Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education

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In recent years, clinical teaching methods have played an increasingly significant role in the education of this nation's lawyers. With the consequential accumulation of data pertaining to various institutional experiences, it is now worthwhile to explore, from a clinician's perspective, some of the psychodynamics of this educational process as it appears to affect a student's future professional behavior. In addition to such an examination, this article will delineate methods for dealing with the stresses of a lawyer's professional life, suggesting ways in which the attorney may satisfy his goals as well as those of his client. It is hoped that these suggestions will be useful to those who seek explicit material for development of an academically acceptable approach to clinical legal education.

Nothing in a lawyer's life has more intellectual content or complexity than the substance of his professional relationships. As

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those transactions are subjected to adequate social and psychological analysis, it will become increasingly apparent why many argue that law schools must bring direct clinical experience into their curriculums or run the substantial risk of graduating students who would, along with their clients, continue to encounter the numerous psychological risks of professional practice.\(^3\) This paper will attempt to present, in a conceptualized framework, a view of the process-dynamics involved in professional behavior and will suggest methods to be used in teaching students how to live that kind of behavior in a manner commensurate with their roles as lawyers. In order to provide a concrete application of many of these concepts, several clinical cases described by Professor Marvin Kayne will be used as illustrations of the conduct in question.\(^4\)

I. THE FEASIBILITY OF TEACHING PROFESSIONAL BEHAVIOR: A THRESHOLD INQUIRY

It has often been argued that legal education, especially as it functions in the law school setting, cannot modify the projected professional characteristics of an individual’s personal behavior.\(^5\) Several studies have tended to support this notion,\(^6\) and certainly most of the past efforts to inculcate law students with "professionalism" have not been remarkable for their visible success.\(^7\) While it would be difficult to dispute the assertion that by the time a person has reached the age of twenty or twenty-one, the major part of his personality is quite well set, there are certain aspects of it which are still subject to critical modifications, and, indeed, society has made use of this change potential to lay down crucial social lessons.\(^8\)


\(^4\) CLEPR, CASES ILLUSTRATING ETHICAL PROBLEMS IN CLINICAL EDUCATION FOR THE LAW STUDENT 114 (1973); Kayne, in M. Bloom et al., supra note 3.


\(^7\) The recent events of Watergate have demonstrated the high vulnerability of lawyers to professional educations of one sort or another. At least a part of this must be attributed to an inadequacy in legal education. See Watson, The Watergate Syndrome: An Educational Deficiency Disease, J. Legal Ed. (publication forthcoming).

Our society prolongs the period of adolescence to a large extent through the intensive and extensive imposed process of education. The issue of a person's "identity" is thus kept open for quite a long time.\textsuperscript{9} It is precisely upon this area of personality function that the important lessons of professional behavior should focus. The concept of identity is one of the most important issues which have been explored in recent psychological studies.\textsuperscript{10} Identity — the sense of self, formed from emotionally significant relationships with others which shape one's being and one's image of self — largely results from emulation of those who are respected or in some cases from images of those who are feared or even hated. It becomes the source of important motivations, especially as they relate to social behavior, and it enables one to join causes with passionate altruism or to reject them with reactive skepticism.\textsuperscript{11} The universal human need to have objects for modeling and identity formation may be the single most important psychological factor in the educational processes.\textsuperscript{12} It is precisely this fact which makes the form and process of legal education so crucial as they relate to the shaping of professional behavior.

Because law students do not habitually conceptualize their future roles as lawyer-professionals, those who teach them how to behave as lawyers become extremely important in the ultimate shaping process. It thus borders on irresponsibility to leave the professionalizing process to the random adventitious experiences of post-law school encounters.\textsuperscript{13} It is critical then that legal educators avoid reinforcement of inappropriate lawyer behavior and avidly grasp every opportunity to reinforce positively those behaviors which are vital to effective and appropriate professional practice. For example, a law teacher who discourages, makes light of, or ignores the multitude of practical problems about law practice that constantly press into a law student's consciousness only reinforces his belief that issues about lawyer-client relationships

\textsuperscript{9} See Erikson, supra note 8, at 59. See also Stone, Legal Education on the Couch, 85 HARV. L. REV. 392 (1971).

\textsuperscript{10} Erikson, supra note 8, at 121.

\textsuperscript{11} Erikson, supra note 8, at 114; Wirtz, Training for Professional Competence and Responsibility, 13 J. LEGAL ED. 461, 468 (1961). See also Jones, Notes on the Teaching of Legal Method, 1 J. LEGAL ED. 13 (1948).

\textsuperscript{12} For a summary statement see Erikson, Growth and Crisis of the Healthy Personality, 1 PSYCHOLOGICAL ISSUES 50 (1959).

are unimportant and of secondary consequence. If the faculty attitude toward professionalism were to be rejected by students, so, too, might others of the precepts they teach be seriously challenged. Consequently, ideas about professional behavior gathered from practicing lawyers will be eagerly grasped and emulated by the student, even when such practices border on unethical behavior. Because of this intensely felt psychological need for appropriate models, all learning experiences, both in and out of law school, will vitally affect the ultimate behavior and character-shaping of every law student and young lawyer.

In the past, most teaching about professionalism was limited to a presentation of Ethics Codes, supplemented by discussions drawn from the opinions of state bar ethics committees. The impact of these exercises was minimal at best and very possibly negative. Dealing with professional and ethical problems is a painful and demanding task, and most persons follow the tendency to avoid such pain if and when they can. Thus, the mouthing or memorizing of ethical codes can provide a person with the belief that he has learned how to behave ethically, although he is in fact using such an exercise to avoid grappling with the core emotional issues. This is known to psychiatrists as the psychological defense of intellectualization, one utilized frequently by those working in the legal profession. While the concept of ethical codes must be learned, the codes should serve primarily as launching points for further discussion. One purpose of such discussion is to highlight emotional conflicts which students (and teachers) generally seek to avoid. It is only through the development of a psychological capacity to deal with these conflicts openly and cognitively that a person can elect to behave with professional propriety.

14 See, e.g., Reinhardt & Gray, A Social Psychological Study of Attitude Changes in Physicians, 47 J. Medical Ed. 112 (1972). The authors found that cynicism in medical students during medical school served adaptive purposes in dealing with such stresses as anatomical dissection and autopsy. On the other hand, when they were exposed to modeling in which the capacity to relate to patients was valued, they became less cynical and more person oriented. For a discussion of this kind of modeling see Engel, Care and Feeding of the Medical Student: The Foundation of Professional Competence, 215 J.A.M.A. 1135 (1971); Engels, The Deficiencies of the Case Presentation Method of Clinical Teaching: Another Approach, 284 New Eng. J. Medicine 20 (1971).
16 Watson, Canons as Guides to Action: Trustworthy or Treacherous, 33 Tenn. L. Rev. 162 (1966).
When dealing with proposed clinical curriculums one must not ignore the limits of intellect as a means for learning about professional behavior. The capacity for cognition can not be isolated from emotions without untoward consequences, especially in problem-solving which involves human relationships. Those who elect to study law characteristically display a stronger-than-average need to master their experience. Such persons will attempt, where possible, to exclude emotional considerations from their activities. While it is true that emotions can grossly disrupt rationality, it is also a fundamental fact of psychological life that to ignore the existence of emotions is itself irrational. It is crucial that professionals who deal with people and their passions be able to react properly to such passions without creating behavior inconsistent with professionally accepted aims and actions. To ignore the enemy is not to defeat him.

For many years it has been the opinion of many educators that methods for coping with the complex intellectual and emotional issues involved in professional behavior are best left to be learned from the experience of practice. Experience is a good teacher, provided the student can understand and properly conceptualize what it is that he is struggling to learn. The problem with leaving these lessons to post-law school experience is that a proper perspective is often difficult to attain without a preconceived learning goal. When unforeseen stress situations are left unidentified and consequently not understood, the predictable result is a psychological defense reaction which will only obscure crucial issues from the young professional’s cognition. Thus, instead of solving and resolving these problems, he will defensively ignore them, and they will remain like land-mines, ready to blow up and cause severe stress at untoward and inappropriate moments.

II. A Psychological Taxonomy of Lawyer Conflicts

As a means for interpreting a student’s experience to him, a curriculum for clinical legal education must include consideration of the explicit emotional conflicts which underlie professional activity. In effect, these problems provide the anatomy and the

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18 Watson, supra note 13, at 101; Bellows, infra note 111.
19 Boyer & Cramton, supra note 6, at 286; Cavers, Skills and Understanding, 1 J. LEGAL ED. 395, 400 (1948); Conard, Letter from the Law Clinic, 26 J. LEGAL ED. 194 (1974); Fuller, What the Law Schools Can Contribute to the Making of Lawyers, 1 J. LEGAL ED. 189, 196 (1948).
20 For a challenge to this proposition, see Slovenko, Teaching Professional Responsibility: A Reply, 16 J. LEGAL ED. 327 (1964).
physiology of the clinical curriculum, and they must be well understood before a rationale for dealing with a lawyer's professional problems may be developed. As medicine was a purely pragmatic profession in its early days, so legal professionalism remains for the present time, awaiting a more sophisticated development. It is when the psychology of its processes are understood that we will be able to explicitly train students to handle these difficult, interpersonal transactions.

The taxonomy which follows demonstrates an approach to understanding lawyer conflicts in terms of the explicit psychological forces which a lawyer must handle if he is to behave with "professional competence." While the taxonomy is tentative, it suggests the kinds of issues that must be discussed if clinical educational programs for professional responsibility are to be complete.

