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HOW AND WHY DID IT GO SO WRONG?: THERANOS AS A LEGAL ETHICS CASE STUDY

G.S. Hans*

ABSTRACT

The Theranos saga encompasses many discrete areas of law. Reporting on Theranos, most notably John Carreyrou's Bad Blood, *highlights the questionable ethical decisions that many of the attorneys involved made. The lessons attorneys and law students can learn from* Bad Blood *are highly complex. The Theranos story touches on multiple areas of professional responsibility, including competence, diligence, candor, conflicts, and liability. Thus, Theranos serves as a helpful tool to explore the limits of ethical lawyering for Professional Responsibility students.*

This Article discusses the author's experience with using Bad Blood *as an extended case study in a new course on Legal Ethics in Contemporary Practice. It begins by discussing the pedagogical justifications for including Theranos in the course and the unanticipated ways in which* Bad Blood *highlighted particular topics and questions. The Article then describes student reactions to using* Bad Blood *as a primary text to communicate ethical principles in legal practice and the strengths and weaknesses of doing so. It concludes by contextualizing the use of Theranos as a case study in the larger history of other uses of popular texts in legal education and what lessons other instructors might take from using such case studies.*

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INTRODUCTION

The charismatic leader of a technology company that claims it will change the world charms investors, the press, and the public. Despite obvious warning signs, the company flies high—until it doesn't. Flaws that anyone would have noticed—had they been paying attention to the company's actual practices, rather than its narrative—seem obvious to everyone in retrospect, yet we are all left to wonder: How did something so problematic manage to charm us for so long? And were we naive to not notice?

The preceding paragraph could apply to a number of companies and founders, from Uber and Travis Kalanick to WeWork and Adam Neumann.[1] One of the most notorious examples in recent history that could fit this narrative is Elizabeth Holmes's Theranos.[2] A technology company that Holmes claimed would transform health care by revolutionizing the testing of blood samples, Theranos burned brightly before flaming out in about fifteen years.[3]

Though Holmes claimed that her blood testing technology could accomplish impossible feats—using a very small amount of blood to run multiple tests in a very small device—the devices never functioned as the company asserted, and the tests were never sufficiently accurate to be of any real use.[4] Some of the test results were so inaccurate that, if they had been followed, patients might have been given dangerous, unnecessary treatments.[5] Yet along the

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1. *See, e.g.*, Ginia Bellefante, *Was WeWork Ever Going to Work?*, N.Y. TIMES, https://www.nytimes.com/2019/10/04/nyregion/wework-Adam-Neumann.html [https://perma.cc/U6SV-XM3F] (May 18, 2020); MIKE ISAAC, SUPER PUMPED: THE BATTLE FOR UBER, at xviii–xix (2019).

2. *See, e.g.*, JOHN CARREYROU, BAD BLOOD (2018).

3. *See* John Carreyrou, *Blood-Testing Firm Theranos to Dissolve*, WALL ST. J., https://www.wsj.com/articles/blood-testing-firm-theranos-to-dissolve-1536115130 [https://perma.cc/4BLG-B3AW] (Sept. 5, 2018, 12:10 AM); Nick Bilton, *How Elizabeth Holmes's House of Cards Came Tumbling Down*, VANITY FAIR (Sept. 6, 2016), https://www.vanityfair.com/news/2016/09/elizabeth-holmes-theranos-exclusive [https://perma.cc/T4BR-QPQF].

4. Bilton, *supra* note 3.

5. *See* CARREYROU, *supra* note 2, at 234–35 (describing how one Theranos test implied that a patient had a worsening thyroid condition that could have led her doctor to prescribe unnecessary medications).

way, Theranos successfully partnered with major players like Safeway, Walgreens, the Cleveland Clinic, and the U.S. military.[6]

In retrospect, it was far too good to be true that Holmes, who dropped out of Stanford as an undergraduate and lacked meaningful experience in biology, chemistry, or medicine, could have solved problems that have bedeviled scientists for years.[7] Yet, Holmes's hubris attracted a great deal of after-the-fact attention—perhaps due to her extravagant healthcare claims, her age, her gender, or her presentation—far beyond that of other Silicon Valley failures.[8] The Theranos story has been told in print, on television, and as a podcast; of these, the definitive chronicle of Holmes and Theranos seems to be *Bad Blood*, the nonfiction bestseller penned by the *Wall Street Journal*'s John Carreyrou.[9] Carreyrou spent many years investigating Theranos as a reporter, and his book provides extensive insights and sourcing into how the company unraveled.[10]

Behind nearly every company, a team of lawyers toils, and Theranos was no exception. Lawyers, alongside other employees, helped spin the story of Theranos and avoid regulatory and legal pitfalls.[11] By concealing the truth of what was happening from regulators and intimidating employees and former employees with legal threats, Theranos and its employees crafted a public strategy

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6. *Theranos and Cleveland Clinic Announce Strategic Alliance to Improve Patient Care Through Innovation in Laboratory Testing*, BUS. WIRE (Mar. 9, 2015, 10:49 AM), https://www.businesswire.com/news/home/20150309005903/en/Theranos-Cleveland-Clinic-Announce-Strategic-Alliance-Improve [https://perma.cc/M2WJ-W3HX]. *See generally* CARREYROU, *supra* note 2.

