2016

Assignments with Intrinsic Lessons on Professionalism (Or, Teaching Students to Act Like Adults Without Sounding Like a Parent)

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There is little question that law schools ought to teach their students professionalism[1]–indeed, they are required to do so to maintain accreditation.[2] And there is little question that the required legal writing and research course is one of the places it ought to be taught.[3] But teaching students to adopt the norms of professional behavior—both in law school and after graduation—is a challenge to law faculties, and particularly to the experiential learning faculty who frequently are on the front lines of teaching professionalism.[4] While

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1. *See*, *e.g.*, Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. Dayton L. Rev. 57, 58-60 (2012).

2. *See* Am. Bar Ass'n, 2014-2015 Standards and Rules of Procedure for Approval of Law Schools, at 15 (2014) (Standard 302) ("A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: . . . (c) Exercise of proper professional and ethical responsibilities to clients and the legal system; and (d) Other professional skills needed for competent and ethical participation as a member of the legal profession.").

3. *See generally* Sophie Sparrow, *Practicing Civility in the Legal Writing Course: Helping Law Students Learn Professionalism*, 13 J. Legal Writing Inst. 113 (2007); Melissa H. Weresh, *Fostering a Respect for Our Students, Our Specialty, and the Legal Writing Profession: Introducing Ethics and Professionalism into the Legal Writing Curriculum*, 21 Touro L. Rev. 427 (2005); Beth D. Cohen, *Instilling an Appreciation of Legal Ethics and Professional Responsibility in First-Year Legal Research and Writing Courses*, 4 Perspectives: Teaching Legal Res. & Writing 5 (1995).

4. This article assumes a very broad definition of "professionalism." It includes all of the topics identified as "Norms of the Profession" in the section of the ABA's *Sourcebook on Legal Writing Programs* called "Content in First-Year Courses." Section of Legal Educ. & Admissions to the Bar, Am. Bar Ass'n, Sourcebook on Legal Writing Programs 35-43 (Eric B. Easton ed., 2d ed. 2006) (hereinafter ABA, Sourcebook). Specific norms of professionalism the *Sourcebook* identifies are competence, diligence and promptness, communication, meritorious claims, and candor toward the tribunal, as well as efficiency and time management,

there are many ways to teach students what professional and unprofessional behavior *looks like*, it is often comparatively difficult to persuade students to *exhibit* professional behavior as a matter of course. This article describes an effective method to help students learn about and internalize professional behavior: embedding professionalism topics in substantive assignments. While legal research and writing courses in particular provide many opportunities to use substantive assignments to also teach professionalism, the approach I describe would work in any class—doctrinal or experiential—that incorporates simulated exercises as part of the substantive work. And since all members of a law faculty share the responsibility of inculcating professionalism norms in students, it makes sense to incorporate professionalism topics in both doctrinal and experiential courses.

The first section of this article provides an overview of this teaching method and describes the inspiration for it. The second section reviews current methods of teaching professionalism topics and explains why those methods, while helpful in *exposing* students to professionalism norms, may be insufficient on their own to get students to *internalize* those norms. The third section describes in detail the approach I advocate, and discusses its benefits. The fourth section provides specific assignment ideas for faculty interested in adopting this approach, and the fifth section discusses two caveats.

I. The Main Idea: When It Comes to Professionalism, Students Learn Best What They Aren't Directly "Taught"

I have two primary goals in teaching professionalism to my students: First, I want them to learn what professional and unprofessional behavior looks like. Second, I want them to internalize the norms of professionalism; I want them to *want* to behave in a professional way. I have found that the second goal is much more difficult to achieve than the first. Students often know they should behave in a particular way—that they should meet deadlines, show up to meetings on time, produce clean and readable documents, acknowledge and make amends for their mistakes, treat other people with respect, etc.—but they don't realize how poorly it reflects on them when they fail to do those things, and therefore they sometimes do so anyway. In other words, it is comparatively easy to teach students what it *means* to demonstrate professional

compliance with deadlines and court rules, civility, and avoiding plagiarism. *Id*. the *Sourcebook* separately identifies "Teaching Self-Reliance or the Ability to Educate Oneself" as potential content for the first-year legal writing course, which is also a professionalism topic amenable to being taught using the method this article describes. *Id*. at 43-44. "Professionalism," as used in this article, refers to the behavior of both law students and practicing attorneys.

and unprofessional behavior.[5] It is much more difficult to get them routinely to make professional behavior part of who they are and how they practice law.[6]

