On Friday, January 19, I gave the introductory lecture for the course. In this version, I am going to use PowerPoint to reinforce and to extend my remarks.
Today is the day for a very big picture of where the course fits in your legal education in particular and in your development as a lawyer more generally. Much of your study in the first semester, if not all of it, was “in the weeds,” where you dealt with details – important details – but details that were largely divorced from any connection to the purposes for which you were learning them. This course is a chance to step back and see the bigger picture.

In a very simplified sense, your legal education and your early years of law school are all about a transformation, a kind of journey. In its simplest form, that journey has been described this way, as a journey from novice to expert. For reasons that you will see in a minute, I do not think this is complete, but it is a start.

You probably do not feel very “expert” yet, but you are certainly no longer a novice.
This course is about helping you to envision yourself as an “expert” practitioner and to help you understand who you are going to have to become to get there. When you are studying Federal Rule of Civil Procedure 26(b)(5), or when you are learning about the rules against perpetuities, or diagramming the intricacies of the uniform commercial code, it will help you to understand why you are doing those things, to see this bigger picture and the goal to which are are striving. I think, if you understand where you are aiming, that your journey there will become more a journey that you understand, that you take control over, that you direct, and that you enjoy. So in a certain sense, we start at the end, by considering what the end result looks like – what the “expert” lawyer looks like.

By the way, it is important to note here that the ability to achieve this result is independent of grades. Exactly one-half of you are in the bottom half of the class, and you probably have never been in that position. You may feel disheartened. Don’t. Everyone made progress from being a complete novice, and everyone, regardless of grades, can have a career full of success and meaning. Keep focused on this big picture and not whether you go an 80 or an 85 in Jurisdiction and Judgments.
When I say the word “expert,” what comes to mind? As you envision yourself as an “expert,” what do you see?

An expert is one who knows things and knows how to do things. An “expert” lawyer is a lawyer who knows the law. An “expert” lawyer is a lawyer who can do the things that lawyers do. Knowledge and skill are two of the things that make a lawyer competent. Surely those terms capture some of what you should be striving for. But is that enough?
The Carnegie Foundation did a detailed study of legal education a few years ago and concluded that law schools were very good at the “knowledge” part and getting better at the “skills” part. But the study, which has been highly influential in legal education, said that was not enough. The way Carnegie put it, obtaining this knowledge and skill were two kinds of “apprenticeships” of legal education, but there was a third. This course, which predated the Carnegie Report by several years, is about that “third apprenticeship.” It is about a bigger picture of what you are trying to become as a lawyer – bigger that the term “expert” can capture it. So what is it?

The Carnegie Report calls it the third apprenticeship of “values.” That is a term that can cause as many problems as it solves. In our culture, it provokes immediate, knee-jerk response of relativism: whose values, and why should anyone’s values be elevated above the values of others?

The “Three Apprenticeships”

- First: Knowledge
- Second: Skill
- Third: 
  - Values?
  - Ideals?
  - Professionalism, more broadly defined?
Members of the bar and the bench do not speak in terms of a “third apprenticeship.” But for the past thirty+ years, the bench and bar have been decrying the lack of “professionalism” among lawyers. They are talking about the lack of knowledge and commitment to the values and the ideals that historically members of the bar have shared. This is not about values or ideals generally, but rather about a specific set of values and ideals -- particularly desirable character traits -- that are defined within and recognized by the “practice” of law as being essential to fulfillment of the lawyer’s roles.