**A Psychological Taxonomy of Lawyer Conflicts**

I. Problems of Conscience Conflict: Hierarchies of Values.

A. Issues of Truthfulness.

1. Defense of "guilty" client. For an excellent example of this problem, see D. Mellinkoff, The Conscience of a Lawyer 215 (1973), quoting Lord Cockburn:
   
   He [the advocate] ought to uphold the interests of his clients per fas [through what is lawful] but not per nefas [through what is criminal]. He ought to know how to reconcile the interests of his client with the eternal interests of truth and justice.

Problems also arise when lawyers are needed to represent "unpopular" clients. See Pollitt, Timid Lawyers and Neglected Clients, Harper's, Aug., 1964, at 81.

B. Use of Case or Client for Personal or Self-Aggrandizement (Narcissistic) Purposes.

An earlier version of this taxonomy appeared in the Appendix to M. Bloom et al., supra note 3, at 119.

22 For an excellent example of this problem, see D. Mellinkoff, The Conscience of a Lawyer 215 (1973), quoting Lord Cockburn:

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Problems also arise when lawyers are needed to represent "unpopular" clients. See Pollitt, Timid Lawyers and Neglected Clients, Harper's, Aug., 1964, at 81.

23 This kind of matter is handled in a humorous vein in H. Cecil, Alibi for a Judge (1960).

24 This is an allusion to the role stresses created by virtue of the fact that, as officer of the court, counsel must assist in the procurement of "justice" — often at the expense of excluding damaging but truthful evidence. This presents a basic conflict to both nonlawyers and lawyers who were reared in settings where truth is a paramount virtue. See also D. Mellinkoff, supra note 22, at 3.

25 Id. at 207.
C. THE USE/MISUSE OF POWER AND COERCION.
   1. "Informing" client of lawyer's acts/intentions without coercion — e.g., client need for lawyer facilitates possibility of "coerced" agreement.
   2. Lawyer conflict over issue of leading/being led.26
   3. Conflicts over use/misuse of economic power in fee, litigation costs, etc.27 — e.g., the client needs a lawyer but the lawyer "needs" a fee.

D. TEMPTATIONS AND MISUSE OF SEXUAL OPPORTUNITY.
   1. Client need/distress may lead to sexual proffer.28

E. CONFLICT AND RETICENCE OVER PEER DISCIPLINE—"There but for the grace of God . . ."29

II. PROBLEMS OF SELF-IMAGE CONFLICT: GETTING RID OF MISAPPREHENSIONS ABOUT LAWYER ROLES.
A. CONCERN ABOUT LAWYERS' NEGATIVE PUBLIC IMAGE.
   1. Lawyer as "shyster"/immoralist.30
   2. Lawyer as manipulator/"mouthpiece."31
      a) Conflicts re: right to counsel.
      b) Rights to not serve as counsel.
   3. Lawyer as scapegoat for public ills or concerns.
      a) During Post-Revolutionary War and Jacksonian Periods.32
      b) Crime-wave due to lawyers "Getting Criminals Off."33

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26 The need to gain a client's "consent" or other means of participation brings into play psychological conflicts relating to the use of aggressiveness or assertiveness. This can be manifested by the lawyer's over- or under-persuasiveness, and in either case the client will suffer. Counsel will thus find that the conflict interferes with appropriate lawyer functions.

27 For a good discussion of how this matter can be balanced, see Conard, supra note 19, at 202. See also Probert & Brown, supra note 5, at 479.


29 This factor of identifying the potential evil in oneself with the misbehavior of others is probably the single greatest factor that inhibits peer discipline. It reflects both a reluctance to behave hypocritically and a residual childhood inclination to fail to distinguish between a thought and an act. This tendency may be seen in the moral admonitions of the Old Testament, where "coveting" (a mental activity) was the moral equivalent of acting. The same lack of distinction is also seen in the medieval treason laws, where to think or wish harm to the King was punishable by death, as was an attempt on his person.

   For a good discussion of this question, see Weckstein, Maintaining the Integrity and Competence of the Legal Profession, 48 TEXAS L. REV. 267 (1970).

30 D. MELLINKOFF, supra note 22, at 8.
31 Id. at 165.
33 See Lenzer, Legal Services Fights for the Poor, But Who Fights for Legal Services?, 1 JURIS DOCTOR 9 (1971); Arnold, Whither Legal Services, 1 JURIS DOCTOR 3 (1971).
c) Causing social problems through nuisance class-actions on behalf of poor.34

4. Lawyer as Representative for "Fat-Cats."35 — e.g., tension caused by representing those who have wealth or "too vigorously" seek it.36

B. CONCERNS RAISED WHEN ACTING AS CHAMPION OF JUSTICE.

1. Aggressiveness versus acquiescence.37
   a) "Am I being aggressive (masculine) enough?"
   b) "Can I be a "good (aggressive) advocate and still be a woman?"
   c) Does need to organize case to "win" threaten attitudes toward "passivity"?38

2. Conflicts over "showing off" while advocating a cause — e.g., "Am I serving this client (cause) because of professional role requirements or just in order to show off?"39

3. Conflicts over caring about justice.
   a) "Lawyers who care about 'justice' are bleeding hearts or soft-heads."40
   b) "Technique without ideals is a menace: and that all men know and laymen fear."41

   Similarly, ideals without technique are also to be feared as ineffectiveness.

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34 Lenzer, supra note 33. See also Conard, supra note 19, at 205.
35 For a discussion of some of these tensions, see Shaffer, Book Review, 46 Ind. L.J. 562 (1971). See also Solomon, This New Fetish for Indigency: Justice and Poverty in the Affluent Society, 66 Colum. L. Rev. 248 (1966).
36 For an interesting discussion of the issue of income for legal work, see Stringfellow, Christianity, Poverty, and the Practice of the Law, 10 Harv. L. School Bull. 4 (1959).
38 See Llewellyn, The Modern Approach to Counselling and Advocacy — Especially in Commercial Transactions, 46 Colum. L. Rev. 167, 169 (1946); Redmount, supra note 17, at 94.
39 I have encountered lawyers on several occasions who were representing classes of disadvantaged poor. As they reflected upon their motivations for working with these clients, it became clear to them and to me that much of their investment stemmed from a desire to show off rather than an interest in the justice of the case. Freedman, supra note 37, at 293, emphasizes the need to focus attention on self to be effective.
41 Llewellyn, supra note 38, at 193.
4. Conflict issues involving value-judgment about race, ethnicity, gender.42

C. CONCERNS AND CONFLICTS ABOUT ONE'S ADEQUACY AND COMPETENCE.

1. Law generalist v. law specialist tensions:43 “Can I handle this patent case or should I refer it to a specialist?”

2. Inexperienced v. veteran tensions
   a) “How am I as a relative neophyte and should my client know?”44
   b) “I certainly feel stupid as compared with my mentor/supervisor.”

III. PROBLEMS OF MASTERY AND CONTROL IN CASE MANAGEMENT.

A. TENSION REGARDING CERTAINTY/UNCERTAINTY.45

1. Over-simplification and premature closure of conceptualization and/or exploration to give pseudo-control.
   a) Do not look for more information about facts or law; might upset theory of case.
   b) Possession of a limited set of conceptual choices into which must fit all issues.

2. The utilization of words and definitions as if they exist in the real world46 — e.g., affix the label of "sexual psychopath" and then "understand" what to do with a given person who committed a "sexual crime."

3. A reluctance to be creative with law because it might generate uncertainty.47

42 Conard remarks on the amount of change most students experienced in their clinical work from contacts with the poor, blacks, and other disadvantaged groups. Conard, supra note 19, at 206. See also Carson, Black Lawyers in White Law Firms, 1 JURIS DOCTOR 21 (1971); Utley, Fighting Sex Discrimination in the Law Office, 4 STUDENT LAWYER 33 (Mar. 1974).


45 D. MELLINKOFF, supra note 22, at 3. See also Ownbey, supra note 44, at 424; Freedman, supra note 37, at 307.

46 D. MELLINKOFF, supra note 22, at 8; Probert & Brown, supra note 5, at 459.

47 See Ownbey, supra note 44, at 423. Gossett describes the way in which a corporate counsel deals with this issue as he helps his company avoid problems. Gossett, The Role of Corporation Counsel, in II JOHN RANDOLPH TUCKER LECTURES 1953-1956, WASHINGTON AND LEE UNIV. at 190.
a) The tension in judge between *stare decisis* concepts and his impulses to make new law.

b) Lawyer writing brief to help court reach a new kind of decision and avoid the *stare decisis* conflict.\(^4^8\)

c) The need to adapt rules to a hard case in order to solve problem.\(^4^9\)

4. A reluctance to think through from affirmative standpoint the other side of the case because it might make one's own case seem/be less solid.\(^5^0\)

5. A fear of accepting/developing new lawyer roles because "I don't know how to do them" — *e.g.*, how does a lawyer function as a "Child Advocate" in juvenile court?\(^5^1\)

B. **CONFLICTS IN MANAGEMENT OF INTERPERSONAL TRANSACTIONS.**

1. Tensions in interviewing process.

a) The lawyer as listener — *e.g.*, conflict over passive-active issues: "Am I a good lawyer if I just listen?"

b) The lawyer as reactor.\(^5^2\)

(1) Conflict over what the client expresses: too disturbing, or too seductive, or too "crazy."\(^5^3\)

(2) Conflict over whether I should hide the emotion which client stimulates: "Should I be angry?"


