decide what to do when you don't know what to do.

Professor Maurer was talking about how students arrive at law school with different levels of development, and one area in which this is particularly true is in the area of moral development. As many of you know, the psychologist Sir Lawrence Colberg has defined two stages of moral development in reasoning. If we're going to expect students by the time they get out of law school to have the ability to make ethical decisions, then perhaps we have to bring them all up to some minimal level of speed about how you go about making ethical decisions. It must be totally divorced from content or substance because students very much resist what they perceive as indoctrination. Whether it's perceived as political or in some other fashion, the barriers immediately go up. It's something that law schools might consider. I know that they're being asked to do and more and more, but if professional values are going to be a goal, that's got to be in there somehow.

**DEAN PITEGOFF**

We have plenty to talk about this afternoon. I'd like to thank all the panelists and thank all of you for coming.

# LUNCHEON PROGRAM

**LOUIS R. CRACO, ESQ.**
CHAIR, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

First of all, some really heartfelt discharge of obligations and pleasures. Though none of them are here at the moment, the record should show our gratitude to the Court of Appeals and Chief Judge Kaye and Judge George Bundy Smith both for harboring these fugitives from academy and practice, and for allowing them to discuss their problems as frankly as we did today. It's an honor that perhaps only a few of us are aware of, to be allowed to assemble in the way we did and conduct the kind of business we did in the courtroom of the Court of Appeals. As far as I know, and I checked it with the Chief this morning, this is only the second time that that has been done. The first time was when we did it in 2000 and it is meant quite explicitly to be a gesture of respect and support to us and to the work that we do. It is really hard to say how fully we appreciate both the gesture and the support. The hospitality of the New York State Bar Association is legendary. We have now enjoyed it for a second time today and we appreciate that very much. Not only the logistical and culinary support, but also the pleasure of their company as partners in this endeavor. I have to, despite their reluctance that I should do so, thank Catherine O'Hagan Wolfe, Sheila Murphy and Takemi Ueno who act as if they were full-time staff of the Institute on Professionalism, although as I said to Mike Seymour last night, those of us who spent a little time in the service recognize the phrase they do this "in addition to their other duties." Young officers used to fear that in orders. "In addition to your other duties, you will be morale officer, you will be mess officer, you will be this that and the other thing." All of those persons whom I mentioned are absolutely indispensable to the working of this Institute, despite the fact that they have full-time jobs being indispensable to other institutions, as well.

It struck me this morning that nothing quite like a lucid catechism of professional values emerged from the discussion we were having, such that we can send it around to the law schools and tell them to plant it indelibly in the minds of their students on their first day with clarity and precision. What happened instead was what always happens when you approach the subject of what is professionalism: A roiling discussion of the implications of that question. We heard people touching on the systemic characteristics of the question, the contextual aspects of the question, and the personal responsibility aspects of the question, sometimes mushing them together, sometimes teasing them apart, but grappling with them all the same; and my function is to function more like the second base man in a double-play. I am sort of the pivot man between the morning and the afternoon session. Taking that omnium gatherum of thoughts that were gath-

ered this morning, it seemed to me that as usually happens in this sort of subject, all the commentary boils down to various ramifications of this question: What does it mean to be an American lawyer today?

Last night I laid down a marker, I laid it down quickly and silently as good gamblers lay down markers. In the course of introducing Russell Pearce, I said that exploring the question I've just stated was a matter of common concern for the legal academy in New York and its bar. But is it a question of common concern? I think it is.

As we turn to the second phase of our work here today, permit me a couple of observations on why calling a sense of what professionalism is all about and the methods by which it might be inculcated a "matter of common concern to the academy and to the bar" is not simply a rhetorical conceit.

First, I want the academics in the group to be clear about one thing that may not, if you are new to our work, be clear to you. In insisting that contemporary lawyer professionalism is a matter of common concern, we do not have any notion at the Institute that it is possible or right to create a uniform way of addressing it in the law schools of New York State. We know full well the diversity of the New York State law schools. They have distinct identities, they have regional settings, they have economic status, they have institutional relationships, they have different populations to which they appeal, and they have different declared senses of mission. All of those things impact how they think about and act on questions of professionalism.

We understand and accept that a single strategy or approach, although a grand design was sketched yesterday by Russ Pearce, cannot and should not be imposed on this diverse body of institutions. It would be futile and misguided to attempt it. But to say that the law schools cannot be expected to speak to this issue with one voice is not to say that they should be excused from speaking at all. Indeed, it is impossible for a law school not to communicate a view on these issues, since silence about those issues itself communicates a message about their importance.

In this, as in so many other things, the diversity with which this state is blessed is both a strength and a virtue. Rather than paralysis, we ought to expect that the very variety of the law schools should produce a stimulating diversity of experiments from which other schools might learn and continue their work in their style on the subject of professionalism and not only in this state.

The fact that we have law schools in rural areas appealing to a rural population, the fact that we have law schools that are tied to state universities, that we have law schools tied to other great private universities, that we have free-standing law schools—that diversity reflects the entire country. You will go to Utah and find only one law school, but it will have its paradigm in New York. You will go to Georgia and find four law schools which will have paradigms in New York. So what we are doing here, and the Institute is self-conscious about this,

is trying to create some models which are useful not only for the professionalism of lawyers in New York, but can be transported to other places and other styles and made use of there.

The purpose of the Institute in this dialogue is far from imposing a catechistic solution, it is to impress upon the law schools that such an effort at experimentation and simulation and trial and error, that such an effort, halting and messy though it sometimes may seem to be, is worthwhile. But is it?

Does it matter after all? A lot of people think it doesn't. Does it matter what new lawyers or any lawyers, for that matter, think that being a lawyer means for them and demands from them? There is a huge body of agnosticism both in the academy and the bar as to whether such a value-laden notion is of any importance anymore. The Institute is dedicated to the proposition that it does matter and it matters profoundly.

For a minute or so, let me tell you why we think that is so, or at least why I think that is so. Some of you have heard me say this before, forgive me if you hear it again. Having a clear conception in one's own self and in one's community about what it means to be an American lawyer now matters because it is the rule of law that is the crucial instrument that holds together the American experiment against the stresses created by the proud oxymorons built into its very being. We are one from many. We subscribe to the notion of "ordered liberty" which the Harvard Law School proclaims at its graduation when it sends its people off saying that they're learned in the wise restraints that make men free. We practice a federal system of competing sovereignties and a divided government of checks and balances. We have an increasingly diverse population, diverse in language and religion, in culture and political aspiration, in economic status, and we have a famously individualistic culture, of which the diversity and the individualism are our biggest strengths and our biggest challenges. It is the rule of law and the common acceptance of the rule of law that in modern America, with the extinction of the frontier, manages the tensions produced by all of this and makes possible the hope of a peaceful, stable and efficient society. It is like the law of gravity. We don't think about it, but it conditions everything we do and how we do it.

But two quotations come to mind that are crucial to this analysis, from two great minds. Oliver Wendell Holmes pointed out that the law is not a brooding omnipresence in the sky; and putting a more contemporary point on it, our colleague Paul Saunders says we lawyers are where the rubber meets the road.

The rule of law is delivered daily to clients by lawyers; that's the only way it happens. We talk about the administration of justice. Russell Pearce referred to it yesterday as the thing that we lawyers are supposed to be doing and I worry about that term for this reason. It tends to smack of a litigation context, but lawyers deliver the rule of law to clients in every house closing, in estate plans,

in zoning proceedings, in custody disputes, in business contracts, because in each of those they are the law givers for the client, they explain to the client what the law permits. They explain to the client what the possibilities of conduct legitimately are and then they carry those things out by conscripting the coercive power of the state to give legal effect to the contracts, the testamentary instruments and the other things that they draw up.

It is a public good that we do in private practice and we do it every day, not to speak of the litigated disputes that come to mind when we talk of the administration of justice. So if the rule of law is crucial to the success of the American experiment, then lawyering is central to the reality of the rule of law, so it matters very much indeed whether that lawyering is good or bad, whether it promotes or denigrates the rule of law it is meant to serve. It can do no harm and likely will do some good if, at the very outset of a law student's career, it is made clear to that law student what the stakes involved in the enterprise are. How precisely to do that leaves much room for individual law schools to fashion their own approach, but that it should be done does not constitute an open question.

Let me conclude on a personal note because my bias on this subject is not only because I was drafted by the Chief Judge but also because I had the great good fortune in my early days of experiencing an introduction to the profession much like the one I just described.

When I appeared at the door of NYU Law School 50 years ago this September, I had already read and reread and committed to memory, as I had been admonished I should do, an article by the former dean of NYU, by then the Chief Justice of New Jersey, Arthur Vanderbuilt, entitled *The Five Functions of the Lawyer*.[1] He expatiated at some length the five functions of the lawyer and we were expected to understand that what we were about to do was start to learn how to perform those functions. The five functions were these: The lawyer was to be a wise counselor, an able advocate—note, not a zealous advocate, an able advocate. He was to promote the reform of the law so that if the adversary system insufficiently approximated justice, he was supposed to do something about it. He was to contribute to the quality of the bar, and he was to be a leader in his community.

Those were the five functions, and nothing I heard this morning disturbs my settled view that that's a pretty good description of what it means to be a lawyer. The law school experience was meant to and did, for me, fortify those predispositions, but I had further good luck—the kind of luck that was mentioned briefly in this morning's session.

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1. Arthur Vanderbilt, *The Five Functions of the Lawyer: Service to Clients and the Public*, 40 A.B.A. J. 31 (1954).

I had a summer job after my second year of law school at the U.S. Attorney's Office, and there my first boss in the law was the very exemplar of what those five functions were. He didn't talk about it, he didn't yell about it, he didn't preach about it, he just was it. He walked, talked and breathed that; and you could not spend the three months I spent with him without understanding both that those values were valuable and that they were realistic of achievement. That boss is sitting back there now, Mike Seymour, and I thank him.

That aggregate of experience has developed in me not just a sense of obligation to pursue this, but a hunger to do it. I do not see in the contemporary scene any plausible reason why new lawyers can't be attracted in the same way I was, infused with the same appetite I was, made to want it the way I was.

I understand the Institute wouldn't be in existence if there were not huge centrifugal forces playing on the professional notion—technology, billable hours, all those things, but in coming to some common understanding about what it means to be a contemporary modern lawyer, as Russ Pearce suggested yesterday, we ought to go back to the beginning and understand why it matters and then find a way to teach it and to model it for the young lawyers coming after us.

That you have come here to think about that with us is a source of great pleasure to me. I am very grateful on behalf of the Institute for your investment of time, effort, and thought in it. Thank you.

# PANEL II—LAW SCHOOL PROGRAMS DESIGNED TO DEVELOP CORE VALUES

**EILEEN R. KAUFMAN, ESQ.**
PROFESSOR OF LAW, TOURO LAW CENTER
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

I am Eileen Kaufman professor at Touro Law Center in Huntington and member of the Institute on Professionalism in the Law.

I'm delighted to participate in this Convocation on developing professional values in law schools. We spent this morning struggling with the difficult definitional issues: What do we mean by professionalism? What do we mean by professional values? Are there core values that distinguish our profession from other professions, and even from other occupations?

As I was driving to Albany yesterday, I was behind a van on the back of which was a sign that said, "This truck is driven by a professional," in bold letters. "Any problems call 1-800..." Too bad we don't have such an eight hundred number.

**PROFESSOR MARJORIE A. SILVER**
PROFESSOR OF LAW, TOURO LAW CENTER

Well, yes, we do.

**PROFESSOR KAUFMAN**

The afternoon panel is designed to move away from those definitional questions and to pick up where we left off this morning.

To the extent that we have a shared sense of what the shared values of the profession are, what is the role of the law school? In addressing that question, this panel starts with the same assumption that Lou Craco made in his address to the assemblage at lunch. We start with the assumption that law schools do, indeed, teach professionalism. They do it explicitly and implicitly, they do it consciously and less than consciously, so the question is not whether law schools should attempt to instill professional values in their students, it's really more a question of how to do it consciously and how to do it meaningfully. How can law schools create an atmosphere where law students gain a sense of what it means to be a professional where, to quote Sandra O'Loughlin, professionalism becomes a kind of metronome, setting the beat for the life of the lawyer? How can law schools help students develop an appreciation of the role that lawyers play in promoting justice?