Several years ago, I stumbled across a solution largely by accident when I developed a new persuasive writing assignment for my students. For pedagogical reasons, I wanted the assignment to involve discovery in civil litigation and require students to use analogical reasoning. I ended up with an assignment that did that and much more: It also instilled an important professionalism lesson in my students. After reading about an amendment to the Federal Rules of Evidence regarding the consequences of inadvertent disclosures of privileged documents,[7] I asked one of my 3L student assistants to create an assignment using the new Rule. Most of the cases that discuss inadvertent disclosures involve an oversight during document production.[8] I asked my assistant to develop a fact pattern that involved a misdirected email because I wanted to force my students to think creatively about how to draw analogies to cases that don't match up nicely with the fact pattern before them. My student assistant wrote a problem about an email error that occurred because the plaintiff's last name was similar to the last name of the defendants' attorney. The plaintiff's attorney meant to send a privileged document to her client, but the attorney's email program made an auto-fill error: It automatically filled in the name of the defendants' attorney instead of

5. In fact, many professionalism norms aren't unique to the legal world; students likely already know them, at some level. *See* Sparrow, *supra* note 3, at 115 ("Most students know that it is important to treat others with respect, work hard, disagree with grace, and listen attentively."). There are exceptions, of course, areas in which we have something new and substantive to teach students about what constitutes professional and unprofessional behavior in the practice of law. Some examples are (1) what the difference is between advocating zealously for one's client and engaging in unnecessarily antagonistic behavior, (2) where the line is between permissible puffery or spin and impermissible lying, whether to a court or opposing counsel, and (3) how to find and follow court rules. Most other professionalism topics typically covered in a first-year legal analysis and writing course (as opposed to an upper-level course that delves deeply into the Model Rules of Professional Conduct) involve incorporating standards for behavior that apply in non-legal contexts and making them specific to what a lawyer does.

6. This problem isn't unique to law students. It affects practicing lawyers—and other professionals—as well. The author of one article exploring the difference between what lawyers know about professional behavior and how they actually act explains:

> Rather than viewing lawyer misconduct as a reflection of an offending lawyer's failure to learn what was expected, the legal profession must begin to understand that the psychological disposition of lawyers—indeed, that of any actor—may be largely irrelevant to whether that lawyer adheres to or violates a code of professional conduct. Thus, the legal profession . . . must grasp the fundamental precept that, for humans, knowing what to do and doing what one knows to do are not the same things.

Burnele V. Powell, *Creating Space for Lawyers to Be Ethical: Driving Towards an Ethic of Transparency*, 34 Hofstra L. Rev. 1093, 1101 (2006) (citations omitted).

7. Fed. R. Evid. 502(b).

8. *See*, *e.g.*, Gloucester Twp. Hous. Auth. v. Franklin Square Assocs., 38 F.Supp.3d 492 (D.N.J.2014); Bd. of Tr., Sheet Metal Workers' Nat'l Pension Fund v. Palladium Equity Partners, LLC, 722 F.Supp.2d 845 (E.D. Mich. 2010).

the plaintiff. The plaintiff's attorney didn't realize the mistake before hitting "send."[9] The assignment required half of my class to represent the plaintiff and draft a motion for a protective order that asked the court to hold that the privilege had not been waived by the inadvertent disclosure. The other half of my class represented the defendants, and drafted an opposition to the motion for a protective order.

The most surprising thing was this: After finishing the assignment, multiple students told me that they had become much more careful about how they used email. They routinely double-checked the "to" line before hitting "send," they waited until they had finished drafting and editing the email before populating the "to" line at all, and they generally were more thoughtful in how they used email. I had, for the previous few years, been incorporating a lesson on appropriate use of email into my syllabus, a lesson that encouraged students to do those very things. But I had never had students come up to me after that lesson and tell me that they were much more careful about email use as a result of that lecture and class discussion. So why was that the result of an assignment that *wasn't* directed toward admonishing them to be careful with email?

I realized that this approach—building professionalism lessons into research, analysis, and writing assignments *indirectly*—could help achieve the goal of instilling professional values in my students across a wide spectrum of professionalism topics. In Section III below, I discuss several thoughts about why this approach to stimulating behavioral changes works. Because the shortcomings of many current approaches to instilling professionalism help explain why, I briefly discuss those current approaches first.

II. Barriers to Teaching Professionalism Using Current Approaches

There are several barriers to conveying professionalism norms to students. Many writers have identified the already-crowded syllabus as an impediment to covering professionalism topics in a satisfying way in first-year classes.[10] Although insufficient time may make it challenging just to describe professional attorney norms, additional barriers make it even harder to help students internalize those norms. First, there is the danger of sounding condescending. I suspect that this is highly dependent on the individual instructor; some professors, by dint of their personalities, can discuss professionalism in a way that doesn't make them sound like scolding parents. But many of us can't do that. Then there are barriers to instilling professionalism that rest more with the student than with the professor. When confronted with a description of unprofessional behavior, many students undoubtedly think,

9. Michael Cedillos, one of my former student assistants, deserves the credit for creating what has proved to be a terrific assignment.