\(^{5^0}\) After setting up best possible brief for own side, do likewise for opponent and build own trial strategy to his case as well as own affirmative position. Llewellyn, *supra* note 38, at 177.


\(^{5^2}\) For a description of some risks in this process, see Stone, *supra* note 9, at 431.

\(^{5^3}\) For a description of a lawyer's conflict about listening to his client's story, see J. COUZZENS, *By Love Possessed* 145 (1957).
(3) Conflict of over-identification with client’s feelings and ideas (i.e., problems of “empathic distance”).
(a) embarrassment.
(b) pain.
(c) avarice.
(d) guilt.
(e) above may be felt as “invasions” of client privacy.\textsuperscript{54}

c) Lawyer discomfort as judge of another’s credibility — e.g., “They won’t like me/approve of me if they know I don’t believe them.”

d) Lawyer distress caused by clients’ psychological defenses — e.g., “Why do they come for help from me when they don’t trust me and don’t use it?”\textsuperscript{55}

2. Psychological problems caused by incompetence.
   a) Of supervisor or senior colleague — e.g., senior partner “permits” one to make serious and self-defeating error in direct examination of a witness.
   b) In a colleague — e.g., causes serious loss to client through sloppy handling of case. What should you do when client asks you what to do about it?
   c) In client — e.g., client fails to provide you with adequate information about his case, making your work difficult or impossible. How do you understand and handle it?\textsuperscript{56}
   d) In self — e.g., you discover during trial that you have seriously botched up client’s case due to your own ignorance. How do you handle the situation?

3. Tensions caused by need to manage own time, psychic and physical energy, and private life.\textsuperscript{57}
   a) Conflict between client’s needs and own needs.

\textsuperscript{54} Freedman, \textit{supra} note 37, at 295, describes how an advocate must “ceaselessly” strive to “. . . break down the incomprehensible resistance of his client to the discovery of facts. . . .” Obviously this must be possible without creating discomfort in counsel.

\textsuperscript{55} See \textit{Do Your Clients Ignore Your Advice?}, CASE AND COMMENT 26 (Nov./Dec. 1962).

\textsuperscript{56} D. MELLINKOFF, \textit{supra} note 22, at 94.

\textsuperscript{57} See Comment, \textit{supra} note 40, at 1137.
b) Need to maintain one's own private life in psychological security and stability in order to be able to attend to professional work.

c) Need to deal with role conflicts between wife-mother and professional woman.

   (1) Conflicts between child-rearing necessities and demands of profession.

   (2) Conflicts between wife-professional and husband vocational goals.

      (a) Where work? How balance the competing and possibly conflicting interests?

      (b) Work schedule conflicts. Who should be home, and when?

   (3) Who does what work around the house?

C. CONFLICTS CAUSED BY LOSING A CASE.

1. Loss of case you expected to win (and should have won?).

   a) What do you do with your self-esteem?

   b) Why did it happen?

   c) Did I do something wrong?

2. Handling case you expect(ed) to lose.

   a) Do you turn off your interest and thus underprepare?

   b) Is your expectation accurate or is it a defense against risk to your self-esteem?

   c) Could other counsel with greater skill win the case?

   d) Does your desire to win a losing case cause you to do unlawful or unethical things?

   e) How do you handle the client's feelings and ideas (rational and nonrational) about you?

      (1) Did you accurately inform him of what he should expect?

      (2) Does his feeling stir discomfort in you? Why?

58 See Probert & Brown, supra note 5, at 462.
D. CONFLICTS OVER WINNING A CASE YOU "SHOULD" LOSE—e.g., "Was I unfair, dishonest, or unethical?"

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While the taxonomy may not yet successfully delineate every conflict that a lawyer will encounter, it is clear that an adequate curriculum covering professional ethics and professional responsibility should embrace at least those conflicts which arise in practice with substantial frequency. It is at this point that much of the difficulty in planning a clinical program arises. How does a teacher know what to include? One possible solution is to subject potential teaching materials to an analysis under the taxonomy. This would permit one to sort out case material very explicitly in terms of whether or not it presented the particular conflict which was set for class discussion. If all the material were so analyzed, it could be clearly decided whether appropriate coverage had been achieved. If there were overlaps, cases could be eliminated and new material could be acquired which filled the gaps identified.

The best way to demonstrate the manner in which the taxonomy works is to apply it to an actual case study. The following is a very good teaching case, although it lacks the kind of information which is needed to explore more fully the psychological conflict processes which are unfolding. It is, however, vastly superior to most descriptions of cases which we can obtain from the legal literature. In order to highlight the conflicts revealed in the case, I have added parenthetical notations of the relevant taxonomic numbers:

Early in 1971 Debra Green, a pert, black 14-year old junior high student in Berkeley entered my life and that of a student of mine, Amelia Ballard. Debra stayed in a star role for nearly a year. During that time she generated about two hundred pages of affidavits, petitions, appeals, orders, amended orders, and several hundred hours of legal research. The ultimate outcome was that Debra Green became officially known as Debra Warren and Amelia Ballard got to know herself much better.

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60 See part IV infra for a further discussion of teaching materials. A taxonomic analysis of the cases in M. BLOOM et al., supra note 3, reveals that only about one half of the conflicts are adequately represented, some are missing entirely, and several are repeated over and over again. This kind of explicit analysis would permit one to set about balancing such a text if it were to be used in class.
Debra was born in Phoenix on February 14, 1957, to Martha Harrison, who was not married to the child’s father, Otha Green, Jr. Otha left the scene shortly and three months later Martha married Moses Tooker. They had three other children together and moved to Berkeley. By the time the legal battle began in 1971 Moses and Martha Tooker had separated and she was living — with seven children — on welfare, AFDC (Aid to Families with Dependent Children) and a small disability allowance. It came to $458 a month. She lived with her seven children in a ramshackle house in which she had a tiny equity.

When Debra, her firstborn, entered school she was known as Debra Tooker, after her stepfather. Then, as Debra’s mother explained in an affidavit:

This year all of a sudden the King Junior High School sent home my daughter’s report card for the eighth grade with the name ‘Debra Green’ on it. Debra was very embarrassed and upset, because everybody knows her as ‘Debra Tooker’ and that is what the school has always called her before this.

Debra was three months old when I married Moses Tooker and I started then to call her by his name. There are four younger children of my marriage with Tooker, and she has had the same name as they had.

When I started her in kindergarten I had to show her birth certificate and that said ‘Debra Green,’ so they wrote it down as ‘Debra (Green) Tooker’ and just called her ‘Debra Tooker’ on all her report cards and notices. When Debra and I tried to get the school registrar to stop calling her ‘Green’ she said she could not unless we had a legal paper to prove Debra’s name was really changed to Tooker.

I thought she might have more trouble like this later when she married or went to college or worked, so I wanted to change her name so nothing like this would happen.

In order to do that she came to Berkeley Neighborhood Legal Services where one of my students, Amelia Ballard, got the case. Amelia was considerably older than the other third-year students in the clinical program. She was 42, the mother of three, and the wife of a faculty member. [III,B,3,c] Since she had come to law belatedly, she felt she had to take shortcuts to fame and establishment as a lawyer.

With her first moves she was able to get the local superintendent of schools to agree to have Debra listed on the records
as Debra Tooker. That was easy. Perhaps too easy. Mrs. Tooker was happy and Debra was pleased, but Amelia Ballard wasn't. No, what was called for was a tort action by the Tookers against the school system because little Debra had been publicly humiliated by surfacing the fact of her illegitimate birth.

As a mother of seven living on welfare and AFDC, Mrs. Tooker had enough immediate problems without a tort action. But Amelia was most persuasive about it and Mrs. Tooker consented. What Amelia had not told her was: (1) the utterly remote chance of winning such a case; (2) the beginning of such a case could give Debra lifelong notoriety as the illegitimate girl who sued because the school said she was illegitimate; and (3) Amelia's own personal reasons for wanting a case that would be well-publicized.

At this point, fortunately, several other students persuaded Amelia that the tort approach was wrong not only because it was futile but because it overlooked a far more serious problem: the wrong birth certificate could plague Debra for the rest of her life. Amelia, reluctantly, agreed to abandon the court approach and seek a court-ordered name change.

New problem: Mrs. Tooker could afford neither the filing fee nor the $35 mandatory publication cost. Ah, here was another constitutional issue: the publication cost . . . .

Actually, there were two ways Mrs. Tooker could get the $35. She could apply to the Welfare Department which had some discretionary funds. Or, she could earn and keep up to $30 a month. In any case, there was a way to get the $35. But Amelia resolutely refused to look into those possibilities. Why destroy the potential for a change in the law on behalf of the class the Tookers represented here? At this point I got into the picture more actively and told Amelia she would have to discuss the possible $35 misunderstanding, specifically with Mrs. Tooker. The latter at the conference agreed that if she absolutely had to, why she guessed she could raise the money, somehow. But if she couldn't — or wouldn't — what then?

Now Amelia leveled. As a test case it was likely to be on appeal for several years, creating the potential for further birth certificate problems and embarrassment. But with the $35, the whole thing would be over in weeks. Amelia now told Mrs. Tooker why she wanted to make it a test case, one that might further her career. She was persuasive and Mrs. Tooker agreed to proceed with the test case.