The core value that distinguishes law from other professions is justice with a real emphasis on equal access to law, to lawyers, and to justice, which is so essential to the legitimacy of any judicial system. How can law schools convey to their students the central, life-long importance of reflection as an essential part of lawyering?

We have five exceedingly well-qualified speakers on this panel to address these issues. They have all spent considerable time considering these questions; and before I introduce them to you, let me indicate how we plan to proceed. Each panelist will be speaking for no more than ten minutes. After each presentation we invite questions from the floor, but I would ask you to limit the questions at that stage to questions that pertain specifically to the presentation. After all five presentations, we have allocated roughly 40 minutes or perhaps even a little more for what I hope will be active participation from the audience, an opportunity that we look forward to, to hear other ideas, other concrete suggestions about other programs, and other forms of pedagogy being practiced in other law schools around the state and around the country. So I will introduce the speakers in the order in which they will speak, starting immediately to my left with Sandra O'Loughlin, the lone nonacademic on the panel and the wearer of multiple hats. Ms. O'Laughlin's full-time job is as a bond attorney with the Buffalo firm of Hiscock & Barclay. She is also the chair of the Committee on Character and Fitness for the Eighth Judicial District. She served for 18 years on the New York State Bar Association's Committee on Professional Ethics. She teaches as adjunct professor at SUNY Buffalo, and she has written on ethics and professionalism. Ms. O'Loughlin will share her observations from the somewhat unique vantage point of a teacher of corporations, chair of Character and Fitness, and partner at a law firm, regarding the lack of understanding of professionalism exhibited by law students and new associates and the critical importance of law schools' efforts to instill professional values.

Next we have Patrick Longan. Patrick Longan holds the William Augustus Bootle chair in Ethics and Professionalism at Mercer University School of Law and is the director of the Mercer Center for Legal Ethics and Professionalism. Professor Longan's leadership role in professionalism issues in Georgia is evidenced by his participation in the Georgia Chief Justice's Commission on Professionalism and by his role as advisor to the State Bar of Georgia Committee on Professionalism. Professor Longan has published extensively in the area of legal ethics and professionalism. He has developed several law school courses on professionalism, including an ethics and professionalism in litigation seminar, the law of lawyering and the legal profession. Professor Longan will describe Georgia's professionalism program, which is among the most ambitious in the country. He will also describe the professionalism course which he recently created and which is now mandatory for first-year students at his law school.

Next is Marjorie Silver, a colleague of mine, I'm proud to say, a professor of law at Touro Law School where she teaches, among other subjects, civil procedure and professional responsibilities. In recent years, Professor Silver's research and writing interests have focused on issues relating to lawyering, psychological mindedness and the importance of emotional and multi-cultural competence for lawyering and legal education. Professor Silver has been an outspoken advocate of the importance of integrating professional values throughout the curriculum and of the efficacy of modeling and mentoring professionalism. Professor Silver will be discussing portions of her paper entitled "Commitment and Responsibility: Modeling and Teacher Professionalism Pervasively"[1] and will be offering concrete ways in which professionalism can be raised in the first-year civil procedure class.

Carol Buckler, at the end of the table, is a Professor of Law and Associate Dean for Professional Development at New York Law School. Professor Buckler has taught clinical offerings at New York Law School as well as a course on legal ethics. As Associate Dean, Professor Buckler initiated a professionalism program that begins in orientation but continues throughout the three years of law school. Professor Buckler will describe New York Law School's professionalism program and the varieties of ways in which her law school seeks to promote and recognize public service.

Finally, Sue Bryant is a professor of law and director of clinical programs at CUNY Law School and a well-recognized and long-standing advocate of clinical education. Professor Bryant has served as a consultant and trainer for the American Association of Law Schools, the Legal Services Corporation, and the United States Department of Education. She has helped developed the Consortium Project, a project designed to increase access to justice by providing resources to graduates in small and solo practices. Professor Bryant works with the Battered Women's Rights and Immigrant and Refugee Rights Clinics and teaches family law courses. Her research and writing emphasizes cross-cultural competence in the profession. Professor Bryant will describe those aspects of CUNY's unique public service mission and program that are potentially replicable at other law schools, emphasizing the critical importance of providing context for students and drawing the connection between skills and values.

I look forward to a very interesting discussion from the panelists and hopefully some interactive dialogue with the audience at the conclusion.

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1. Marjorie Silver, *Commitment and Responsibility: Modeling and Teaching Professionalism Pervasively*, 14 WIDENER L.J. 329 (2005).

**SANDRA S. O'LOUGHLIN, ESQ.**
CHAIR, CHARACTER AND FITNESS COMMITTEE FOR THE EIGHTH JUDICIAL DISTRICT

Good afternoon. I'm deeply honored to be here in this august assemblage, this magnificent room. It says great things about the majesty of the law which we all deeply believe in. As Eileen Kaufman said, I come to this panel with a slightly different perspective. I see young people who are going to be entering the profession in a number of ways and I will share with you some of the observations I have about the process of training law students and admittees to professional societies and some comments I have on the profession.

First, I'll say the obvious. What we are doing here is deeply important and always has been. It is more important now than it has been in many years. It seems as if the profession goes through these convulsions. There was Watergate and then we started teaching ethics and now there's post-Enron and we're worried again about where were the lawyers, if you remember that, from the thrift crisis. What we need to do is continue the effort to integrate professionalism, whatever that might mean, into the law school curriculum.

When I ask a question—whether I'm in a legal opinions class or corporations class or talking to an admittee who is interviewing with me for admission to the bar or an associate—posed in a hypothetical way about something that pertains to the course or what we were doing, I too often have gotten a puzzled look, "What course are we in?" It is so easy because we all learn this serially, but it is important to have them understand that professional ethics and professionalism is not a course, it's not property law, it's not corporations. It's how we approach what we do and it has to be internalized.

A participant here in the audience described what needs to be done as pulling a thread. Through the course, I call it a metronome; it's the way we think. Nancy Maurer said a colleague called it the Tao; maybe that's the best way to think about it. It has to be done early, has to be continuous, has to be integrated into whatever you and I are teaching because each of our students and each of us has to start thinking about how it affects the way we look at problems.

I don't know what professionalism means. I've heard wonderful approaches to it today from a deep steeping in the Code of Professional Responsibility. To me that is at least the wellspring of what professionalism is to be. It teaches us courtesy to colleagues, it teaches us the absolute obligations to be excellent in our preparation, it teaches us—here we go again—zealous advocacy of the client within the bounds of law, it teaches us to respect the rule of law and, as Lou Craco said so eloquently at lunch today, that's what holds our society together. So we need somehow to make them understand that it is not something that they set aside and take off the shelf. They need to learn it, they need to integrate it and internalize it, have it inculcated into whatever they do in their judgments, in their approaches to clients and to colleagues. We will be better in the profession for it and so will they.

My second observation is—and I must admit I'm on Russ Pearce's side—I'm a blue person. I don't think it's rosy out there and I needn't go back and state what Vince Buzard has said earlier today; I will just reinforce it. The profession is under terrible strain, just as our society is. Just as it is going to be hard to prepare law students for their practice, it is going to be very, very difficult for them to go into private practice, to be prepared for what they are going to experience—not because the lawyers that are out there are bad or because they don't feel as we do that we're part of a proud, wonderful profession, that what we do is important—it's because they're very, very stressed. The small firms are stressed perhaps in different ways, but the big firms are stressed, too. It's billable hours, it's bringing in clients, it's not having enough time. I would expect that each one of you in this room, partly because you are now in this room, had a superior mentor. I did. Everybody around this room did. We were sharing experiences last night and this morning of the people we knew who gave us lessons for lifetimes. I've used them in my classroom; I've used them with associates.

Who has time to mentor? I have many, many mentors. We have a firm that cares very, very much about this, but it's time, you work long hours, you have lots of billable hours, you work weekends, somehow you're supposed to be going out and getting clients and then you have your family somewhere out there. I can understand why lawyers are breaking down or leaving the profession.

Enter the new associate. All of us directly and indirectly. Just as someone on the morning panel said, we learn what is important by whether it's paid for, by whether you get a larger credit for it or whether it's just tucked in.

Associates learn that you get ahead by having lots of billable hours, by bringing in clients, because that's how partners get ahead, it's tied to their compensation.

However competitive they think law school may be, the competition in the profession today is ferocious. I was regional coordinator for a malpractice carrier for many years, and they would tell you that one of the chief reasons for malpractice claims is the unworthy client. Are we too eager to take anyone in the door? I'm not saying that whether you want to represent someone this is a personal screening test, but we have to be cautious about taking in business as business, and notice I said "business." Even the trade publications are calling our profession a business.

A large percentage of any trade magazine today deals with managing, sometimes they use "practice" but they very often say your "business." Somehow we have to not only prepare the law student through law school, but we must also look at those practicing. The partners today would like a way to lessen the competition, lessen the stress, find a model that works for them. We know they're out there, we have had them mentioned today, we have them in this room, and if we can do that, then we have made a great contribution to a profession that we really love.

**PATRICK E. LONGAN, ESQ.**
PROFESSOR OF LAW, MERCER UNIVERSITY SCHOOL OF LAW

First let me say thank you for allowing me to be here. As the only southerner in the group, I can say that where I come from people talk about southern hospitality, but I have been the beneficiary of your northern hospitality these last couple of days and I very much appreciate it.

I want to talk about two things that we're doing at Mercer about teaching this new generation of law students about professionalism. One is the orientation on professionalism that we do and another is the course on the legal profession that we teach in the second semester of the first year.

For about 15 years since the creation of the Chief Justice's Commission on Professionalism in Georgia, Georgia law schools have conducted orientations on professionalism. This program is now in place in various forms at over 40 law schools around the country. At Mercer, we have a mass orientation. Students go to court, not to attend a session of court but to be welcomed to the community by a state judge and then a federal judge, and because they are going to court we make them dress up. Those of you who hang around law students know that they are sartorially challenged, so you have to find a way to get them to dress up and appreciate a little bit the solemnity of what they're doing.

Since we've got them dressed up, we make them stay that way for the afternoon and we have them sit through an address from usually it's a Supreme Court justice or another judge about professionalism, maybe 20 minutes.

Beginning this year we had the students stand, hold up their right hands and recite the Law Students Pledge on Professionalism.[2] It is adapted from the Georgia Lawyer's Creed, which was written by my colleague, Jack Sammons, and simply intended to convey to the students the solemnity of this moment as they really do enter the legal profession.

But the heart of this program is when the students break up into small groups where they're led in the discussion by volunteer lawyers from the community who talk to them for about an hour and a half about a series of vignettes. The volunteer lawyers receive the Group Leader's Handbook, which contains the vignettes and suggested discussion, questions, and an amount of background material to assist in the discussion. The students only receive the vignettes and they're not asked to do any research, they're simply asked to react instinctively to what's presented to them.

In one vignette, a student learns that a fellow student has cheated on a take-home examination, so the discussion then proceeds in large measure about whether you should or must report the student to the appropriate authorities within the law school. That gives us a chance to talk about the law school code

2. *See* Appendix 1.

of conduct and Rule of Professional Conduct 8.3. It also gives us a chance to talk more generally about self-regulation by the bar and the circumstances under which lawyers deserve the right to regulate themselves and whether self-reporting is part of that. That's just one example.

There are six examples of problems that law students may face on professionalism, five that deal with lawyers in civil practice and two that deal with lawyers in criminal practice. Group leaders are allowed to choose the vignettes they want to talk about and, often as part of the program, they will invite the students to say which ones they found to be particularly interesting. This goes along for about an hour and a half in these small groups. The students evaluate the program at the end. The evaluations are consistently high, and their comments are very illuminating about how impressed they are to see at the beginning of their law school career that things like this are important.

From my perspective, it is not so important that the students remember the substance of anything that's discussed because I'm not sure that they do, but they do remember that when they sat down on their last day of orientation at law school, they looked around our largest classroom and saw the walls lined with lawyers, all of whom were there as volunteers giving up a Friday afternoon to spend their time talking with them about issues of professionalism. That conveys an extraordinarily important message, which is that these are issues that are important. It's not just the law professors, it is the bar and the bench. We have judges come to this, as well.