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Other terms for the Third Apprenticeship

- “Professionalism” or the “Professional Lawyer”
- NOT values or ideals generally, but instead the character traits that the legal profession has itself defines as being essential to the lawyer’s ability and inclination to fulfill the public purposes of the legal profession
- In other words, to use the title of one of your books: the Third Apprenticeship is about the identification, acquisition and cultivation of the “Essential Qualities of the Professional Lawyer”
So a better depiction of what this journey is about is to see that you are striving to become a “professional lawyer,” whatever that might turn out to mean. It certainly includes being an expert – having knowledge and skill, having technique – but it is more than that. The first task for the course must be to try to understand what that “more” consists of – what does “professionalism” mean for lawyers, what are the “essential qualities of the professional lawyer?
I bet only a few of you have ever hired lawyers, but I bet almost all of you have seen doctors of one kind or another. You probably have some sense of what it means to be a good doctor, or what it means to be a “bad” doctor. So help me here: describe the “good doctor” and the “bad doctor” of your experience.

A good doctor is a doctor who _____.

A bad doctor is one who _____.

If we were doing this exercise over at the med school what adjectives would you use?

I hope you see from this exercise that one can at least begin to identify the “essential qualities” of the “professional doctor” by using your experience to identify character traits that improve or impede a person’s likelihood of fulfilling the purposes of the medical profession. These are not generalizations about what all people should be – they are specific traits that the “practice” of medicine would identity as being essential. You know about at least these just from your experience as patients.
A place for us to start is to fill this out, to try to agree on the character traits that a “good lawyer” – a “professional lawyer” will have and deploy. Some of these we might be able to identify from our experience or imagination, but in fact the legal profession itself has undertaken to do this for us. When the so-called “crisis of professionalism” arose, committees and commissions of the bench and bar went to great lengths to define what “professionalism” for lawyers means, to list the “essential qualities” of the professional lawyer. These are the values and ideals of the “practice” of law, defined by members of the “practice,” not general values and ideals.
How many of you have any background in Aristotelian Ethics? (You don’t need one). In those terms, what we are talking about is virtue and vice. A virtue takes you closer to the ideal, while a vice takes you further away. I say only because you will hear me, Professor Floyd, and Dean Floyd, sometimes talk about “virtues.” This is nothing fancy – we are only talking about the character traits of what it means to be a professional lawyer.

Let’s see what the profession says these character traits are.

An Aside: Aristotelian “Virtue “Ethics”

- “Telos” – the end, or goal, of a process (i.e. becoming a “professional lawyer”)
- “Virtue” – a quality or trait that takes one closer to the telos
- “Vice” - a quality or trait that takes one further away from the telos
So our first take is to agree on the traits that matter, on a definition of “professionalism” or a list of the “essential qualities of the professional lawyer.” You have already seen some descriptions. I had you read Chief Justice Clark’s little article about “Repaying the Debt.” That little article was really the beginning of the modern professionalism movement in Georgia. When I told him, a year or so before he died, that as long as I am at Mercer first year students would begin their study of professionalism by reading that article, he was very gratified. You have read the lawyer’s creed and aspirational statement on professionalism, promulgated by the Georgia Supreme Court (and by the way in large part written by Mercer Emeritus Professor Jack Sammons, who originally came up with the idea for this course). You have read Dean Floyd’s article. And I will tell you that there are more than 100 bar codes and creeds that attempt to articulate the virtues of the professional lawyer. Working from these materials, we can distill the definition of the “essential qualities of the professional lawyer” to five virtues.
The first of the five virtues is competence, which is comprised of knowledge, skill, diligence and judgment. Much, but not all, of this is what Professor Llewellyn meant when he spoke of “technique,” without which your efforts as a lawyer, no matter how well intentioned, would be a “mess.” You cannot fulfill any of the public purposes of the lawyer without competence.

We are working in this course on aspects of all of these, but of course much of this part of your professional development has begun in your other classes. The first year of law school is heavy on the development of knowledge of certain areas of the law and on the development of particular skills – the type of reasoning that is expected of lawyers and research and writing skills that all lawyers must have. As you continue in your studies, your knowledge of the law will become more advanced as you choose your elective courses, and your skill set will expand to include other skills, such as interviewing, counseling, negotiating, appellate argument, and trial practice, as well as more advanced writing skills. I do not need to tell an audience of first year law students that you are learning the importance of diligence and hard work. Judgment is a little more subtle, but in this course we will explicitly be studying and working on this aspect of professional competence.