Was it necessary to tell the court of the possible availability of welfare funds? The question might be raised. Perhaps it would be a good idea to make the actual application. Amelia submitted the application but advised the social
worker that if the Welfare Department refused, the require-
ment would be waived by the court. This left the door open to
the client for later application and was good advocacy, but was
it fabricating evidence?

Amelia started drawing up a petition for the name change as
a class action. Who needed it?, I asked. The class was neither
proper nor necessary here. Worse, to bring it as a class action
would "red-flag" it for greater resistance, extraneous issues
and delay. Well, if you pressed her, Amelia admitted she
needed it. A class action was important; a plain name change
was nothing. It took doing but she was persuaded to drop it.

There was the problem of waiver of publication. A recent
United States Supreme Court case assured that the filing fee
would not have to be paid and there was dicta that was favora-
ble on the publication issue, but the specific issue of the case
had not been decided by any appellate court. . . .

There were two feasible ways of framing the motion: request
that the county pay the the publication fee or declare the sta-
tute unconstitutional and provide an alternative no-cost
method of providing notice. Amelia opted for the latter
method, but the attorney at the Neighborhood Legal Services
office she was working with directly on the Tooker case pre-
ferred the county payment method. I never quite understood
why. It seemed to me that by trying to gain a substantial exten-
sion of the law and imposing a future cost burden on taxpayers
on behalf of poverty clientele, he was tackling a formidable
and unnecessary task. But he insisted and at this point Amelia
felt that she could no longer, in fairness to the client and the
case, allow the attorney to direct the matter. [III,B,2,a,(1)]

She asked for and obtained consent for my substitution as
attorney of record. (She appears in all pleadings as "Certified
Law Clerk.")

The motion was filed to declare the statute unconstitutional.
She argued it, opposed by the county counsel. The court said it
was the rule of that particular Superior Court that they would
not declare any statute unconstitutional without a specific
case-in-point precedent from an appellate court. Amelia was,
of course, delighted. She now had the chance to take the mat-
ter higher. . . . A petition for a writ of mandate to the District
Court of Appeal was filed. The upper court issued its alternate
writ of mandate and a date was set for the hearing. Amelia,
certain that victory was in sight, was elated. Until county
counsel intervened. He spoke to the lower court judge, ad-
vised him of the issuance of the alternate writ of mandate and
of new case law and obtained the lower court's consent to
rehear the matter. It seemed to me very likely that the lower
court would reverse its prior opinion and now grant the motion. From the client's point of view, of course, this would be a total, splendid victory.

As far as Amelia was concerned, it was almost a total disaster. A lower court opinion would not be published and would not have the precedential value of the opinion of the upper court. And it did seem likely that the upper court would rule favorably.

Amelia and I had another of our many jousts. [II,C,2] As far as I could see, there was a serious problem of potential unfairness to the Tookers here by resisting a lower court rehearing. After all, we had no guarantee that the case would be won at the appellate level. We *could* lose it. Amelia was adamant. I was keeping her from the fame she justly deserved! I was restraining her — for God knows what dark reason. She felt so strongly about it — and at such length — that I yielded. [I,C,2] I hoped that judicial temperament on the appellate court level was sufficiently objective to absorb the matter.

The appellate court indicated that it preferred to let the lower court rehear the matter. Finally crushed, [III,C,1,a] Amelia started learning one of the important realities of the adversary proceeding: she started having conciliatory talks with the county counsel. [III,B,1,a] They achieved a good working relationship which led to a verbal stipulation for reversal of the court's order. The rehearing resulted in publication by way of posting in conspicuous places in the county: the Alameda County Courthouse, the Oakland City Hall and U.S. Post Office. At no cost to the Tookers, of course.

It was now the end of the second semester and the hearing on the name-change petition was still to be held. Amelia again chose to persevere with the case and continue into a third semester without any course credit. [III,B,3,a] Her confidence was shaken when she suddenly realized she wasn't home free: the court still had within its discretion to deny the name change. Fortunately, the . . . name change was granted routinely.

When it was necessary to register the change in the birth certificate with the Secretary of State, Amelia found that the fee was $5. She was ready to start the battle all over again. Fortunately, opposing counsel and the court saved the day with a stipulated order to the Secretary of State to issue a new birth certificate at no cost.

The appellate division had denied her a chance of appellate reporting. But surely there were lots of legal services attorneys who should know about the case. I pointed out that she was possibly invading the privacy of her clients. She agreed to talk it over with them.
They said, sure. The clips from the . . . papers were gratifying. The Oakland paper gave it a three-column feature . . . . Only Amelia’s name was omitted.61

III. TEACHING TECHNIQUES AND ISSUES TO BE RAISED IN THE CLINICAL PROGRAM

The central issue and the hallmark of effective clinical legal education for professionalism is “interpreted experience.” It should be carried out by utilizing the multitude of emotional reactions generated by law practice situations. A good example of this is the emotionally-laden motivation (at least in those students who elect clinical courses) to try a case and establish one’s professional status. Eagerness “to get into court for experience” can subtly pervade decisionmaking with nonrationality and bring the student into conflict not only with his client, but also with his supervisor.62 The educational task which the teacher must accomplish is to help the student understand what he is doing, to permit him to learn why it happened, and then to assist him in developing the capacity to control such professionally inappropriate behavior in the future. This must lead the student to confront questions which bring him to recognize the appropriate behavioral responses.63

When counsel has some private and personal motive which causes him to wish to use the case for purposes other than those directly related to the client’s interests, how can he properly evolve a “consent” to do so from the client? This issue was skillfully handled in Kayne’s case,64 and such an exploration should be carried out in every possible situation.65 The quintessence of a good professional education should be to mobilize these emotional conflicts in order that they might be experienced, apprehended, and then handled with a proper perspective. In other words, the

61 Case 14: The Game of the Name, in M. Bloom et al., supra note 3, at 102. The case is reproduced with the permission of the publisher.
62 I say “nonrational” here to denote the normal irrationality in all of us, which must be apprehended and dealt with if appropriate objectivity is to be achieved.
63 The following questions are suggestive: What are the symptoms of such a nonrational response? What are the student’s personal signals of internal conflict? How can a person build into his practice apparatus a method for identifying such blind and unconscious responses? How may one utilize partners and colleagues to assist in objectifying this kind of emotionally conflicted behavior?
64 See note 61 and accompanying text supra.
65 Kayne, in M. Bloom et al., supra note 3, at 119, said of this case that it was one of the “. . . rare examples where the ethical decisions received adequate attention.” More often than not in the cases discussed by Kayne, it seems that these issues were handled gropingly and that the students probably learned very little about the ubiquity of their self-serving motives and behaviors.
emotional proclivity for self-serving motives in professional behavior should not be disregarded. It should be quite clear from the taxonomy of lawyer conflicts that counsel’s private motives can permeate professional activities in many complex ways. Since the case was identified as a successful experience, I would imagine that the student in Kayne’s illustration went through a certain amount of chagrin and discomfort when she discovered her inappropriate-though-unconscious motives. Later, a sense of elation probably developed when she was able to proceed, with the client’s full support, to make a test case of the problem. This is a perfect example of the way in which narcissistic goals in both the lawyer and client may be joined to bring about a mutually desirable result. Ideally, one can thus gain self-serving satisfaction from socially useful activities and circumstances. This is what psychiatrists call sublimation, and it is a fundamental characteristic of smooth and civilized social adjustments. It is also the measure of effective professionalism.

Another splendid example of a professional conflict which needed interpretation in one of Kayne’s cases involved a student-lawyer who did not reveal to his client that he was a student. The client ultimately had to know that his lawyer was a student, and the matter had to be dealt with directly. While I do not suggest that there is only one way to approach this question, at the very least the law student must cope with his own emotional reactions to inexperience, and probably he will somehow have to make it known to the client as well. There may be interesting ethical and legal problems in regard to clients’ consent to be assisted by students.

There are many crucial psychological elements in this case which need exploration if it is to be used for education. First and foremost is the matter of the student’s identity and self-image. Basic questions should then be raised: How good am I? Will the client like/love/accept me? Can I carry out my task and succeed? These questions would otherwise be a part of the student’s conscious and unconscious fantasies, and they must be brought to his awareness if they are not imperceptibly to cloud his relationship with, and decisionmaking for, the client. Although lawyers tend to

66 Note 61 and accompanying text supra.
68 M. BLOOM et al., supra note 4, at 117.
69 As the Baron von Clausewitz has noted, when you have to lose a battle, lose it as cheaply as possible. 3 C. VON CLAUSEWITZ, ON WAR 329 (1956).
70 For a discussion of this issue by students, see Wolf, The Delivery of Legal Services: Some Ethical Considerations in the Use of Law Students, in CLEPR, CLINICAL ED. FOR THE LAW STUDENT 236 (1973).
attribute consciousness to acts like this, it may well be that the student was not even aware of what he was doing. Similarly, when the student attempts to explain his behavior, the resulting inaccuracies need not necessarily be considered "lies." They are, more likely, the product of an unconscious distortion process which reflects his struggle to maintain a self-image that is comfortable for him. As these psychological factors are identified and explored with the student, the teacher should also point out that this process is analogous to what clients do when they distort the information they bring to counsel. There is far too strong a belief among many working lawyers that such distortions tend to be motivated by conscious willfulness, which sets the course of their client relationship in a false direction.

