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An Approach to the Teaching of Professional Responsibility to First Year Law Students

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I. INTRODUCTION

The continuing problem of the instruction of professional responsibility[1] by law schools is typically met by one of three approaches. The first is the particularized course in which legal ethics is taught by use of a casebook on the subject or by a series of problems.[2] Emphasis is normally placed on the Code of Professional Responsibility. The popularization and proliferation of clinical legal education has provided a second and distinct avenue for the inculcation of professional responsibility.[3] Lastly, the well worn, much abused pervasive method is still advanced as an effective way of instilling in burgeoning attorneys the insight and sensitivity necessary to straddle the ethical fence constantly confronting practicing lawyers.[4]

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1. While the term professional responsibility encompasses a wide variety of obligations and responsibilities of lawyers including legal ethics, the term will here be used interchangeably with legal ethics. *See* Countryman, *The Scope of the Lawyer's Professional Responsibility*, 26 OHIO St. L.J. 66 (1965); Smedley, *The Pervasive Approach on a Large Scale—"The Vanderbilt Experiment"*, 15 J. LEGAL 435, 436 (1963).

2. *See* B. BOYER, SELECTED MATERIALS ON THE PROFESSIONAL RESPONSIBILITIES OF THE LEGAL PROFESSION IN THE FIELDS OF LEGAL AID, CLIENTS' SECURITY FUNDS AND PROFESSIONAL DISCIPLINE (1967); E. CHEATHAM, CASES ON THE LEGAL PROFESSION (2d ed. 1955); V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY (1966); A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY (1976); D. MELLINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE (1976); MORGAN & ROTUNDA, PROFESSIONAL RESPONSIBILITY (1976); L.R. PATTERSON & E. CHEATHAM, THE PROFESSION OF LAW (1957); N. REDLICH, PROFESSIONAL RESPONSIBILITY: A PROBLEM APPROACH (1976). For a series of problems on professional responsibility *see* R. MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION (6th ed. 1974).

3. *See* Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273 (1976); Brickman, *Contributions of Clinical Programs to Training for Professionalism*, 4 CONN. L. REV. 437 (1971); Cohen, *The University of Texas' Criminal Justice Project: An Example of Involvement and Clinical Training*, 41 U. COLO. L.REV. 438 (1969); McKay, *Legal Education: Law, Lawyers, and Ethics*, 23 DEPAUL L. REV. 641, 649 (1974); Pincus, *One Man's Perspective on Ethics and the Legal Profession*, 12 SAN DIEGO L. REV. 279, 281-87 (1975); Sacks, *Remarks on Involvement and Clinical Training*, 41 U. COLO. L. REV. 452 (1969). A particularly lucid treatment of teaching professional responsibility in clinical programs can be gleaned from LAWYERS, CLIENTS, & ETHICS (M. Bloom ed. 1974). Fifteen case histories of ethical problems faced in a clinical program are presented along with commentaries by a practitioner, a psychiatrist law professor, and two law professors who teach professional responsibility.

4. The pervasive approach has been characterized as requiring the involvement of several faculty members and the exploration of issues of professional responsibility in the

Although commentators generally acknowledge and sometimes criticize the use of the pervasive method, little consideration has been given to the actual teaching of professional responsibility in the traditional law school courses. Even less attention has been paid to the existing and potential use of materials in the traditional law school casebooks to foster the students' awareness of the ethical considerations that permeate the law. This article will seek to briefly recapitulate the arguments posed against attempts to use the pervasive method, will take a look at the methods various torts and contracts casebook editors have utilized to reveal ethical problems, and will suggest ways in which law professors can integrate problems of professional responsibility into substantive courses. It should not be presupposed that any implicit or explicit arguments made herein for the utilization of the pervasive method are intended to suggest that the pervasive method displace other methods. Rather, the arguments are intended to underscore the thought that the pervasive method is most useful when coupled with a course in professional responsibility or clinical practical courses.

II. BACKGROUND

The pros and cons of the pervasive method of teaching professional responsibility have been argued at length elsewhere.[5] However, a brief recapitulation of some of the advantages and disadvantages of the approach will benefit the subsequent inquiry into actual and proposed methodologies of teaching the pervasive method.

Opponents of the pervasive method often object to the reluctance and the incompetence of law faculties to teach professional responsibility in the context of their substantive courses. Professional responsibility is a complex discipline and cannot be easily mastered and applied to substantive law courses by law professors. Many law teachers have little or no experience practicing law and have never faced the ethical dilemmas inherent in their fields of expertise.[6] The lack of practical experience of some teachers is said to engender a disdain among students for the study of legal ethics because they can see no rational

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regular substantive law courses. *See* Covington, *The Pervasive Approach to Teaching Professional Responsibility: Experiences in an Insurance Course*, 41 U. COLO. L. REV. 355, 356-57 (1968); *see also* Smedley, *supra* note 1, at 436-37.

Professor Brainerd Currie is acknowledged to be the first to have recognized the need for pervasive professional responsibility training in the law school curriculum. He wrote over twenty years ago that "training for professional responsibility and for the awareness of the role of law in society is not a matter that can be parceled out and assigned to certain members of the faculty at certain hours, but is the job of all law teachers all of the time." Currie, *Law and the Future: Legal Education*, 51 NW. U.L. REV. 258, 271 (1956).

5. Thode and Smedley, *An Evaluation of the Pervasive Approach for Professional Responsibility of Lawyers*, 41 U. COLO. L. REV. 365 (1969).