7. *See, e.g.*, Bilton, *supra* note 3.

8. *See, e.g.*, James B. Stewart, *The Narrative Frays for Theranos and Elizabeth Holmes*, N.Y. TIMES (Oct. 29, 2015), https://www.nytimes.com/2015/10/30/business/the-narrative-frays-for-theranos-and-elizabeth-holmes.html [https://perma.cc/QE5B-YRJJ]; JR Thorpe, *Is Criticism of This Female Billionaire Sexist*, BUSTLE (Oct. 19, 2015), https://www.bustle.com/articles/117841-is-criticism-of-billionaire-elizabeth-holmes-sexist-yes-no [https://perma.cc/5UHW-WY22]; Katie Heaney, *What Kind of Person Fakes Their Voice?*, THE CUT, https://www.thecut.com/2019/03/why-did-elizabeth-holmes-use-a-fake-deep-voice.html20fake [https://perma.cc/6V4B-PPX4] (Mar. 21, 2019). *But see* Yohana Desta, *Theranos Founder Elizabeth Holmes's Family Swears Her Deep Voice Is Real*, VANITY FAIR (Mar. 21, 2019), https://www.vanityfair.com/hollywood/2019/03/elizabeth-holmes-voice-family [https://perma.cc/4524-2XVK] (quoting a TMZ article in which family members attest that Holmes's voice was not faked and that her grandmother also had a low voice).

9. *See generally* CARREYROU, *supra* note 2.

10. *Id.* at ix–x.

11. *Id.* at 120–22.

reliant on private malfeasance.[12] As described by Carreyrou, some of the company's strategy relied on the work of high-powered law firms that engaged in questionable conduct.[13]

David Boies, one of the most well-known and infamous attorneys currently practicing in the United States, was intimately involved in the rise and fall of Theranos, both as an attorney representing the company and as a board member.[14] Boies's role in Theranos raises many obvious ethical questions, as did his conduct in other contemporaneous, high-profile cases (such as the Harvey Weinstein allegations).[15] And beyond Boies's conduct, several other examples of ethical issues for lawyers arose in the Theranos saga.[16] *Bad Blood* describes many moments that are likely to turn the stomachs of lawyers and law professors who keep legal ethics in mind.[17]

While designing a course on "Legal Ethics in Contemporary Practice," which focuses on how current issues in the legal profession highlight different aspects of the ethical rules that regulate attorneys, I chose to include *Bad Blood* as an extended case study. Given Theranos's public notoriety—including a well-regarded podcast and an HBO documentary series, in addition to *Bad Blood*—the story of this failed company provides an illustrative, well-known tool to explore many issues covered in the standard Professional Responsibility course.[18] I believed that the Theranos saga, with its riveting, dramatic details and complicated ethical questions, would help students engage with the sometimes dry ethical rules with

12. *Id.* at 135.

13. *Id.*

14. James B. Stewart, *David Boies Pleads Not Guilty*, N.Y. TIMES (Sept. 22, 2018), https://www.nytimes.com/2018/09/21/business/david-boies-pleads-not-guilty.html [https://perma.cc/94M9-QQYJ].

15. *Id.*

16. CARREYROU, *supra* note 2, at 247.

17. *See generally id.*

18. THE INVENTOR: OUT FOR BLOOD IN SILICON VALLEY (HBO Mar. 18, 2019) [hereinafter THE INVENTOR]; *The Dropout*, ABC NEWS (Jan. 15, 2019), https://abcaudio.com/podcasts/the-dropout/; *see also* G.S. Hans, Syllabus: Legal Ethics in Contemporary Practice (2019) (class syllabus) (on file with the Georgia State University Law Review) [hereinafter Syllabus].

greater zeal than any hypotheticals that I could design or that a casebook could provide.

This Article describes my experience with using *Bad Blood* and Theranos as ongoing pedagogical tools while teaching students a standard course on the Model Rules of Professional Conduct (MRPC) that included extensive discussion of current issues in the legal profession.[19] *Bad Blood* indirectly highlights ethical issues on a range of topics, from conflicts of interest to reporting requirements. Thus, I chose to periodically engage students throughout the term with questions targeted to different ethical rules implicated by the book.