1. The lawyer is competent. The lawyer has the knowledge, skills, diligence and judgment necessary to be competent.

https://www.youtube.com/watch?v=xnVP4cr9X0U
2. The lawyer acts with fidelity to his or her client. Among other aspects of fidelity, the lawyer does not permit the lawyers’ interests or the interests of others to take precedence over the client’s interests.

The second virtue is fidelity to the client. This, for most of you, will be a new mindset, the mindset of one who acts for another, in the place of another, as a “fiduciary” — “someone who has undertaken to act for and on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence.” Fidelity to the client requires you to subordinate personal interests, and the interests of others, to the interests of the client. It requires that you transcend the pressure or inclination to serve yourself or others at your client’s expense and keep the client’s interest primary.

You will see many examples of fidelity to the client — or lack thereof — in this class. You will understand it more deeply if you undertake an externship or clinic experience in law school. Your Law of Lawyering course will explore in depth the rules that guide you as you deal with particular issues of conflicting fidelities. Of course, in practice your development on this score will continue.
Here is a dramatic example of fidelity to the client. In this scene from The Verdict, Paul Newman is presented with a settlement offer for the claim that his comatose client has for medical malpractice against a church run by the Boston Archdiocese. Paul Newman’s character is broke and an alcoholic, with only the one client. He desperately needs the money from his one-third share of the settlement. The offer is inadequate for his client, but easily divided by three (so he can calculate his fee immediately). He declines the offer, saying that if he does so, he’s “lost.” He talks about what he will become if he takes the money. He is displaying fidelity to the client and being guided by intrinsic rather than extrinsic values, in an extreme situation.

https://www.youtube.com/watch?v=Asm-9UXAOog
3. The lawyer acts with fidelity to the law and the institutions of the law. This includes not assisting the client in the perpetration of crimes and not taking actions that corrupt the fairness and legitimacy of the courts.

The third virtue is that the professional lawyer will act with fidelity to the law and the institutions of the law, especially the courts. You know or could surmise that there are things you do not do as a lawyer – you do not help clients commit crimes, and you do not threaten, bribe, or intimidate witnesses, judges or juries. There is more to this notion of fidelity to the law, but that gives you a flavor for what we are talking about. It should be obvious that we cannot have a fair, efficient or legitimate judicial system, nor can we encourage obedience to the law, if lawyers are prepared to undermine the system and the law.

In this class, you will see numerous examples of lawyers who had to decide how to comply with this duty of fidelity to the law and its institutions, and you will see the pressures on them, both internal and external, not to do so.

You need to notice one thing right away: the virtues I am talking about can conflict with each other. Perhaps the client’s interests really would be best served by bribing or killing witnesses, yet the competing duty of fidelity to the law surely would prevail. The professional lawyer would do no such thing.

As it turns out, navigating to a decision when the virtues conflict, or indeed navigating to a decision when there are conflicting objectives and interests (particularly under conditions of uncertainty) will call upon you to exercise a particular type of competence. That is the exercise of “practical wisdom.” This part of competence – which is an essential component of good judgment – will be a primary focus of our discussions this semester in our small groups. We will learn more about this as the semester progresses.
In this scene from Anatomy of a Murder, Jimmy Stewart explains to Ben Gazarra that there are four ways to defend murder. Arguably, the lawyer is helping the client, in a subtle way, to come up with a phony story to tell the jury. If that is what the lawyer is doing, that is a violation of his duty of fidelity to the law and the courts. He tells his client, “try to remember just how crazy you were.”

https://www.youtube.com/watch?v=9NAaB24PNBM
4. The lawyer conducts himself or herself with civility. This means that, in interactions with opposing counsel and others, the lawyer is cooperative, courteous and truthful.