6. *See* Watson, *Some Psychological Aspects of Teaching Professional Responsibility*, 16 J. LEGAL EDUC. 1, 12 (1963).

relationship between esoteric discussions of supposed ethical problems and their application to the practice of law.[7]

The pervasive approach has been reproved because it may cause deletion of important substantive matters from courses already overloaded with material. Also, it makes for a haphazard coverage of ethical issues since each instructor will vary his approach and emphasis. There is the chance that some individual teachers will attempt to indoctrinate students to their own ethical predilections. And it breeds unrealistic resolutions of problems of professional responsibility because the external pressures facing a practitioner are not present in the classroom.[8]

Although these criticisms have merit in regard to problems of teaching the pervasive method in today's law schools, they can easily be overstated. For example, the majority of younger faculty members have had practice experience of some type.[9] Of course, a few years of law practice does not make one an expert in legal ethics. But it is likely to result in forced indoctrination to recurring ethical problems faced by attorneys in their various relationships with the bench, other lawyers, clients, and witnesses.[10]

Many of the objections to the pervasive approach are applicable to law school education generally. For example, law teachers could rarely agree on the substance of and emphasis to be placed on any course in the curriculum. There is always the chance that a professor will use the classroom as a forum to espouse his conception of the law, no matter how unpopular. And all law school education, with the possible exception of clinical courses, suffers from a certain lack of realism since law students are free from client demands and financial and professional pressures. In this sense, law school training is conducted in a vacuum.

Too much should not be expected or attempted by the use of the pervasive method. Detailed analysis of the Code of Professional

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7. *Id.* Of course, the lack of ethical experience of law teachers is a shortcoming affecting all modes of professional responsibility instruction; it is not limited to the pervasive approach.

8. For a thorough list of positive and negative aspects of the pervasive approach *see* Thode and Smedley, *supra* note 5, at 370-72.

9. *See* 1977 DIRECTORY OF LAW TEACHERS (A.A.L.S.).

10. Further, lack of practical experience does not foreclose ethical insight. One commentator has stated that "it remains to be demonstrated that one must actually experience a particular ethical dilemma in order to recognize it and attempt a resolution in a classroom setting. One does not have to have been a prosecutor to enunciate the advantages, disadvantages, and underlying rationale of prosecutorial discretion and plea bargaining. Nor must one have served as a public defender to help students identify and analyze ethical problems encountered in the defense of one known to be guilty. Even if it were true, this argument indicates, the need for greater efforts to better educate professors, not the abandonment of efforts to educate students with respect to their ethical duties." Aronson, *Professional Responsibility: Education and Enforcement*, 51 WASH. L. REV. 273, 276-77 (1976).

Responsibility and problems of professional responsibility may be best left to specialized courses. However, typical ethical dilemmas faced by lawyers can be emphasized through the pervasive method. The goal of users of the pervasive method should be to identify professional responsibility questions in the particular contexts in which they arise. Ethical considerations are contextual or situational; that is, they arise in a particular factual legal setting. Thus, a major advantage of the pervasive method is that professional responsibility issues may be reflected on and reasoned about in the appropriate settings of the substantive law being studied.

Not only does the pervasive approach assure that problems of legal ethics will be considered in the proper context, it also aids students to realize and accept early in their law school careers that professional responsibility is an important and constituent part of all legal problem solving. Similarly, it confronts law students throughout their years in law school with the issues of professional responsibility. The resulting exposure and emphasis is more likely to affect the appropriate student attitude and instill the requisite respect for ethical considerations than is a two hour course in professional responsibility tucked away in the second or third year.

The identification and not necessarily the resolution of ethical problems is perhaps the most important contribution the pervasive method can provide. Although the intentions of members of the practicing bar may be good, they daily perform acts of questionable professional responsibility because of gross ignorance of the ethical constraints which should govern their profession. For example, many lawyers commonly accept forwarding fees, ignorant that such a practice is forbidden by the Code of Professional Responsibility unless the fee is split in relation to the work actually performed by each participating attorney.[11]

None of the profits of the pervasive method can be realized without the enthusiastic support and competent application of law faculties. A disinterested faculty is a difficult obstacle to overcome. If the ultimate value to the legal profession of concerted professional responsibility training in the substantive curriculum is not recognized by the

11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-107. Other activities of questionable ethical validity frequently occurring among practicing attorneys include the representation by one lawyer of both sides of a real estate transaction, the use of the criminal courts to collect a civil debt, the unfounded threat of an appeal in order to bargain for a reduction of a judgment entered of record, and the listing of attorneys' names in telephone directories in areas other than their place of business or residence and in areas from which they derive no legal business. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-102(A)(5). Often the participating lawyers are unaware that their actions contain dubious ethical implications. For a further listing of ethical problems common to practitioners *see* Weinstein, *On the Teaching of Legal Ethics*, 72 COLUM. L. REV. 452, 459-63 (1972).

faculty a structured pervasive program will no doubt fail.[12] An unstructured pervasive program in which only those teachers who are so motivated attempt to discuss matters of professional responsibility in their substantive courses cannot have the same influence as a structured program because its benefits are unevenly distributed.[13] Of course, the more teachers on any given faculty who undertake the pervasive method, the more equally distributed are the benefits and the greater is the overall influence on the student body.

In addition to supporting of the utilization of the pervasive method, law faculties must become competent to instruct in matters of professional responsibility within their respective fields of expertise to ensure a successful program. A superficial or inaccurate treatment of an ethical question can do more harm than good. Students may assume that unimaginative treatment of the topic is indicative of the topic's secondary importance.[14] And, as in any other teaching endeavor, poor coverage of the material makes for poor learning.

A law teacher must rely on supplemental materials to successfully integrate considerations of professional responsibility in a substantive course. A worthwhile pervasive approach depends largely on the readings and preparations required of students and the ability of the instructor to present the issues of professional responsibility that are uncovered without detracting from the substantive learning process.[15] Thus, a look at various approaches employed in casebooks may be helpful to teachers looking for an understanding of ethical problems and their integration in the pervasive tradition. It may also indicate appropriate learning tools for shaping students' views of professional responsibility as a vital component of their legal education.

III. CASEBOOK TREATMENTS OF PROFESSIONAL RESPONSIBILITY ISSUES UNDER THE PERVASIVE METHOD

No attempt will be made to exhaustively report the professional responsibility approaches and materials included in all casebooks. The discussion will be limited to torts and contracts. These two subject areas are particularly well adapted to the use of the pervasive method

12. *See* Samad, *The Pervasive Approach to Teaching Professional Responsibility*, 26 OHIO ST. L.J. 100, 105 (1965); Thode and Smedley, *supra* note 5, at 367-68.