Because my course is designed to help students develop their own ethical framework before entering practice, it was my hope that *Bad Blood* would provide more than a cautionary tale. In an ideal world, the Theranos case study would help my students realize that "professional responsibility" is more than just a graduation or bar requirement. The thesis of my course is that professional responsibility is a core element of legal practice that all lawyers must be constantly cognizant of to best represent their clients and promote the public good—which lawyers have a special responsibility to do.[20]

For that reason, near the end of the semester, I devoted a full class session to explore how attorneys—including, but not limited to, Boies—behaved in the book's narrative and whether the conduct described in *Bad Blood* helped the students understand how ethical rules play out in the real world. I designed that discussion to encourage students to reflect on how the book highlighted ethical rules. It also allowed them to describe their own intuitions regarding what they might do as attorneys if they faced similar questions while practicing law.

This Article proceeds in three parts. Part I discusses the reasons I chose to include *Bad Blood* as a component of my course, the

19. Syllabus, *supra* note 18. Some of the topics were: criminal justice reform; diversity, equity, inclusion, and advancement in BigLaw; privacy and security tools; judicial elections; and litigation finance, in addition to others. *Id.*

20. *See* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

pedagogical goals for doing so, and the ways in which teaching Theranos provided unexpected opportunities for learning. As a gripping, timely exploration of corporate malfeasance and high-stakes lawyering, *Bad Blood* was a highly engaging element of the class—which was quite welcome, given the undeserved reputation for dryness that Professional Responsibility courses often have. But because Professional Responsibility courses are both surveys and also contain sequentially structured material, incorporating *Bad Blood* presented challenges in highlighting the ethical problems posed by the book—for example, discussing conflicts of interest that the book mentioned when students had not yet learned that material.[21] Conversely, the book often provided unexpected opportunities to highlight particular ethical rules and pose hypothetical questions regarding the ethics of lawyering.[22]

The Article continues in Part II to discuss student responses to the use of *Bad Blood* as an extended case study to highlight ethical principles. Students were excited by the chance to discuss Theranos, Boies, and Holmes in part because several students were familiar with Theranos and in part because of the engrossing nature of the case study. Nevertheless, though there were many benefits to teaching *Bad Blood*, it was not an unqualified success, given the nature of the course and other pedagogical goals. The costs of including the book included switching amongst different types of reading assignments and less extensive coverage of the ethical rules.

Part III contextualizes my use of *Bad Blood* in the existing literature documenting how other educators incorporate popular texts and case studies into their legal curriculum. From civil procedure

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21. By this I mean that the standard Professional Responsibility course covers a range of disconnected topics (e.g., admissions to the bar, lawyer advertising and solicitation, the attorney–client privilege, and judicial ethics, amongst others), as well as topics that build off of each other (e.g., students must learn duties of confidentiality and loyalty before learning conflicts of interest). This is one reason instructors may find it challenging to teach, as it is neither fish nor fowl.

22. *See* G.S. Hans, Theranos Teaching Prompt: Intuitions on Conflicts (2019) (class exercise) (on file with the Georgia State University Law Review) [hereinafter Intuitions on Conflicts]. Before learning the MRPC rules on conflicts of interest, for example, one hypothetical asked students to discuss their intuitions on conflicts of interest when Holmes asked McDermott to represent Theranos against the father of one of McDermott's partners. *Id.*; CARREYROU, *supra* note 2, at 64–65.

classics such as *The Buffalo Creek Disaster* and *A Civil Action* to the use of case studies in corporate law courses, law professors have often turned to materials beyond casebooks to teach students core legal principles.[23] Building off of scholarly discussions of those experiences, I conclude by offering suggestions for other Professional Responsibility instructors who may consider using *Bad Blood* or other texts to help students see how a class they may treat as a duty, in fact, contains some of the most engaging, provocative, and vital material in the curriculum.

I. CHOOSING THERANOS

A. *Never Waste a Good Ethical Crisis*

My own introduction to the Theranos story came with Ken Auletta's largely credulous *New Yorker* profile of Elizabeth Holmes, published in December 2014.[24] Auletta interviewed some experts and competitors who criticized Theranos's claims and approach, but the profile likely did more to help Holmes's standing in the media and public than hurt Theranos.[25]

Because Holmes and I are the same age and because I was living and practicing in the Bay Area at the time, I began to follow media coverage of Theranos with interest.[26] It did not take long for obvious problems to come to light.[27] In large part due to John Carreyrou's reporting in the *Wall Street Journal*, Holmes soon seemed much less of a wunderkind and more akin to an evasive saleswoman. With the May 2018 publication of Carreyrou's book on Theranos, *Bad Blood*,

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23. GERALD M. STERN, THE BUFFALO CREEK DISASTER (2008); JONATHAN HARR, A CIVIL ACTION (1995).

24. Ken Auletta, *Blood, Simpler*, NEW YORKER (Dec. 8, 2014), https://www.newyorker.com/magazine/2014/12/15/blood-simpler [https://perma.cc/E6YJ-JGTB].