The fourth virtue is civility. I want you to notice something strange about being a lawyer, particularly a lawyer engaged in adversarial negotiations or litigation. You will bring to the table all of your knowledge and skills in service to your client’s interests. Sitting across the table from you there often is another lawyer whose job will be to serve his or her client’s interests. It may be that the best way for that lawyer to serve his or her client is to use all of his or her knowledge and skill to see that you fail in what you are trying to do.

Doctors do not operate this way. No doctor stand across the operating table from another doctor and tries to slap the scalpel away. Yet for those of you who engage in contested negotiation or any kind of litigation this will be an inescapable part of your life. Yet, for reasons we will explore – reasons that Justice Clarke touches upon in the short article you have read – our system of justice will not work unless lawyers conduct themselves with civility, particularly with cooperation, courtesy, and truthfulness. Once again, you can readily imagine circumstances under which fidelity to your client will conflict with this principle of civility. We will have in this course opportunities to explore the contours of civility and to exercise judgment about situations in which such conflicts occur.

One final note on this: it is of particular importance because, sad to say, you will encounter incivility in practice. You need to learn how to deal with it. I did not learn that in law school, and it is a personal mission of mine to ensure that you are ready when – not if – it happens.
This is an extreme but not unique example of incivility. It comes form a deposition that was taken by the famous Texas lawyer Joe Jamail in the 1980’s.

https://www.youtube.com/watch?v=ISW3_KT5PeY
5. The lawyer practices in a spirit of public service. The lawyers acts particularly to ensure that everyone has access to needed legal services and generally to ensure that self-governance of the legal profession is conducted in the interest of the public.

The fifth virtue is practice in a spirit of public service. This I have found is sometimes a sensitive subject with first year law students. Maybe you came to law school thinking that you would like to devote your energy and skills to serving the poor or otherwise practicing in a public interest setting. Whether you did or not, it is certainly possible for any such inclination to be eroding. This may be happening because of the enormous cost of the education you are receiving – the attitude might be, “if I had to go through all that and incur so much debt to be a lawyer, why would I or should I ever give away service for free?” Perhaps any such erosion is occurring because you perceive that the primary “prize” of the profession is wealth – I have heard many lawyers say, “money is how we keep score”– and, as an achiever, you adopt that prize as your goal. (This transformation in your goals is one of the things that Dean Floyd discussed in her lecture).

Whether you ever had an ambition to serve the public interest or not, and whether or not any such ambition is eroding, the need for lawyers to exhibit this fifth virtue will be one of the subjects we study and discuss. We will also discuss this public service orientation in connection with self-governance of the profession. For the most part, lawyers regulate themselves, and they’re justified in retaining that right as long as that regulation is in the public interest.
So the first step in this course is to help you understand what it means to be a “professional lawyer,” especially what it means beyond knowledge and skill. We are “sensitizing” you to this part of your “big picture” goal. We are also proving a vocabulary for you to use in talking about these qualities.

For example, you have read or will read Spectator Sport for this week’s discussion groups. One of the things you will be talking about in your working groups and in the section meetings is: how did these lawyers live up to this ideal of the professional lawyer? More importantly, where did they fail? What virtues were not displayed? You are learning to identify and name what’s needed in particular situations.

But we must also sensitize you to more than that.
But as early as this week’s discussion, we move beyond just identification of the virtues. We will be talking about lawyers who failed in some way. These are lawyers who did not go to law school in order to fail or to be talked about by students as being “unprofessional.” I want you to dig deep to try to understand why – what was it about these lawyers or the context that led them to fail? What obstacles were there in the particular circumstances that they failed to overcome?

Allow me to borrow Vice President Gore’s terminology of “inconvenient truth.” There is an inconvenient truth that I fervently wish were not true – for your sake – but which indisputably is true. If we pretended this was going to be easy, we would be doing you a disservice. If we worried about making you uncomfortable, we would be failing you. So get comfortable with being uncomfortable.