13. In Thode and Smedley, *supra* note 5, at 367, it is suggested that a fully structured pervasive program would overload teachers and surfeit the students with professional responsibility. The authors believe that a few subjects taught by adept professors should be selected for pervasive treatment. Of course, if the subjects selected were required courses the ultimate benefits would be more evenly distributed.

14. *See* Covington, *supra* note 4, at 357.

15. There exists the real possibility that class discussions about legal ethics can degenerate into ill-considered, opinionated sessions rather than analytical exercises. *See, e.g.*, Finman, *The Place of Professional Responsibility Discussions in the First-Year Civil Procedure Course*, 4 CONN. L. REV. 462, 466 (1971). The contrary view that prepared professional responsibility materials are not necessary for employment of the pervasive method is set forth in Smedley, *supra* note 1, at 441.

because the role the attorney plays in each is fraught with common, practical professional dilemmas. Also, the location of each subject in the first year law curriculum provides an optimum time to begin the employment of the pervasive method.

Not surprisingly, the majority of even the most highly regarded casebooks on any given legal subject provide little or no treatment of typical ethical considerations. However, one can discern a trend in the newer casebooks and in the more recent editions of older casebooks to include some materials on professional responsibility.

A. Torts

Torts is almost always a required first year course in American law schools. Many issues of professional responsibility naturally inhere in the subject matter, such as considerations of the propriety of the contingent fee, negotiation and settlement, conflicts of interests, solicitation of clients, and ethical problems in the litigation process generally. The traditional methods of resolving personal injury claims have resulted in some of the most publicized and outrageous acts of ethical misconduct by practicing lawyers. It is important to expose students embarking on a legal career to the improprieties of ambulance chasing and to the effects that such practices have on the entire legal profession. Thus, torts provides an excellent opportunity for the pervasive approach because of its place in the curriculum and because of the scope of professional responsibility issues compatible with and even necessary to its study.

Tort law encompasses attorney negligence which results in malpractice litigation. Malpractice claims usually involve a breach of an attorney's duty in representing a particular client. The standard of care and degree of competence owed by a lawyer to his client is an important aspect of professional responsibility, although the criteria do not necessarily have ethical implications. A lawyer may be negligent for many reasons without being unethical. The use of the pervasive method in torts presents the opportunity to introduce questions concerning the responsibility of attorneys to clients and the effects of breaches of that responsibility.

The *Lucas v. Hamm*[16] decision is an excellent focal point for a discussion of the level of competence required by an attorney in performing work for a client. The Supreme Court of California refused to find an attorney negligent for preparing a will that violated the rule against perpetuities and was invalid. The court found that the duty of lawyers is "to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of tasks which they undertake."[17] The increasing specialization

16. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).
17. *Id.* 15 Cal. Rptr. at 825.

of the bar poses interesting questions about the continued application of the *Lucas* standard. Should a lawyer working exclusively in the estate section of a large metropolitan firm have the same standard of care and be held to the same expectation of competence about the rule against perpetuities as the small town general practitioner? Do attorneys have a duty to practice law only in areas in which they are fully experienced and proficient? What should a lawyer do when, after beginning work for a client, he finds himself involved in legal intricacies beyond his range of expertise?

The Prosser, Wade and Schwartz casebook on torts[18] employs the *Lucas* case in a note about the standard of care owed by professionals to their clients or patients. The principal case, *Hodges v. Carter*,[19] mitigates the "ordinary skill and knowledge" standard required by a lawyer by imposing a good faith caveat. There the court held that an attorney acting in good faith and in the best interest of his client was not liable for an error in judgment. Conversely, reasonable care and diligence must be exercised by a lawyer in the use of his skill and the application of knowledge to the client's cause. The notes following illuminate the delineating courts have constructed between the use of due care and error of judgment in the representation of clients.

Similar problems facing the medical profession permeate the materials. Although the standard of care issues are similar in medicine and law, separate treatment of the attorney-client relationship in torts courses would provide a more precise focus on the professional responsibility of a lawyer in representing a client. A thoroughgoing utilization of the pervasive approach should accentuate professional responsibility issues anytime lawyers are parties to litigation or deviate from the expected norm of professional behavior.

Professor Franklin's torts casebook provides a section of materials outlining a variety of professional responsibility issues in the context of the attorney-client relationship.[20] The professional responsibility issues are raised in a chapter entitled "Harm to Economic Interests." The broader theme of the section concerns causes of action for financial loss occasioned by the actions of one contractually bound to perform services for another. The author's purpose in including the professional responsibility materials is to present a common situation in which contractual obligations result in economic harm and raise tort law considerations.[21]

Even though the avowed intention is not to heighten awareness of problems embodied in the attorney-client relationship, the materials do

18. W. PROSSER, J. WADE, & V. SCHWARTZ, CASES AND MATERIALS ON TORTS (6th ed. 1976).

19. 239 N.C. 517, 80 S.E.2d 144 (1954).