As students come to grips with their "studentness," the analogy should be drawn to practice situations in which counsel will encounter problems he has never worked on before. This should stir up discomfort that, ideally, will stimulate a series of professional consultative moves in the client's best interest. The substantive implications of this type of transaction should be explored from an ethical perspective: How far must counsel go to seek consultation in a legal area which he does not fully understand? How does he deal with his limitations in relation to his client?71

Problems related to the quality of the student's work product provide another excellent opportunity for exploration and interpretation of a ubiquitous professional conflict.72 In many of the cases a lawyer handles during his career, there exists the difficult practical question of how much time should be invested in the resolution of a particular problem. This taps into fundamental aspects of a lawyer's self-image, and the same problem is highly visible in the law school experience of many students. There are a great many students who have profound conflicts about how hard to work in order to be "acceptable." Some set the task so high that it is humanly impossible, and once this becomes apparent to the student it can disrupt his performance through a pervasive and debilitating sense of hopelessness. Thus, a psychological need for

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The question of informed consent should also be raised, as it relates to a lawyer's inability to expertly serve a client in all facets of the law, and to the fact that outside counsel may be consulted as a consequence.

72 See CLEPR, supra note 4, at 114.
perfection can result in massive imperfection, the result being non-feasance caused by neurosis. I have examined several lawyers on behalf of a bar ethics committee who had committed malpractice because of this kind of inhibiting conflict — they perceived their task to be so massive that they could not even begin to work on it.

In clinical programs, deep concern on the part of many students about the widespread need for legal services creates another problem area. If that kind of person does not develop some sort of emotional capacity to cope with the massiveness of this social need and the impossibility of filling it, he is doomed to a kind of frustration and disappointment which may convert altruism to cynicism. Students and young lawyers can, however, be helped to face these conflicting emotions in order to learn a means for coping. There obviously exists a necessity to inform clients about some of the limitations imposed by time and costs, and this leads to the requirement of helping them to decide among the several alternatives. The legal malpractice ramifications of this area, while not extensively explored at present, are likely to be the focus of greater attention in the future.

Finally, as an illustration of another aspect of the abovementioned emotional conflict, student concern about grades may be seen as a reflection of the powerful desire to know exactly where one stands. Much of the discussion about pass-fail grading stems from a kind of magical effort to eliminate the fact of competition in order to control where one will be placed in it. Of course, if grading is abolished, the ambiguity about one's status and performance will then reincarnate the same conflict, and the state of anxiety would exist anew. This situation provides another example of how classroom situations, if coupled with their emotional elements, can be analogized to law practice — in this case, the matter of work product.

In view of the foregoing descriptions of legal practice conflict situations, it is my contention that the essence of learning about professional behavior resides in the psychological interpretations of such legal activities. When these interpretations are not made, the appropriate lessons are rarely learned. While the conflicts will arise regardless of how they are handled, the way they are normally resolved when not understood is to banish them from awareness through one of the psychological defense mechanisms. An explanation of this term follows.

One of the principal contributions of Freud and other psychodynamic therapists has been to elaborate the nature of
man's unconscious behavior. This includes the process of "psychological defense." Defenses are unconscious mechanisms by means of which an individual obscures from awareness conflict situations that cause him psychic pain. These conflicts may ema-
nate from either internal values, which are at variance with needs and desires, or from conflicts between external situations, which are incompatible with personal goals and for which there is no apparent resolution. These defenses tend to provide the immediate gain of increased comfort, but they create the long-range risk of a moderate or substantial distortion of reality. An example is the defense called "reaction formation." When this defense is used, a feeling or an idea is expressed by its opposite in order to obscure the original one from the user's conscious awareness. It is characteristic of unconsciously defending feelings and ideas that they will arise in other contexts and perhaps with other people, thus creating confusion for the individual who remains unaware of their origins. Kayne's students, in the cases he described, were frequently manifesting defensive behavior. Many of their defended conflicts were related to motivations which were consciously unacceptable, such as that of the student in the earlier illustration, who wished to have a test case, even if it appeared contrary to the best interests of the client. Those defensive behaviors were the very things about which they should have learned.

At times, these obscured and defended-against motivations will also involve the legal supervisor. It is thus necessary and desirable as well for a teacher's feelings and attitudes to be apprehended and handled in an appropriate and professional manner. These feelings — referred to as countertransference by psychotherapists — may inhibit the teacher's responsiveness to students' learning process. Countertransference is recognized as one of the most serious bars to skillful participation in any interpersonal process. In one sense, this process-teaching could be described as an effort to help law students learn about their own countertransference reactions as they deal with a client's legal problems.

Under ideal circumstances, lawyer-supervisors would know how to explore these kinds of process issues for teaching purposes.

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73 A. Watson, supra note 67, at 46.
74 For a full description of these defense mechanisms, see id. at 112.
75 See id. at 125.
76 Note 61 and accompanying text supra.
77 See A. Watson, supra note 67, at 7.
However, it must be recognized that, at least for the present, most law schools will need outside, nonlawyer assistance to carry out this technique with skill and effectiveness. Kayne began the description of his cases by commenting that: “Most of the stories I tell will be negative.” It would have been very effective to join a skilled psychological process observer to these case discussions in order to clarify and elucidate the emotional meaning of the difficulties. While Kayne accurately and skillfully described the student conflicts, he appeared not to understand their causes. It is precisely in this area that law teachers need “expert” assistance. A lawyer trying a case involving psychological issues will seek an expert witness to examine relevant parties and to help formulate the strategy for trial presentation of these issues, and law teachers could well do the same. To whom should law teachers turn?

There are several kinds of professionally trained people in the community today who deal with “process observation.” No one professional group holds a corner on this skill, nor may one assume that all of the professionals in any group are skilled at doing so. Some psychodynamically trained psychiatrists have the highest degree of skill for this task. Many clinical psychologists have this kind of interview-process training which fosters such analysis, and they, too, can effectively deal with this kind of teaching. In addition, there are a large number of social workers who are skillful and experienced in swiftly understanding the meanings of communication transactions and could therefore aptly fill this role. Each clinical law teacher must explore the local availability of such professionals. It is obviously important for the law teacher to know what he wants before he begins his search or he will waste inordinate amounts of time locating the person who will be useful. Members of the above-mentioned groups would be loath to make “instant” interpretations about process, though they do so daily with individual patients. While this may be due to professional defensive ness and the desire to “look good,” rather than lack of such skill, this impediment should be foreseen.

We now turn to the question of how to organize and arrange the best teaching setting in which to develop process-skills. While the most effective means would clearly be to have one-to-one supervision, this is usually not feasible. Thus, to carry out this kind of

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78 See CLEPR, supra note 4, at 117.
clinical learning in a law school setting, it will probably have to be organized in conjunction with some kind of a classroom technique.

IV. THE CLASSROOM-CLINIC RELATIONSHIP

As noted earlier, it was argued at one time that professionalism could not be successfully taught in the law school setting. However, with the advent of several clinical programs, and following a considerable debate within the profession, it is now thought to be possible. The question that remains is how to do it. There have been proposals for courses on the legal profession and on ethics, but on the whole these have not been thought to be terribly successful. Others have suggested "pervading" curriculums by infusing materials about professional behavior into the context of many courses, but this, too, has apparently been less than fully successful. Ideally, that kind of teaching should be incorporated into any curriculum design. However, institutions are loath to place pressure on teachers to modify their teaching techniques, rendering self-imposed educational modifications unlikely in the near future.

One of the most innovative experiments in clinical education, still too new for any substantial evaluation, is taking place at the

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79 There is an enormous psychotherapeutic literature about this kind of individual supervision. See, e.g., L. Saul, Psychodynamically Based Psychotherapy (1972); Bonn & Schiff, Clinical Supervision of Psychiatric Residents, 27 BULL. MENNINGER CLINIC 15 (1963); Clancy, Brodland & Fahn, A Psychiatric Clerkship for Law Students, 129 AM. J. PSYCHIATRY 322 (1972); Dobbs & Carek, The Conceptualization and Teaching of Medical Interviewing, 47 J. MEDICAL ED. 272 (1972); Fleming & Benedek, Supervision, A Method of Teaching Psychoanalysis, 33 PSYCHOANALYTIC Q. 71 (1964); Jason, Kagan, Werner, Eckstein & Thomas, New Approaches to Teaching Basic Interview Skills to Medical Students, 127 AM. J. PSYCHIATRY 1404 (1971); Shapiro, Teaching Observational Skills in Child Psychiatry to Medical Students, 34 AM. J. ORTHOPSYCHIATRY 563 (1964).

80 See note 5 supra.

81 These matters have been the subject of several national conferences. See, e.g., COUNCIL ON EDUCATION IN PROFESSIONAL RESPONSIBILITY, PROCEEDINGS: THE ASHEVILLE CONFERENCE OF LAW SCHOOL DEANS ON EDUCATION FOR PROFESSIONAL RESPONSIBILITY (1966) [hereinafter cited as ASHEVILLE CONFERENCE ]; E. Kitch, Clinical Education and the Law School of the Future (1970); J. Stone, Legal Education and Public Responsibility (1959); D. Wechstein, Education in the Professional Responsibilities of the Lawyer (1970).

82 See, e.g., Smedley, The Pervasive Approach on a Large Scale — "The Vanderbilt Experiment," 15 J. LEGAL ED. 435 (1963). See also Selby & Masserman, The Pervasive Approach Project at Ohio State University College of Law, in ASHEVILLE CONFERENCE, supra note 81, at 60; Samad, The Pervasive Approach to Teaching Professional Responsibility, 26 OHIO ST. L.J. 100 (1965). For a strong attack on the pervasive system, see Starrs, supra note 5.