10. *See*, *e.g.*, Kristin E. Murray, *Legal Writing Missteps: Ethics and Professionalism in the First-Year Legal Research and Writing Classroom*, 20 Perspectives 134, 135 (2012); Julie A. Oseid, *It Happened to Me: Sharing Personal Value Dilemmas to Teach Professionalism and Ethics*, 12 J. Legal Writing Inst. 105, 110 (2006); Weresh, *supra* note 3, at 429.

"Well, *I* would never do that." And many students undoubtedly think "Sure, I might do that sometimes, but that behavior isn't *that* bad."[11] When teaching professionalism, my objective is to get students to both (1) believe that they could make a professionalism "error" if they aren't cautious and thoughtful about their behavior, and (2)understand that such an error could be very damaging, whether to their client, to themselves, or both. Traditional methods of covering professionalism topics are unsatisfactory at achieving both parts of that objective—at getting students to internalize norms of professionalism.

Faculty members use a variety of methods to cover professionalism topics.[12] First, of course, faculty have available to them those traditional teaching methods that professors routinely use to teach other topics—methods such as reading assignments, lecture, class discussion, and written exercises addressing the topic directly.[13] While those methods might help students understand what professional behavior *is*, they don't address the more difficult goal of inculcating professional norms in students; they inform students about what professional behavior looks like, but they often don't persuade students to adopt that behavior.

Other methods are more specific to teaching professionalism. Some professors assign a professionalism grade or enable students to earn and lose professionalism points throughout the course.[14] Many incorporate professionalism requirements into administrative aspects of assignments—rejecting submissions that don't comply with formatting guidelines, requiring a certificate of compliance, imposing negative consequences for late "filings," etc.[15] My concern with these approaches is that the rewards for engaging in professional behavior (or the negative consequences for failing to do so) are confined to the course itself; they may not actually persuade students to engage in professional behavior once they are no longer in the class.[16]

11. *See*, *e.g.*, Sparrow, *supra* note 3, at 115 (Students "do not always realize how their actions are perceived by, or influence, others. . . . They may not realize how important being civil is for them, for their clients, and for the legal profession.").

12. For a thorough review of the many ways legal writing faculty teach professionalism, *see* Kehner & Robinson, *supra* note 1, at 86-92.

13. *See* Edwin Fruehwald, *Legal Writing, Professionalism, and Legal Ethics* 1-5 (Hofstra Univ. Legal Studies Research Paper Series No. 08-20, 2008) (hereinafter *Legal Writing, Professionalism*); Ben Bratman, *Toward a Deeper Understanding of Professionalism: Learning to Write and Writing to Learn During the First Two Weeks of Law School*, 32 J. Legal Prof. 115, 122 (2008).

14. *See* Kehner & Robinson, *supra* note 1, at 87; Sparrow, *supra* note 3, at 140.

15. *See* Kehner & Robinson, *supra* note 1, at 87; Fruehwald, *Legal Writing, Professionalism*, *supra* note 13, at 5-7; ABA, Sourcebook, *supra* note 4, at 39-40.

16. *See* Scott Fruehwald, How to Become an Expert Law Teacher by Understanding the Neurobiology of Learning 22 (July 23, 2012) (unpublished manuscript) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115768 ("[S]tudents learn better when they have learning goals, rather than goals of just getting through the class or a good grade."). Of course, assigning grades for professionalism in such a way that leads to, for example, civility and respectful discourse in the class might lead at least some students to recognize that such behavior makes engaging with others more pleasant and productive. Those students might

Faculty also enjoy sharing (and students enjoy learning about) real-world "horror stories" of attorney behavior gone awry.[17] Depending on how significant the professionalism breach contained in the scenario is, this method may contribute to the "*I* would never do *that*" barrier. Those true tales of outrageous attorney behavior are doubtless fun to learn about, but the behavior described is often so atrocious that students are correct in thinking they wouldn't do that. (Any student who would is probably beyond the ability of law school faculty to help.) Two recent examples of attorney professionalism lapses—reported on legal blogs[18]—demonstrate this point. One involved an attorney who told an employee for a vendor that the employee "was nothing but a slut who worked for a copy service" and uttered a string of expletives when he didn't receive the documents he wanted as quickly as he would have liked.[19] The other involved email correspondence between opposing counsel where one attorney repeatedly wrote things like "Fuck with me and you will have a huge asshole."[20] Certainly there are less extreme stories that are amenable to use as "don't let this happen to you" cautionary tales, and faculty frequently make students aware of those real-world incidents.[21] However, these stories will be more effective at changing students' current and future behavior if they can be incorporated into the course in a way that forces students to do more than just hear about and discuss the incident as part of a stand-alone professionalism lesson.

In fact, all of the traditional approaches described above have value, but for many students they may not be enough to get them to internalize norms of professionalism. Students (and lawyers, and even law professors) must often battle procrastination, exhaustion, laziness, stress, multiple work and non-work obligations, and so many other things that can make it all too easy to suffer a professionalism lapse. Teaching students to resist the pull of those things as a matter of course requires more than simply telling them about the negative consequences of succumbing to such a lapse. It requires giving students the

take those lessons with them into practice even where the tangible reward of a higher grade is no longer present. But I am not convinced that that effect is a big one.