25. *Id.*

26. *Id.*

27. John Carreyrou, *Hot Startup Theranos Has Struggled with Its Blood-Test Technology*, WALL ST. J., https://www.wsj.com/articles/theranos-has-struggled-with-blood-tests-1444881901 [https://perma.cc/63B7-C4NQ] (Oct. 15, 2015, 3:20 PM).

it seemed clear that the empress had no clothes; Theranos wound down operations just a few months later.[28]

In summer 2018, I read *Bad Blood*—despite having known some of the story already—because I had heard that it was an engaging, disturbing account of corporate malfeasance. After devouring it in two days amidst preparing to teach Professional Responsibility for the first time, it became clear to me that Theranos highlighted several ethical problems that both lawyers and non-lawyers might face in their professional lives.[29]

In my first experience teaching Professional Responsibility, I had relied mainly on the textbook I had chosen, written by the clinicians Lisa Lerman and Philip Schrag.[30] Lerman and Schrag use a problem-based approach to teach the ethical rules.[31] My discussion here is based on comparing teaching *Bad Blood* against my prior, more standard Professional Responsibility course.

In 2019, while redesigning my course to focus on current issues in the legal profession and to use a more discussion-oriented approach, I hit upon the idea of using *Bad Blood* as an extended "case study." I was familiar with other such uses of books in law school courses—most famously, professors who assigned *A Civil Action* in Civil Procedure.[32] *Bad Blood* had become a bestseller, increasing Theranos's notoriety. HBO had aired a documentary, *The Inventor*, and ABC had released a podcast, *The Dropout*, making the Theranos saga a truly multimedia event.[33] Theranos had transformed from a

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28. *See id.*; *see also* CARREYROU, *supra* note 2.

29. CARREYROU, *supra* note 2.

30. LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (4th ed. 2016). A third co-author, Robert Rubinson, has joined the new 5th edition. LISA G. LERMAN ET AL., ETHICAL PROBLEMS IN THE PRACTICE OF LAW (5th ed. 2020). I teach a three-credit Professional Responsibility course that employs a "problem-based" approach in which multiple long hypotheticals are included in the text to highlight particular ethical issues or ambiguities. LERMAN & SCHRAG, *supra* at xxiv–xxxv.

31. LERMAN & SCHRAG, *supra* note 30, at xxiv–xxv.

32. HARR, *supra* note 23, at 77–81, 87. Harr's book describes *Anderson v. Cryovac*, 96 F.R.D. 431 (D. Mass. 1983), concerning the toxic contamination of groundwater in Massachusetts. HARR, *supra* note 23, at 77–81, 87. It documents a long-running civil case, as well as related issues like discovery, fees, and settlement. *Id.*

33. THE INVENTOR, *supra* note 18; *The Dropout*, *supra* note 18.

somewhat obscure, failed startup to an infamous catastrophe. Given the pending federal criminal charges and the somewhat colorful details of Holmes's life before and after Theranos, it was unsurprising that the story continued to have legs even after the company's demise.[34]

Yet merely being a popular story that raised some ethical issues was not sufficient for me to justify including it in my course. Professional Responsibility covers a great deal of material, much of which is unrelated, and including additional readings—especially a 300-page book—would mean that I would have to sacrifice depth in complex areas like confidentiality, conflicts of interest, and duties to the tribunal.[35]

The reporting on the well-known attorney David Boies, who had represented Theranos, and his actions relating to the *New York Times*'s investigation into Harvey Weinstein's sexual predation, helped convince me that teaching *Bad Blood* in my course would reap pedagogical dividends.[36] A core theme of my course is that law students and lawyers should carefully guard their professional reputation because they have worked hard to achieve career

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34. *See* Indictment, United States v. Elizabeth Holmes, No. CR 18 00258, 2018 WL 3216817 (N.D. Cal. June 14, 2018); *see also* Joel Rosenblatt, *Elizabeth Holmes Phones In Her Defense After Civil Lawyers Quit*, BLOOMBERG (Jan. 24, 2020, 7:00 AM), https://www.bloomberg.com/news/articles/2020-01-24/elizabeth-holmes-phones-in-her-defense-after-civil-lawyers-quit [https://perma.cc/5BFM-6CKJ]. The U.S. District Court for the Northern District of California subsequently denied Holmes's motions to dismiss the second and third superseding indictments. United States v. Elizabeth Holmes, No. 18-CR-00258, 2020 WL 6047232 (N.D. Cal. Oct. 13, 2020).

