

# PROFESSIONAL RESPONSIBILITY SYLLABUS

Professor Neil Hamilton

Fall semester 2010

## I. Challenge of Our Subject Matter

The pedagogical challenge of our course is that our subject matter has multiple layers, but we have only 3 credits together for one semester to explore these layers. Let me outline the major layers of our subject:

- A. The role in professional life of your personal conscience including your faith and the ethical first principles that flow from your faith.
- B. The ethics of duty consisting of both the Rules of Professional Conduct themselves and the case law on malpractice and fiduciary duty.
- C. The ethics of aspiration consisting of the traditions, core principles, and ideals of the profession.
- D. The strong “role morality” that both the Rules and the culture of the profession create, especially in terms of confidentiality, loyalty to the client, and zealous advocacy. You have been learning this role morality subliminally since you started law school. The traditional law school curriculum in many schools leans strongly toward the advocacy skills and the zealous advocate’s role in adversarial relationships in litigation.
- E. The critical importance of peer review and self-regulation for a peer-review profession.
- F. The actual reality of how lawyers work out conflicts among the ethics of duty and the ethics of aspiration and their own conscience in practice. You are seeing this in your mentor and clerkship experiences. The legal profession has always been also about making a living. A lawyer’s answer to the question “What is a satisfactory living?” will influence that lawyer regarding both the ethics of duty and the ethics of aspiration.
- G. Development of your skills of ethical sensitivity, moral reasoning and judgment, moral motivation and professional identity, and moral character and ethical implementation (the Four Component Model of what is necessary for a moral action to occur).
- H. Development of your client relationship skills so that you can help your individual or organizational client with the Four Component Model. How do you become a trusted advisor to your clients? The traditional law school curriculum in many schools gives little attention to the development of client relationship and counseling skills. The Mentor Externship is focused on these skills.
- I. Development of your fundamental lawyering skills of legal analysis, clear writing, clear oral presentation, and creative problem-solving.
- J. Development of your own path to practice law while staying true to your own faith and first principles of ethics.

## **II. Course Objectives for Each Student**

### **A. Learning Fundamental Principles of Professional Responsibility and Applying Them to Solve Problems**

#### **1. A Strong Working Knowledge of the Ethics of Duty, the “Role Morality” created by the Rules, and the Importance of Peer Review and Self-Regulation.**

In order to practice law, you must pass both the Multi-State Professional Responsibility Examination and, in some states, an essay question on the main bar examination concerning the Model Rules of Professional Conduct and the law regarding legal malpractice and fiduciary duty. Once you have passed the bar examination and are practicing law, you must comply with the Rules and avoid malpractice or face both professional discipline by your peers and malpractice litigation. You must understand the “role morality” that the Rules create. You must understand your responsibilities in a peer-review profession to hold other law students and lawyers accountable for the Rules. We will spend roughly **sixty** percent of our time in this course on these topics.

#### **2. A Strong Working Knowledge of the Ethics of Aspiration and Fiduciary Duties.**

The ethics of duty describe the floor below which we as peers discipline each other for failure to satisfy the minimum ethical requirements of our profession. The ethics of aspiration refer to the highest ethical traditions, core principles and ideals of our profession. Fiduciary duty refers both to the floor created by the law governing fiduciaries and also to the fiduciary duties beyond minimum duty imposed by law. We will spend roughly **forty** percent of our time in this course on the ethics of aspiration and fiduciary duty beyond the minimum imposed by law as well as the ethics that flow from your personal conscience.

This allocation of time does not reflect my view of the relative importance of the ethics of duty and both the ethics of aspiration and your personal conscience in terms of your personal and professional life. Clearly, the latter two are more important. However I believe that this three-hour course in Professional Responsibility is your principal exposure in law school to the ethics of duty in the form of the Rules of Professional Conduct. You simply must know the Rules in order to practice law.