20. M. FRANKLIN, CASES AND MATERIALS ON TORT LAW AND ALTERNATIVES 873 (1971).

21. *Id.* at 877.

form an excellent departure point for discussion of professional responsibility. For example, the principal case, *Von Wallhoffen v. Newcombe*,[22] involved a suit against an attorney for his failure to obtain a valid divorce decree in his representation of the plaintiff. Issues such as the standard of care, level of ability, proper exercise of discretion and judgment, and degree of diligence owed to a client are raised by the discussion. The practical question of whether contributory negligence can be asserted as a defense by an attorney who has been sued for malpractice is considered. The availability of contributory negligence as a defense illustrates an important practical facet of the attorney-client relationship, for it indicates that a lawyer need not vouchsafe his client's actions. Although lawyers are held to a higher standard of care than the so-called ordinary man, one who disregards his counsel's legal advice will not be heard to complain of attorney negligence.[23]

Another related series of inquiries are appropriate for consideration in the attorney-client context. What obligation does a lawyer have to follow his client's directives? Does the obligation depend on the character of the directive? Certainly an attorney who pursues an unorthodox course of action runs a greater risk of deviating from the expected standard of care than does one who performs in a more accepted manner, particularly when the client prefers the conservative approach. On the other end of the spectrum, must a lawyer follow client demands which are probably doomed to produce an unfavorable result?[24]

Tort law is peculiarly suitable for providing exposure to the negotiation and settlement of cases. The great majority of all personal injury cases are settled. Many cases are resolved before suit is filed; others reach compromise during the actual trial or even on appeal. Negotiation is present in every torts case, even those that are never settled. The new casebook by Professor Shapo[25] reprints a substantial portion of an article devoted to the settlement of personal injury suits.[26] Settlement materials are not only useful in divulging pertinent practical information about the place of negotiation and settlement in the litigation process, but they can be utilized to illustrate another aspect of the obligations of attorney to client. Assuming that a lawyer has an obligation to abide by the client's wishes in settlement proceedings, what happens if two clients with different interests are involved? This situation is common where an insurance company's counsel represents the insured in the defense of a personal injury suit.

22. 10 Hun. 236 (N.Y. S. Ct. 1877).

23. Theobald v. Byers, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961) (*quoted in* M. FRANKLIN, *supra* note 20, at 876).

24. Many of these questions can be raised from the materials appearing in the notes discussing legal malpractice. *See* M. FRANKLIN, *supra* note 20, at 875-76.

25. M. SHAPO, CASES AND MATERIALS ON TORT AND COMPENSATION LAW (1976).

26. Kelner, *Settling Personal Injury Cases*, TRIAL, Aug.-Sept. 1969, at 29.

If a case can be settled within policy limits yet the insurance company refuses to authorize payment, what duties of disclosure are owed to the insured by counsel?[27] What possible personal liability can attach to the insured's lawyer if a verdict is rendered in excess of the policy limits after an offer to settle within the limits has been rejected?

The contingent fee agreement represents an area of professional responsibility frequently dealt with in torts casebooks.[28] The contingent fee has traditionally been of particular relevance to the American system of reparations for injuries because it is responsible for the allocation of the plaintiff's attorney's fees to the plaintiff and not to the defendant as in the English system. Further, the contingent fee is an extremely controversial practice; it is unethical in most legal systems in the world and under some systems it is illegal.[29] It has come under severe criticism by a variety of commentators,[30] and has been the subject of controlling legislation in some states.[31]

The arguments espoused both for and against the use of the contingent fee contain forceful professional responsibility implications. For example, the three most common justifications for the contingent fee are that: 1) it gives the lawyer a direct economic incentive to perform capably and energetically on behalf of the client; 2) it provides legal representation in fee producing cases to everyone, even the most indigent plaintiffs; and 3) a portion of the risk of litigation is shifted from client to lawyer because the legal fee is dependent upon plaintiff's recovery.[32] But, although the contingent fee helps the legal profession fulfill its obligation of providing representation to anyone who needs a lawyer, the financial interdependence that results between attorney and client may undermine the autonomy traditionally associated with a lawyer in his representation of clients. There exists the danger that the lawyer working for a contingent fee will become a partner to the client rather than a professional performing his role as advocate.

The torts casebooks which purport to cover the contingent fee

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27. *See* Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1961).

28. M. FRANKLIN, *supra* note 20, at 13; C. GREGORY AND H. KALVIN, CASES AND MATERIALS ON TORTS 494-502 (2d ed. 1969); W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 18, at 551; M. SHAPO, *supra* note 25, at 526-31.

29. M. FRANKLIN, *supra* note 20, at 13.

30. *See* M. T. BLOOM, THE TROUBLE WITH LAWYERS (1968); Kraut, *Contingent Fee: Champerty or Champion?*, 21 CLEVE. ST. L. REV. 15 (1972). *See generally* F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964); Brown, *Some Observations on Legal Fees*, 24 SW. L.J. 565 (1970); Radin, *Contingent Fees in California*, 28 CAL. L. REV. 587 (1940); Schwartz and Mitchell, *An Economic Analysis of the Contingent Fee in Personal Injury Litigation*, 22 STAN. L. REV. 1125 (1970); Note, *Contingent Fee Contracts: Validity, Controls and Enforceability*, 47 IOWA L. REV. 942 (1962).

31. *See* N.J. CT. R. 1:21-7, upheld in American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 330 A.2d 350 (1974); *see also* 29 N.Y. JUD. LAW § 474-a (McKinney Supp. 1976), which sets forth a contingent fee schedule for medical malpractice suits.

32. Schwartz and Mitchell, *supra* note 30, at 1125-26.

generally do so by the use of a brief discussion in a note coupled with citations to cases or articles.[33] The treatment afforded the contingent fee by the Gregory and Kalven torts casebook raises many issues of professional responsibility appropriate for founding useful class discussions.[34] Among the issues raised are the fee schedule as an answer to the abuse of lawyers exacting too high a percentage for their services,[35] the problem with third party interference with the contingent fee contractual arrangement,[36] contingent fees and ambulance chasing,[37] the relationship of legal aid organizations handling non-fee producing cases with personal injury suits typically engendering contingent fees,[38]and the economics of the contingent fee.[39] The broad coverage forms an extensive base from which a wide spectrum of professional responsibility issues can be identified and discussed. Obviously, an extensive treatment of a volatile issue like the contingent fee may detract from time spent on substantive course material, but after the major issues are at least identified the depth or length of the discussion should be subject to instructor discretion.

The bulk of torts casebooks do not stress or even identify the problems of professional responsibility inherent in the subject matter. Some casebooks do not purport to deal with any ethical or responsibility questions. A few casebooks have an excellent treatment of one area of professional responsibility but overlook other important ethical topics. And surprisingly, many of the ethical issues that are covered are tangential to the editor's purpose in using the materials.[40] In such instances the teacher has the burden of extracting the ethical implications of the material.