17. *See* Murray, *supra* note 10, at 136; Oseid, *supra* note 10; Mary Whisner, *When Judges Scold Lawyers*, 96 Law Libr. J. 557, 557 (2004) ("From time to time, professors have asked me to find opinions in which judges chide attorneys for sloppy drafting or research. Professors who teach legal writing and research may hope that a vivid example or two will get the students' attention and motivate them to develop better skills.").

18. Staci Zaretsky, *Benchslap of the Day: Rude, Crude, and a Bad Attitude,* Above the Law (May 5, 2012, 3:13 PM), http://abovethelaw.com/2012/05/benchslap-of-the-day-rude-crude-and-a-bad-attitude/; Elie Mystal, *'[Bleep] With Me and You Will Have a Huge [Bleep]hole,' Warns Biglaw Partner*, Above the Law (May 16, 2012, 5:58 PM), http://abovethelaw.com/2012/05/bleep-with-me-and-you-will-have-a-huge-bleephole-warns-biglaw-partner/.

19. Report and Order Imposing Sanctions at 4-6, In re Ziman, Nos. 10-1394, 10-2329, 11-0130 (Sup. Ct. Ariz. Apr. 30, 2012).

20. Plaintiff's Motion for Sanctions, Buxton Arlington Pet, LLC v. Pete and Mac's Arlington, LLC, No. 348-256203-11 (D. Tex. Mar. 2, 2012).

21. Several examples are discussed in Section IV, *supra*.

opportunity and reason to discover, on their own, internal motivation for engaging in professional behavior in spite of the many potential roadblocks.

The teaching approach I describe here is intended as a supplement to, and not a replacement for, existing approaches to teaching professionalism. It is intended to address all of the barriers to teaching professionalism, but particularly the problem of actually *inculcating* professional behavior in law students and future attorneys.

III. Another Way

I advocate using the subject of some assignments themselves to demonstrate, indirectly, what professionalism is and why it matters.[22] In other words, in creating traditional memo and motion assignments, choose topics that demonstrate, through their substance, what professional and unprofessional behaviors look like and what the consequences are of demonstrating those behaviors. Students who spend weeks analyzing, researching, and writing about whether a lapse in professionalism should incur negative consequences are likely to internalize the message that they should avoid a similar lapse themselves. They are then likely to internalize that message regardless of whether they ultimately conclude that no formal sanction would result from the unprofessional behavior.

Students are likely to remember and internalize lessons on professionalism that are part of a regular assignment that is principally designed to teach legal analysis and writing. This is so for three primary reasons. First, students teach themselves the professionalism lesson. They discover the key lessons on their own, and therefore learn and internalize the lessons in a way that enhances the likelihood of their using it in different situations later.[23] Second, because the professionalism message isn't directed at students from an authority figure, there is no danger of students perceiving the message as condescending. As a result they are likely to be more open to it. And third, in the course of preparing their assignment—researching, analyzing, and writing it, and perhaps engaging in oral argument as well—students must grapple with the implications of the unprofessional behavior in depth, usually over a period of several weeks. That lengthy treatment aids in cementing the professionalism lesson because it requires students to engage with the material in several different ways and

22. One recent survey of trends in professionalism education in law schools found that at least a handful of legal writing faculty already use this approach. *See* Kehner & Robinson, *supra* note 1, at 90-91 n. 136.

23. This is an example of discovery learning theory at work. Discovery learning theory posits that "students learn concepts and skills more deeply when the students have discovered them for themselves than when the concepts and skills are the subjects of lecture or reading." Terri L. Enns & Monte Smith, *Take a (Cognitive) Load Off: Creating Space to Allow First-Year Legal Writing Students to Focus on Analytical and Writing Processes* 9 (Ohio State Pub. Law Working Paper No. 242, 2014), http://dx.doi.org/10.2139/ssrn.2430741. For a helpful discussion of how discovery learning works generally, *see id*. at 20-24.

calls on students to use many different kinds of skills.[24] Those characteristics require increased student effort—what the learning literature calls "desirable difficulties."[25] It is that effort that helps students understand the material more deeply and in ways that enhance their ability to apply it in different contexts.[26] Such in-depth treatment and active learning also bolster the impact of the message because the students engage in self-discovery of the key principles.[27] That type of learning is somewhat analogous to the learning that occurs through the Socratic method used by a skilled faculty member.

