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## Building on the Professionalism Foundation of Best Practices for Legal Education

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## ARTICLE

# BUILDING ON THE PROFESSIONALISM FOUNDATION OF *BEST PRACTICES FOR LEGAL EDUCATION*

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### INTRODUCTION

The book *Best Practices for Legal Education* celebrated its ten-year anniversary in 2017.<sup>1</sup> *Best Practices* challenges law schools to embrace the mission of preparing students for practice, and encourages law teachers to integrate knowledge, skills, and values throughout the curriculum.<sup>2</sup>

The book's authors stress that law schools should give more attention to teaching professionalism.<sup>3</sup> While there are many facets of attorney professionalism, *Best Practices* notes five values worthy of special attention in law school.<sup>4</sup> The book also emphasizes the importance of teaching professionalism pervasively across the curriculum.<sup>5</sup> *Best Practices'* emphasis on professionalism is complemented by another book—*Educating Lawyers: Preparation for the Profession of Law*, otherwise known as “The Carnegie Report.”<sup>6</sup>

This article considers *Best Practices'* continuing influence on professionalism pedagogy and professionalism scholarship. Part I of this article summarizes *Best Practices'* suggestions about teaching attorney professionalism. From there, each part of this article considers an area where law professors continue to build on that foundation. Part II explains that *Best Practices* prompted a conversation about professionalism outcomes and as-

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1. ROY STUCKEY ET AL., *BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP* (2007) [hereinafter *BEST PRACTICES*].

2. *Id.* at viii.

3. *Id.*

4. *Id.* at 84.

5. *Id.* at 100.

6. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) [hereinafter *EDUCATING LAWYERS*] (arguing that “professionalism needs to become more explicit and better diffused throughout legal preparation.”).

assessment that continues today. Part III discusses the “co-educator” model to professionalism education encouraged by *Best Practices* and its continuing role in legal education. Finally, Part IV discusses *Best Practices*’ prediction of expanded opportunities for interdisciplinary scholarship created by a new approach to legal education. This part discusses some of those opportunities, and concludes with an extended discussion of interdisciplinary work in the area of behavioral legal ethics and its impact on professionalism education.

## I. BEST PRACTICES FOR LEGAL EDUCATION AND PROFESSIONALISM

*Best Practices* first addresses professionalism in a chapter concerning setting goals for the program of instruction.<sup>7</sup> Professionalism is listed as one of six attributes for effective, responsible lawyers.<sup>8</sup> Initially, the term is defined as “appropriate behaviors and integrity in a range of situations” and “the capacity to deal sensitively and effectively” with participants in the legal system regardless of background, culture, and disability.<sup>9</sup>

*Best Practices* explains that teaching professionalism encompasses the task of helping students understand “the values, behaviors, attitudes, and ethical requirements of a lawyer and to infuse a commitment to them.”<sup>10</sup> The authors acknowledge that professionalism encompasses duties required under the Rules of Professional Conduct,<sup>11</sup> but also urge that professionalism education should address what is expected of lawyers “by the public and by the best traditions of the legal profession itself.”<sup>12</sup>

*Best Practices* reminds legal educators that “we are not born with values” but that they are learned.<sup>13</sup> The book explains that it is a law professors’ role to teach professional values, because law students enter law school with an undeveloped understanding of legal professionalism<sup>14</sup> and that teaching professionalism is consistent with the idea that a law school should influence “what kind of lawyers it wants its students to be.”<sup>15</sup>

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7. BEST PRACTICES, *supra* note 1, at 39.

8. *Id.* at 65–91 (in addition to professionalism, the list includes: self-reflection and lifelong learning skills; intellectual and analytical skills; core knowledge of law; core understanding of the law; and professional skills).

9. *Id.*

10. *Id.* at 79.

11. *Id.* at 79–80. After noting that professionalism includes duties under professional conduct rules, the authors describe that standard as “the minimally required conduct of lawyers.” *Id.* at 80. I have previously pushed back against this negative, dismissive attitude concerning professional conduct rules. Paula Schaefer, *A Primer on Professionalism for Doctrinal Professors*, 81 TENN. L. REV. 277, 286 (2014). Viewing professional conduct rules as the ethical minimum disregards the high standards of conduct required by many professional conduct rules and fails to explain what it means (or how it is possible) to do “more than” the professional conduct rules in many situations.

12. BEST PRACTICES, *supra* note 1, at 80.

13. *Id.*

14. *Id.* at 81.