35. My course is now called "Legal Ethics in Contemporary Practice," but I will continue to refer to it as "Professional Responsibility" for clarity and to analogize it to the broader array of Professional Responsibility courses that other schools and instructors teach. In describing Professional Responsibility as a subject with "unrelated" material, I mean to call attention to how the course deals with a wide swath of topics. Though most Professional Responsibility courses focus on the MRPC, those rules cover a wide range of topics. *See generally* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020). Some of those topics are interrelated (e.g., the duty of confidentiality and conflicts of interest), while others are completely unrelated to other areas of the course (e.g., restrictions on lawyer advertising and solicitation, which do not meaningfully build on any other components of the MRPC). *Id.* Thus, the course is simultaneously a broad survey that builds on prior material. In a three-credit course like the one I teach, it is possible but difficult to cover many of the "core" ethical concepts, especially given my goal to include materials touching on current issues within legal practice. *See* Syllabus, *supra* note 18.

36. Deborah L. Rhode, *David Boies's Egregious Involvement with Harvey Weinstein*, N.Y. TIMES (Nov. 9, 2017), https://www.nytimes.com/2017/11/09/opinion/david-boies-harvey-weinstein.html [https://perma.cc/D264-NNHE].

milestones. Yet one's professional reputation can easily be threatened, marred, or lost by an ethical misstep. Thus, I attempt to persuade students in my course that developing a strong ethical compass will help them safeguard their careers.

Few attorneys have experienced such a dramatic shift in professional reputation over the last few years as Boies has.[37] Once the celebrated advocate who represented the federal government in the Microsoft antitrust case, Vice President Al Gore in *Bush v. Gore*, and same-sex marriage advocates in the challenge to California's Proposition 8, Boies is now tied more closely in the public consciousness to his representation of Weinstein and Theranos—and not in a positive way.[38] Thus, I felt that including *Bad Blood* and a broader discussion of Boies's behavior in the Weinstein case would highlight ethical principles such as (over)zealous advocacy, conflicts of interest, and lawyer liability. I also hoped that it would emphasize the broader themes of the course—namely, encouraging students to develop their own professional identities and to understand the value of a strong ethical compass. As it turned out, I was pleasantly surprised to learn that *Bad Blood* taught many lessons beyond Boies as a cautionary tale, including the ambiguities of legal practice and the need for additional guidance beyond ethical rules in acting as an ethical lawyer.[39]

Though corporate malfeasance may be common, the extensive reporting from Carreyrou and other journalists, as well as the captivating details of the Theranos saga, indicated that this was a rare pedagogical opportunity to connect the ethical rules of legal practice to a dramatic story. It was also a story that new attorneys and law students could relate to, given that many junior associates worked on the Theranos case. Theranos made the potentially dry duties of

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37. *See, e.g.*, Andrew Rice, *The Bad, Good Lawyer*, N.Y. MAG.: INTELLIGENCER (Sept. 30, 2018), https://nymag.com/intelligencer/2018/09/david-boies-harvey-weinstein-lawyer.html [https://perma.cc/36UY-7AFC]

38. *See, e.g.*, *id.*; David Margolick, *The Man Who Ate Microsoft*, VANITY FAIR, Mar. 2000, at 148; RONAN FARROW, CATCH AND KILL: LIES, SPIES, AND A CONSPIRACY TO PROTECT PREDATORS (2019).

39. *See generally* CARREYROU, *supra* note 2.

lawyering and legal ethics seem vital, and I felt that that was more than enough to justify inclusion in my course. Ultimately, Theranos seemed like too good of a story to pass up.

B. Incorporating Bad Blood

Deciding to include *Bad Blood* was merely the first step on the journey to incorporating it into my course. Most obviously, I faced a number of options in assigning *Bad Blood*, from asking students to read the entire book before classes got underway, to teaching it as a self-contained unit after covering the core of my syllabus's focus on the MRPC.

I decided to "assign" portions of *Bad Blood* throughout the term as reading assignments.[40] On the first day of class, however, I informed the students that we would not extensively discuss Theranos until a session about three-quarters through the term that would exclusively focus on *Bad Blood*. The reading assignments were thus "suggested," insofar as the students would not be expected to discuss the book on a regular basis. But if they wanted to avoid reading 300 pages at once, keeping up with the syllabus would help.

This approach had strengths and weaknesses. It required minimal restructuring of the syllabus. It also meant I did not have to consistently engage with *Bad Blood*, given that each reading assignment did not necessarily implicate an ethical issue.[41] This approach empowered students to engage with *Bad Blood* on their own timelines. For example, one student reported finishing the entire book within the first month of the semester because she found it so engrossing. Another read the entire book before classes even started—perhaps because the book was more appealing than an assignment from a casebook.

There were, however, significant drawbacks to inconsistently engaging with *Bad Blood*. Given its comprehensiveness and dramatic detail, students found it to be one of the most engaging parts of their

40. Syllabus, *supra* note 18.
41. *Id.*

readings and wanted more consistent engagement with the text.[42] Though I had planned to periodically highlight elements in the suggested readings during my lectures, dips into *Bad Blood* were the first topics I skipped over when class sessions ran behind schedule so that I could remain on track to cover the core MRPC issues. Student presentations and secondary readings helped to address this gap, but there was frustration in the lack of consistent engagement with the text before the class session devoted to discussing Theranos (which occurred in the final weeks of the term).