I suspect that the professionalism lesson is even more likely to take hold when the assignment is a persuasive one, as opposed to a predictive one like an advice memorandum to a client. Most legal writing professors have observed the extent to which students become deeply engaged in assignments that pit students against one another as advocates for a client (even a hypothetical one). When forced to argue for a particular position, many students do their best work. They mine the record for the minutest details to use in support of their position and think creatively about the facts and the law in an attempt to outwit the other side.[28]

This approach has multiple additional and complementary benefits beyond merely cementing the professionalism lesson in students' minds. First, students are likely to produce, on their own, ideas on how to avoid the professionalism lapses the assignment requires them to grapple with. For example, in the misdirected email assignment described above, half of my students were seeking to establish that the attorney-client privilege had been waived by opposing counsel's autofill error. Most of the students representing the defendants argued that plaintiff's counsel should have taken the basic precaution of either disabling the autofill function or removing the opposing counsel's address from her address book and entering it manually when necessary instead. Most assignments that address professionalism problems are likely to lead students to suggest, as part of their analysis or argument, those things the attorney

24. Writing assignments like those that form the core of most first-year legal practice courses are particularly effective in cementing learning objectives. *See*, *e.g.*, Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 Legal Writing 1, 21-22 (2000).

25. Peter C. Brown, Henry L. Roediger III & Mark A. McDaniel, Making it Stick: The Science of Successful Learning 68 (2014) (citing Robert A. Bjork & Elizabeth L. Bjork, *A New Theory of Disuse and an Old Theory of Stimulus Fluctuation*, *in* 2 From Learning Processes to Cognitive Processes: Essays in honor of William K. Estes 35-37 (Alice F. Healy, Stephen M. Kosslyn, & Richard M. Shiffrin eds., 1992)).

26. *Id.* at 72-79.

27. *See id.* at 94 (describing "generative learning"—"the process of trying to solve a problem without the benefit of having been taught how"—as an effective learning technique).

28. Educators in other fields have noticed a similar effect. For example, Nobel Prize-winning physicist Carl Wieman discovered that his students demonstrated significant improvements in learning physics when he had them debate each other about physics concepts. *See* Valerie Strauss, *Why Arguing is the Best Way to Learn*, Wash. Post. (Jan. 11, 2013), http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/01/11/why-arguing-is-the-best-way-to-learn/.

should have done or could have done to avoid the lapse. An assignment about a late court filing might lead students to delve into effective ways to keep track of deadlines. An assignment about inappropriate social media postings might lead students to reconsider whether even stringent privacy settings protect against disclosure of personal messages to the world. As discussed above, law students and professionals both face multiple stressors that can lead to a lapse in professional behavior. Giving students the opportunity to produce, on their own, ideas for how head off those lapses before those stressors arise makes it more likely that students will actually take those steps *ahead of time*—when they are likely to be most effective. And discovery learning theory suggests that, having produced those ideas on their own, students are more likely to incorporate them into their own professional lives.[29] They have learned the lesson at a deeper level; they don't just *know* the information, they *use* it.

Designing an entire research and writing assignment around a professionalism issue—instead of, for example, creating just a brief hypothetical or distributing a news article about a real-world error—also allows for the creation of a record rich in factual details. Those details make the problem real for students and enable the professor to emphasize any points he chooses. As just one example, imagine that a professor wanted to make students aware of the resources available to bar members experiencing significant stress or other mental health issues. The existence of such resources could be written into the problem as a potentially relevant fact. Consider an attorney disciplinary proceeding arising out of the attorney's verbally abusive behavior, similar to that described above (but with less egregious facts, to help students identify with the attorney more readily). The record could include a hearing transcript in which the attorney testifies that she has been under tremendous personal stress—perhaps from a divorce, substance abuse, or financial difficulties—and that her outburst was the result of that stress. The record might include evidence that the attorney had been urged by a colleague to use her bar association's hotline to obtain a mental health referral.[30] The record could further show that the attorney either accepted or rejected her colleague's advice, depending on which fact would make the problem appropriately balanced. Students would actually use that piece of evidence in their analysis—either to support their position or as a negative fact they need to address. Inserting that small detail into the record lets students know that such bar association resources exist. And having

29. For more about discovery learning theory, *see supra* note 25.

30. For example, the State Bar of Michigan has a Lawyers and Judges Assistance Program, which exists to "support Michigan's legal professionals to optimize their general wellness." *Lawyers and Judges Assistance Program*, State Bar Mich., http://www.michbar.org/generalinfo/ljap/ (last visited Nov. 13, 2015). The program has a hotline that provides callers with "a free, confidential consultation with a trained mental health professional," and also runs workshops for legal employers about "stress management, substance abuse issues, or any identified topic which relates to overall coping/mental health." *Lawyers and Judges Assistance Program Frequently Asked Questions*, State Bar Mich., http://www.michbar.org/generalinfo/ljap/faq (last visited Nov. 13, 2015).

written about that resource, students are more likely to remember it should they ever need to rely on it.[31]

The ability to use the record to add detail also makes it possible to incorporate positive examples of professional behavior, not just negative examples of unprofessional behavior. For example, in the real incident described above about abusive emails from an attorney to opposing counsel, the attorney on the receiving end refused to engage in heated rhetoric himself. Instead, he consistently responded to the increasingly vulgar emails with messages that were restrained and professional, yet still firm, and he ultimately simply informed the sender that he would seek sanctions. Including a full email string in the record shows students what professional behavior looks like—and, particularly, what a professional response to unprofessional behavior looks like. Including the email string also enables students to see how professional behavior can actually work to the attorney's advantage. In a motion for sanctions, for example, the recipient attorney's restrained response is likely to bolster his credibility without that attorney having to do anything other than place the email string into the record.