### **B. Your Personal Conscience and the Client’s Conscience**

Fostering your personal ethical sensitivity, moral reasoning, moral motivation, and moral character and implementation capacities is central to the School of Law’s mission. If you choose to write short essays for this course, you will be

doing some in-depth reflection on four topics from the course which should help develop your moral reasoning. In general, we are going to use both small group and large group discussion to develop your moral reasoning and judgment. Our discussion of each problem in terms of the ethics of duty, the ethics of aspiration, and your personal conscience should help develop your ethical sensitivity.

The client relationship skills, particularly the skill to serve as a trusted advisor – are important if you seek to live a life where your personal ethics play a role in your professional life. It is through the counseling role that you assist your client to think through all aspects of the client’s problem. While you go to the client’s shoes to help the client think the problem through, your personal ethical development will give you the ability to help the client wherever the client is in terms of his or her ethical development. Consider taking Client Interviewing and Counseling or a Clinic course, or any other course that emphasizes the counseling skill. We will try to develop your counseling skill through class discussion.

### **C. Development of Your Own Life Path**

The mission of our law school is to integrate faith and reason in the search for truth through a focus on morality and social justice. We commit ourselves to preparing you to become servant leaders in the practice of law and to helping you integrate your faith and deepest ethical principles into your professional identity.

Finding a path to a good and worthy life through the sometimes conflicting ethical systems that a lawyer must navigate is a lifelong challenge. Theologian Michael Novak observed that a calling “is a source of endless personal challenge, testing intellectual and moral mettle in the crucible of practicality.” Our profession will offer abundant opportunity to stretch your soul in the crucible of practicality.

Defining your own path to a good and worthy life – staying true to your faith and first ethical principles while practicing law – is a career-long project. The habits you develop here at law school will carry you through the crucible of practical reality that lies ahead.

### **D. Changing the Profession During Your Watch Over the Profession**

In this course, we will treat the profession’s current ethical rules and aspirations as a tradition to be examined and debated. We should try to work out answers in a shared search for best reasons and soundest analysis. The tradition has to be renewed in each generation of the profession, but also reconsidered. How do you want our professional ethics to change on the watch of your generation?

### III. General Background

You need to be aware that when many lawyers in practice refer to “professional ethics” or even just “ethics,” they mean compliance with the floor created by the Rules of Professional Conduct. This narrow understanding undermines the tradition of our profession and encourages “gaming” the Rules by using our advocacy skills (including the skill of statutory interpretation) to push the envelope on interpretation of the ethics rules themselves. Unfortunately, “gaming” the Rules is sometimes financially rewarded.

In the 750-year tradition of the learned professions, society and members of a learned profession form an unwritten social contract whereby the members of a profession agree to restrain self-interest and both to maintain high standards of performance and to promote the highest ideals of the profession in the area of the profession’s responsibility. In return society allows the profession substantial autonomy to regulate itself through peer review. The profession’s autonomy to regulate itself translates into substantial autonomy and discretion for professional judgment in the work of each individual lawyer.

The ethics of each profession are descriptive of the profession’s duties under the social contract. In order to maintain the social contract and its autonomy, a profession must develop clear principles of professional conduct, hold members accountable for meeting the principles, and foster the highest professional goals and ideals. A profession must renew the social contract in each generation by educating new entrants and the public about the duties of the profession and how the public benefits from the social contract.

One aspect of this tradition bears special emphasis. By definition, in the relationship between the person(s) to be served and the professional, there are purposes that are not captured in the ordinary market exchange between a customer and a service provider or an employer and an employee. Professor Robert Bellah posits a “tripartite structure” essential to the definition of a learned profession, namely the professional, the person(s) to be served by the professional, and a higher transcendental purpose that informs and guides the relationship between the professional and the person(s) to be served. The transcendental purpose of each profession flows from its role in contributing to the flourishing of society. Professor Bellah notes that the central transcendental purposes of the original learned professions – law, medicine, the ministry and the professoriate – were in fact sacred purposes to assist others in justice, physical health, spiritual health, and the growth of reason. The tradition of the learned professions is that the professional acts as a fiduciary for a sacred trust.