15. *Id.* at 82.

Recognizing that professionalism can be described in various ways (and discussing some of the ways that others have conceptualized professionalism),<sup>16</sup> *Best Practices* presents five professional values that “deserve special attention during law school.”<sup>17</sup>

The first value, “a commitment to justice,” is described as the most important goal of teaching the profession’s values.<sup>18</sup> *Best Practices* concludes that implementing or achieving justice is the primary goal of lawyers as officers of the court.<sup>19</sup> The second value is “respect for the rule of law.”<sup>20</sup> The book describes a lawyer’s “special obligation to respect and foster respect for the rule of law,” and urges law schools to “infuse students with a commitment to foster respect for the rule of law.”<sup>21</sup>

The third value is that lawyers should embody the qualities of “honor, integrity, fair play, truthfulness, and candor.”<sup>22</sup> *Best Practices* describes the relationship between improving lawyers’ commitment to these values and public trust in the profession.<sup>23</sup> The fourth value concerns, “sensitivity and effectiveness with diverse clients and colleagues,”<sup>24</sup> and describes “cross-cultural competence” as a skill to be taught.<sup>25</sup> The fifth and final value is “nurturing quality of life.”<sup>26</sup> The book notes that depression, substance abuse, and poor physical health are problems that impact the legal profession at a higher rate than the rest of the population.<sup>27</sup> *Best Practices* encourages law schools to help students understand the things that will make them fulfilled, namely a focus on “growth of self, relationships, and community.”<sup>28</sup>

Another key point *Best Practices* emphasizes is that law schools should teach professionalism pervasively throughout the curriculum.<sup>29</sup> This entails all faculty members modeling professional behavior and addressing ethical problems when they arise in class material.<sup>30</sup> The book cites Deborah Rhode, who observed that if law schools do not address professionalism issues as they arise in courses, students will view professionalism

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16. *Id.* at 82–84.

17. *Id.* at 84.

18. *BEST PRACTICES*, *supra* note 1, at 84.

19. *Id.* at 84–85.

20. *Id.* at 85.

21. *Id.* at 87.

22. *Id.*

23. *Id.* at 88.

24. *BEST PRACTICES*, *supra* note 1, at 88.

25. *Id.* at 88–89 (discussing five habits of cross-cultural lawyers that we can introduce to students and that they can continue to hone throughout their legal careers).

26. *Id.* at 90.

27. *Id.*

28. *Id.* at 90–91.

29. *Id.* at 100–104 (discussing how the competitive law school experience can foster unprofessional conduct, and that schools must instead create a community that fosters professional conduct and in which “faculty, staff, and administrators model professional values and attitudes”).

30. *BEST PRACTICES*, *supra* note 1, at 102.

as “a digression from what is really important.”<sup>31</sup> Rhode warns that “every law school does, in fact, teach some form of ethics by the pervasive method, and pervasive silence speaks louder than formal policies and commencement platitudes.”<sup>32</sup>

*Best Practices* concludes this discussion by summarizing the approach it endorses: law professors should have greater awareness of themselves as role models; law schools should consider teaching professionalism pervasively and should have a “system for encouraging and monitoring its ethics and professionalism programs”; new law textbooks should incorporate more material on professionalism; and law schools should develop co-curricular activities that reflect a commitment to teaching professionalism.<sup>33</sup>

## II. FOUNDATION FOR AN ONGOING CONVERSATION ABOUT PROFESSIONALISM OUTCOMES AND ASSESSMENT

The authors of *Best Practices* acknowledge that there are many aspects of attorney professionalism and that educators may disagree on the importance of certain values and traits, as well as the attention they deserve in law school.<sup>34</sup> While *Best Practices* presents five values requiring special attention, legal educators have continued to discuss various understandings of professionalism and the formation of a professional identity.<sup>35</sup>

Today, the American Bar Association (ABA) requires schools to adopt learning outcomes, including outcomes addressing competency in upholding “professional and ethical responsibilities to clients and the legal system.”<sup>36</sup> As a result, all US law faculties have become participants in the conversation about the meaning of attorney professionalism and the priorities of educating students about the values of the profession.

31. *Id.* at 102–103.

32. *Id.* at 103.

33. *Id.*

34. *Id.* at 84.