And finally, this approach naturally overcomes the barriers to teaching professionalism described in Section II above. First, it doesn't require adding anything new to a crowded syllabus, and it doesn't require faculty members to create more assignments than they otherwise would. Faculty who write their own assignments can simply choose a professionalism topic as the centerpiece of one or more problems they already create and assign. Second, there is no danger of sounding condescending because the professor doesn't tell students how to behave (or how not to behave). The consequences of the behavior aren't told to the students; students discover those consequences on their own. They are the ones either analyzing the potential consequences for a client (in a predictive memo assignment) or attempting to impose or resist the potential consequences for the behavior (in a persuasive writing assignment). Third, the deeper they get into the problem, the more students can start to envision themselves engaging in the behavior. This is especially true if the individual who made the error is someone with whom students can easily identify. For this reason, the ideal protagonist for assignments is someone who is sympathetic but sloppy, stressed out, momentarily thoughtless, etc. And finally, this approach addresses the problem of students thinking "That behavior isn't really *that* bad so it's OK if I engage in it sometimes." In creating the fact scenario it is easy to show how seemingly minor errors can blow up in spectacular ways—whether it is the email sent a bit too hastily, the habitual tardiness that chips away at the

31. For an illustration of how writing about a topic leads to greater recall and use of that information, s*ee* Brown et al., *supra* note 25, at 89 (describing an experiment in which students demonstrated deeper understanding and retention of material when they were required to "generate[] their own written summaries of the key ideas, for example restating concepts in their own words and elaborating on the concepts by generating examples of them.")

employee's reputation over time, or the one additional drink at a work event that leads to an embarrassing display.[32]

IV. Specific Ideas for Assignments

There is almost no limit to professionalism topics that are amenable to being taught using this approach. Most professors already have a list of unprofessional student behaviors that raise concern about how those students will survive in the often-unforgiving work world. Professors also have lists of student behaviors that simply drive them batty. Those behaviors are the perfect place to begin when thinking about what topic to build an assignment around. Another excellent source of ideas is those real-world "horror stories" discussed earlier. It is often necessary to tone down the facts so that they are less egregious—both to make the problem balanced and to enable students to identify with the attorney in the problem.

Three categories of topics for assignments are amenable to this approach: (1) assignments about an attorney's error that arises during the course of client representation, (2) assignments where the substance of the lawsuit itself is about an attorney's behavior, and (3) assignments where the substance of the lawsuit is about unprofessional behavior that can arise in any context, not just among attorneys.

A. Attorney Errors During Client Representation

The first category is of disputes that arise in the context of any kind of lawsuit, and are handled by the court as part of that larger lawsuit. Assignments in this category frequently focus on attorney carelessness, but can also involve intentional conduct by an attorney as described in the last example below. Topics in this category usually work well for short motions and memos, and are typically amenable to being incorporated into a larger case file on just about any substantive topic. Some professors prefer to use a single lawsuit throughout the entire semester and tie each writing assignment, oral argument, settlement negotiation, etc., to some aspect of that same lawsuit. The problems described below can be easily integrated into a lawsuit on any subject. Here are some examples:

- The problem that initially got me thinking about this approach to teaching professionalism: a motion for a protective order that seeks to avoid waiver of privilege for an inadvertently disclosed document. Inadvertent disclosure

32. In fact, as I was thinking about this topic, the Michigan press reported a terrific example of how a seemingly minor issue with alcohol can lead to negative employment consequences. The president of a local university got into a heated argument with an alumnus at an alumni event, and she later blamed her overly aggressive behavior on having had a few drinks on an empty stomach. The result was a blistering written reprimand from the university's Board of Regents and considerable embarrassment for the president when the story hit the media. *See* David Jesse, *EMU Board Puts President on Notice After Argument at a Bar*, Detroit Free Press (July 11, 2012), http://www.freep.com/apps/pbcs.dll/article?AID=20122071104l4.

can arise through such circumstances as email errors, insufficient discovery procedures, or careless conversations between attorneys.[33]