It's important, and the entire profession is telling them on the front end that it's important. That's what they get out of it. If that's all they get out of it, it's worth it. This is not a complete answer to the issue of professionalism education in law schools, but it's an important start.

To follow up on this, we have a required three-credit, graded course on professionalism in the spring semester of the first year. This is not the course on legal ethics that's required by the ABA; we do that in the third year. This is a new course; it has been taught only one time. It originated with a plan for the curriculum that the faculty came up with about five years ago. That report is infused throughout with the notion of the importance of professionalism. This particular course was part of that report, the brain child of my friend and colleague, Jack Sammons.

The biggest component of this course is 30 classroom meetings that are devoted to professionalism and what that means. When you're teaching it, you cannot do as we have done and as many of these meetings do and say, "Well, we're not sure what it means. We know it's important, but we're incapable of defining it." You have to define it if you're going to teach it, and so we do. The definition that I and my students worked with last year included five components. One is craftsmanship, way beyond competence. Professionals are craftsmen about their calling. Second is civility. Third is a notion that we called tran-

scendence but that includes a number of things, including transcendence of personal interests when it comes to setting fees. The example mentioned by Mr. Buzard this morning about the lawyer who would settle cases for 20 cents on the dollar because it was in the lawyer's interests to do that, that's not transcendence. Transcendence even of the client's interest when the lawyer is acting, for example, as an officer of the court, that notion is also part of that. Public service is part of it, and observance of rules of ethics, the ethical norms of the profession, is also part of it.

We talk about what it means, we talk about why it matters, we talk about why it is so important that lawyers live up to these ideals, even under circumstances where they're not likely to be caught or punished if they don't.

The importance of professionalism is at the core of the course. We then spend some time surveying the profession and talking about all the different kinds of practice areas, and here is where these notions of the economics of law practice, the economics behind the billable hour, for example, come into the discussion. As we move from big firm to medium firm to small firm, in-house, government practice, all the different practice areas, we talk about the special pressures the new lawyers will feel in those areas on these notions of professionalism that we have defined.

Then we talk about how it is that the profession seeks to create and to enforce these notions of professionalism and, in large measure, we talk about how those enforcement mechanisms do not work. Where we end up, of course, is that the way professionalism is obtained is that lawyers choose to comply with those values—not because they're under the threat of punishment, but because they choose to be the kind of people and the kind of lawyers who live up to it.

Another component of the course is the living in the law component. There are five classes here. This is material that I can't possibly test on an exam so I have to segregate it in some way, and here we talk about things like, for example, the issues of alcoholism, substance abuse, and depression that lawyers face. I've got members of the state bar Lawyers' Assistance Committee coming in to talk to students in the spring. I have Steven Keeva, whom many of you may know, coming to talk to the students about his book, *Transforming Practices* and ways that lawyers have found to cope with the stresses of law practice.[3] Judge Carl Horn from North Carolina has written a book in the last couple of years, *LawyerLife*, about finding a higher calling in the law, and Judge Horn has agreed to come and talk to one of these sessions.[4] And finally, we have a session on faith and the practice of law that will include a couple of my faculty colleagues.

That's the classroom component. There are a couple of other pieces to this. One of them is the oral history component. We have an Inns of Court, and I asked those involved in The Inns of Court, lawyers of ten or more years experience, to meet with a small group of students, talk at least an hour—most of these stretch into more than one hour—about their lives as lawyers, what they found

3. STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (Contemporary Books 1999).
4. CARL HORN III, LAWYERLIFE: BALANCING LIFE AND A CAREER IN LAW (American Bar Association 2003)

to be challenging, and what they found to be rewarding. Nobody in the Inns of Court ever turned me down; that also sends an important message to the students about how important these lawyers think it is. I try not to take it personally, but many students said this was the best part of the course because they were talking to real lawyers, and law students like to talk a lot about professors not being real lawyers and who they really want to talk to is you all. Students then write a short paper reflecting on that experience. I also have them read a biography of a famous lawyer or judge from a list of eight that I give them. They then have to participate in a discussion group about it and here the hope is to help them find heroes, help them find sources of inspiration and maybe even to get them started on a lifetime of reading about the great tradition that exists in our profession and to help them, in times of difficulty, draw some sustenance from those who have gone before.

Finally, I have them write two more papers, one at the beginning and one at the end, with the same assignment. The assignment at the beginning is to write about your ambitions as a lawyer: what you hope to achieve as a person and as a lawyer in the profession that you're about to enter. At the end of the course, I have them do it again and I say, "In light of what you have been through and what you've learned and what you've read and what you've heard, have your ambitions changed at all in the course of the semester?" They have to do it but they're not graded, they're anonymous.

One student wrote:

> More important than whether or not my ambitions as a lawyer and as a person have changed is the fact that I know a lot more about how to achieve those ambitions. I think that most of the people in my class, whether we could articulate it or not, essentially wanted to be all of the good things we talked about lawyers being this semester and I don't think that anyone feels differently about that in that regard as a result of taking this class. The most important thing that I am taking away from this semester is that being a good lawyer and a good person at the same time is without a doubt harder than I realize but it is also very possible. There are probably a lot of lawyers along the way who have either given up on the profession, or worse, upon themselves as a result of not knowing the things that we all know now. I don't think that will happen to any of us because now we know what to expect.

That was what I was trying to accomplish in the course on the legal profession. At least with that one student, we accomplished that.

**HONORABLE JACK M. BATTAGLIA**
NEW YORK CITY CIVIL COURT, KINGS COUNTY

Do your faculty members dress up?

**PROFESSOR LONGAN**

Yes.

**JUDGE BATTAGLIA**

Every day in class?

**PROFESSOR LONGAN**

I would say about 90 percent of the time.

**JUDGE BATTAGLIA**

That's great.

**PROFESSOR LONGAN**

We're a little scruffy.

**RAY KELLY, ESQ.**
PRESIDENT, NEW YORK ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

I have not so much a question as an observation. My children have taught me that the best way of teaching is by showing and not by telling. I'm asked to teach ethics CLE quite often. I'm a criminal lawyer by trade. I've had over 240 trials, I've had over 60 murder trials, and I'm on my eighth death penalty case right now. My definition of professionalism is everlasting adherence to the unenforceable.

I use an example where Osama Bin Lady, a female wrestler, comes to this country and you later find out it's Osama Bin Laden. You now have the plans for what happened with the World Trade Center. What are your obligations as criminal defense lawyers within our society given what has happened since 9/11? The rule that you have to follow when you're answering the question is what does constant adherence to the unenforceable require of you.

Your reaching out to the bar is vitally important. It's important for law students to have the contribution not only of academia, but also of practicing lawyers.

**PROFESSOR KAUFMAN**

Thank you, Ray. That is the link between the first two presentations that we heard this afternoon that Sandra was referring to, the pressures of the profession and the real economic challenges and the terrible strain that the profession is under and the tremendous importance of mentors. It sounds as if Georgia is making use of the practicing bar to make the point that you did, Ray.

I have so many questions for Pat about this program. I'll throw one in; I expect that there are many more in the audience.

One thing I wonder is an issue that Carol raised in a planning session for this afternoon, namely, how do we measure success? If we're contemplating what law schools should do, how do we evaluate that process? It may be too soon for you to know the answer to this, but at your law school, do you see the students' participation and contribution in classes in their second and third years being qualitatively different, reflecting what they've thought about in this first- year professionalism course?

**PROFESSOR LONGAN**

Firstly, I only taught it once. Let me just make two or three comments about that. One, we do need to measure in some way—and there have been some preliminary discussions about trying to track these students over the next ten years or so—to see how, if at all, it may have affected them.

In the short term, I can tell you two things: One, a lot of the students did not like this course; and again I try not to take that personally, either, but one of the reasons they didn't like it is that they got a lot of bad news. They come in young, naive and idealistic and I try to convey to them what I truly believe, that it is a tremendously noble and rewarding endeavor to be a lawyer. I'm proud to be a lawyer. I am proud of them that they want to be lawyers and are going to be lawyers and it is a tough road ahead in ways they have no way of knowing. They don't know about the billable hours, they have no idea what kind of pressure that's going to put on them, they have no idea what kind of work/life balance issues they're going to face, they have no idea that lawyers suffer through depression three times as much as other professions. It's not welcome news, but it's news they need to receive. We don't let inmates run the asylum, so we don't let students decide what courses they take; and whether they like it or not, this needs to be an important course.

In terms of affecting other discussions, I have had anecdotal feedback. A couple of my colleagues have asked, "In that legal profession course, did you talk about this, that or the other?" I reply, "I did. Why do you ask?" They answer "Well, the discussion in class reflected a degree of sensitivity to these issues that I have never seen before." So, with that limited response, I can say that the professionalism course affects students' contributions to other classes.

**JOHN H. GROSS, ESQ.**
MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

At Emory, part of the program was a continuing effort in the second and third years to hold small group discussions where faculty members pair with a practicing attorney. They meet several times with the students throughout their career. Do you do the same thing at Mercer?

**PROFESSOR LONGAN**

At Emory, at least as I understand what they have been doing, they meet in the fall semester the first year, spring semester the first year, just with the same mentor. In the second and third years, they form larger groups primarily so as not to use up the patience of those lawyers who are kind enough to devote their time. Although I will say at Emory, they always have to turn people away because there are so many people who want to help do this. We have not chosen to do that at Mercer—not because it's a bad idea, it's a wonderful idea, but we saw an opportunity to do this program as a stand-alone, mandatory, graded course of the same dignity as property, torts, contracts, and so that's the opportunity that we seized. I think that's a wonderful idea.

**BARBARA A. SHERK, ESQ.**
STATE UNIVERSITY OF NEW YORK AT BUFFALO LAW SCHOOL

I have some observations about professionalism courses following up into substantive courses in the second and third years. In the courses I teach to upper-class students, I work on the hypothesis that they learn better if they understand the environment in which they are to practice. I teach a skills-driven course but this principle could apply to substantive courses too. As part of my course, I have confidential law clerks who come speak to the students and get involved in the learning process.

I would first like to have a first-year core course addressing ethics and professionalism to do this, but it's important to tie in these issues to every course so students don't see it just as an isolated cameo at different levels of their learning but they see professionalism as an integrated part of what they're learning.

**PROFESSOR LONGAN**

I agree with that completely, and at Mercer I'm proud to say we have a culture that supports this sort of thing and colleagues who do weave it into their other courses.

One of the things the stand-alone course does, is it gives the students a structure and, as one of them put it to me, a vocabulary for thinking about and

talking about issues of professionalism that they can then use in these other contexts. For example, students don't come in having any idea what civility means to a lawyer and what incivility looks like. I showed the students a videotape of what some true incivility looks like and it shocks them but they leave the course able to think about and articulate these issues in a way they couldn't otherwise do and then they can use that throughout the curriculum, I hope, to try to get the kind of result you're talking about.

**PROFESSOR KAUFMAN**

Our other speakers are going to talk about the importance of experiential learning in the context of their remarks, also. Could I ask a different kind of question? Anyone who has ever sat on a curriculum committee knows that it is very difficult to change anything, particularly in the first-year curriculum, which tends to be sacrosanct. Can you briefly describe the politics behind Mercer's change and whether you had to overcome tremendous faculty resistance in order to accomplish this?

**PROFESSOR LONGAN**

It is accessible to all my colleagues at Mercer whom I love and respect dearly. Mercer has been very innovative in its curriculum. One of the things they tried a number of years ago was a three-credit course in the spring semester of the first year on statutory interpretation. Like some innovations, it turned out to be a failure and there was great consensus to get rid of it. I timed my approach to the faculty so that we could make an even swap. We took statutory law out and put legal profession in.

Having said that, we are in the middle of a curricular review right now and I have to admit that this course is under some pressure because, as Russell Pearce said last night, the first-year courses are considered to be the flagship courses and they convey what the law school feels is important. Every member of the faculty believes their course should belong in the first year, so it's a very difficult battle to fight. It's there now, and I'm going to find every way I can to keep it there because I firmly believe it needs to be in the first year.

**PROFESSOR SILVER**

First of all, I want to add my appreciation for being invited to participate in this Convocation. I've already gotten so much out of this discussion and been so inspired by what I've heard that I can't wait to rush back and lobby for some of these ideas.