The presence of adequate course materials on professional responsibility should heighten the law teacher's awareness of the pervasiveness of ethical considerations in his specialties. At the least, good materials act as a reminder and a reinforcer of knowledge already gained. Thus, even if a teacher has a substantial background in professional responsibility, the presence of adequate materials will accentuate his class treatment of the pertinent issues. Similarly,

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33. *See* W. PROSSER, J. WADE & V. SCHWARTZ, *supra* note 18, at 551; M. SHAPO, *supra* note 25, at 526.

34. However, the treatment is characterized as a digression which gives the impression that the material on the contingent fee is not as important as the other materials. C. GREGORY AND H. KALVEN, *supra* note 38, at 494.

35. Gair v. Peck, 6 N.Y.2d 97, 160 N.E.2d 43, 188 N.Y.S.2d 491 (1959).

36. Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 363 P.2d 310, 14 Cal. Rptr. 294 (1961).

37. C. GREGORY AND H. KALVEN, *supra* note 28, at 499.

38. *Id.* at 500.

39. *Id.* at 500-02.

40. The use of surprise in ethical discussions should not be discounted. It may be that the coverage of issues of professional responsibility imbued in lead cases or other materials has as valid an educational purpose as materials specifically directed to legal ethics.

enlightened materials may compensate for an instructor's inadequacies or disinterest in professional responsibility. Casebook coverage of ethical and professional considerations assures that students will be exposed to the common ethical dilemmas of the profession even absent any class discussions on the topic.[41]

The recent torts casebook by Professors Henderson and Pearson[42] represents a drastic departure from the traditional mode of either slighting or ignoring the ethical aspects of tort law. Notes about various aspects of professional responsibility are interspersed throughout as part of an attempt to instill in the student an understanding of the legal processes by which torts disputes are resolved.[43] Also, a series of twenty-four problems permeate the materials. The problems contain a wide variety of factual situations and place the student in an assortment of professional roles. Many present important questions of legal ethics or professional responsibility.

Thus, the materials provide students with a two-pronged exposure to legal ethics. The notes supply textual discussions of torts related ethical considerations such as interviewing witnesses, negotiation and settlement, conflicts of interest, the partisan expert witness, and the lying client.[44] Meanwhile the problems often provide a factual seting wherein the academic treatment of the ethical dilemmas must be applied. For example, problems are presented which place the student in the role of advocate and confront him not only with substantive legal and procedural questions but also with confidential information from his client that may affect the duty to represent the client[45] and would be, if revealed, determinative of the outcome of the case.[46] Similarly, other problems pose negotiation dilemmas,[47] the ethical use of expert testimony,[48] and the lying client.[49]

The approach employed has the broader goal of providing students with a greater insight and knowledge of the actual machinations of the practice of law than can be gained from the reading of appellate decisions. This methodology has the advantage of exposing law students to the pragmatic, nontechnical concerns of the practitioner. Such exposure is important because the practice of law involves many pro-

41. Of course, this proposition assumes that the instructor will at least assign the professional responsibility materials for outside reading.

42. J. HENDERSON AND R. PEARSON, THE TORTS PROCESS (1975).

43. The editors have attempted to convey an understanding about the legal process of the tort law by dividing a substantial amount of textual material into five broad categories: Mechanisms for Resolving Disputes; the Law-Fact Distinction; the Lawyer's Professional Responsibility; Law and Behavior; and Law and Policy. *Id.* at preface.

44. *Id.* at 116, 202, 258, 352, and 408.

45. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102.

46. J. HENDERSON and R. PEARSON, *supra* note 42, at 401 (Problem 12).

47. *Id.* at 175 (Problem 4), 552 (Problem 16).

48. *Id.* at 340 (Problem 9).

49. *Id.* at 401 (Problem 12).

blems of human relations which typically have professional responsibility consequences. Often the non-legal, interpersonal aspects of a client's problem are more complex and difficult to resolve than are the legal aspects. And, at the least, the personal troubles of clients may be tightly interwoven with their legal problems, causing need for lawyers to be sensitive and responsive to both.[50]

Problem one of the Henderson and Pearson torts casebook illustrates the kind of difficult emotional turmoil with which an attorney may be confronted.[51] The problem demonstrates that often the initial question is whether to take the case. Is a lawyer justified in refusing a case because of an unpleasant factual situation? What place should subjective judgments about a client's reasons for wanting to take legal action play in the attorney's decision? Should a lawyer refuse representation if he believes he cannot control the client's actions during the course of the litigation? Also, when is a lawyer justified in revealing a confidentiality?[52] What place should the legal merit of the claim and the expectancy of a satisfactory result play in the attorney's decision to accept the case and in his adivce and counsel to the client? Although none of these questions are easily resolved, they form an integral part of the practice of law.

Early exposure to these kinds of dilemmas, as evinced by the Henderson and Pearson casebook, should provide an added dimension to legal education. Students, in addition to studying substantive law, will gain valuable insights into the societal role performed by the practicing lawyer and the professional responsibility quandries which are confronted by lawyers in fulfilling the role. The early insights and exposure obtained will east the transition from law school to practice and hopefully result in greater awareness of the practicing bar to issues of professional responsibility.[53]

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50. Torts cases particularly reflect the close relation between people's legal and personal problems. Torts clients are very likely to have been involved in a serious accident, sustained injuries, or experienced the death of a close relative.

51. The problem involves a possible statutory rape. The client is the victim's father who caught his daughter and her boyfriend having sexual relations. The father wishes to engage an attorney to explore the possibility of bringing criminal and civil actions against the boyfriend.

52. *See generally* M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975); B. MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973); ABA CANONS OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 4-101.

53. The use of the Henderson and Pearson materials may also result in a greater cognition by law instructors of the professional responsibility issues imbedded in tort law. For example, Professor William H. Theis of Louisiana State University has used the casebook and has reported to the author that the treatment of the ethical issues in the materials gave him a greater awareness of the ethical implications of torts and also engendered class discussion. By the same token, the materials place a greater burden on the instructor; he or she can no longer be content to intellectualize appellate decisions but must appreciate and understand the entire torts litigation process, including the ethical ramifications.