35. In the years that have followed, at least twenty-two law review articles have cited BEST PRACTICES’ discussion of professionalism issues. In BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD (the follow-up volume to BEST PRACTICES), the values of the legal profession and priorities of professionalism education were described in a multitude of ways. See BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD 253–368 (Deborah Maranville et al. eds., 2015). Many other articles have explored the topics of professionalism and professional formation. See, e.g., Neil Hamilton & Jerome M. Organ, *Thirty Reflection Questions to Help Each Student Find Meaningful Employment and Develop an Integrated Professional Identity (Professional Formation)*, 83 TENN. L. REV. 843 (2016).

36. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2016–2017, at 15–16 (2016), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf) [hereinafter ABA STANDARDS] (discussing Standard 302(c)). Each law school is required to publish its learning outcomes. *Id.* at Standard 301(b) (requiring schools to publish learning outcomes). *Id.* at 23–24 (discussing Standard 315—requiring schools to “conduct ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods”).

The Holloran Center for Ethical Leadership at the University of St. Thomas School of Law has analyzed the professionalism-related learning outcomes for US law schools.<sup>37</sup> While some outcomes provide no detail about specific aspects of professionalism the school plans to develop,<sup>38</sup> others are incredibly detailed. For example, using the database links tagged “high professionalism” and “professionalism,” educators can research detailed professionalism-related learning outcomes that have been adopted by fifteen law schools.<sup>39</sup> Other outcomes are categorized as addressing issues such as improving the profession, pro bono service, cultural competence, and leadership.<sup>40</sup>

*Best Practices* encourages law schools to adopt learning outcomes by reaching a “consensus after dialogue and deliberation.”<sup>41</sup> The Holloran Center’s compilation of professionalism-based learning outcomes is an invaluable springboard for such a conversation. Whether a law school is in the initial stages of drafting, revisiting, or revising its professionalism learning outcomes, understanding the range of outcomes adopted by other law schools is helpful.

Law school faculties should also look to *Best Practices* as they make plans to assess achievement of professionalism learning outcomes, as required by the ABA.<sup>42</sup> *Best Practices* emphasizes the need to assess whether

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37. *Learning Outcomes Database 302(c) and (d)*, HOLLORAN CTR., <http://www.stthomas.edu/hollorancenter/resourcesforlegaleducators/learningoutcomesdatabase/learningoutcomes301c/> (last visited Feb. 22, 2018) [hereinafter *Learning Outcomes Database*] (addressing both Standard 302(c)—“exercise of proper professional and ethical responsibilities to clients and the legal system”—and Standard 302(d)—“other professional skills needed for competent and ethical participation as a member of the legal profession”).

38. *See id.* The Holloran Center categorizes these outcomes as “basic learning outcomes.”

39. *Id.* For example, at the “high professionalism” link, there are links to the outcomes for Pennsylvania State University Dickinson College of Law, The University of Tennessee College of Law, and Villanova University Charles Widger School of Law. Following the link to Villanova’s “high professionalism” outcome, one finds the following: “**Learning Outcome 1:** Graduates will demonstrate a commitment to ethics and integrity consistent with the highest standards of professionalism as a lawyer. 1) Graduates will demonstrate knowledge of a lawyer’s professional and ethical responsibilities and will understand the role of a lawyer in promoting justice. 2) Graduates will be able to recognize the most common ethical and professional liability dilemmas and will know methods for resolving them with the highest professional standards. 3) Graduates will understand the importance of integrity, honesty, diligence, civility, accountability, and commitment to excellence in interactions with other lawyers, governing bodies, clients, and the public. 4) Graduates will be given an opportunity to appreciate and understand the importance of giving back to the community through involvement, volunteerism, and pro bono service.” *Assessment of Student Learning and Learning Outcomes*, VILL. U. CHARLES WIDGER SCH. L., <http://www1.villanova.edu/content/villanova/law/academics/learningoutcomes.html>.

40. *Learning Outcomes Database*, *supra* note 37.

41. *BEST PRACTICES*, *supra* note 1, at 49.