I'm going to out Eileen Kaufman. She was completely self-interested in asking that question about curriculum. Eileen has been chairing the Curriculum Committee at Touro for these many years, and I have been a loyal member for

these many years. Thinking about what to put in the first-year curriculum and how to get anything out of it is critical. My position is that the messages we give in the first semester basically set the framework for how our law students view what it means to be a lawyer. Patrick, your course begins in second semester but perhaps the message is sent by what you do during orientation. The traditional curriculum, which is driven by the case method, gives one view of what it is to be a lawyer, which is at odds with what most lawyers will experience, especially those lawyers who graduate from non-elite schools like Touro. That is a real problem, so I really applaud Georgia for what they're doing.

I also want to acknowledge how gladdened I was to hear—Carol first raised it from the audience and Nancy Maurer raised on the panel—the empirical evidence out there about law students and lawyer distress. If this is news to some of you, I can't encourage you too strongly to read the recent studies that have been published. There's one recent study by Larry Krieger from Florida State, working with a social scientist colleague whose name is Sheldon, that documents what happens to students in law school.[5] Much as Nancy was saying, they come in as happy as anybody else and within six months, their levels of depression shoot up, alcohol abuse shoots up, substance abuse shoots up, and it stays that way when they go out to practice in law.

I want to acknowledge in the audience Barbara Smith, who is the Executive Director of the New York State Lawyers Assistance Trust. Under their auspices, I developed materials this summer which should be available next month, which basically critiques our curriculum's effect on substance abuse, alcoholism, and depression among law students and lawyers. The materials are designed for inclusion in a professional responsibility course, although they can be used in other ways as well. The materials also talk about the quality of life issues that challenge lawyers and law students.

I also want to harken back to the theme of choice that has been articulated this morning and again this afternoon. One of the reasons our graduates are so unhappy is because they feel so constrained. As Jack Battaglia said this morning, they feel as if they have no choice. Patrick's program is a wonderful opportunity to show students that they, in fact, do have a choice. Books like Steve Keeva's *Transforming Practices* demonstrate that there are lawyers in practice who have found ways to practice in a rewarding, healing and productive way.[6]

The goal for everyone is that our students, like our children, should find lives in the law that they love, that at the end of their life they can look back and say, "I'm really happy with the choices I made and the things I accomplished." Too many lawyers, the vast majority of lawyers, don't feel that way right now, and that's sad.

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5. Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well Being*, 22 BEHAV. SCI. & L. 261 (2004).
6. KEEVA, *supra* p. 68, note 3.

I'm going to focus on today on the core value of integrity. As Eileen mentioned, this is part of a longer paper I wrote that I delivered at the American Association of Law Schools in January 2004.

Only in the last couple of years have I consciously integrated skills of professionalism into my teaching. I teach professional responsibility, and obviously speaking about professionalism is one area we want to develop in professional responsibility. But what I've come to realize is that as important as teaching about professionalism is, the critical piece is getting students to understand how it operates in their own lives and drawing the connections between their responsibilities as students and what their responsibilities will be as lawyers.

At the American Association of Law Schools in January, Tracy McGoff gave a wonderful presentation on Generation Xers. What Generation Xers want to know is, "How does this relate to me now? What does this have to do with me and my life?" If you can make that connection, they learn a lot better. That's the kind of connection I try to make for my students.

I'd like to look closer at professionalism by describing what I do with my first-year civil procedure students. We have been talking about the macro issues that present themselves when we discuss the core values of professionalism. I'm going to focus more on some of the more micro issues, which are things like taking responsibility, complying with rules, etcetera.

In the second class with the students, I brainstorm with them. I say, "Look, we're all here committed to the same goal. You want to become the best possible lawyers you can be. Today we are going to discuss what you expect from me this year in civil procedure to help you become the best lawyers you can be. We will also address what to expect from each other and what you are willing to give to your fellow students and to me."

This brainstorming exercise elicits ideas about professionalism from them, at a time when they couldn't be more energetic and enthusiastic about this new enterprise they've embarked upon. They expect that I will show them how to use the tools of civil procedure, that I will cover material that they are going to be tested on, that I will answer their questions. What do they expect from one another? They expect to be listened to, they expect respect. And I say, "How about respect from me, as well?" They expect students to be attentive and supportive. Then I ask them what they are prepared to give. When we did this exercise this past fall, one of the students said, "Well, you just take everything on both those lists and that's what we're willing to give. We're willing to make sure we're here on time, make sure we ask questions, make sure we're completely prepared, make sure we give it our absolute best."

I use this virtual supplement in my class provided by West, it's The West Educational Network, affectionately called TWEN and post these comments in a discussion forum on TWEN. I say, "Okay, now these are up here for comment. Is there anything you would like to add or subtract from that? After a while, this

will become a contract between us. These are the commitments we make among ourselves; if we meet these commitments, you will become the best possible lawyers you can be."

Rather than chastise them for showing up late or being unprepared, I point to the commitment and say, "Look, you made a commitment in order to become the best lawyer you can be. Are you willing to recommit to that now?" So that's one of the exercises I use.

I also use the classroom as what I call the professionalism laboratory. Our students need frequent reminders. Many teachable moments occur where I can demonstrate professionalism to a student. For example, I'll call on a student to talk about an assigned case, and the student will get flustered and search through his brief and stumble through answers. It's clear the student has read the case but the student isn't really prepared to talk much about it. Invariably the student will come up after class and say, "We were supposed to read that case for last week, and last week I was thoroughly prepared." It's a teaching moment for me to say, "Can you imagine going to a judge on the day you're supposed to start trying your case and saying, 'Your Honor, I was fully prepared to try this case last week, but all this time has passed and now I just need some time.' They get the point. So, by tying their responsibility in class to that, the lesson gets through.

Our students have trouble following rules to the letter of the law. Most of their experience seems to be that close enough is good enough. My non-lawyer, film-maker husband has a similar approach to life, and I frequently tell affectionate anecdotes about him to my students, but I'm not going to share them today; they're in a longer paper.[7]

From time to time, I will tell my students to break up into groups of two or three and discuss a hypothetical or a matter in class. Invariably there's a group of four that forms. I go up to them and say, "I said groups of two or three." "Is it okay if we have four?" Another teaching moment. If the rule is that memoranda of law can't exceed 25 pages in length, that means that a memorandum of law which is 27 pages in length may well get rejected, in which case you could be at the wrong end of a malpractice action by your client. It's the importance of following the rules as they are.

I mean, really, what is the big difference whether they're talking in a group of four as opposed to three or two? The difference is that they've got to get comfortable with accepting rules and following them because that is what the profession expects us to do and certainly the consequences of not doing that among lawyers are significant.

Similarly with punctuality. Students come in late. I keep track of who comes in late. A student will come in and say, "You didn't really mark me down

7. *See Silver, supra* p. 63, note 1, at 337-8.

for being late, Professor Silver. I was only one minute late." Another teaching moment. "If you missed the statute of limitations by one day, you still missed the statute of limitations." Hopefully, students begin to understand the relevance of their responsibilities as students to what their responsibilities will be as lawyers.

That said, it's also important for me to convey the message that nobody is going to understand everything immediately. Students are going to make mistakes; they are going to find that they're not fulfilling their responsibilities from time to time and that's okay, it happens to all of us. The message I hope to give them is that they need to take responsibility for the error and fix it. That's one of the areas where I do a fairly good job of modeling because sometimes I don't meet my own commitments to myself or them. I will get impatient with them when I ask a question that is met with total silence among the class. I sometimes chastise them for not being sufficiently prepared and often a student whom I respect—and I would like to say I respect all my students equally, that's a goal, I haven't met it yet—will come up to me and say, "Professor Silver, I read over that material several times and I just didn't get it. That's why I didn't raise my hand." So what do I do? I apologize to the class and say, "I'm sorry that I got short-tempered, I'm sorry that I made an incorrect assumption." I don't think too many of them have had teachers in their lives who have apologized to them.

If they see that I'm willing to take responsibility for my own mistakes, hopefully they will be more willing to take responsibility for theirs and also see that as a model for their clients. Talking about apologies and how they can help resolve disputes is for another conference at another time. I think that's another important lesson.

The final thing I want to mention is what I do in terms of self-evaluations and setting of goals, and this is not unrelated to what some of the other speakers have spoken about already. For my civil procedure students, I don't do this until the beginning of the second semester. Now they've got their first real set of grades. I ask them as soon as they've taken the exam, even before they know what their grade is, to reflect on the commitments they made to one another at the beginning of the year and to think about how well or not well they met those commitments and if that had any impact on how well they did in the course and then to recommit to what they feel they need to recommit to and to set some personal goals for themselves.

In professional responsibility, I have goal-setting for the semester. From the beginning I say, "Look, all of us have strengths and weaknesses. All of us have areas of our lives where we need to do some work. It may be showing up on time, it may be preparedness, thoroughness, whatever. Set some personal goals for yourself that you're going to work on so that at the end of the semester, you can evaluate how well or not well you met those goals."

This goes back to the whole issue of choice that the morning panel was talking about and the issue of owning professionalism that Sandra was talking about. Professionalism has to be internalized. If the students will reflect on what they committed to do and how well they met those commitments and what are the things they need to work on in their lives to become the professional they want to be—not necessarily the professional I think they should want to be, because it's important that there be choices among those and there are legitimately choices among those—then hopefully they will own not only the goals but also the process by which to get there.

When I have read the self-evaluations from students, I'm gratified to see how many of them say things like, "I didn't understand why we were doing this silly process in the beginning, but now I have found it so useful to focus me on what I need to work on that I'm doing it in all my courses, and I plan to keep doing it in my life."

My last comment is that I've been inspired by Carl Rogers's book, *On Becoming a Person*.[8] What is implicit in that book is that we're never there. A person isn't a goal; it's a life-long journey. That's true of becoming a professional and what I hope is that I can inspire my students to settle on the road of that journey. Professionalism is something that they will keep working on for their whole lives. Thanks.

**CAROL A. BUCKLER, ESQ.**
ASSOCIATE DEAN FOR PROFESSIONAL DEVELOPMENT, NEW YORK LAW SCHOOL

I, too, want to thank the Institute for inviting me. It's really important that we keep finding opportunities for the academy and the bar and the bench to communicate with each other so that we can understand each other better and continue to work together toward common goals, even if we don't always agree on exactly how to define those goals. I wanted to start with two vignettes, both of which will probably resonate for most of you. The first is that when I meet lawyers socially and tell them what I do and that I teach legal ethics, about half of the time lawyers will say, "I wish I had paid more attention in that legal ethics class. At least every two weeks I have an ethical dilemma that I have to think about and solve." And they say, "But, you know, we really didn't take it seriously in law school." Sometimes they will add, "But I'm sure it's different now."

The other vignette is that a couple of weeks ago in my class, we read a case where an associate had gotten into pretty deep trouble by following the instructions of a partner in a law firm and was unable to use the subordinate lawyer defense because the violation was a clear violation. We discussed the violation

8. CARL R. ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY (Constable and Robinson 1977).

in question and then one of the students raised his hand and said, "But Professor, what do you do if the partner says to you, 'I know that's what you learned in law school, but this is the real world, kid.'" And we had a good discussion about that.

Those two conversations—one from a practicing lawyer looking backward and the other from a student looking forward—crystallize the challenge for those of us who teach, which is to focus on and attend to not just what we are teaching, but what they are learning and what sticks with them about what they are learning. Sue will talk about this in more detail, but these are adults that we're teaching and all the literature tells us that adult learners learn more by doing and by example than they do in lectures. Certainly on issues like this, it's very easy to slip into preaching mode and it's probably not all that effective to do so. I'm really impressed to hear the examples that Pat and Marjorie have talked about which manage to overcome a certain resistance.

It may be generational, but if you think that it's controversial to talk about law as a business, you should hear some of the conversations that we have when we talk about higher education as a business and students as consumers. In truth, they're both consumers and students, and we have different kinds of obligations to them as students and as consumers, but they're pretty discerning consumers. They're very sophisticated and they have lots of demands on their time, and they're scared a lot of the time about what the future holds for them. So everything that we ask of them, they are able to evaluate both as a responsibility and as a product, and they want to know from that product, "What is it going to do for me? If it's not going to help me pass the bar and it's not going to help me get a job, then you need to justify to me why you're making me do it." We have some examples where we're making some progress, but that's the yardstick that we often have to use when we create programming for students.