I also had broader concerns in assigning *Bad Blood.* I worried that students would choose to rely upon the HBO documentary or the ABC podcast rather than read the book.[43] These concerns did not seem to be borne out, given the level of enthusiasm students expressed in engaging with the text. Additionally, *Bad Blood*, though engaging and extensively reported, has a distinct point-of-view from Carreyrou and is not a dispassionate examination of Theranos—nor does it claim to be.[44] Though I do not believe it necessary to always give credence to both sides of a debate, I wondered if students would think the portrayal of the story was one-sided. Given the egregiousness of Holmes's conduct and Theranos's malfeasance, however, it did not seem necessary to present a "pro-Theranos" viewpoint—if I could even find one.

C. Happy Accidents in Assigning Theranos

In general, I believe that assigning *Bad Blood* was a success. Though I primarily assigned the book to highlight the issues with Theranos and Boies, serendipitous moments occurred in multiple classroom discussions. These discussions broadened our analysis beyond one well-known, high-powered lawyer and made ethical challenges more accessible to discussion. Although Boies's career

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42. Course Evaluations from Students, Vanderbilt L. Sch., to author (2019) (on file with author) [hereinafter Course Evaluations from Students].

43. THE INVENTOR, *supra* note 18; *The Dropout*, *supra* note 18.

44. *See generally* CARREYROU, *supra* note 2.

provided ample material for classroom discussion and exercises on ethical practice, I wanted to broaden the suite of examples of lawyers' conduct and ethical considerations.[45]

Boies is a singular attorney whose career has been exceptional—so much so that I wondered if students would relate to his decision-making or find it inapposite to their own perspectives.[46] By exploring how other attorneys in *Bad Blood* were faced with ethical questions, I hoped that students would find other stories to latch onto.[47] Luckily, the book provided multiple relevant examples.[48]

Early in *Bad Blood*, for example, Carreyrou describes a potential conflict of interest situation. Richard Fuisz, a medical inventor and entrepreneur who had been a neighbor of Holmes's family during her childhood, patented an invention he created based off of his research into Theranos's activities.[49] By doing so, he intended to exploit a weakness in Theranos's strategy and leverage that weakness to extract a licensing fee from the company once his patent was granted by the federal government.[50] After the patent was granted, Theranos eventually discovered it.[51]

Holmes's reaction to this turn of events was, unsurprisingly, not positive.[52] Fuisz's son, John, was an attorney at McDermott Will & Emery, a large law firm that had done some patent work for Theranos.[53] In 2008, after Theranos had moved its patent work to another law firm, Wilson Sonsini, Holmes came to McDermott to request the firm file a lawsuit against Richard Fuisz—despite the fact that his son still worked at the firm.[54] Holmes also implied that John

45. *Id.*
46. *Id.*
47. *Id.* at 64–66.
48. *See, e.g.*, *id.* at 59–66.
49. *Id.* at 59–64.
50. CARREYROU, *supra* note 2, at 60. Effectively, Richard Fuisz's plan was to patent an invention that would make it impossible for Theranos to operate without licensing the rights to his invention because he could potentially claim the company had infringed his patent and could be liable for massive monetary damages. *Id.*
51. *Id.* at 63.
52. *Id.* at 132–33.
53. *Id.* at 64.
54. *Id.*

Fuisz might have leaked confidential information about Theranos to his father, facilitating Richard Fuisz's patent application that could imperil Theranos's business strategy.[55] In essence, Holmes claimed that John Fuisz might have breached his confidentiality duty to help a family member and harmed a client of his law firm.[56] Ultimately, McDermott thought it unlikely that John Fuisz had done anything improper and decided that representing Theranos, a former client, against the father of a partner was undesirable; thus, the firm declined the case.[57]

This episode in *Bad Blood* coincided with the conclusion of the confidentiality unit in the class curriculum but occurred before students learned conflicts of interest rules.[58] Thus, I chose to use it as a group discussion for the entire class to highlight three points. First, I aimed to reinforce the importance of the confidentiality rules in protecting client information and how central confidentiality is to the client–lawyer relationship (even after a lawyer concludes representation).[59] Confidentiality is arguably the most important duty a lawyer owes to a client.[60] If Holmes had been correct in her claim that John Fuisz had leaked Theranos's confidential information to his father, the leak would have been a devastating betrayal of the duties that McDermott owed to Theranos.[61] Moreover, it would have made it extremely difficult for the client–lawyer relationship to continue in

55. *Id.* at 66.

56. CARREYROU, *supra* note 2, at 65. John Fuisz did not work on the team that worked on Theranos's patent applications, and Theranos was not directly his client. *Id.* Under the MRPC, though, he could still have committed multiple rules violations if he had done what Holmes implied he did. *See* MODEL RULES OF PRO. CONDUCT rr. 1.6, 8.4 (AM. BAR ASS'N 2020).