B. Contracts

Contract law has a different function than does torts in the first year law school curriculum. Contract principles permeate several areas of law while tort law is relatively self-contained. It serves as a foundation for not only more sophisticated commercial law courses but also for many diverse legal disciplines. Further, contract law is vital to the business and economic life of society.[54]

Contracts and torts have other rudimenntary differences. Contract law, besides being business oriented, is preventive law to a great extent. Practitioners draft agreements to set forth clearly the rights and duties of contracting parties and to avoid misunderstandings that can result in litigation.[55] Thus, the study of contracts is largely an endeavor to understand typical or normal transactions and situations. Conversely, tort law is concerned primarily with the resolution of certain kinds of disputes; its basic import is remedial. As a result torts concerns itself largely with abnormal happenings or events, in contrast to contract law's relative normalcy. The tort law's predeliction for extraordinary occurrences provides striking factual situations which make the subject inherently more exciting than the more mundane business transactions of contract law.

Because of contract law's place as a cornerstone of the law, its study should include fundamental concepts of professional responsibility. The probable repetition of ethical problems in later course work, assuming a complete utilization of the pervasive method, should not bar enthusiastic initial coverage. The aim of the pervasive approach in the first year contracts course should be to identify and alert students to typical ethical problems faced by lawyers when dealing with contractual relationships. Later course coverage should illustrate how general professional responsibility considerations arise in specific legal and factual settings. And specialized courses will raise ethical problems which may be peculiar to that branch of the law.[56]

Countryman and Kaufman's Commercial Law casebook[57] exemplifies a treatment of professional responsibility which builds upon fundamental concepts and at the same time considers narrower issues. For example, the traditional problem of fee splitting among lawyers is

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54. Professor John Jackson states in the introduction to his contracts casebook: "Indeed, almost every business transaction involves contract law, and in the history of contract law can be found the source of most of the major branches of government economic regulation (utilities regulation, common carrier regulation, anti-trust law, corporate securities regulation, consumer protection, etc.)" J. JACKSON, CONTRACT LAW IN MODERN SOCIETY (1973).

55. Of course, contracts is also a study of the failure to avoid misunderstanding and the resultant litigation.

56. *See* Weinstein, *supra* note 11, at 459-63, for examples of ethical problems common to practitioners in different areas of the law.

57. V. COUNTRYMAN AND A. KAUFMAN, COMMERCIAL LAW, CASES AND MATERIALS (1971).

discussed in the context of bankruptcy proceedings.[58] Thus, the law student with the previously gleaned knowledge that fee splitting is generally forbidden by the Code of Professional Responsibility[59] can observe the abuses which occur in one area of the law and gain a deeper understanding of the reasons for the prohibition. Similarly, the editors discuss the problems of multiple representation of clients by lawyers employed by financial lending institutions.[60] The focus on the difficulties frequently faced by the lender's attorney when confronted by a borrower without counsel is useful to demonstrate that dual representation is a continuing problem for practitioners and is not composed of simple resolutions.[61]

Insurance law is a subject area where professional responsibility matters pertaining to contracts may have specific application. Insurance is grounded on the contractual relationship of the insured and the insurer; many of the ethical issues confronting the insurance practitioner are derived from this association. For example, the transcending ethical problem of attorney conflicts of interest arising from the representation of multiple clients originates from the insurer's contractual obligation to provide counsel for claims against the insured. The attorney representing insured and insurer is likely to have clients with discordant interests. The common dual representation dilemmas faced by laywers engaged in insurance defense work define an explicit situation where the general problem of conflicts of interest has specific relevancy. The pervasive approach in insurance law courses should include specific application of the prevalent conflicts problem.[62] Ideally, the students will have gained a background in the area from a substantive first year course.[63]

Three of the current contracts casebooks appear to give considerable thought to issues of professional responsibility.[64] A fourth, edited by Professors Mueller and Rosett, emphasizes the diverse roles attorneys play as counsellors, draftsmen, negotiators, and advocates.[65]

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58. *Id.* at 168-69.

59. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-107.

60. V. COUNTRYMAN AND A. KAUFMAN, *supra* note 57, at 29.

61. *See* text accompanying note 27 *supra* and note 62 *infra*. Although it seems to be a simple proposition that lawyers should not represent clients with conflicting interests, in practice the temptations are many. For example, lawyers frequently represent both buyer and seller in real estate transactions, both for the convenience of the parties and for the obvious financial benefits.

62. *See* W. YOUNG, CASES AND MATERIALS ON THE LAW OF INSURANCE 417-18 (1971). *See also* Covington, *supra* note 4.

63. The issue is one that could receive initial coverage in both contracts and torts cases.

64. A. FARNSWORTH, W. YOUNG AND H. JONES, CASES AND MATERIALS ON CONTRACTS (2d ed. 1972); M. FREEDMAN, CASES AND MATERIALS ON CONTRACTS (1973); C. KNAPP, PROBLEMS IN CONTRACT LAW (1976).

65. A. MUELLER AND A. ROSETT, CONTRACT LAW AND ITS APPLICATION (1971). Three chapters in particular focus on attorney roles. They are the chapters on the Sale of Goods, Personal Service Contracts, and Construction Contracts.

This kind of pragmatic approach lends itself to topical discussions of professional responsibility. Even absent specific emphasis of ethical problems by the editors, the materials are conducive to pinpointing ethical questions and their discussion in class.

Professor Knapp's casebook employs the problem method to a substantial degree.[66] Role playing is by necessity a part of problem solving and, like the Mueller and Rosett approach, can easily form a structure for broaching discussions of professional responsibility. Particular attention is paid to various aspects of the attorney-client relationship.[67] As in torts, the ability of the lawyer to perform for his client is of major practical import. The attorney-client relationship is fraught with possible pitfalls which are not limited to any field of law. But since the basis of a client's employment and use of a lawyer is a contract, contract law is well suited for an investigation of the ethical difficulties posed by the relationship.