What I'd like to talk about is a mix of programming that we provide at New York Law School, some of which is curricular, some of which is extracurricular. In that way we involve not just faculty and members of the bar, but also administrative staff.

As Eileen mentioned, we have an orientation program. The first week, called "Advance Week" is before classes begin officially. It starts with a welcome message that's both from the Dean and from me, which is a welcome to the profession. I like the idea of taking them to court for that; and I was thinking, too, when Lou Craco was speaking at lunch, that we always have to think about these various kinds of programs and how to adapt them to particular schools or particular locations and cultures and numbers, but we have to give our welcome message four times in order to get to all of the incoming class of 550 students. Both the dean and I emphasize the broad themes that we have talked about here: commitment to justice, compassion, competence at the highest level. That's something our dean talks about. I like the replacement word, craftsmanship.

Our students' orientation materials include papers on law student professionalism, student conduct and expectations, and the law student professionalism primer on how to approach studies and what it means to be a member of the profession. The primer brings back these themes of professionalism to their lives today, to their lives as students.

One day in our orientation program is called "Public Service Day." We deploy students throughout the city on a volunteer basis. We organize students in soup kitchens and park bench painting projects and all sorts of stuff and have them come back to campus so they can learn about the public interest programming and our public interest student organization and all of those things that are available to them.

This year we started, in cooperation with the New York State Bar Association Committee on Professionalism—Steve Hoffman is here, he came to our school—a pilot project, "Dinner and a Movie," where we watched *The Verdict* and shared pizza and conversation afterward about the ethical issues that were raised.[9] We had four members of the State Bar Committee there. The students were fascinated and they loved to hear the commentary from the practicing bar. Again, I can't emphasize that enough. When you say it to them, it means something entirely different than when we say it to them. They stayed well past the pizza being gone. It was an optional program, it meant something to them. They felt they took away something.

Because we can't actually pack everything that we want to do into the first week, we manage to find holes in their schedules throughout the semester to have two other sessions. We have a session on substance abuse and alcoholism. We have the Lawyers' Assistance Program come in and usually a member of the Disciplinary Committee as well, talking to students about the stresses that they will face. It's sometimes a bit of a "scared straight" kind of a program because, generally speaking, it finishes up with an attorney who has gone through a crisis involving some substance abuse or alcoholism or depression and can talk from personal experience about the experience, which is very effective. In our evening division program, we have students who are people of the world, not necessarily fresh out of college, but that program makes an impression on them.

Then we have another program mid-semester of the first year where we start to talk about career choices, what questions they should be asking themselves, how they should be exploring their options, and how they should be developing their professional portfolio. To some degree, it's a career development program, but it also deals with how they present themselves and what they are looking for in their lives as lawyers. We ask them to start thinking about that.

In our curriculum, we have a first-year required course that's similar to the course at Albany Law School that Nancy described. It's called "Lawyering." It's

9. THE VERDICT (20th Century Fox 1982).

a skills course that focuses on interviewing, case planning and investigation and counseling, but inevitably, as Sue will talk about as well, teaching skills is tied to teaching values. Students are asked to think about what issues beyond knowledge of the law come into play as they interview and counsel clients.

We have our upper-level required ethics course on the legal profession. We expanded it from two credits to three credits to allow faculty to take the time to examine the roles of the lawyer in society and values issues. Currently we have four full-time faculty members teaching the course to various sections. Two of us are former or current clinical professors, and two are faculty members who specialize in ethics issues. That's where the research and scholarship is, which is not always the case in law schools. Frequently, the required ethics course is taught by an adjunct professor or a member of the faculty who specializes in another area and is teaching it as part of their obligation to teach a required course. That sends a negative message to students.

At our school, the people who are teaching the course are doing so because they want to, because they choose to, and because they care about issues beyond just the rules. As Russ Pearce said last night, one of the first things that I say to my students is that this is not just a course about how to avoid getting disbarred, it's also about how to think about the kind of lawyer that you want to be.

We also have something called the "Center for Professional Values in Practice," which is one of our five academic centers. It organizes symposia and also plays an essential role in our honors program. We have an honors program where students affiliate with one of the five centers and they take a course of study that's related to that center. It's a way of sending a message to our students that this is a valuable thing to concentrate on as an honors student. We have clinical courses and externships as well.

We don't have a mandatory pro bono program, but we have initiated a public service certificate program so that students who devote a certain number of hours as volunteers or in a combination of clinical and volunteer positions can be recognized and receive a public service certificate. They will get a notation on their transcript. Again, to the students who want to do it, it's a way of saying, "We value this."

It doesn't even have to be law related. We have a pretty active child literacy volunteer program where our students go into New York City public schools and help with reading in the public school. The students find it a wonderful way to enrich themselves and contribute to the community. It's not only about public service, but it gives them a little bit of balance, gives them a sense that, "If this helps me now, I bet it will help me again later in life when I'm feeling stressed, if I can find a way to give back to the community."

I wanted to talk a little bit about my position and the reorganization that resulted in my position. This again, sends a message to students about modeling in a different way than has been discussed before.

I am the Associate Dean for Professional Development. That's an administrative office; it incorporates career services, public interest and community service, and student life. You may ask what all those have to do with each other, but the notion is that this represents the professional lives of students outside of the classroom. We have developed and are continuing to develop. For example, the orientation program is something that we organized in our office, and the public service certificate is something that we do through our office. A lot of the noncurricular programs that I've discussed, such as the honors program, are housed in my office. The fact that it's headed by a full-time faculty member, again, is a message to the students.

We coordinate counseling. Not only do we have professional counselors, but we have also developed liaison programs where we match the students when they first come to the law school with an upper-level student and a faculty member. We also have senior staff members and we're developing an alumni liaison matching program. We have an alumni mentor program which is structured somewhat differently. The idea is to reinforce to the students that they're professionals from the time they enter the school. We are going to take them through this nurturing program at the beginning from a concept of personal attention, they are going to get personal attention even at a big school like ours, to personal responsibility. All of us model that idea for them. I was talking to Peter Pitegoff at lunch about some of the analogies to parenting that Marjorie also mentioned. Those of us who are parents know that we model for our children, whether intentionally or not, and they learn lessons from us, whether they are the lessons we intend or not. Similarly, students are watching us all the time. They are watching professors, they are watching staff, they are watching the members of the bar, and so we have to watch ourselves. We have to hold ourselves to the high standards that we expect of them. Students have lots of interactions with staff and, as I said, they think of themselves as consumers, so one of the responsibilities that I have as an administrator as well as a professor is to hold staff to high standards and make sure that when they're giving services to the students, that they model professional behavior and that they expect and demand professional behavior from students. That's something that we're still working on.

In all of these endeavors, I was wondering "How am I going to measure all of this? What is it I would like the students to take away when they leave us and join the practice?" All of the themes that I was thinking about have already been touched on by a number of speakers. The first is inspiration. I want them to feel there's something to reach for. Lou Craco specifically mentioned the value of it at lunch time, that there is something that they can model themselves on, values that they can follow. Second, sensitivity to issues. When I teach in the clinical program, I tell my students that I want to be that little voice in their heads after they graduate that causes them to ask themselves, "Well, did this

come out the way I thought it would? Did I accomplish my goals? What were my goals? If I didn't accomplish them, why not?" The same is true for these values, sensitivity to the issues, the knowledge that there are choices to be made, because sometimes they get into the most trouble when they glide by without realizing that they made a choice. And finally support, that they know when they have made the hard choices, and maybe they're suffering consequences, that they can come back to us or to members of the bar, that they have mentors that they can count on for, at the very least, emotional support, if not other kinds of support.

Thank you.

**SUSAN BRYANT, ESQ.**
DIRECTOR OF CLINICAL EDUCATION AND PROFESSOR OF LAW,
CITY UNIVERSITY OF NEW YORK SCHOOL OF LAW AT QUEENS COLLEGE

I wanted to talk about three concepts which are key to what a law school can do to teach about professional responsibility, the professional role and ethics. These are themes that for the most part are not unique to me. You've heard them all day, but I'll just state them again with emphasis. The first is "early and often"—we used to talk about that in terms of voting in Chicago where I came from; now I'm talking in terms of ethics. Second, "holistic." Third, "longitudinal."

"Early and often." Like many of the other panelists in the programs you've heard today, I think you can't start too soon, and at my own law school we start with an orientation where the students spend a day reflecting on the meaning of justice. It starts with a visit to the state courts in Manhattan. We spend the morning in Housing Court, Family Court, and Supreme Court. During that time they're asked to reflect on five questions, which basically ask them about justice and what they're observing in the courtroom.[10] The assumption is that every player in the courtroom has a role to play in advancing justice, and we ask them to examine that.

In the afternoon, they participate in a facilitated conversation about their observations of justice. This is followed by an opportunity for them to reclaim the Lawyers Oath.[11] It was written, I'm told, by Karl Llewellyn, so it has obviously been there for quite a while, yet it resonates for the kinds of values that we're trying to teach our beginning lawyers today. The Oath talks about accepting honor and responsibility, about the profession of law, about giving a whole heart and good faith, about weighing conflicting loyalties, about justice, talks about personal sacrifice, about being a champion of fairness, a champion for the powerful and envied, for one's neighbors, for the helpless, for the hated, and for

10. Appendix 2.
11. Appendix 3.

the oppressed. It captures a lot of what we were talking about this morning. Unlike Carol, we only have an entering class of 160 students so we all fit in the ceremonial courtroom of the federal courthouse. In that majestic place, as the students take this oath, they feel the weight of the profession that they're about to join.

Our school has a very specialized mission and, in some ways, that makes some of the things we're talking about today easier to talk to them about. The motto of the school is "Law in the Service of Human Need," and our students, in order to be admitted to the law school, have to initiate a practice that includes service, that includes an understanding of utilizing their law degree to make a difference. As we have heard today, there are many, many law students who come to law school owning that aspiration, so we are not alone in that regard. We have the benefit of knowing that everybody has come with that; it makes it a bit easier.

Almost all the students experience that taking the oath in that majestic place, when combined with the realities of struggles for justice in the state courts, creates a powerful message about the roles that they are going to have in doing justice.

I completely agree with everybody who has spoken so far that you can't just stop there, that it has to be a continuing conversation, it has to be integrated into the doctrinal courses, as well as the lawyering courses. The challenges for the academy in doing that integration have to do with the fact that many in the academy are not really from the profession. In trying to think about the ethical dilemmas that lawyers in a particular doctrinal area face, there's often a lack of experience or a lack of hypotheticals. There's very much a role for the bar to play in that regard. In any event, "early and often" means we have to think pervasively.

The second characteristic of values education that is important is "holistic." By that, I mean that you cannot talk about trying to instill values without giving the students the skills they need to realize their aspirations to be the kind of lawyers they want to be. I have spent almost all of the last 30 years that I've been teaching as a clinical teacher, so it will come as no surprise that while Russ thinks the answer lies in teaching ethics in all of the courses, I think putting the students in the role, teaching them how to be lawyers, engaging them in the ethical dilemmas that they are going to face as practitioners while they're still in school, with a chance to reflect on that experience, is key to them starting their professional lives with a sense of values.

Students and lawyers may embrace values of competence, expertise, service, equality, integrity, civility, and collaboration, but if they don't have the skills and knowledge to carry those values out, it's a problem. If Sandra's right that we're not spending as much time as we used to in the profession to teach those skills and to mentor the young lawyers, then it's an opportunity for the law schools.

I don't think that beginning lawyers break rules or are not the kind of lawyers that we want them to be because they arrive at our doorstep with bad values or that they don't understand the concepts of civility or equality. What happens is that they understand, as you all said so articulately this morning and this afternoon, that the practice of law is hard, it's challenging, it requires a lot of them. We need to be teaching them collaborative skills, time management skills, clinical judgment, how to avoid burn-out, how to be argumentative and civil at the same time, how to defuse the incivility of their opponent without taking the bait. This can be taught, these are all skills. Where are the new lawyers learning them?