Reflecting this tradition, historically an oath to God committing the entrant into the profession to use his or her special knowledge and skills for the common good and the good of those served was an important step in becoming a member of the profession. It still is in three of them – the ministry, the law, and medicine - but professors no longer take an oath. An example of the oath you will take when you become a lawyer is attached at the end of this syllabus. In each of the learned professions, the professional extends care and commitment for the well-being and growth of both the person served and that person's communities through counseling and education. The relationships are thus transformational, not simply transactional.

#### **IV. Administration of the Course**

##### **A. The Text and the Problems in the Text.**

The text for the course is Morgan and Rotunda, Professional Responsibility: Selected Problems and Materials (10<sup>th</sup> ed. 2008) plus Morgan and Rotunda, 2010 Selected Standards on Professional Responsibility.

We cover approximately one problem for each 60 minutes that the class meets. This means that we cover two to three problems per week of class. If you are reading ahead, note that we skip some problems. When the textbook refers to the provisions of the Model Rules of Professional Conduct, be sure to read those Rules in the Supplement.

##### **B. Evaluation.**

My objectives in evaluation are both to ensure that you understand the ethics of duty (the Model Rules) and to encourage and empower you to think through the ethics of aspiration and your own personal conscience. You can choose either of the options below to determine your course grade.

##### **Option 1**

The course grade will be based upon a 3 hour final examination (as adjusted by class participation discussed below).

For the final examination, you may use **only** your Selected Standards on Professional Responsibility book, You may annotate the Standards book for use in the examination. You may not use a book annotated by another student. The examination will have two parts:

Part I      A multiple choice section identical in format to the Multi-State Professional Responsibility Examination.

Part II one or two essay questions very similar in format to the essay questions on the essay portion of the main bar examination.

### **Option 2**

The course grade will be based 50% on the final examination as discussed above and 50% on **four** essays as described below (as adjusted for class participation discussed below).

I will divide the students selecting Option 2 into groups A and B. Group A will write essays to be submitted on Sept. 20, Oct. 4, Oct. 25, and Nov. 15 and Group B will write essays to be submitted on Sept. 27, Oct. 11, Nov. 8, and Nov. 22. Note that we skip the break week and the week of Nov. 1.

Each essay will consider a topic from a problem that we did the week **previous** to the Monday class where you are handing in the essay.

An essay consists of no more than 600 words. I list below the criteria for each essay.

- a. You are writing on a topic from the week prior to the Monday when you turn in your essay. Select **one topic** raised by our readings, in our class discussion, or in your reflection on the readings and class discussion for the previous week. I emphasize that (1) you are to select just **one topic** that you can state clearly in the first paragraph of your essay for a particular week and (2) the topic must be related to the readings and discussion of that particular week of class.
- b. The topic for each essay can be on II. A.1. above, but at least two of your topics should include some discussion of II.A.2. and II.B. above.
- c. You may include and discuss outside reading on any topic if you wish.
- d. I encourage discussion of any topic with others, especially your mentor or practicing lawyers or judges, but including other students, family members, and your friends. You may quote them if you wish. This course will give you a rich variety of topics to discuss with your mentor – all lawyers face the issues we discuss. The ultimate writing of each essay must be solely your work.
- e. You will turn in your essay on the dates indicated above for Groups A and B.
- f. Each submitted essay must be typed.
- g. Submit the essay marked with your **student exam number**.
- h. Put a **word count** on the journal.
- i. The grade for each essay will depend upon the following:
  1. the selection of one topic clearly stated in the first paragraph;
  2. the creativity and difficulty of the topics you have selected;

- 3. your synthesis of class or other readings, class discussion or discussions with others, and your own reflection on the topics you have selected;
- 4. the quality of your analysis; and
- 5. the quality of your writing.
- j. Late papers will not be accepted.
- k. Once you are assigned to Group A or Group B, you must stay in that group and meet that group's deadlines.