Inconvenient truth: No matter what type of law practice you undertake, there will be pressures on you not to live up to one or more of the five virtues. These pressures are inescapable. You will see them as we go through the semester, and you will develop an ability to name them and talk about them. You need to be sensitized to their existence. That sensitization is one of the goals of this course, and we will seek to accomplish it primarily through the case studies of lawyers and hypotheticals that we talk about in your section meetings. Through these case studies and hypotheticals, you will see, and have to play the roles of, lawyers on the inside of a practice faced with these inevitable challenges and, I hope, begin to appreciate that you are being prepared for them before you confront them in the wild.
The Question of Motivation

- It is impossible to ensure that lawyers fulfill these five duties by writing rules and trying to enforce them. You will learn rules—mostly in Law of Lawyering—but fear of sanctions will not come close to being enough.
- So why should you care?

One response to the need for this course is to say, as most law schools have said, all we need is a course on the rules of conduct. The argument is that all we need are enough rules, with enough detail, to tell lawyers what to do in all situations, and a system of detection and sanction that is sure enough that the lawyers will act as desired if for no other reason than fear of sanction.

Even if we wanted lawyers to act appropriately just for the primitive reason to avoid punishment, that system is not possible. I will elaborate on this in a future lecture, but the world that lawyers work in is too complex for any set of rules to cover all situations. The settings in which lawyers work are largely too private for us to believe that detection of misbehavior is likely to be reliable. Rules are not enough. Fear is not enough.

Which raises the question for us: why should you care? I have already said it is going to be hard. Why bother?

This is the heart of why we at Mercer are not content to just teach you the rules of conduct. If that is all you know, and if that is all you think is important, then there is little hope that you will become the kind of lawyer whose professional identity includes adherence to the five virtues. In turn, there will be little hope that you would conduct yourself in such a way that the public purposes of your office as a lawyer will be fulfilled or that you would find deep satisfaction in your work. I repeat—rules are not enough. Fear is not enough.
The Evolution of Motivation for Professional Conduct

- “Legal Ethics”: use the fear of disbarment or indictment to cause lawyers to behave as they should
  - Failures of detection and enforcement
- “Professionalism”: try to inspire lawyers to conduct themselves appropriately, not out of fear but out of a sense of duty to others, including clients and the legal profession
- “Professional identity”: seek to have lawyers internalize the character traits that lead to proper conduct, for the sake of their personal and professional satisfaction
An early hint of “Professional Identity”

- Justice Clarke writes, “…professionalism is a higher standard *expected* of all lawyers. This is the kind of standard which leads to a satisfaction for a job well done or a life well spent. John Ruskin said: ‘The highest reward for a person’s toil is not what they get for it, but what they become by it.’ We may well ask what we have become by our experience as members of the legal profession.”

Professor Sammons has thought long and hard about this question. He eventually came to the conclusion that the decision to try to become this “professional lawyer” must be a selfish one or there is no hope that it will happen. Part of what I hope to convince you of in this course is that the lessons of this course are really all about you and your happiness as a lawyer. You should CHOOSE to become a professional lawyer for the selfish reason that you will be happier as a lawyer if you do.

There has been much written and said in the last twenty years about lawyer dissatisfaction and unhappiness. It is likely that many of these statements are exaggerations, but to the extent there is a systemic tendency toward less satisfaction in the practice of law, I think (with Justice Clarke) that it can be described in these terms: by doing what we do as lawyers, every day, what do we become? Perhaps the answer to that question would explain any sense of unhappiness or dissatisfaction in the law.
Justice Clarke is not alone in his view that happiness as a lawyer has something to do with what we become. More than 25 years ago, Tony Kronman, later the Dean of the Yale Law School, published this article on “Living in the Law.” In that article, he asked this question: what is it about the life of the lawyer that justifies the huge investment? You will all have invested enormous effort, time, and expense to become lawyers. What makes it worth it?