- A dispute about whether a party can show excusable neglect for a missed filing deadline. In *Pioneer Inv. Services Co. v. Brunswick Associates*,[34] the United States Supreme Court addressed the question of what constitutes excusable neglect with respect to a missed deadline for filing a proof of claim in bankruptcy court. Many federal and state courts have adopted the *Pioneer Inv. Services* approach to analyze claims of excusable neglect for missed filings in other circumstances. Some examples include late-filed appeals[35] and default judgments that resulted from other missed deadlines during the litigation.[36]
- A response to an order to show cause why the court should not impose sanctions for an attorney's misstatement to the court. Such a misstatement can arise through such circumstances as an attorney's failure to properly supervise a junior attorney or paralegal, an attorney's failure to communicate effectively with her client, or sloppy record keeping. This issue arose recently in a high-profile lawsuit in Florida brought against a bank that had failed to detect a Ponzi scheme run by one of its clients.[37] In that case, the law firm representing the bank had told the court during trial that a particular document about the bank's anti-money laundering protocols did not exist. The law firm later discovered that the document did, in fact, exist, and that one of the attorneys representing the bank had received the document by email from her client well before the trial but did not review it. The attorneys also failed to search for the document in their discovery files after the document's existence became an issue at trial. The judge issued sanctions against the law firm[38] and, while she didn't issue

33. The legal blog *Above the Law* has published several stories illustrating how indiscreet attorney discussions can lead to at least embarrassment, if not disclosure of confidential information. The Acela train seems to be a particularly popular venue for attorneys to reveal confidential information during loud cellphone conversations. *See* David Lat, *Acela Bob, Meet Acela Jim: Kelley Drye Managing Partner Conducts Confidential Conversation on Packed Train*, Above the Law (Jan 12, 2011, 11:29 AM), http://abovethelaw.com/2011/01/acela-bob-meet-acela-jim-kelley-drye-managing-partner-conducts-confidential-conversation-on-packed-train/; David Lat, *A Funny Thing Happened on the Way to New York: Pillsbury Admits Gaffe—and Looming Lawyer Layoffs*, Above the Law (Feb. 19, 2009, 7:07 PM), http://abovethelaw.com/2009/02/a-funny-thing-happened-on-the-way-to-new-yorkpillsbury-admits-gaffe----and-looming-lawyer-layoffs/. The facts of those stories could easily be reworked into an assignment about thoughtlessly revealing client confidences.

34. 507 U.S. 380 (1993).

35. *See*, *e.g.*, *Williams v. KFC Nat'l Mgmt. Co.*, 391 F.3d 411 (2d Cir. 2004); Halicki v. Louisiana Casino Cruises, Inc., 151 F.3d 465 (5th Cir. 1998).

36. *See*, *e.g.*, Midwest Emp'rs Cas. Co. v. Williams, 161 F.3d 877 (5th Cir. 1998) (missing the deadline for motion for a new trial).

37. Coquina Invs. v. Rothstein, No. 10-60786-Civ., 2012 WL 3202273 (S.D. Fla. Aug. 3, 2012).

38. *Id.* at *13-17.

sanctions against individual attorneys, she did describe the conduct of the attorneys—whose names appear multiple times in the order—as negligent.[39]

- A dispute about a party's request for sanctions for the other side's unprofessional conduct. Several situations have been reported in the news lately, situations that involve attorney rudeness, offensive conduct, and even abusive conduct. If the facts of the news story are egregious, it is important to tone them down enough that students can imagine themselves falling prey to one of these unprofessional errors if they aren't cautious.

One benefit of many of these kinds of problems is that they are especially good at showing how seemingly minor errors can cause significant problems for a client's case. One example that received a lot of press coverage[40] involved a prominent law firm missing a filing deadline by one minute. The attorneys had waited until forty-five minutes before the deadline to dispatch the courier to the courthouse, and underestimated how much traffic the courier would encounter.[41] As a result, the law firm's client missed out on the opportunity to recover nearly $1 million in attorney's fees from the opposing party.[42]

B. Lawsuits About an Attorney's Misbehavior

In contrast to the preceding category, this category involves problems where the underlying dispute itself is about the attorney's behavior. The primary examples are bar discipline cases and attorney malpractice cases. For ideas about factual situations around which to write a problem, read bar discipline reports[43] and research attorney malpractice cases. Specific ideas include disputes over (1) failure to communicate with one's client in a timely manner, and (2) failure to meet deadlines in the client's case because of procrastination.

C. Lawsuits About Unprofessional Behavior in Work and Educational Environments Generally

Finally, there is no need no confine assignments to just those that deal with attorney behavior. Many of the professionalism norms we want to instill in our students are norms of behavior that apply to all individuals in the workforce, or at least to those in professional fields. Lawsuits that challenge employment decisions often involve facts about employee behavior and provide great opportunities to incorporate just about any kind of professionalism lesson. To make such problems balanced, mix in some evidence of wrongful conduct by

39. *Id*. at *17.

40. *See*, *e.g.*, Peter Lattman, *A Litigator's Nightmare: Late FilingvCosts Client $1 Million*, Wall St. J.vLaw Blog (Jan. 8,v2008, 9:19 AM), http://blogs.wsj.com/law/2008/01/08/a-litigators-worst-nightmare-late-filing-costs-client-1-million/.