New lawyers and law students have a lot to teach us about what it means to be a good lawyer and what good professional values are all about. The Institute recognized this when it spent a lot of money and time going around the state asking students what they learned from the programs they took and what professionalism meant to them. They're not jaded, they're not cynical, and they're not yet, for the most part, bottom-line-focused.

Our core values have been defined by a profession that was largely white and male. We know that values are not all relative, but we also know that values are not culturally free of bias. It's really important that we create space for newcomers to define the profession and help us shape it as a profession for the justice of the future, to allow racial, ethnic and gender diversity to shape the meaning of justice, to let the students shape concepts of ethical behavior. We need to be teaching them what we know about the profession and about being good lawyers, but we also need to be listening to them. These new lawyers' view of what they think the good lawyer should do in a particular setting is invaluable for me to see where some of the contradictions in the values of the profession might be playing out today.

I thought I would give you all the opportunity to experience what I experience on a daily basis by asking you to do the following. Put yourself in the role of a clinical teacher. You teach in an immigration clinic. You are supervising a student who's working on the following case: Your student represents a client who is eligible by marriage to apply for an adjustment of status and to get the coveted green card. A question on the application that the student will prepare on the client's behalf to make this green card possible is the following: "Have you ever committed or been convicted of a crime?"

Now the student knows, because they've done a run for a rap sheet, that the client has never been convicted of a crime, but that she was addicted to cocaine and that she spent eight months in a drug rehab program. Suffice it to say that while the government would be unlikely to know this fact, the client has committed but not been convicted of a crime. If she answers this question truthfully, she will be asked to explain the crime. If she explains the crime, she will be barred by law from getting a green card.

The student is an immigrant herself. She has a strong emotional attachment to the client, having already represented the client in a custody case and gotten to know her well. She knows the importance to the client of getting working papers and of legalizing her status. You are the student's supervisor. Think for a moment: What are the lessons about professionalism that you want to teach this student in the context of helping her figure out what her next steps should be? What are the lessons you would want to teach this student about being a lawyer?

**MR. KELLY**

Within the ambit of ethics, you have a responsibility to the client. What is the client's legal objective? The client's legal objective is to get the green card. You are confronted with a sentence that says "Have you ever committed or been convicted of...?" "Convicted of" is a legal question, "committed" is an illegal question. Once you know that, how do you advise her as to how to answer that question within the framework of the advice that you are providing at that moment?

**PROFESSOR KAUFMAN**

Do you ask that back to the student?

**MR. KELLY**

Most certainly.

**MS. BRYANT**

What are you hoping the student to get from that exchange? What lesson about professionalism are you hoping to impart?

**MR. KELLY**

Number one, client-centered representation. Number one, that the vital success of our democracy has been geared to the ability of the lawyer to, as I said, within the ambit of ethics, achieve the legal goals of the client.

The bottom line is that you're forcing them to confront the issue, the client's goal versus the overall good. Who says what the overall good is, and where do you fit within the framework of what is the overall good in telling this client how to answer that question?

**MARC WALDAUER, ESQ.**

MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

I would tell the student, "You've got to draw a line now as to what kind of lawyer you're going to be in the future, but be aware that if you don't take the case, there's a lawyer out there who will take the case for a fee. That's the dilem-

ma you're going to face your entire career, namely whether or not to go for that money and take that fee and do the right thing and justify it in that way or live within the rules, and that's a decision you have to make early on, a decision you're going to face over and over and over, and the temptation is great for some." It's not even a temptation, for some it's the right thing to do even if it's not the lawful thing to do. That's what you've got to tell them: they need to make their call, how do they want to live the rest of their life?

**NANCY MAURER, ESQ.**
CLINICAL AND PROFESSOR AND DIRECTOR OF CLINICAL PROGRAMS, ALBANY LAW SCHOOL

You also want to ask a question that would lead the student to think about his or her obligation to the tribunal, so to speak, as compared to the obligation to the client. It's another way of looking at the bigger social picture, what the ethical rules are and at the same time consider zealous representation, client centered representation. Is it a legitimate rule or an illegitimate rule? What does the ethics code say you are obligated to do as a lawyer, and what happens if you don't follow what the rules say? Is there a conflict in the ethics rules, which there often is, that would give you leeway to make a value choice that allows you to meet your client's needs without conflicting with your own personal morality?

**MS. BRYANT**

You all have done a great job with me as student and you as teacher. Hopefully, just the experience of trying to figure that out would give you a window into the richness of the educational experience for the students.

The third piece of the ethics education is "longitudinal." At our law school, we have a program where we work with people who are in small and solo practices. That's because we recognize, number one, that the law school can't do it all, that there are learning moments that come in practice when they confront the realities of practice, and so the student who says, "I wish I had paid more attention to ethics" actually has a place later on to have those conversations. We bring our students together, we immerse them in the economics of law practice, we teach them billing, we have technological consultants to help them set up their practices, we give them free CLEs, and we bring in experts on the economics of small practice to talk to them.

Our motto is that it is possible to do well and do good. There's nothing wrong with doing good, and there's nothing wrong with doing well. The two are not in opposition to each other. It's a matter of skills, it's a matter of knowledge, and it's a matter of the law school integrating those two: For us it's not just about three years. When our students walk across the stage, we know their education is not done. We want to facilitate their further education, to be a place where they can come together and continue to work on those issues.

**PROFESSOR KAUFMAN**

We have a little time for questions from the audience or comments and suggestions, other ways in which law schools can and should be addressing professionalism.

**WHITNEY N. SEYMOUR, JR., ESQ.**

MEMBER, SPECIAL COMMITTEE ON JUDICIAL INDEPENDENCE,
NEW YORK STATE BAR ASSOCIATION

I'd like to go back to our beginning this morning when the Chief Judge pointed out that law schools are the gateway to the profession and Judge Smith pointed out that the law was a privilege and also that, in terms of at least certain core values, by the time the student gets to the door of the law school, it may already be too late to affect a number of those values. I'd like to put forward a controversial suggestion. This is starting from the premise that among those core values at least are integrity, responsibility, reliability, handling of stress, and handling of anger. There are a lot of people—professionals, psychologists and others—who believe that by the age of six, in many cases, the die has already been, and others who say it might even happen in the womb. I don't take sides on that, but accepting for discussion purposes that by the time the student applies to law school he or she has already been informed on a lot of those core values, I'd like to advance the proposition that the LSAT is not a sufficient basis for including or excluding students who ought to become lawyers.

I think there are a lot of people who have wonderful qualifications to be lawyers who are being kept out of law school because the premium is on scholastic achievement and not on character. We have now reached a point in our society where there are objective tools that are accepted—at least in the corporate world—for measuring some of those core values. There was a time when those kind of tests were very bad because they were used to exclude minorities and women and so on, but generally speaking, the courts have knocked all those things out. Now in the corporate world and with computers, there are objective tests to determine whether somebody has strong leadership potential, strong integrity and such values.

I hope somewhere there is a law school—Susan obviously already is on her way there if not already there—that will say, "We're not just going to look at LSAT scores, we're also going to look at the indicia of the core values of character and we're going to weigh them equally or in some proportion, and we're going to include in our profession for the future people who we know are going to be really terrific people in terms of character and personality."

**PROFESSOR KAUFMAN**

Do any of the panelists want to address that idea of screening for character in the admissions process?

**MS. O'LOUGHLIN**

There is an issue about the LSATs, and certainly as chairman of a character and fitness committee I'll answer your question first. Character and fitness is different from scholastic ability, but we don't know what it is, just like professionalism. There is an issue as to whether you have the requisite character and are fit to practice law. As chairman, I see a lot more problems every year in the people who come to me for admission and a recommendation for admission.

If I left the impression in this room that the profession is under stress, that it doesn't have time to do all the things it should be doing and would like to do, then I made only half my point and I apologize.

The other half of my point was to include the profession, to integrate the profession. Whether students are correct or not in saying it, there's a cachet in being out in the "real world." There is a depth of experience and a breadth. We don't have to make up hypotheticals; they're there in front of us, as Susan accurately pointed out.

But the other side of that wonderful equation is to sensitize the professional practicing bar, once again, to all the ideals that they came to the profession with that get buried under the detritus of everyday stuff. This hopefully will create a safe harbor for the young people coming in, whether it's an associate who is a new hire or a summer associate. It will allow them space to ask the right questions.

I saw a candidate for the bar two weeks ago who came to me with $200,000 of educational loans. He has already gone through bankruptcy to wipe out his credit card debt. He has an elite education but he somehow started to drown under all of those loans. I told him that he had to work out a payment plan. I explained to him why the courts are so concerned about debts that are not addressed. I don't know if he's going to ever be able to address these debts. He has a job, so you want everything to turn out right for him, to make it work so he can finally begin living his profession, discharging these huge debts. But what if a partner tells him to do something unethical, what does that young person do?

Integrity, responsibility. I don't know how we make it happen, but the message has to be brought both to the practicing bar and to the young people. I used the phrase "gird their loins" because it is tough out there and it's tough on both sides.

I think Mr. Seymour's idea is interesting. I'm genetically coded to reject tests, I don't always trust them, but if we can find a way to allow persons into the profession who perhaps do not have a high score on the LSAT but who have what we're looking for, that would be an advance.

**COMMENT FROM THE AUDIENCE**

About ten years ago, I chaired a standing committee on lawyer competence, which worked with the legal education section for admissions to the bar. Just as Mike suggested, one of the suggestions we made was that the character and fitness process precede law school. As part of the law school admissions process, if a youngster has a character and fitness issue in his or her background, it would be dealt with early on. This would avoid the risk of going to law school, building up all of that debt, and then not being admitted to the bar.

One of the comments we got was that it would restrict law school admissions. Many people go to law school not intending to practice law and some of those folks wouldn't have to undergo the character and fitness process until such time as they decide, "Yes, I really want to be a lawyer." The feedback we got from the legal education section was that our suggestion was not acceptable because it's going to restrict the applicant pool.

**MS. O'LOUGHLIN**

Some states do that. There is a process in the New York rules where you can petition, once you have been admitted to a qualified law school, to have a particular issue looked at by the character and fitness committee. If the committee decides the issue in your favor, the issue is closed from further scrutiny. Your jacket is clean, and you can go on to apply to be admitted to the bar. When students have talked to lawyers about this issue, the lawyer, rightly or wrongly, using the best interests of that student as the test, will tell that student, "You're better off going through the process because you will have a record then; you will have people behind you; you will have a sympathy factor having gone through the process."

**COMMENT FROM THE AUDIENCE**

That process is not well publicized.

**MS. O'LOUGHLIN**

We have tried to make it known that it is in the rules.

**G. ROBERT WITMER, JR., ESQ.**

MEMBER, NEW YORK STATE JUDICIAL INSTITUTE ON PROFESSIONALISM IN THE LAW

I would like to pick up on what Bob Seymour was saying. Four years ago at the first Convocation, we learned that there is only one criterion for admis-

sion to law schools. That is the LSAT scores because that is how law schools are ranked. They have pressure on them just as lawyers have pressure on them in the practice of law. If that's the case, and I have no reason to believe it's not, the die is cast in many ways. As long ago as ten years ago when I was president of the New York State Bar Association, I was very concerned that more and more people were entering law school for the wrong reasons. One of the reasons was that the profession of law was becoming quite lucrative, and consequently people were entering law schools in order to make money. There's nothing wrong with making money. On the other hand, when you are faced with these tough choices that invariably you face in the practice of law, if you have $100,000 of debt, then it's very difficult to make the right choice.

My question is, assuming that my recollection of what we heard four years ago is correct, is there any change in the admissions process in law schools?

**ELLEN P. CHAPNICK, ESQ.**
DEAN FOR SOCIAL JUSTICE INITIATIVES, COLUMBIA UNIVERSITY SCHOOL OF LAW

The answer is no. It wasn't right four years ago, and it's not right now.

Students at Columbia are not admitted solely by virtue of LSAT scores, although I would be lying if I said that the LSATs are not a factor. One of the other factors is their GPA, but we look for a diversity of students, not only the usual demographics, but also the kind of schools they're coming from and the kind of experiences they had before they came to law school. To the extent that LSAT scores and grades are used at a school like Columbia, they are used to create the pool, but the pool is still vastly larger than the number of students we can admit. So, once somebody is in the pool, the kinds of characteristics that Mr. Seymour mentioned come very much into play.