83 See LAMBORN, supra note 15, at 7-8.
Antioch School of Law in Washington, D.C. The School has been organized around a working law firm, the personnel of which are the law school faculty, and students are involved with clients from the very beginning of their law school experience. The logistical problems which must be resolved for this strategy to work are enormous, but if this experiment is successful, other law schools may feel tremendous pressure to incorporate some of the innovations Antioch will have developed. That result would instantly press law schools in the direction of the educational model which has been so successful for the professional education of physicians. In the meantime, other methods should be sought that will better enable law schools to integrate legal concepts and professional process-teaching.

The "seminar continuing-case method," widely used by psychiatrists, psychologists, and social workers for teaching interpersonal process-skills, is a well-tested technique which might be used in teaching legal professionalism. In this procedure, one student is chosen to present to the group continuously over time the detailed process of the case under discussion. This seminar-discussion, if used in the law school setting, would inevitably focus upon the many legal questions and procedural issues of relevant cases. However, high in priority on the teacher's agenda would be a meticulous exploration of all of the psychological questions which arise in the context of the cases. For example, a teacher could use the Kayne case involving the tension with a case supervisor over statistics, in which it turned out that the student, no doubt stimulated and abetted by the client's conflicts, systematically had avoided gathering important, though routine, information. This case could provide an ideal vehicle to explore a multitude of questions on the subject of data collection, a central technical problem in all cases. The following are examples of ques-

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84 For a discussion of teacher backgrounds, see Boyer & Cramton, supra note 6, at 282. In recent years the American Association of Law Schools has sponsored three workshop conferences for young law professors in an attempt to open up new insights into the law teaching process. These were organized and directed by Professor Frank Strong. See Kelso, Teaching the Teachers: A Reminisicence of the 1971 Law Teachers Clinic and a Tribute to Harry W. Jones, 24 J. LEGAL ED. 606 (1972); Strong, The Pedagogic Training of a Law Faculty, 25 J. LEGAL ED. 226 (1973).

85 See, e.g., Finesinger, The Teaching of Psychotherapy, 104 J. MENTAL SCIENCE 504 (1958); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, COMMITTEE ON MEDICAL EDUCATION, SMALL GROUP TEACHING IN PSYCHIATRY FOR MEDICAL STUDENTS (1958); Guiora, Hammonn, Mann & Schmale, The Continuous Case Seminar, 30 PSYCHIATRY 44 (1967).
tions that might be posed: What information is needed for the many administrative matters which must be handled by the office or agency staff? What kind of information is needed to carry out an adequate legal analysis of the problem? What kind of information will supply counsel with an accurate pretrial image of the facts in the case? What kind of information is needed from the interviews in order adequately to understand the client, his motives and problems — especially as they relate to the efficient identification and management of the legal issues which brought the client into the office? What kind of information must be derived to enable counsel to apprehend and comprehend his own responses to his client? When class discussion has fully identified the answers to these questions, it will then be appropriate to ask why some pieces of information were not elicited or obtained.

Another level of process exploration is directed toward questions relating to why a student presented his material to the seminar in the manner in which he did. For example, certain kinds of information will be brought forth in an obscured manner or will be left out altogether. When the missing and obscured pieces of data have been identified, then their relevance to the lawyer-client relationship is explored: What does it mean in relation to the lawyer’s self-image as well as that of his professional peers? What does it reveal in terms of the student-teacher relationship? The answers to these questions have operational importance to the lawyer’s behavior and will influence the way in which he carries out his professional tasks. The next topic of discussion for the seminar is, consequently, the application of these matters to lawyer roles.

Many of the feelings stimulated by these cases and in the discussions about them relate directly to issues identified as areas of professional conflict. In the “statistic case,” there was much anger stimulated in the client and in her student-lawyer, and the result appears to have been that the client became progressively more angry until she gave “a withering tongue-lashing and demanded to see a real attorney right now.” This might have been due partially to accrued anger stemming from uneasiness which she

86 CLEPR, supra note 4, at 117.
87 It should be clear that this type of exploration is predicated upon the psychological assumption that all behavior and "nonbehavior" is purposeful and has a detectable and understandable meaning. This is a fundamental postulate of those working in behavioral science fields. See A. Watson, supra note 67, at 71.
88 CLEPR, supra note 4, at 117; see text accompanying note 86 supra.
felt because of the nonrevealed information. This defensive reac-
tion, known as "displacement," is commonly found in professional
relationships.\textsuperscript{90} It often leads to strong emotional responses, far
out of proportion to their apparent stimulus, which are unleashed
in the law office, on the witness stand, during negotiations, or in a
multitude of other circumstances, and which are destructive of the
legal-process goals being sought. We see in this situation, as well as
in some of the earlier examples, a replication of the central
pedagogical insight of Langdell — the use of one prototype exam-
ple which is generalized to a whole class of situations.\textsuperscript{91} Although
this concept of education has been much attenuated since
Langdell's day by a return to the use of massive quantities of
technical materials, it remains an important central idea in legal
education. If the continuing case seminar is properly utilized in
clinical education, every case presented will be representative of
an entire class of important professional problems.

At another level, the continuing case seminar could explore
process-questions in relation to their bearing on procedural
policies. For example, how far may we assume law students will be
able to carry a particular kind of case? How far can the individual
student carry the instant case? What kind of overall policies does
this suggest in regard to law students managing cases in response to
a defendant's right to adequate representation by counsel?\textsuperscript{92} In
other words, are there certain reality limitations which we can
presume to be present in student-lawyers generally which will
cause us to impose limits in law upon what they can do in handling
cases? Or conversely, if we allow students to carry cases to com-
pletion, do certain kinds of presumptions about adequacy of coun-
sel arise as grounds for appeal if the client wishes to invoke them?
Such questions as these may or may not develop as real legal
issues, but they will serve as excellent points for seminar discus-
sion about client's rights as they relate to professionally responsi-
bable behavior.

The Kayne case reproduced earlier\textsuperscript{93} can serve as a further il-
ustration of the dynamics of the continuing case seminar. This
case could be utilized to explore, \textit{inter alia}, the issue of a lawyer's

\textsuperscript{90} Id. at 118.
\textsuperscript{91} A. WATSON, \textit{supra} note 67, at 130.
\textsuperscript{92} See Watson, \textit{supra} note 13, at 116-17.
\textsuperscript{93} U.S. CONST., amend. VI. See, e.g., Argersinger v. Hamlin, 407 U.S. 25 (1972), which
extended the application of the sixth amendment to defendants charged with nonfelony
offenses.
emotional conflict of interest. One of the central questions is, once again, how a lawyer learns to know that he has an emotional conflict. One cannot tell from Kayne's description whether the student knew how her desire to make this a test case was influencing her decisionmaking. This kind of problem relates to and reflects another important psychological principle, that of "overdetermination." The principle refers to behavior that results from the summation effect of several emotional motivations or facts. For example, one can "practice good law" in order to: (1) behave with professional propriety; (2) succeed and make money; (3) avoid censure; (4) please one's partners and friends; (5) have a sense of accomplishment; and (6) emulate one's lawyer-father.

Another psychological factor which might have been present in this student is the defense of reality — a situation in which a reality-appropriate motive is utilized to obscure from an individual's awareness an unacceptable motive. It is quite conceivable that this student had convinced herself of the "value of the tort action to the client" as a "basis" for carrying the case forward and thus minimized and obscured the intensity or degree of her own private motive. She might well have been able to acknowledge that "of course I want to try the case, but that's not the main reason I'm doing it." In the seminar this situation was ascertained and explored and, hopefully, helped all of the students in the group to learn how to gain awareness of underlying motivations. Learning about these kinds of issues is critical for developing appropriate professional skill in handling one's self-centered concerns and interests.

It could have been quite possible in a case like this for the student to deny completely that she had any personal interest in the case. In that event, the class and/or the teacher could raise the question of why the case was not handled more expeditiously. In other words, if the student understood and was fully aware of all of the issues, why did it take her so long to come to an appropriate resolution? Some of the obscuring process might have been responsive to concerns about peer group image, concerns about the teacher or, indeed, concerns about the conscience implications of her personal motivation.

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93 Note 61 and accompanying text supra.
94 A. Watson, supra note 67.
As always, the central professional problem when these personal motives are apprehended is how they should be handled with the client. In this successfully managed situation, the desire to make a test case was fully discussed with the client. The student-lawyer's zeal and interest were surely noticeable to the client, and under such circumstances, clients are often very happy to join with some of the educational purposes of students as a part of their *quid pro quo* and gratitude for professional services rendered. Quite clearly, this latter issue itself has potential ethical implication, since an unwary or an unscrupulous lawyer or student might use such a reaction coercively. He might, with conscious or unconscious deliberation, induce a client's guilt-obligation feelings in order that the client would be willing to do things he would not otherwise do. This possibility should also be thoroughly explored, and it could lead into a discussion about the considerable technical difficulty professionals will experience in avoiding "coercive" pressures even when they are understood. Since competent professionals are constantly performing tasks which are "useful" to their clients, they have an in-built probability for stimulating guilt-obligation responses in the clients who have such tendencies. All of these matters should be actively explored in the continuing case seminar with respect to ethical responsibilities to the lawyer's own value and status system, and, ultimately, to clients and client needs.