41. *See* Toshiba Am. Info. Sys., Inc. v. N.Eng. Tech. Inc., No. SACV 05-00955-CJC(MGLx), 2007 WL 8089815 (C.D. Cal. Nov. 14, 2007).

42. *See id*.

43. *See*, *e.g.*, *Orders of Discipline and Disability*, Mich. Bar J., Nov. 2015, at 66-69.

the employer with some evidence of problematic employee behavior. Here are some examples:

- Discrimination in hiring: The record might suggest some evidence of discrimination, but also evidence that, for example, the employer relied in part on posts the applicant made on a social networking site that reflected poorly on her.
- Wrongful termination: As with the discrimination in hiring example, an assignment that involves an allegation of wrongful termination (or failure to promote) could include some evidence suggesting fault by the employer, but also evidence that the employee exhibited less-than-professional behavior. Examples of such behavior could include poor judgment, excessive tardiness, rudeness to subordinates, or whatever other negative behavior the professor wants to highlight. The key, as always, is to draft facts that are realistic instead of over the top, to emphasize how such things as merely arriving a bit late for meetings on a routine basis and taking too long to respond to emails reflect poorly on an employee's reputation and work ethic, and can lead to adverse employment consequences.
- Defamation resulting from lukewarm reference: The facts for a defamation case could show that the plaintiff was a very talented employee, but one who demonstrated some of the professionalism failures identified in the wrongful termination example above. Alternatively, a problem could be drafted around a professor's reference for a former student, to emphasize the importance of demonstrating professional behavior in the educational context.

V. Caveats

Faculty considering adopting the method of teaching professionalism described in this article should be aware of two potential caveats, neither of which presents insurmountable obstacles. First, it is possible that the lesson will be more successful if students are required to make a persuasive argument on behalf of their client, as opposed to merely predicting what a court is likely to do. Second, some professionalism topics will still need to be covered using only the traditional methods described in Section II above.

The first caveat—that the professionalism lesson is more likely to "stick" if embedded in a persuasive rather than predictive assignment—is based mostly on my own intuition. I do think that students will realize many of the benefits identified in Section III above even in the context of predictive assignments. Students must still grapple with the implications of the unprofessional behavior, and possibly deliver bad news to their client regarding the consequences of that behavior. Many of the touchstones for successful learning—active learning and self-discovery of the key principles, learning material in the context in which students are likely to use it later on, immersion in the topic to bolster the likelihood of transference to permanent memory—apply with equal force to predictive assignments as they do to persuasive assignments.

But students tend to become more invested in assignments when they are given a side to argue. With respect to persuasive writing assignments, my experience is that students internalize the professionalism lesson regardless of whether they are assigned to represent the party challenging the behavior or the party defending it (or seeking to minimize the impact of the behavior). The students assigned to challenge the behavior nearly always take the opportunity to think creatively about all the ways in which the behavior is troublesome and why the consequences for the behavior should be significant. The students on the other side are faced with the stark realization that defending the behavior or minimizing the consequences is no easy task, and have to grapple with all of the arguments the other side raises. As a result, when drafting a problem, consider whether the lessons you want to instill would work better as a persuasive writing assignment instead of a predictive one.

One other drawback is that this approach can't cover every professionalism topic one would want to cover in a single course. That is partly because of the tedium that would result if every assignment were about attorneys behaving badly. And even if all of the assignments did focus on professionalism topics, the first-year syllabus still doesn't contain room to squeeze every potential lesson into the facts of the assignments. This drawback is one reason this approach to teaching professionalism topics works best as a supplement to other approaches, instead of a complete replacement for them.

While this approach can't be used to cover every professionalism topic, it might have a more extensive reach than it appears to have at first. This is because, in my experience, students internalize a message that is broader than the specific one contained in the assignment. For example, in the misdirected email assignment, the inadvertent disclosure of privileged information was caused by a similarity between the last names of the plaintiff and opposing counsel, which resulted in the email program auto-filling in the wrong name. Despite this fairly unusual scenario, students told me that after spending several weeks on that assignment, they had become much more careful about all aspects of using email. They avoided filling in the recipients' names until the email was ready to go, made sure they were only sending or forwarding emails to people who absolutely needed to receive them, and engaged in similar hallmarks of professional email behavior.

VI. Conclusion

Even the most diligent law students can fall prey to lapses in professionalism. Getting law students to want to act in a professional way in all of their interactions—with professors, with peers, with colleagues, and with supervisors and supervisees—is a continuing challenge for law faculties, but one that is surmountable given the right tools. The benefits of persuading them to do so inure not just to the law students themselves, but to the legal profession as a whole. Incorporating professionalism topics into substantive assignments is one effective way to achieve that goal.