The Knapp casebook illustrates how ethical problems arising from the attorney-client contract can be included in the materials without deviating from or changing the book's organization. By using cases containing apparent ethical issues as opposed to notes following a series of cases which suggest or hypothesize ethical problems, students may more directly perceive the results of professional malfeasance. And, the use of primary cases containing ethical situations has the dual advantage of promoting the substantive learning of the course as well as the ethical awareness of the learners.

One of the principal cases, *In re Hyman*,[68] confronts the problems an attorney can encounter by overzealously pursuing a client's cause. The case is presented in a section concerned with contracts that are illegal in their formation or in their performance. The attorney in question threatened an adverse party with criminal action for refusing to settle an accident case with his client. The case identifies the general problem of overzealous representation of a client and the more particular ethical prohibition against the threatened use or actual use of criminal sanctions to pursue a civil claim.[69]

Another leading contracts casebook, I. MACNEIL, CASES AND MATERIALS ON CONTRACTS (1971), emphasizes the importance of planning in the various types of contractual relationships. Included is a subsection entitled "Roles of the Lawyer". There the functions of the lawyer in negotiating and planning, accurately ascertaining the facts, drafting, and perceiving the proper legal framework are considered. *Id.* at 574-87. Although the coverage is directed to the substantive legal role of the lawyer, the materials do provide a foundation for the discussion of ethical dilemmas confronted by practicing lawyers in contract negotiation, planning and drafting.

66. The Knapp casebook, *supra* note 64, thus has some similarity to the torts casebook by Henderson and Pearson, *supra* note 42.

67. For a look into the moral aspects of the attorney-client relationship *see* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

68. 226 App. Div. 468, 235 N.Y.S. 622 (1929).

69. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rules 7-101, 7-102, and 7-105.

The identification of the particular ethical issue is important because practicing attorneys often unwittingly become embroiled in criminal actions brought solely for the purpose of forcing payment of a debt without realizing the professional implications of their involvement. Often the client has started criminal action himself or is urging his lawyer to do so. The situation commonly occurs when a debtor tenders a worthless check to a creditor and is unable to make it good. A criminal action often follows with the creditor's attorney becoming involved as a private prosecutor in the initial stages of the prosecution. Typically no effort is made to hide the fact that the criminal action will be dropped on payment of the debt. Everyone, including the magistrate or justice of the peace, the debtor, the creditor, creditor's lawyer, and the district attorney know of the purpose of the criminal complaint, and it is likely that no one is aware of the ethical implications of the action. The identification of this kind of rather fundamental ethical premise through use of the pervasive method gives the professional responsibility question more meaning because of the context in which it is presented.

Bounougias v. Peters[70] provides a detailed look into the responsibilities of lawyers when dealing with clients. The case emphasizes the attorney's heightened fiduciary obligation to a client when contracting with the client for legal representation and the payment of the legal fee. Practitioners should avoid any appearance of impropriety or undue influence.[71] They have the burden of showing good faith and full disclosure of the meaning and effects of the employment fee agreement.[72] Again, the inclusion of the case in the materials, apart from the substantive value of the decision regarding the effect on fiduciary relationships on the enforceability of contracts, gives the reader some perception of the ethical responsibilities of attorney to client.

The Mueller and Rosett casebook strives to provide a familiarity with the nature of the attorney-client relationship and with the perils which can befall even a careful, well-intentioned practitioner.[73] Interwoven throughout a section on personal service contracts is a hypothetical contractual relationship between an attorney and a client.[74] Background information is given about the importance of the attorney employment agreement and the functions it serves. For instance, the editors state that the employment agreement should establish the authority of the lawyer to act as agent and attorney for his client, should describe the scope of the work performed, and should

70. 49 Ill. App. 2d 138, 198 N.E.2d 142 (1964).

71. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 9, Disciplinary Rule 9-101.

72. The Pennsylvania Supreme Court has recently passed a rule of court requiring all contingent fee agreements to be in writing and executed in duplicate. PA. R. CIV. P. 202.

73. A. MUELLER AND A. ROSETT, *supra* note 65, at 544.

74. *Id.* at 545.

set the basis for compensation.[75] The incompleteness of many agreements which breeds controversy and litigation between client and lawyer is illustrated by two appellate decisions.[76]

The continuing hypothetical integrated among reported cases in the Mueller and Rosett materials dispenses substantive legal knowledge while permitting the student to partake of the role of a lawyer representing a client and negotiating with the adverse party. The law student can thus appreciate the professional responsibility contingencies of dealing with the other side and with the client. The hypothetical, because of its continuing nature, realistically portrays the development of problems which can occur during an attorney's handling of a file. Students can perceive that the problems of lawyering are not isolated obstacles to be overcome, but are a continuum in most instances.

Cases and Materials on Contracts, edited by Freedman, presents a different but thoroughgoing approach to the pervasive method.[77] Many issues of professional responsibility are interspersed throughout the materials without specifically being identified. Through hypothetical problems, students are asked to play the part of an advocate, make a decision and justify it. Many of the selected cases also raise questions of ethical impropriety such as the unauthorized practice of law.[78]

This demonstrably subtle approach to legal ethics casts a larger burden on the instructor. It is likely that less enlightenment can be derived by law students, particularly beginning students, by solely reading the materials. Students with no background in the law will probably be unable to gain much insight into ethical problems unless a helpful class disucssion accompanies class materials. The contracts teacher must develop some sophistication in ethical matters to make this approach worthwhile.

The Freedman approach would be very useful in upper level courses. Its shortcoming is that it may not adequately identify fundamental issues of professional responsibility for beginning law students. But once students have gained an awareness of the concepts of professional responsibility, the subtle approach of Freedman lends itself to a more comprehensive analysis of complex ethical issues. It could provide the fulcrum for deeper understanding of the implications of legal ethics to the practice of law, if the instructors supply the needed impetus.[79]

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75. *Id.* at 546-47.