57. CARREYROU, *supra* note 2, at 66.

58. *See* Syllabus, *supra* note 18.

59. *See* MODEL RULES OF PRO. CONDUCT rr. 1.6, 1.9 (AM. BAR ASS'N 2020).

60. *See* MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS'N 2020). The principal rule addressing confidentiality has very few exceptions. *Id.* Comment 2 to Rule 1.6 notes, "[a] fundamental principle in the client–lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. *See* Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client–lawyer relationship." *Id.* cmt. 2. Thus, in the framework of the MRPC, confidentiality forms a core principle of the client–lawyer representation. *Id.*

61. CARREYROU, *supra* note 2, at 65.

any meaningful way because such a betrayal would make it challenging for Theranos to trust McDermott going forward.

Second, I asked students if they thought that this situation *should* constitute a conflict of interest. I emphasized that I knew they had not yet learned those rules but given that they were familiar with the general principle, I wanted them to explain their reasoning based on their baseline assumptions of what conflicts of interest rules should prevent. I did this to encourage students to not merely apply the conflicts rules by rote but to also consider the policies underlying those rules.[62] By asking whether the McDermott/Fuisz/Theranos situation should constitute a conflict, I hoped that students would think critically about what factors should be relevant in conflicts analysis.[63] It also provided a helpful preview of the different elements of the conflicts rules, which we were covering imminently.[64]

Finally, I wanted students to think about what factors McDermott used in deciding not to represent Theranos in the patent case against Richard Fuisz.[65] I often remind students that "professional responsibility" means not just following ethical rules but also thinking about broader concerns, such as the reaction of the community at large (also known as public relations—"the other 'PR'"), economic forces, political concerns, and the like.[66] In Carreyrou's telling, McDermott elected not to represent Theranos because of "optics" concerns.[67] I asked students whether such concerns should matter, what considerations beyond the law or

62. *See* Syllabus, *supra* note 18.

63. *Id.*

64. Those rules are principally MRPC 1.7, which addresses conflicts of interest involving current clients, and MRPC 1.9, which addresses conflicts involving former clients. MODEL RULES OF PRO. CONDUCT rr. 1.7, 1.9 (AM. BAR ASS'N 2020).

65. CARREYROU, *supra* note 2, at 62, 64–66; Intuitions on Conflicts, *supra* note 22.

66. I connect this discussion of what factors a lawyer or legal organization should weigh beyond law or ethics to Rule 2.1, which we had discussed at this point in the term. *See* Syllabus, *supra* note 18. Rule 2.1 explicitly authorizes lawyers to act as counselors with clients and to use "other considerations such as moral, economic, social and political factors" in rendering candid advice. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020).

67. CARREYROU, *supra* note 2, at 66.

ethical rules they would use in making such a determination, and whether McDermott made the right call in opting to *not* represent Theranos against Richard Fuisz.[68]

The discussion that resulted touched on many of these issues and likely could have taken at least half an hour to analyze the many variables in the situation as described in the book. When I decided to include *Bad Blood* in my course, I did not anticipate that so many episodes would provide rich discussion for my students, in part because I planned to focus predominantly on Theranos and Boies. Yet given the story's intricacies, Carreyrou's extensive reporting, and the staggering level of corporate and legal malfeasance, there were multiple opportunities to discuss a range of legal behavior and lawyers' choices throughout the term.[69]

Another fruitful example not involving Boies occurred in an incident involving Theranos's advertising firm, TBWA\Chiat\Day, and potential issues around false advertising.[70] Chiat\Day famously worked on multiple campaigns for Apple at Steve Jobs's behest, including the famous "1984" advertisement.[71] Holmes latched onto using Chiat\Day in part due to its well-known connections to Apple, and thus, Chiat\Day was hired to help Theranos develop its brand messaging.[72] Yet, in part because of Theranos's obsession with

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68. *See* Syllabus, *supra* note 18; CARREYROU, *supra* note 2, at 65–66 ("[Holmes] wanted to know if McDermott would agree to represent Theranos against Richard Fuisz. . . . [T]he optics of the firm going up against the parent of one of its own partners were messy. [McDermott] decided to turn down [Holmes's] request.").

69. *E.g.*, CARREYROU, *supra* note 2, at 65–66.

70. *Id.* at 157 ("It became apparent to [the advertising firm] that some [claims] were exaggerated. For instance, they gleaned that Theranos couldn't produce test results in less than thirty minutes.").

71. Jeff Beer, *Apple Advertising Legend Lee Clow, One of the Last Larger-than-Life Creative Titans, Is Retiring*, FAST CO. (Feb. 14, 2019), https://www.fastcompany.com/90307081/apple-advertising-legend-lee-clow-one-of-the-last-larger-than-life-creative-titans-is-retiring [https://perma.cc/7AQF-FA8A].