Dean Kronman first tries on “instrumentalism” – using the practice of law as a way of getting, for example, the money to take great vacations. It is not the work itself, under this view, but what the fruits of the work can buy you, that make it worthwhile. Remember Justice Clarke quoted John Ruskin as saying, “The highest reward for a person’s toil is not what they get for it...” Dean Kronman, too, rejects this as a way to find meaning and happiness in the law.

Instead, Dean Kronman finds that meaning in the “excellences of character their work requires them to develop and allows them to display.” Note again an echo of Ruskin, as quoted by Justice Clarke: “The highest reward for a person’s toil is...what they become by it.”
Dean Floyd told you about, among other things, the difference between “intrinsic motivations” and “extrinsic motivations.” She talked about the research that shows what actually makes people feel happy and satisfied. She tied that to a sense of self as a professional – “professional identity” – that you will develop – and of more immediate importance – you ARE DEVELOPING already as law students. Dean Floyd inspired you, I hope, to reflect on what the law school experience is doing to your motivations and thus perhaps to your happiness and sense of self. She also introduced you to the link between a particular kind of professional identity – one that is intrinsically motivated – and finding happiness in the life of the lawyer.

If all that seems like a bit much to digest right now, that’s OK. Suffice for now to say that the second purpose is about you and your happiness, that we will talk about it much more as the semester progresses, from several different but ultimately complementary perspectives.
The Third Step: Implementation
I have mentioned already that there will be times when two or more of the five virtues conflict. They may conflict with other interests, such as the need to provide for you and your family, as well. Seeing the problem and wanting to do the “right” thing – whatever that might be – will not be enough. It will take skill to choose and implement a decision under conditions of conflict and uncertainty. It will require at least the “practical wisdom” I mentioned before. It may also require knowledge you do not attain from a law book, such as emotional or cultural intelligence. It may require skills such as tact and finesse. It may require old-fashioned virtues such as courage, even physical courage, that are not unique to the law.

This is the hardest part of the course, and again I emphasize that the course is just the beginning of your training. Learning how to make and implement decisions under conditions of conflicting values and inherent uncertainty is a lifetime endeavor. It is not, by the way, limited just to decisions that implicate the virtues I have been talking about. In that sense, this skill to make and implement a decision is in two ways a question of professionalism. First, and most obviously, it comes into play when virtues are in conflict. Second, it is a part of the first virtue of competence. Remember that competence includes judgment, and judgment is what we are talking about when we speak of the skill to make and implement a decision when values conflict and uncertainty is irreducible.
Summary of what you can expect to get out of this course – your introduction to the “third apprenticeship”

- Sensitivity to the virtues of the professional lawyer and obstacles to deploying them
- Motivation to become a lawyer who embodies and deploys the five virtues
- Skill to implement your professional identity on a routine basis and in more complex situations

In summary, these are the three things we hope to accomplish with you.

If you were a psychology major, you may recognize a close analogy between these three conditions and James Rest’s set of conditions – the so-called four component model (here collapsed into three) – of morality. No background in psychology is required, but you should know that the approach that this course takes is grounded not only in ethics but also in moral psychology.
Conclusion:

Vocation is “where your deep gladness meets the world’s deep need.”

The best way to sum up the big picture of what this class is about is this quotation. We are trying to make explicit for you what it takes to be a professional lawyer – one who fulfills the purposes for which we have lawyers. The world really does have a “deep need” for lawyers – but for lawyers of a particular kind, those who have and deploy the virtues we have been talking about. At the same time, we have learned from the studies of lawyer happiness and satisfaction that the acquisition of these virtues, the cultivation of a professional identity that includes them, is what makes it most likely that you will be happy in your career – in this language, it is where your deep gladness will be found.

And that convergence, of what the world needs and what you want, is the best news of all.