We've taken a very close look at their letters of recommendation, looking for character as well as whether they canread and write. We have the oldest entering class among our peer schools because we're looking for prior life experiences that they will be bringing into the classroom, and public interest ranks very, very highly among those life experiences at which we are looking. So I'm happy to tell you that it was never right and it certainly is wrong now.

**MR. WITMER**

Two quick observations. I suspect Columbia has the luxury of making those decisions within a very high LSAT rating, and your then-dean did not indicate four years ago, at least as I recall, that my prediction was wrong.

**COMMENT FROM THE AUDIENCE**

The same analysis goes on when you're dealing with 4,700 applicants for 185 slots. That pool is so big that the LSAT numbers alone are not it. Grade

point averages and LSAT scores combined are very influential in that; but, again, the pool for those schools is so big that you look to other characteristics within your class.

**DEAN CHAPNICK**

Also, there's a range on the LSAT score that's adjusted by certain factors and certain goals for students, such as diversity.

**ROBERT M. HARRISON, ESQ.**

ASSISTANT DEAN FOR ADMISSIONS ST. JOHN'S UNIVERSITY SCHOOL OF LAW

It's very difficult, but we interview as many applicants as we can. We also look at their backgrounds and letters of recommendation. We are constrained by resources. At St. John's we'll get about 4,200 or 4,300 applications. We have five people who read applications. We can't interview everybody, and we can't read every letter of recommendation, although we try.

It would be wonderful if law schools had the resources that business schools or engineering schools have, where they literally accept every applicant. We don't, but we try the best we can. We try to get that information in as many different ways as we can, as imperfect as it is.

**MS. SHERK**

Logistically, it is difficult with the number of applicants. I attended a graduate program in medical school, and we had personal interviews all day. They were looking at your aptitude for the program, but also your ability to fit in. Obviously, they were also looking at the ethical issues in their profession. We don't have that luxury, at least at this point, unless you can get an objective test; and we can't even decide what professionalism is, let alone determine the cut-off point in an objective test to get applicants for law school. However, we hope that the things that we are addressing through this Institute will lead us to correct some of the deficiencies and concerns that we have.

I will mention that I'm the chair of the Tort Insurance Compensation Law and Professional Responsibility Committee of the New York State Bar Association. Recently, I was at a meeting in Georgia, where I met with the Savannah bar. Partners there were talking about having weekly meetings with their associates in their firms addressing the issues of professionalism and ethics. They felt compelled to do that because of what is happening in Georgia, both at the schools and at the judicial level. So we can certainly make impacts all along the way. That's a good example of practicing attorneys trying to address issues as well as what we're trying to do here in terms of helping schools address the issues.

**FAY L. ROSENFELD, ESQ.**
SENIOR ASSISTANT DEAN FOR STUDENT AFFAIRS AND EXECUTIVE DIRECTOROF INTERNATIONAL AND COMPARATIVE LAW PROGRAMS, HOFSTRA LAW SCHOOL

In terms of the admissions process, one thing that was requested on the application to admission at our law school [Hofstra], and probably every other law school as well, is information about any criminal or academic misconduct in the applicant's past. Obviously that's an imperfect way to judge an applicant's character, but it's an important question that's asked, and that's something that should be out there.

I've often thought about whether we do enough in our application process to explain why we ask that question. I don't know that we ever took the time to include a paragraph in the application packet on why that question is in there and why it's particularly important for law schools and the repercussions of answering that question incorrectly. If the character and fitness committee finds a discrepancy between the student's application for admission to law school and their application to the bar, that will be a major problem.

**ABEL P. MONTEZ, ESQ.**
DIRECTOR OF STUDENT AFFAIRS, FORDHAM UNIVERSITY SCHOOL OF LAW

Going back to Professor Silver, the basic information and education on professionalism that you provide your students when they show up late or are not prepared is very, very important.

I'm Director of Student Affairs at Fordham. My job is to deal with problems, so I have a skewed view of the law school environment. I may be dealing with five percent of the population and I'm thinking there's something wrong here, they're not following instructions, they're not reading, they don't know the rules, so any time a professor is actually educating and saying, "You have to show up on time, you have to turn in things by the deadline," it's important. Sometimes professors forget to do that.

**PROFESSOR SILVER**

Mike was saying that character is formed at a very young age. There have been studies showing that one can affect character, whether you call it values or emotional competence. I have written that it can be affected and that it can be learned.

I wish we could screen out that set of students that come in saying, "I'm just in here to get my degree, then I'll go out and do whatever the hell I want with it." That's not the vast majority of our students, I'm glad to say. There are others who come in and can't even believe that the New York State Bar

Association would think it necessary to propose a civility code because of course lawyers should do these things, or they come in with these values. There's a vast middle that we have the opportunity to affect positively or negatively, and that's where I feel I can do some good. If we model for them the finest aspects of our profession, if we reinforce for them positive values like public service, for many of them it will make a difference in the kinds of lawyers that they will be.

**PROFESSOR KAUFMAN**

I would like to wrap up this panel by having the record reflect the Institute's gratitude to some people who are not here today. There were a few references today, Sue made it in her remarks, to students from around the state who participated in a series of round table discussions. They were asked what their understanding of professionalism was when they entered law school and what their impression was of efforts that their law schools had made to instill professionalism in their students.

They were also asked to comment on the efficacy of using some sort of commitment letter or oath. You've heard different speakers, both Pat and Sue, talk about their institutions making use of an oath, and we have distributed a few alternatives. I think you have a copy of Mercer's oath and CUNY's oath.[12] At the back of the room or perhaps on your chairs is a copy of something that Judge Battaglia drafted when he was on the faculty at Touro that describes the good lawyer.[13] Then there's yet a fourth version of a commitment letter that the Institute has circulated.[14] What the students said to us in those various round table discussions was that there was some value in these oaths and commitment letters, if no other value than prompting a discussion of issues of professionalism. So I invite you to read the various drafts that are in the materials and bring those back to your institutions for consideration. But I did want to acknowledge the contributions that the students from various law schools have made to our process, and I of course also want to thank the speakers on this panel for their thoughtful and thought-provoking presentations. This panel is part of the Institute's ongoing effort to try to generate ideas that law schools can selectively draw on and utilize in their effort to develop professionalism in their students. Each of this afternoon's presentations made a meaningful contribution to that process, so I thank all of the speakers and I turn the microphone over to Eleanor Stein who is going to help us reflect on today's proceedings.

12. *See* Appendices 1 and 3.
13. *See* Appendix 4.
14. *See* Appendix 5.

# SUMMARY OF CONVOCATION

**ELEANOR S. STEIN, ESQ.**
VISITING ASSOCIATE PROFESSOR, ALBANY LAW SCHOOL AT UNION UNIVERSITY

Searching for an appropriate image for this Convocation, I was struck by the magnificent patchwork quilt hanging in the Court of Appeals rotunda, sewn by Long Island schoolchildren in commemoration of police and firefighters who died on September 11th. The quilt symbolized the words participants used—composite, indeterminate, elastic, growing—a collective project undertaken over time by a large group of people creating a whole greater than the sum of the patches stitched together. What emerged from the presentations and discussions was not one proposal for a statewide curriculum on professionalism. Instead of a unitary proposal, what emerged was closer to a patchwork of approaches, susceptible to adaptation to the specific contextual realities of the 15 law schools, and of the different corners of the bar with their own specific and concrete ethical and professional considerations.

The other image is the Chinese ideogram for person: grounded in the earth but stretching toward heaven. This image expresses the tao of the harsh economic and social realities for most legal practitioners, in comparison to the high-flown aspirations of the profession. Both are part of the professional practice and the professional life. We can neither ignore those harsh realities nor fail to reach for heaven.

The aspirational quality of ethics for a perfect world, compared to ethics in the real world in which we live and practice, is best captured by W.H. Auden, a piece I might be reluctant publicly to apply to the legal profession, in his 1940 poem "As I Walked Out One Evening,"

> O look, look in the mirror,
> O look in your distress;
> Life remains a blessing
> Although you cannot bless.
>
> O stand, stand at the window
> As the tears scald and start;
> You shall love your crooked neighbor
> With your crooked heart.[1]

If the image is of quilt and patchwork and a diversity of approaches, it is nonetheless possible—and it is necessary to pull out the common threads. The first charge of the Convocation was how to define professionalism. The second, to survey how it is and should be addressed in our law schools.

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1. "As I Walked Out One Evening," copyright 1940 and renewed 1968 by W.H. Auden, from COLLECTED POEMS by W.H. Auden. Used by permission of Random House, Inc.

We convened in a climate of criticism. Fordham's Russell Pearce opened the Convocation with a charge that the study of professionalism is relegated to a dusty academic back corner. While the MacCrate Report's recommendations for skills learning have been embedded into law school curricula, far less attention has been given its work on fundamental values, and its broader goal of integrating the promotion of justice into all aspects of practice. Pearce speculated that an enormous new academic undertaking may be necessary.

Indeed, a recurring theme of the Convocation was the stark dissonance between the kinds of work most lawyers do compared to the shadowy portrait of lawyers' work that emerges from the traditional doctrinal law school curriculum: appellate opinions, usually federal and often of the U.S. Supreme Court, following fully-litigated proceedings. Yet only a minority of the legal profession engages in federal appellate litigation, and a far tinier proportion ever finds itself arguing before the bar at the Supreme Court.

Convocation participants linked this value dissonance and the ethical dilemmas of practice to the documented high degree of alcoholism, depression, and mental illness prevalent among attorneys. Participants bemoaned the seductive emphasis on top grades, high salaries, and Wall Street jobs—in other words external rewards, affluence, fame and power, noting that these goals can correlate with relative unhappiness.

Possessors of intrinsic values, such as the importance of personal growth, relational connection, and improving the community, frequently test significantly happier. The link was the core sense of a self with integrity.

Values were also perceived as bound by ethnic, religious, and race diversity, with students and attorneys urged to identify their own cultural values and those of the client. The example offered by CUNY's Sue Bryant was that of a student lawyer in the school's immigration clinic. The client had to respond to a question on her green card application: Had she had ever committed or been convicted of a crime? The dilemma was, how should the student—herself an immigrant—advise her, when the client indeed had no conviction but had spent eight months in cocaine rehab?

In the search for a definition, there was consensus that professionalism goes beyond the ethical canons, or what Pearce called "those rules you get punished for violating." Larger than that, professionalism implied a moral compass—for some, zealous advocacy; for others, a responsibility to the larger public sphere and to one's own moral, ethical, or even religious framework. These human and professional value systems may well be in conflict—they are not always, but it is where they are in conflict that the hard questions get raised—and that is where we find the teachable moment.

New York Court of Appeals Senior Associate Judge George Bundy Smith offered the Convocation a touchstone: the practice of law is a privilege, both as a legal matter and in the broader sense, as a professional matter. The law is a

profession of power and influence, it is self-regulated, and it is a profession, he cautioned, consisting of "a lifetime of giving advice." He also left us with threads to stitch into the quilt of what constitutes core values: access to the profession for all, regardless of race, ethnicity, gender, national origin, or sexual preference; and access to justice and protection of the laws. These values are under scrutiny and in some cases and in some places they are under attack. We cannot take them for granted; so advocacy for the needs of the larger society must be considered, not only advocacy for the needs of the client.

Others insisted that the practice of law is both a trust and a public trust, not only a service and incidentally a livelihood. Some defined two strands of professional values: those that are ends-oriented (justice, access) and those that are means-oriented (confidentiality, loyalty). Also of concern to many was context: a red thread running through the fabric of the Convocation. Professional choices in the context of civil appellate advocacy, criminal prosecution and defense, family law practice, adjudicating among unrepresented parties, or a mediation practice, present very differently.

Participants wrangled over how much is encompassed within zealous representation: Does it encompass the sum total of the lawyer's obligations? What about the decision whether or not to take on a certain case or client? The ethical and professional difficulties of stepping out of a case or changing a client's mind? Of accepting personal and professional responsibility for the outcome of a case notwithstanding a client-centered ethics jurisprudence? Where do alternatives to a traditional litigated process fit? Professionalism for alternative dispute resolution, settlement, or restorative justice, can be a syllabus all its own.