As cases are chosen for presentation in the continuing case seminar, the instructor should elect them with an eye to establishing over time a sequence which embraces all or most of the crucial skills and concepts involved in professional behavior. Because the acquisition of cases is somewhat serendipitous, the teacher must have a certain flexibility in his agenda. Since an innate logic does not inhere in any precise order, it is not disruptive if reversals and postponements occur. The content of the agenda can, to a large degree, also be covered in a multitude of kinds of law cases.

The content requirements of an adequate curriculum sequence must influence a clinic's decisions as to which cases it will accept. Whoever is teaching the continuing case seminars must explicitly communicate the nature of the case needs to the client-intake person. Much of the logistical planning for the clinical intake must be tailored to these classroom needs. Certain kinds of cases will be favored at certain times because of their utility as teaching cases. It will, of course, be emphasized that whenever clients are utilized for teaching purposes, their legal needs and their legal rights must never be compromised. The process of providing this protection must also be brought into the continuing case discussions.
Because each case has a momentum of its own — determined by such factors as court schedules, notice requirements, and the like — a means for preserving the "case process record" for teaching purposes must be found. Inexpensive audio- and video-taping capacities are now available which can produce well-documented records of lawyer-client transactions and which may be kept for subsequent teaching uses.95 The possibility of client objections has been well-explored in medical education situations,96 and it is unlikely that a client in a legal situation will object if the purpose is explained to him. It should be noted that the person who is likely to be most uncomfortable about being recorded will be the student or the lawyer-supervisor rather than the client. The client's attention will focus largely on his legal problem, while the student or teacher will be highly aware of his own narcissistic status and of how his colleagues will observe him. The presence of this discomfort in the teaching process is indeed advantageous, provided that it is utilized for learning.

Classroom teachers in many courses could plan to have clinic students introduce interesting case illustrations on explicit issues being discussed, which, in turn, could be related to questions about professional behavior. The classroom situation is clearly analogous to some of the critical psychological dynamics of the lawyer-client relationship. For example, a student's relationship to the teacher is a precise parallel from a psychological viewpoint to the client's relationship to the lawyer. Both of these relationships are characterized by the presence in one person of the authority which comes from massive knowledge, while the other helplessly seeks assistance and stands highly vulnerable. If these forces were brought into open discussion in the classroom, they could be utilized to demonstrate important principles about professional behavior.97 If a classroom teacher does not deal with the psychodynamics of the classroom, he is covertly reinforcing a negative proposition.98 For

95 A group of surgeons notes that a student reviewing his own video tape alone will markedly improve his operative technique. See Goldman, Saltzman & Rosemond, Television Equipment and Its Application in the Learning of Surgical Skills, 47 J. MEDICAL ED. 786 (1972); Ryan & Budner, The Impact of Television: An Evaluation of the Use of Video Tapes in Psychiatric Training, 126 AM. J. PSYCHIATRY 1397 (1970).


97 See Watson, Know Thyself and Thy Client, 1 LEARNING AND THE LAW 23 (Spring, 1974). This article was transcribed from a movie I made, and could be utilized by teachers to demonstrate this technique. The film is available as part of "The Great Law Teacher" series, produced by Professor Charles Kelso at the University of Miami.

98 See Watson, supra note 13, at 123.
example, when a student becomes annoyed at the teacher during class but is fearful of expressing it because of his real or imagined belief that it would be detrimental to do so, a failure to bring that belief into the open for testing reinforces his idea that one must always acquiesce to authority. Since a law student should learn how to assist his clients to express and alleviate such inner tensions in order that they might communicate more effectively, he is being reinforced in a behavior which will tend to blunt his capacity for doing so.99

We can conclude, then, that one of the ways in which the “pervasive approach” to professional education could be readily instituted would be to use the emotions stimulated in the classroom to illustrate analogous professional circumstances. While some may argue that such an arrangement borders on invasion of privacy (of the psyche), this argument has been adequately disposed of elsewhere.100

V. THE “TRIAGE” PROBLEM: A NEW DIFFICULTY FOR THE LEGAL PROFESSION

This problem, a logistical one, has never been confronted by the legal profession.101 When decisions such as Gideon,102 Gault,103 and Argersinger104 were handed down, there was an instant need for the legal profession to face the problem of handling a vastly increased case load. Much of the management of these questions has been haphazard, but some legal-aid clinics and offices operated by OEO have attempted to move more systematically into the

99 The trend toward dehumanizing attitudes has also been observed in medical students. To remedy this trend sensitivity groups have been utilized. See Dashef, Espey & Lazarus, Time-Limited Sensitivity Groups for Medical Students, 131 AM. J. PSYCHIATRY 287 (1974).
100 Watson, Book Review, 116 U. PA. L. REV. 172, 175 (1967); Watson, supra note 13, at 149.
101 Indeed, the word I choose to designate it does not appear in many English dictionaries. Its principal English-language utilization to date has occurred either in military medicine or in civilian-medical-disaster planning. A French dictionary defines it as: “Sorting (of letters); choosing, selecting, picking (action); choose, pick, marshalling (of trains).” M-M DUBOIS, MODERN FRENCH-ENGLISH DICTIONARY (1969 ed.). The word is also employed in the title of a recent book. L. LEWIN, TRIAGE (1972). This book is interesting in that it conjures up all of the fears which arise when issues of community planning are presented. They will occur and have occurred in relation to legal planning as well.
102 Gideon v. Wainwright, 373 U.S. 335 (1963) (right to counsel for all indigent felony defendants).
103 In re Gault, 387 U.S. 1 (1967) (constitutional procedural protection extended to juvenile defendants).
breach. When this case-volume issue arose, the legal profession could join the medical profession in the struggle to develop strategies for meeting "disaster." Triage planning for legal clients requires several explicit kinds of responses which raise complicated ethical, professional, and pedagogical problems. These problems serve as excellent focal points for discussion in the continuing case seminar.

The first step should thus be to make an explicit diagnosis of the client's legal needs. This must be done relatively swiftly. The "intake-lawyer," who does the diagnosis, must then employ a kind of inventory-checklist to investigate the availability of services for the specific problems of the client. It should be clear that several of these judgments will be laden with value considerations. For example, it may be thought that the problem cannot be alleviated, that help would be extraordinarily expensive, and that the client will have limited means or that the issue may be too complex to be handled by any of the personnel available in the servicing agency. In addition to these external value considerations, there may exist subtle personal value judgments that enter into the evaluations, expressed subconsciously in questions such as: Does this client deserve help? Do I like this potential client? Will this client cause me trouble? and many other questions relating to the personality characteristics of the client. All of these factors must be consciously recognized and appropriately handled if decisions are to reflect professional skill and propriety.

After making a diagnosis and evaluating service availability, the intake-lawyer must then make a dispositional decision which is responsive to these two sets of considerations. To do so adequately there must be two kinds of explicitly organized services to meet such problems. First of all, there must be a capacity to handle a high volume of cases relatively swiftly and possibly in limited ways, and this I will call an "overload" or a "high-press" service. Secondly, there must be a "low-press" or "underload" service, which has the capacity to work up cases with total thoroughness, including years of litigation and appeals.

105 At the time of the urban riots in the late 1960's, there were several occasions when hundreds of defendants were arrested, arraigned, and subsequently represented fairly early in the procedure. For a description of the process in the Detroit riot, see J. LINCOLN, THE ANATOMY OF A RIOT 201 (1968). There is a tentative suggestion for approaching the huge problem of prison inmate needs in Wexler, Counseling Convicts: The Lawyer's Role in Uncovering Legitimate Claims, 11 ARIZ. L. REV. 629, 638 (1969).

106 This will include an estimate of his legal problem, his resources for dealing with it, the complexity of the case, and probably the client's economic capacities, since the latter characteristic will be of consequence to disposition of his case.
The overload or high-press service, because of the high case volume involved, might only carry out procedures which solve acute problems and alleviate "pain." However, these measures must fulfill certain minimum requirements and should not add difficulties for the client.

Some measures should be taken to reserve the possibility of some later kind of service. The case may or may not be carried further and the reasons may relate only to resource limitations. Such a decision would have to be responsive to inherent value considerations and to their professional and ethical ramifications. This inevitably raises questions about how much the client must be informed about the decisionmaking and of the notion of informed consent. These questions must be adequately explored and are highly relevant to the educational goals of the law clinic operation.

Since some of the decisions in the overload situation relate directly to the inadequacy of legal services and to questions of community support, persons other than lawyers should be involved in the decisionmaking. A parallel exists with respect to such social-medical problems as access to kidney machines; the shortage of machines necessarily generates various social implications. In this kind of situation, clinics will develop and utilize "neighborhood councils" or "boards" to evolve policies dealing with the dispositional decisions. It should be emphasized that these types of problems relate not to the legal, technical considerations involved in the case, but rather to the issues which flow from the shortage of social resources. These decisions and the psychological-process-educational questions they generate necessitate explicit consideration, providing, once again, excellent professional educational opportunities.

The necessity of making these decisions can potentially create a high degree of anxiety in the lawyers and students involved. This anxiety may lead to a total inhibition of the lawyer's capacity to act, or in the alternative, a powerful urge to turn every problem into a "federal case." The latter course is an example of a lawyer overidentifying with his client in a way that renders it impossible for him to face the reality of what action he must take. Another common example of a lawyer's inability to deal with a matter is presented when he believes that no adequate relief can be pro-

108 This might have been the conflict in case number 1, in CLEPR, supra note 3, at 114, involving an underperforming student, who finally acknowledged his strong overidentification with issues involving "the people."
vided. The student or lawyer will thus overcompensate for his feelings of uneasiness by overstating his position to his client. The exaggerated, seemingly casual attitude is used to ward off anxiety, and the lawyer exhibits a "pseudo-callousness" toward the entire affair.