42. ABA STANDARDS, *supra* note 36, at 23 (discussing Standard 314 “A law school shall utilize both formative and summative assessment methods in its curriculum to measure and improve student learning and provide meaningful feedback to students.”).

students are prepared to act professionally in practice.<sup>43</sup> *Best Practices* acknowledges that assessment can be difficult.<sup>44</sup> The book stresses that measuring achievement of an outcome does not require mathematical precision, but a judgment call by the professor.<sup>45</sup>

Without an assessment plan, professionalism outcomes are merely platitudes. For example, an outcome providing that “students will have a commitment to justice”<sup>46</sup> sounds nice, but students cannot understand this commitment until a school makes a plan for teaching and assessing this aspect of professionalism. In order to assess achievement of this outcome, students will need to be placed in a situation in which they are required to determine the factors that properly influence a lawyer’s understanding of “justice.”<sup>47</sup>

While a professional responsibility course may be one place to assess professionalism-related learning outcomes, law schools adopting a pervasive approach to professionalism instruction should designate other courses as places for assessment.<sup>48</sup> Beyond that, law schools should consider the possibility of assessment starting before coursework begins (during orientation or at the beginning of a course)<sup>49</sup> and continuing after graduation.<sup>50</sup> Surveys of and conversations with graduates in the years after law school could help educators better understand the challenges faced in various settings, graduates’ level of preparedness for these issues, and their ideas for addressing any shortcomings of their education.

43. BEST PRACTICES, *supra* note 1, at 101 (citing the *Carnegie Report* for its discussion concerning the need to teach and assess professionalism); *see also id.* at 265–273 (discussing assessment generally).

44. *Id.* at 49.

45. *Id.* (giving the example that clinical faculty who spend a semester with a student should be able to assess (or make a general judgment concerning) whether a student has achieved the outcome of “recognizing and resolving ethical dilemmas”).

46. *Id.* at 84. This outcome tracks the most important value of professionalism, according to *Best Practices*. *Id.*

47. For example, an attorney representing the biological parent to a child born in a same sex marriage may have to determine which arguments to make (or not make) regarding whether the non-biological parent/spouse should be treated as a parent under state law. *See, e.g.,* Jamie Satterfield, *Parenting Rights in Same-Sex Divorce Headed to a Tennessee Appellate Court*, KNOXVILLE NEWS SENTINEL (June 24, 2016), <http://archive.knoxnews.com/news/crime-courts/parenting-rights-in-same-sex-divorces-headed-to-a-tennessee-appellate-court-36046f02-b742-54df-e053-384279061.html> (discussing biological parent’s attorney’s arguments in the case). What it means to fight for justice in this situation, how this fight should be waged, and who should decide, are complex questions that our students should be prepared to wrestle with by applying professionalism principles. A student’s ability to address a web of authorities in such a scenario is a tool we can use to assess this professionalism outcome.

48. BUILDING ON BEST PRACTICES, *supra* note 35, at 418 (as part of institution-wide assessment, a faculty must identify the places in the curriculum where learning outcomes are assessed).

49. BEST PRACTICES, *supra* note 1, 95 (explaining that a diagnostic assessment occurs before teaching).

50. BUILDING ON BEST PRACTICES, *supra* note 35, at 420 (explaining that properly structured graduate surveys and focus groups can be used as a tool for assessment).

### III. FOUNDATION FOR A CO-EDUCATOR APPROACH TO ATTORNEY PROFESSIONALISM EDUCATION

The authors of *Best Practices* make clear that professionalism education requires the efforts of a variety of players beyond professional responsibility professors.<sup>51</sup> By advocating for professionalism education across the curriculum, *Best Practices* recognizes that all of the professionals within a law school play a role in developing professionalism in its students.<sup>52</sup> The authors also advocate looking to practicing attorneys and judges to play a role in the professional preparation of law students. These attorneys and judges can advise professors developing curriculum,<sup>53</sup> teach as adjuncts and guest speakers,<sup>54</sup> and model professionalism outside of the classroom in co-curricular activities, such as mentoring and pro bono programs.<sup>55</sup>

Teaching professionalism requires commitment to the endeavor. All of the professionals who interact with students (professors, career services professionals, alumni, and others) must think about how they are teaching professionalism. They can teach professionalism through a multitude of everyday efforts, such as being a good role model<sup>56</sup> and pausing to let students identify and resolve professionalism dilemmas in class materials.<sup>57</sup> In many ways, the law professor's job is easier today, because law school textbook authors and publishers followed the *Best Practices* advice of integrating attorney professionalism issues into many textbooks.<sup>58</sup>

*Best Practices* also encourages a co-educator approach by encouraging law professors to teach outside of their comfort zones. The book insists that all law professors can teach professionalism.<sup>59</sup> But not all professors feel prepared to lead a discussion of the topic. Professors with a passion for teaching professionalism should seek out opportunities to co-teach a class with a colleague who has an expertise in another area. This can enrich the students' experience and help both professors feel more comfortable teaching in the other person's area of expertise. This makes it more likely that professors will continue to integrate professionalism-related issues into their courses.