The Convocation returned again and again to the duty to zealous representation, including the importance of attorneys representing the "unlovable," the "rapscallions," those I term the pariahs.

As to the second charge, to examine how professionalism is taught in our law schools, the Convocation heard a range of approaches sounding effective but different, and a wealth of resources to draw on. At the close, we shared a common sense that the teaching of professionalism was under serious development in law schools, but also a sense that this was no longer an issue exclusively for the law schools. Participants were committed that sharing the experiences of the academy, bench and bar should continue and should grow, and that we should look for common threads that every law school might incorporate. We shared an agreement that silence is a terrible mistake; and that practicing attorneys, judges, academics and students can each enrich the others' discussions.

Approaches offered included identifying a couple of themes: confronting the tao of professionalism, starting early and throughout the curriculum; using clinics, externships, and visiting practitioners to make professionalism a lived practice, not just a set of written rules. All without compromising the importance of rigorously trained professional attorneys, with these great consciences.

Chief Judge Kaye opened the Convocation this morning questioning whether law schools could do more. At the end of the day, the collective answer was yes, but law schools are doing a great deal with a great range of different approaches.

In New York, clinics provide professionalism orientations for second- or third-years. Judge Smith suggested an oath comparable to the Hippocratic Oath, and some schools administer an oath at the beginning of legal education; many have a formal swearing in of students when they become law interns. The oath is a ritual of professional investiture—students don't dust off the oath every morning but ritualizing, sharing, giving dignity to entry into this professional world is being explored.

One school has students note down their ambitions when they enter, and reevaluate them when they complete their legal education. At CUNY, following a morning in Housing, Criminal, Supreme, and Family Courts students are sworn in at Federal Court. At Albany Law School, the Third Department Presiding Justice swears students in, and discusses the importance of public service. Other methods included moot court, simulation, problem-based learning, or field placements, which examine the role of lawyers as problem-solver in addition to adversary. Pro bono and community service assignments open students' eyes to the needs of the low income or disabled client. Curricula that are problem-based create opportunities to discuss professionalism. At Buffalo, a one-month program is taught by the practicing local bar and bench. Columbia is looking for better integration of clinical and doctrinal courses, with projects such as a seminar on multi-state Attorney General litigation paired with a practice component in the New York Attorney General's office. Albany integrates ethics and professionalism in the orientation for first year students, while some schools offer a course on the economics of law practice. Clinicians expounded the value of students learning to consider the context of decisions, and the contrast of their own values and those of their clients. As Albany's Nancy Maurer explained, for some clients, professionalism may be defined by whether the attorney returns the client's phone calls, more than the brilliance of her oral argument.

Impediments to professionalism education included the practical: a decision to teach one subject is a decision not to teach another. In Georgia today professionalism is a required first-year course, but that design may not hold. A practical approach is to address the economic pressures on law students as well as on attorneys—the increase in law school debt limits students' job choices. Recognizing this, several schools are exploring loan forgiveness in exchange for public service work. Lost opportunities include the summer job—schools seldom reflect on professionalism issues arising from summer work experience—the inconsistency of professionalism study in externships or field placements; classroom hours considering ethical problems arising from case law; or drawing upon practitioners for current professionalism dilemmas.

Tensions were identified: like context, we were left with the idea of tension. Some maintained zealous representation was the only moral compass needed; others said we need a larger public vision. Where that tension is located is where ethical and professionalism discussion takes place most profitably, although perhaps also most uncomfortably. There was a sense that some of what law schools do is "[n]ourishing a stronger moral imagination"; however, in practice, there was tension between representing the client and larger ends. We had a heated exchange on the Exxon Valdez case, in which ten years after an uncontested finding of liability, the defense attorneys have managed to prevent payment of any damages, notwithstanding damage assessments, including punitive damages, in the hundreds of millions of dollars. Let's not turn away from those hard choices: the Enron lawyers who closed their eyes or looked away, or the whistleblowers, or unpopular government regulators.

There are other recent hard lessons. Defense attorney Lynn Stewart, charged with violating security agreements with the government, raised the defense that she was zealously representing her client. Her trial should be studied; we should not be afraid to rub the sore spots. Similarly, we should examine the objections on grounds of ethics violations to the appointment of Alberto Gonzales as Attorney General. The Association of the Bar of the City of New York thoroughly analyzed his memoranda to the president concerning the Geneva Conventions and the torture of detainees from the point of view of his obligation to his client and his obligations to the rule of law. These documents should also be studied for their professionalism and ethical discourse.

Another suggestion emerging from the day is to identify heroes and heroines, to pull out the exemplars. Who are the people who do well balancing the job and the service? Myra Bradwell and Kate Stoneman come to mind, the early women fighting to attain bar membership. Also those who represent the unlovable, the rapscallions, and the pariahs can be held up to the light. Among those are the Judge Advocate General Corps attorneys representing individual Guantanamo detainees, in tension with their own employers; or Haywood Burns, the first African-American dean of a New York law school, who walked away from a lucrative corporate law career for a life in civil rights and legal education.

Also generated in the course of the Convocation was a table of authorities to examine the role of the lawyers: the Exxon Valdez litigation, the Enron and WorldCom collapses, the Guantanamo cases, and the many cases where fearless advocacy and creative jurisprudence changed the law.

The conclusion is to return to the focus groups of law students. The reader of these transcripts is struck by the continued repetition of a single word: "service." Each time speakers were asked, "Why did you go to law school? What are you looking for in your career?" the answer was, "Service would be the first word that comes to mind," or "Service, that is why I chose law," or "To do some

good to other people." Back to where we started, the aspirational word of service, always brings to mind its synonym, "To be of use", Haywood Burns's favorite poem by Marge Piercy, which speaks to the law students and lawyers straining to fulfill their professional responsibilities—and to find meaning in their work:

> The people I love the best
> jump into work head first
> without dallying in the shallows
> and swim off with sure strokes almost out of sight.
> They seem to become natives of that element,
> the black sleek heads of seals
> bouncing like half submerged balls.
> I love people who harness themselves, an ox to a heavy cart,
> who pull like water buffalo, with massive patience,
> who strain in the mud and the muck to move things forward,
> who do what has to be done, again and again.
> I want to be with people who submerge
> in the task, who go into the fields to harvest
> and work in a row and pass the bags along,
> who stand in the line and hawl in their places,
> who are not parlor generals and field deserters
> but move in a common rhythm
> when the food must come in or the fire be put out.
> The work of the world is common as mud.
> Botched, it smears the hands, crumbles to dust.
> But the thing worth doing well done
> has a shape that satisfies, clean and evident.
> Greek amphoras for wine or oil,
> Hopi vases that held corn, are put in museums
> but you know they were made to be used.
> The pitcher cries for water to carry
> and a person for work that is real.[2]

Thank you.

(Whereupon, the proceedings were concluded.)

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2. "To be of use" by Marge Piercy. Copyright © 1973, 1982 by Marge Piercy and Middlemarsh Inc. From CIRCLES ON THE WATER Alfred A. Knopf, Inc. Used by permission.

## APPENDIX 1

## MERCER UNIVERSITY
## WALTER F. GEORGE SCHOOL OF LAW

## LAW STUDENT'S PLEDGE

I, _____, as a student entering the Walter F. George School of Law, understand that I am embarking on a course of study that will enable me to join the legal profession. I also understand that as a member of the legal profession, and as a member of this community of learning, I will be expected to conduct myself at all times with honor and professionalism. Therefore, I pledge as follows:

To the faculty and administration, I offer my attention, my diligence, and my respect. I will strive to excel in my studies so that my future clients will benefit from the knowledge and skill that I may acquire here.

To my fellow students, I offer my support, my respect, and my courtesy. I will strive to make our association a collegial and fruitful one, in which we may depend upon each other for the benefit of all.

To the legal profession, I offer my service. I will strive to become a true professional and to learn to practice my craft as a calling, in the spirit of public service.

## APPENDIX 2

## CUNY SCHOOL OF LAW AT QUEENS COLLEGE ORIENTATION QUESTIONS

2004 FIRST YEAR COURT ORIENTATION
COURT VISIT DEBRIEFING
"IMAGES OF JUSTICE"

1. List three adjectives that describe the experience of the parties — the people seeking justice — you saw in court today.

2. List three adjectives that describe the atmosphere and the physical setting in the court — the place to seek justice — you saw today.

3. Which person or persons that you saw today (besides the judges) played the most influential role in moving the parties in court toward justice?

4. Having observed lawyers in court today and looking toward the day when you will be in that role, what is the most important thing for you to learn in law school in order to be prepared to take on that role?

5. What words other than "justice" would you use to describe what you saw happening in the court today?

## APPENDIX 3

## CUNY SCHOOL OF LAW AT QUEENS COLLEGE OATH

# *THE LAWYERS' OATH*

*In accepting the honor and responsibility*
*of life in the profession of law,*
*I will strive as best I can:*
*to work always with care,*
*and with a whole heart and with good faith;*
*to weigh my conflicting loyalties*
*and guide my work with an eye to the good,*
*acting less for myself*
*than for justice and the people;*
*and to be at all times,*
*even at personal sacrifice,*
*a champion of fairness and due process,*
*in court or not,*
*for all persons,*
*whether the powerful or envied*
*or my neighbors or the helpless*
*or the hated or the oppressed.*

# APPENDIX 4

## PROPOSED LAW SCHOOL MISSION STATEMENT

The primary mission of legal education is to help men and women become good lawyers — lawyers who provide competent representation to clients, with attention to justice and the moral sources and goals of law and to the lawyer's responsibility to mediate between the public interest and the client's wants. For "[t]o educate a person in mind and not in morals is to educate a menace to society." (Theodore Roosevelt)

The good lawyer possesses skills and wisdom — "practical, effective, persuasive, inventive skills for getting things done" and "wisdom and judgment in selecting the things to get done." (Karl Llewellyn) In assisting clients to solve problems and realize opportunities, the good lawyer provides independent counsel about ends as well as means. Good lawyers understand that what they do affects individuals, legal institutions, and society, and they are willing to take personal responsibility for those consequences.

The good lawyer is respectful of human dignity, and is committed to social justice, fairness, equality and other values of the professional community, including participating in public life and assisting underserved segments of the community. The good lawyer develops a professional character that demands higher standards than apply to other occupations, making the profession of law a "calling." Those professional qualities include integrity, honesty, trustworthiness, compassion and faithfulness, These skills and character traits are essential whether the good lawyer is advising corporations, making government policy, or representing the indigent.

The good lawyer is a peacemaker, using listening and communication skills, counseling and negotiation, to fashion reconciliations and accommodations. Although dedicated to truth, the good lawyer is tolerant of ambiguity and diverse points of view, and has a capacity for empathy and imagination that allows for the complexity of social relationships and a wide range of human activities, behaviors, motivations and interests. The good lawyer recognizes that zealous advocacy includes the peaceful resolution of conflict and alternatives to litigation.

The good lawyer derives pride from membership in a profession that is essential to the functioning of a just society.

+ *Based upon a mission statement adopted by the faculty of Touro Law Center to guide review and revision of the curriculum.*

# APPENDIX 5

## LAW STUDENT PLEDGE OF COMMITMENT TO PROFESSIONALISM

As I begin the study of law, I execute this document understanding that my law school study embraces not only the academic substance of the law but also requires a sincere commitment to professionalism. I acknowledge that law is a learned occupation and is inescapably a public calling. In the aggregate, my chosen profession allows our American democratic system to function through the rule of law by the private ordering of affairs in a responsible, reliable and efficient way and in the facilitation of the resolution of public and private disputes peaceably. These efforts accrue a body of law to guide affairs in the future. By providing diligent service to my clients, I will promote the public interest through application of the rule of law.

I acknowledge that the law is a helping profession: that lawyers, as custodians of the legal system, have enhanced obligations of service to the community and promotion of justice through the rule of law.

During my law studies, and after as a practicing lawyer, I must exhibit certain traits. These include lawyer independence, ethical behavior, self-renewal, competence, responsibility, an appreciation for the historical continuity and tradition of the profession and respect for my client, my adversary and the courts.

Over the course of my law school career, I pledge that I will strive to develop, uphold and maintain the core values of the profession of law and will continue to embrace them upon admission to the practice law.

Sign Name: _____

Print Name: _____

Date: _____