**C. For Either Option 1 or 2: Class Participation and Attendance**

Each student will have **no more than three absences** for the semester. Failure to meet this attendance requirement will result in a lower grade including the possibility of failing the course.

I will both call on students and use volunteers in class discussion. This is professional responsibility class – presumably professional competence in preparation should not be an issue. If professional competence in preparation is an issue for a student, I will adjust the final grade to reflect the problem.

For consistent, professionally competent contributions to class discussion, I will raise your grade calculated from Options 1 or 2 up one grade (e.g. from a B to a B+). I submit to the registrar the anonymous exam numbers with your course grade, and the registrar makes the adjustments. I do not see your exam numbers.

**I am asking you not to wear hats in this class.**

**You must also be on my seating chart.**

**D. Appointments.**

I prefer that you send me an email to make an appointment since I have such a heavy load of committee meetings both here at the law school and over in St. Paul that sometimes get scheduled without input from committee members.

If you make an appointment, you will not be frustrated by waiting for me.

Verna Monson who offices next to Dave Bateson on the third floor also keeps my schedule. She can also make an appointment for you to see me.

**IV. Topics Covered in the Course**

	<u>pages</u>
Chapter I. THE LEGAL PROFESSION: BACKGROUND	12-14
	28-30

Chapter II. REGULATION OF THE LEGAL PROFESSION	31-32
1. Admission to the Bar	32-46
2. Lawyer Discipline and the Disabled Lawyer	46-64
3. Regulating Lawyers Outside of the Formal Disciplinary System	64-83
Chapter III. FUNDAMENTALS OF THE LAWYER-CLIENT RELATIONSHIP	84
4. Undertaking to Represent a Client	85-99
5. Billing for Legal Services	90-117
6. Handling Client Property	117-33
7. The Duty of Confidentiality	133-48
8. Confidentiality and the Organization as Client	148-65
Chapter IV. THE REQUIREMENT OF LOYALTY TO THE CLIENT	166
9. Representing Multiple Parties Dealing with Each Other	167-79
10. The Duty of Loyalty	180-98
12. Conflict Between Client Interest and the Lawyer's Personal Interest	212-25
13. Representing the Insured and the Insurer	225-41
14. The Lawyer and Her Former Client	241-55
15. Imputed Disqualification	255-70
16. Special Problems of Government Lawyers	270-86
Chapter V. ADVISING CLIENTS	287
17. The Lawyer as Adviser For An Individual Client	289-301
18. Advising the Business Corporation	301-14
19. Contact with Represented and Unrepresented Persons	314-30
20. The Ethics of Negotiation	330-47
21. The Lawyer as Evaluator	347-63
Chapter VI. ETHICAL PROBLEMS IN LITIGATION	
23. The Decision to File Suit	380-97
24. Litigation Tactics	397-415
25. Disclosure of Law or Facts Favorable to the Other Side	415-31
26. Handling Physical Evidence	431-46
27. The Client Who Intends to Commit Perjury	446-68
29. The Crusading Prosecutor	479-500
Chapter VII. THE DELIVERY OF LEGAL SERVICE	512
31. Solicitation of Legal Business (plus read Rules 1.5(e) and comment 7 to that Rule and Rules 5.1-5.3)	513-34
32. Referral to a Specialist	534-46
33. Roles and Responsibilities in the Modern Law Firm	547-60
34. Leaving One Firm and Forming Another	560-79
35. The Duty to Work for No Compensation	579-96
37. The Future of the Legal Profession	614-38

### **Minnesota Attorney Oath of Admission**

I swear that I will support the Constitution of the United States and that of the State of Minnesota, and will conduct myself as an attorney and counselor at law, in an upright and courteous manner, to the best of my learning and ability, with all good fidelity to the court as to the client, and that I will use no falsehood or deceit, nor delay any person's cause for lucre or malice, so help me God.