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51. *BEST PRACTICES*, *supra* note 1, at 102.

52. *Id.* (“[W]e are proposing that all members of a law faculty should embrace their collective responsibility to contribute to their students’ understanding of and commitment to professional behavior.”).

53. *Id.* at 272.

54. *Id.* at 158.

55. *Id.*

56. *Id.* at 101, 129.

57. Schaefer, *supra* note 11, at 299–301 (discussing how doctrinal professors can use case law to discuss professionalism issues in their doctrinal classes).

58. *Id.* at 302 (providing examples of textbooks that incorporate experiential exercises that require students to address professionalism issues).

59. *BEST PRACTICES*, *supra* note 1, at 103 (asserting that the most important qualification for teaching professionalism is that the professor “above all . . . views herself as a professional”).



IV. FOUNDATION FOR AN INTERDISCIPLINARY APPROACH TO  
PROFESSIONALISM EDUCATION

*Best Practices'* authors anticipated that the book's teachings would lead to new avenues of interdisciplinary scholarship.<sup>60</sup> Attorney professionalism pedagogy and scholarship have been enriched by interdisciplinary work in the areas of leadership,<sup>61</sup> professional formation teaching methods,<sup>62</sup> and behavioral ethics.<sup>63</sup> The remainder of this Part considers how the interdisciplinary study of behavioral ethics and attorney ethics—behavioral legal ethics—can play a significant role in legal professionalism education in the future.

The field of behavioral ethics draws on cognitive science research to understand the role that psychological processes play in ethical decision-making.<sup>64</sup> Behavioral legal ethics scholars apply these lessons to the decision-making processes of lawyers.<sup>65</sup> This emerging field reveals that attor-

60. *Id.* at 5 (“If law teachers begin giving more thought to how students learn as well as what lawyers do and how they do it, new avenues of legal scholarship will be opened . . . . These new directions in scholarship are more likely to involve interdisciplinary work than traditional legal scholarship . . . .”).

61. *See, e.g.*, Deborah L. Rhode, *Lawyers as Leaders*, 2010 MICH. ST. L. REV. 413, 418 (2010) (encouraging legal educators to draw upon interdisciplinary research and theory to educate law students about leadership); Garry W. Jenkins, *Educating Lawyer-Leaders: The Mechanics and Artistry of Case Study Teaching and Discussion Leadership*, 83 TENN. L. REV. 729, 730–732 (2016) (explaining how business school case studies and social science leadership literature can be used in a law school leadership course).

62. Charity Scott, *Collaborating with the Real World: Opportunities for Developing Skills and Values in Law Teaching*, 9 IND. HEALTH L. REV. 411, 432 (2012) (discussing an interdisciplinary partnership between law school and medical school to teach law and medical ethics); Jennifer S. Bard, *Practicing Medicine and Studying Law: How Medical Schools Used to Have the Same Problems We Do and What We Can Learn from Their Efforts to Solve Them*, 10 SEATTLE J. SOC. JUST. 135 (2011) (discussing what law schools can learn from medical school pedagogy); Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361 (2010) (same).

63. Andrew M. Perlman, *Behavioral Theory of Legal Ethics*, 90 IND. L.J. 1639 (2015) [hereinafter Perlman, *Behavioral*]; Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1107 (2013).

64. Tigran W. Eldred, *Prescriptions for Ethical Blindness: Improving Advocacy for Indigent Defendants in Criminal Cases*, 65 RUTGERS L. REV. 333, 358 (2012) (noting that “the thesis running through [behavioral ethics research] is that, contrary to the assumption that ethical choices are primarily the product of deliberate calculation, significant evidence demonstrates that unconscious aspects of decision making play a substantial role in ethical judgments.”) [hereinafter Eldred, *Prescriptions*]; *see also* Bradley Wendel, *Stephen Glass, Situational Forces, and the Fundamental Attribution Error*, 4 J.L. 99, 100 (2014) (explaining that a central finding of behavioral psychology is that situational forces play a more significant role in determining behavior than a person's character or personality).