To manage these new kinds of educational issues, new approaches will have to be devised. A lawyer must ultimately face the fact that he does not have the capacity to solve all problems. Then and only then may he comfortably put forth his best effort and feel comfortably satisfied that he has done all that a human being can do. Successful resolution of such problems would make it possible to avoid the pretense that the attorney does not care about the problems which remain unsolved. These identity conflicts are common in law practice, and legal education should help students to cope with them just as medical education is doing with the problem of death.109

The underload or low-press service is the more familiar one in which a case is explored for all its possibilities and treated definitely. This may include consultation with experts in many fields as well as full consideration of compiling a record for appeal. Most of the emotional conflicts that arise in this setting are those discussed above with respect to overload situations.

Because of the existence of procedural familiarity, the underload service has more appeal from a teaching standpoint. The known is usually more attractive than the unknown, and will generate powerful institutional pressure to channel matters into familiar ways. Competition and conflict will develop between faculties of the underload and the overload services, the reverberations of which will be sensed by students who may react accordingly. This will cause them anxiety which, in turn, will generate further tension in the two groups and lead to counterproductive nonrational responses so far as teaching goals are concerned.110 Teachers and adminis-

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110 This technical problem has been encountered in community mental health programs in the tension between work with individual patients and community consultation services. See G. Caplan, Principles of Preventive Psychiatry 16, 275 (1964); A. Leighton, An Introduction to Social Psychiatry 12 (1960); Plaut, Psychosocial Forces and Public Health Programs, in I Social Psychiatry 240, 249 (A. Kiev ed. 1969). See also Grossman, Clinical Legal Education: History and Diagnosis, 26 J. LEGAL ED. 162, 178 (1974).
trators who are involved in the overall program must therefore prevent or keep to a minimum this kind of internecine struggle.

Finally, it should be noted that both the overload and the underload services will be capable of generating explicit case records for use in the classroom as well as for continuing case seminars. Overall coordination of the teaching requirements from both services should be sought, with some consideration of cases related to the conflicts delineated in the taxonomy.

VI. TEACHING MATERIALS

There have been a number of contributions to the literature on problems of professional behavior in recent years, including several books.111 However, most of these sources do not deal with the processes of professional behavior.

An effective study of process requires an accurate record. Thus we encounter one of the principal obstacles to studying professional behavior. For example, because appellate courts recognize that many nonverbal elements of demeanor and behavior transpire in the trial courtroom they refrain from making an independent finding of fact in most instances.

Modern technology has made it possible to substantially capture this kind of information and in time this may allow courts to approach fact questions in new ways.112 Whether or not the courts make these changes, such new methods open exciting possibilities for teaching professionalism. It is now possible, at relatively moderate expense, to video tape interviews, trials, negotiating sessions, lawyer-client discussions, and any other transactional process in which lawyers and their clients engage. If these video tapes were coupled with transcripts of the same situations, they could lead to a third kind of informational content. Behavioral scientists, expert in the analysis of nonverbal data, could go over such records and

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111 See, e.g., V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY (1966); H. FREEMAN & H. WEIHOFEN, CLINICAL LAW TRAINING (1972); R. MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITY OF MEMBERS OF THE LEGAL PROFESSION (2d ed. 1968); M. MELTSNER & P. SCHRAG, PUBLIC INTEREST ADVOCACY: MATERIALS FOR CLINICAL LEGAL EDUCATION (1974); M. PIRSIG, PROFESSIONAL RESPONSIBILITY (1970); Bellows, On Teaching the Teachers: Some Preliminary Reflections on Clinical Education as Methodology, in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT, supra note 4, at 374; Stone, supra note 9, at 436.

112 A new courtroom utilizing such equipment has been built at the McGeorge School of Law, University of the Pacific, in Sacramento, California. Experimentation in this setting should permit future judgments about feasibility.
draw inferences about the nature of the professionals' reactions in response to client stimuli. Such interpretative material would demonstrate the various alterations of meaning made by the participants from time to time and would provide superb material around which to center classroom exploration and discussion of professional behavior and on the behavioral forces that influence it.

At the present time, there is little such material available. Some casebooks do contain interesting anecdotes and analyses, and these can be used successfully with students in exploring and speculating about the rational (and nonrational) reactions in each situation. The University of Michigan's Institute for Continuing Legal Education has developed another kind of material that might be used for teaching, in which several skilled cross-examiners react independently to a single direct examination. After their cross-examinations are concluded, the lawyers participate in a panel discussion in which they explain what they did and why they did it. Some of these programs have been filmed and some of them have been reduced to descriptions; both could be used for seminar discussions on professional behavior.

Professor Louis Brown's "mock" law office competitions in recent years have been video taped and might be used as the focus for discussion. Similarly, Professor Charles Kelso at the University of Indiana has done some interesting experiments in which a law professor approaches classes in several psychologically different ways, and he then studies the variance of student responses. That kind of material could be utilized for discussion and it might also be used to relate the psychological processes of the classroom to those of the law office.

A great opportunity exists for the creative development of an entirely new kind of teaching material. It should be reemphasized that this material must be different than that which was used in the past in order for it to be helpful in the exploration of the psychological processes of professional behavior.

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113 A good example of this in relation to a trial transcript can be found in the Goldstein-Katz Family Law book, in which Anna Freud analyzes a case record involving the foster placement of a child. J. GOLDSNIK & J. KATZ, THE FAMILY AND THE LAW 960-62 (1965).


115 See Brown & Bonanno, Interscholastic Mock Law Office Competition – A Description and an Invitation, 1 STUDENT LAWYER 24 (1970).
VII. CONCLUSION: THE ISSUE OF TEACHING EFFECTIVENESS

There is a frequent tendency among educators to attempt to measure the effectiveness of new techniques. Foundations making grants often require such studies, and legal education has been no exception in this regard. While it is highly desirable to be able to measure and evaluate changes and make a cost-benefit analysis, a great deal of money and resources may be wasted if this is done prematurely. It would seem very unwise to attempt objective measurement of results at this time. While measurement procedures can and will be developed, at present they would be extremely expensive and the results would be less than rewarding.116

The available alternative, for the time being, is what physicians call "clinical evaluation." These are subjective judgments made by experts, and are as vulnerable to refutation as any opinion evidence. However, these clinical assessments of teaching professionalism are the first step in a scientific approach to an evaluation of efficiency. If teachers embarking on experimentation in this area were to explicitly set down their goals and intentions and, after the fact, estimate and describe their successes, limitations, and failures, it would be possible over time to progressively improve the evaluation process.

The multitude of questions about what skills are needed to carry out various types of legal functions will begin to shape the contours of specialty designations in law practice.117 It will become a matter of great professional importance for legal specialists to develop ways of identifying themselves to the public. Definitions of specialty competence in medicine have evolved into standards with legal implications, and the same process must inevitably take place for lawyers. When teachers systematically explore questions of teaching effectiveness and professional behavior, they must come to grips with this problem as well.118

The most glaring deficiency of clinical programs has been the failure to introduce the interpretative process into the learning experience.119 Expert assistance should be procured in order to develop professional skills in students and teachers; for, without the interpretative element, adequate teaching of professional behavior cannot take place.

116 See Boyer & Cramton, supra note 6, at 256.
117 See id. at 227.
118 Id. at 270. See also Rutter, A Jurisprudence of Lawyer Operations, 13 J. LEGAL ED. 301 (1961).
One positive development that has occurred is that many law professors appear to be taking an active interest in teaching about practice. Those who would not have done so earlier have recently elected to teach clinical law, and the experience has been a positive one.\textsuperscript{119} It is likely that larger numbers of faculty members will follow suit, and in due course the same balance between academic and practice pursuits presently found in medical faculties will be seen in law faculties. It is then that the compartmentalization which has existed for so long will progressively break down. Whereas intellectual defensiveness was the only alternative available to academically oriented law professors in the past, involvement in clinical activities will offer valuable skills oriented toward accommodating the necessity for teaching professionalism. Hopefully, these opportunities will be capitalized upon, and the role of professionalism in the legal education will be an indispensable and permanent one.

\textsuperscript{119} There have been only a few situations in which the technique has been effectively utilized. \textit{See} Bellows, supra note 111; Levy, \textit{The Family Law Project at the University of Minnesota Law School}, in Asheville Conference, supra note 81, at 36; Little, \textit{Additional Remarks on the University of Illinois Project}, in Asheville Conference, supra note 81, at 36; Pattison, \textit{Teaching Human Relations in Legal Negotiation}, 126 Am. J. Psychiatry 525 (1969); Probert, \textit{“Psychology” and the Training of Lawyers: A Modest Experiment}, Human Relations in Law (no. 2, Mar. 7, 1969); Sacks & Kenoe, \textit{The Counselling Training Project at Northwestern University School of Law}, in Asheville Conference, supra note 81, at 42; Sacks, \textit{Human-Relations Training for Law Students and Lawyers}, 11 J. Legal Ed. 316 (1959); White, \textit{The Lawyer as Negotiator: An Adventure in Understanding and Teaching the Art of Negotiating}, 19 J. Legal Ed. 337 (1967).