76. Shaw v. Leff, 253 Cal. App. 2d 437, 61 Cal. Rptr. 178 (1967); Moore v. Fellner, 50 Cal. 2d 330, 325 P.2d 857 (1958).

77. M. FREEDMAN, CASES AND MATERIALS ON CONTRACTS (1973).

78. *See* Gunn v. Washek, 405 Pa. 521, 176 A.2d 645 (1961).

79. For a specific look at Professor Freedman's views on teaching professional responsibility in contracts and on the utilization of his casebook *see* Freedman, *Professional Responsibility of the Civil Practitioner: Teaching Legal Ethics in the Contracts Course*, 41 U. COLO. L. REV. 343 (1969).

The Farnsworth, Young, and Jones contracts casebook exemplifies how materials on professional responsibility can be incorporated into the traditional casebook format.[80] Various ethical considerations are pointedly examined in their substantive context. In the section concerning adhesion contracts the problem of a lawyer including a provision in a contract which he knows is unenforceable is considered.[81] Also, the attorney's role as an advocate for consumers is discussed.[82] Elsewhere, the ethical implications of raising technical defenses such as the statute of frauds and statute of limitations[83] as well as different aspects of the attorney-client relationship are explored.[84]

The ethical materials are presented in discussion form under headings which pinpoint their professional responsibility nature. Some brief problems or questions are posed in connection with the materials, causing the reader to reflect on the preceding discussion. In contrast, many of the casebooks purporting to treat issues of professional responsibility do so by resort to the problem method.[85] The student is momentarily placed in the shoes of the advocate or counselor and faced with a hypothetical ethical dilemma.

The Farnsworth, Young, and Jones casebook illustrates that ethical considerations can be included in substantive course materials without resort to the problem approach. The professional responsibility coverage properly identifies many important ethical issues and serves as a foundation upon which the law teacher can base class discussions. Even for ethical topics not covered in the materials, the existing materials should give the law instructor a conception of how to handle other professional responsibility issues in their substantive context.

As with the torts casebooks, the bulk of the existing contracts casebooks provides little or no consideration of issues of professional responsibility. The law teacher who intends to make use of the pervasive approach of teaching legal ethics should be cognizant of the dearth of professional responsibility coverage. Class discussions which touch upon ethical problems presented by decisions set forth in casebooks are likely to be more beneficial if the materials themselves explore the ethical ramifications.[86]

IV. SEPARATE MATERIALS

As an alternative to sole reliance on the casebook treatment of ethical issues, the law teacher can either develop his own professional

80. A. FARNSWORTH, W. YOUNG AND H. JONES, *supra* note 64.
81. *Id.* at 367-68.
82. *Id.* at 379.
83. *Id.* at 26-28, 440-41.
84. *Id.* at 26-27 (the zeal of advocacy), 129-30 (perjury by client).
85. *E.g.*, J. HENDERSON AND R. PEARSON, *supra* note 42; C. KNAPP, *supra* note 64.
86. *But see* note 15 *supra*.

responsibility materials or possibly use a set of existing materials.[87] Of course, the former involves a sacrifice of time and effort that the average law teacher is unable or unwilling to make and the latter is not readily available. Although specially prepared professional responsibility materials do exist for some subject,[88] there are no compilations specifically for torts or contracts.[89]

An independent set of ethical materials must be capable of logical integration into the substantive portion of the course to be useful. The pervasive approach depends largely on the treatment of professional responsibility questions in context; this important advantage is lost if the ethical materials bear little relation to the rest of the course. Also, the separate materials should be succinct. For while their required presence adds credibility and importance to their standing in the course, too much quantity creates too great a burden for the students and may detract from the rest of the course.

V. CONCLUSION

Overall there exists a paucity of coverage of professional responsibility in torts and contracts casebooks. But the treatments that do exist reflect that different presentations of ethical materials can be effectively utilized by law teachers employing the pervasive approach to professional responsibility.

The problem for the law teacher of the pervasive method is how to incorporate the ethical materials into class discussion. The teacher must guard against becoming overly didactic in his treatment of professional responsibility. Whether the class discussions take the form of hypothetical problems or considerations of ethical situations derived from the substantive course materials, the use of professional responsibility materials should be aimed first at the identification and then the analysis of common problems faced by practicing attorneys. The justification of the pervasive method in first year courses such as torts

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87. A further alternative would be for the instructor to incorporate a series of ethical problems in the course such as those compiled by Professor Mathews. R. MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION (6th ed. 1974).

88. B. BITTKER, PROFESSIONAL RESPONSIBILITY AND FEDERAL TAX PRACTICE (1965); V. COUNTRYMAN, PROBLEMS OF PROFESSIONAL RESPONSIBILITY UNDER THE UNIFORM COMMERCIAL CODE (1969); R. COVINGTON, PROBLEMS OF PROFESSIONAL RESPONSIBILITY: INSURANCE (1961); T. FINMAN, CIVIL LITIGATION AND PROFESSIONAL RESPONSIBILITY (1966); M. SCHWARTZ, CASES AND MATERIALS ON PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE (1961); T. SMEDLEY, PROFESSIONAL RESPONSIBILITY PROBLEMS IN FAMILY LAW (1963); T. SMEDLEY, PROFESSIONAL RESPONSIBILITY PROBLEMS RELATING TO MORTGAGE TRANSACTIONS (1966).

89. *But see* M. BENFIELD, NEW APPROACHES IN THE LAW OF CONTRACTS (1970), for a compilation of materials concerning consumer contract law intended to supplement existing casebooks in contracts and commercial law. The materials contain inherent professional responsibility considerations derived from coverage of adhesion contracts, representations of the poor in consumer matters, and the promulgation of consumer legislation.

and contracts is that the early identification and emphasis of various aspects of the responsibility of lawyers to the legal system will serve to sensitize law students to their obligations and responsibilities as lawyers throughout their legal careers.