65. Perlman, *Behavioral*, *supra* note 63, at 1639–1643 (arguing that legal ethics theories should be influenced by social psychology research because doing so more accurately predicts factors that influence an attorney's judgments); Robbennolt & Sternlight, *supra* note 63, at 1112–1113 (describing the article as “the first attempt to provide a comprehensive survey of the implications of psychology for legal ethics.”).

ney misconduct is often the product of obedience pressure,<sup>66</sup> confirmation bias,<sup>67</sup> overconfidence bias,<sup>68</sup> and other unconscious biases<sup>69</sup> and influences.<sup>70</sup>

For example, lawyers who represent indigent defendants in criminal cases routinely encourage their clients to accept guilty pleas despite doing little or no investigation into the facts.<sup>71</sup> On the surface, it may appear that these lawyers know they are not fulfilling their professional obligations to their clients.<sup>72</sup> Behavioral legal ethics brings a different perspective to the problem, explaining how ethical fading can cause these lawyers not to recognize their professional failures in this setting.<sup>73</sup> Various forces combine to cause such fading, including: a lawyer's belief in the client's guilt; self-interest in conserving resources and preserving the view of self as ethical; ambiguity in controlling rules regarding necessity of investigation; social norms of the lawyer's office and the justice system; and many others.<sup>74</sup> By understanding all of the influencing factors, law students and lawyers can see the issue in a new way<sup>75</sup> and begin to develop meaningful solutions to the problems that plague the profession.<sup>76</sup>

66. Catherine Gage O'Grady, *Wrongful Obedience and the Professional Practice of Law*, 19 J.L. BUS. & ETHICS 9 (2013); Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007) [hereinafter Perlman, *Obedience*] (discussing obedience pressure).

67. Leslie C. Levin, *Bad Apples, Bad Lawyers or Bad Decisionmaking: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549, 1585 (2009) (discussing confirmation bias).

68. Vivien Holmes, 'Giving Voice to Values': Enhancing Students' Capacity to Cope with Ethical Challenges in Legal Practice, 18 LEGAL ETHICS 115, at 121 (2015) (defining overconfidence bias).

69. See, e.g., Jerry Kang, *Implicit Bias, A Primer for Courts*, NAT'L CTR. FOR ST. CTS., <http://wp.jerrykang.net.s110363.gridserver.com/wp-content/uploads/2010/10/kang-Implicit-Bias-Primer-for-courts-09.pdf> (discussing implicit bias).

70. A lawyer's bias as a partisan or mindset as a zealous advocate can influence unethical conduct that the lawyer mistakenly believes is in the client's interest. See, e.g., Perlman, *Behavioral*, *supra* note 63, at 1647–1657 (discussing studies that establish the distorting effect that a partisan role has on a person's perceptions); Paula Schaefer, *Harming Business Clients with Zealous Advocacy: Rethinking the Attorney Advisor's Touchstone*, 38 FLA. ST. U. L. REV. 251, 258–274 (2011) (explaining how the lawyer's conception of self as zealous advocate can contribute to the lawyer providing poor advice to business clients).

71. Eldred, *Prescriptions*, *supra* note 64, at 340–347.

72. *Id.* at 336–337 (explaining the lack of funding and attorney workloads, but noting that most literature on the issue assumes lawyers know they are failing to meet their professional obligations).

73. *Id.* at 339 (describing blind spots as “the phenomenon that causes people to fail to perceive themselves as unethical in situations in which their own self-interest conflicts with duties owed to others”).

74. *Id.* at 359–385.

75. *Id.* at 339 (explaining that it is crucial for indigent defense lawyers to be aware that they are providing inadequate performance because that is necessary for them to take steps to become more effective).

76. *Id.* at 385–393.

Behavioral legal ethics research explains something that most professional responsibility professors probably have suspected: law students (and lawyers) believe they will not engage in unethical conduct in practice because they believe themselves to be good people with integrity.<sup>77</sup> (This is overconfidence bias, which causes everyone to give inadequate thought to ethical dilemmas because we firmly believe we are ethical).<sup>78</sup> In contrast, law students see the lawyers who engage in misconduct as people different from themselves: unethical lawyers who do not share the profession's values and who make calculated choices motivated by greed or malice. This belief is so pervasive—and wrong—that it has a name: fundamental attribution error.<sup>79</sup>

Legal educators are beginning to explore ways of integrating behavioral legal ethics into the law school classroom.<sup>80</sup> Introducing law students to these issues helps students understand that they are fallible.<sup>81</sup> It is not enough to understand the values of the legal profession, to know the professional conduct rules, and to be a person who possesses the highest ethical values.<sup>82</sup> A lawyer does not *become* professional, but must be vigilant every day to avoid engaging in professional misconduct.<sup>83</sup> Behavioral legal ethics

77. Holmes, *supra* note 68, at 121 (explaining that most people are overconfident in their moral character and that this bias causes people to “make decisions without proper reflection”).

78. *Id.* (rather than giving an ethics dilemma adequate thought, overconfidence bias causes us to think, “I am a good person, so I will do good things”).

79. Wendel, *supra* note 64, at 100 (explaining fundamental attribution error as the human tendency to attribute the cause of wrongdoing by another to the person's traits or dispositions and not to the features of the situation).

80. Tigran W. Eldred, *Insights from Psychology: Teaching Behavioral Legal Ethics as a Core Element of Professional Responsibility*, 2016 MICH. ST. L. REV. 757 (2016); Paula Schaefer, *Teaching Behavioral Legal Ethics: A Seminar*, BEHAV. LEGAL ETHICS (Mar. 1, 2017, 5:17 PM), <https://behaviorallegalethics.wordpress.com/2017/03/01/teaching-behavioral-legal-ethics-a-seminar/>.

81. Holmes, *supra* note 68, at 120 (behavioral ethics research explains that “psychological heuristics and situational pressures can influence good people to do bad things”); Robert A. Prentice, *Behavioral Ethics: Can it Help Lawyers (And Others) Be Their Best Selves?*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 35, 84 (2015) (explaining that most people think they are good people, “so the ethics stuff . . . will take care of itself,” but that behavioral ethics education can help law students understand “most of their ethical judgments are made intuitively and are not always optimal”).

82. Holmes, *supra* note 68, at 119 (behavioral ethics is contrary to the ordinary assumption “that if students know the rules, and the sanctions that follow breach of the rules, then when they become legal practitioners they will make rational decisions about their conduct based on this knowledge”).

83. *See generally* Prentice, *supra* note 81, at 84 (“[I]f people can be educated regarding their vulnerability to various cognitive shortcomings, they can also guard against them.”). In some areas, vigilance alone is not enough. *See, e.g.,* Perlman, *Obedience*, *supra* note 66, at 472 (noting a lack of evidence for the proposition that being enlightened about the power of obedience will help individuals overcome obedience pressure). In other areas, a lawyer's understanding of behavioral legal ethics and vigilance is likely to have a significant impact. For example, the use of euphemisms can help obscure the ethical dimension of an issue. Being alert to common euphemisms for misconduct can help lawyers avoid ethical fading. Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES., 223, 226–228

research suggests methods lawyers, firms, courts, and others can employ to encourage ethical behavior.<sup>84</sup>

#### CONCLUSION

In 2007, *Best Practices* urged law schools to be a “part of the cure” for the public’s loss of trust in lawyers by infusing professionalism into legal education.<sup>85</sup> Ten years later, law professors continue to work towards this goal, and *Best Practices*’ professionalism lessons continue to guide. Law professors, as members of the legal profession, should continue to reexamine what we mean by “professionalism” and how we will assess whether we have prepared law students to conduct themselves professionally in practice. *Best Practices* recognized the variety of educators who can play a role in professionalism preparation. In the intervening years, we have become more purposeful in coordinating and facilitating the efforts of these lawyer-educators. Finally, *Best Practices* predicted that a new approach to teaching law students would lead to interdisciplinary scholarship. We are just beginning to appreciate how an interdisciplinary approach to professionalism education—in the area of behavioral legal ethics and others—can help lawyers navigate the obstacles to acting professionally as lawyers.

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(2004) (describing how language euphemisms like “creative accounting” contribute to ethical fading).

84. See, e.g., O’Grady, *supra* note 66, at 30, 36 (explaining how introducing “strain” promotes independent thinking and counters wrongful obedience, such as introducing a competing authority figure like ethics counsel in a law firm); Tigran W. Eldred, *Moral Courage in Indigent Defense*, 51 NEW ENG. L. REV. 97 (2016) (describing the elements in a training program that would help public defenders develop the moral courage to resist unethical conduct in indigent criminal defense); Robbenolt & Sternlight, *supra* note 63, at 1156–1181 (providing various suggestions for individuals and organizations to address the reasons for common ethical failures); Holmes, *supra* note 68, at 131 (explaining how simulations provide opportunities for practice/rehearsal, which research suggests is an effective method to improve ethical decision making).

85. BEST PRACTICES, *supra* note 1, at 28.