72. CARREYROU, *supra* note 2, at 150–51. Holmes's admiration of Steve Jobs at times seems to have bordered on the obsessive. *See* Julia Brucculieri, *What to Know About Issey Miyake, the Man Behind Elizabeth Holmes' Turtlenecks*, HUFFPOST (Mar. 20, 2019, 5:13 PM), https://www.huffpost.com/entry/issey-miyake-elizabeth-holmes-black-turtleneck_l_5c925110e4b0dbf58e46bfcc [https://perma.cc/CLY4-V2CZ]. Amongst other affectations, she imitated his wardrobe choices, donning a black turtleneck similar to the Issey Miyake turtlenecks that Jobs wore as a uniform. *Id.*

secrecy, Chiat\Day staff members ran into obstacles when attempting to determine what claims Theranos could make on its website and flagged for their in-house attorneys the potential liability issues.[73] Chiat\Day staff also noted these concerns to Theranos, which made changes to avoid violating advertising laws.[74]

At the point when students were scheduled to read the Chiat\Day interlude, we had covered Rule 1.2(d)'s general prohibition on assisting clients in committing crimes or fraud.[75] Rule 1.2(d) reads as follows:

> d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[76]

Therefore, in a small group, in-class discussion, I asked students to consider what they would do if they were junior attorneys in Chiat\Day's general counsel's office reviewing Theranos's advertising claims. How would they avoid liability for violating Rule 1.2(d) (assuming that the advertising claims might be fraudulent)? How would they communicate these concerns to their supervisors?[77] And potentially to the client?[78]

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73. CARREYROU, *supra* note 2, at 157 ("They suggested adding a disclaimer to the website . . . but . . . [Holmes] didn't want a disclaimer.").

74. *Id.* at 158 ("They went over the site line by line, as [Holmes] slowly dictated every alteration that needed to be made.").

75. MODEL RULES OF PRO. CONDUCT r. 1.2(d) (AM. BAR ASS'N 2020).

76. *Id.*

77. This question also highlighted MRPC 5.2, which addresses the liability of subordinate attorneys when directed by a supervisor. MODEL RULES OF PRO. CONDUCT r. 5.2 (AM. BAR ASS'N 2020).

78. MODEL RULES OF PRO. CONDUCT. r. 1.2 cmt. 13 (AM. BAR ASS'N 2020) ("If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct . . . the lawyer must consult with the client regarding the limitations on the lawyer's conduct.").

Students were thus responsible for grappling with the difficulties in evaluating what conduct might give rise to a 1.2(d) issue, how they would address a 1.2(d) issue with an important client, and how challenging—but necessary—these conversations can be with clients and colleagues.[79] Though students generally provided predictable answers regarding both evaluating and discussing these ethical issues, my primary goal was to encourage them to think through how to discuss an ethical issue with others rather than merely analyze it through the framework of the MRPC.

These examples demonstrate not only the value of assigning *Bad Blood* but also the variety of ethical issues that can arise in practice. Ethical issues often fall far afield of the high-stakes questions involving the conduct of a famous attorney like Boies.[80] Ethical questions can arise when one is working on a matter as "mundane" as analyzing conflicts issues, determining what potential client actions might violate the law and thus potentially violate ethical duties, or figuring out what non-legal, non-ethical repercussions can result from a particular choice.[81]

I also found it valuable to broaden the class discussion of ethical decision-making beyond the realm of a notorious, highly skilled attorney like Boies, whom most students cannot directly relate to given their limited experience in the profession. By showing that ethical questions can arise for all types of lawyers—not just high-powered superstars like Boies—I hoped that my students would see themselves in the problems that we discussed and thus understand the value of developing an ethical framework *before* entering practice. Using McDermott's conflicts analysis or placing them in the

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79. *See* Syllabus, *supra* note 18.

80. *Compare* MODEL RULES OF PRO. CONDUCT r. 1.7 cmt. 8 (AM. BAR ASS'N 2020) ("For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions . . . ."), *with David Boies, a Star Lawyer, Faces Fresh Questions over Ethics*, N.Y. TIMES (Dec. 2, 2019), https://www.nytimes.com/2019/12/02/business/dealbook/david-boies-jeffrey-epstein.html [https://perma.cc/9C9Y-543V] (reporting that Boies and another lawyer "discussed a plan to use the videos, allegedly of the rich and famous having sex with girls in [Jeffrey] Epstein's residences, to extract money from the men").

81. MODEL RULES OF PRO. CONDUCT rr. 1.2(e), 1.7 (AM. BAR ASS'N 2020).

role of a hypothetical junior Chiat\Day lawyer, I thought, would help students comprehend that they may be addressing challenging ethical questions much more quickly than they anticipated, even as junior attorneys.[82]

Bad Blood allowed the class to engage more consistently with a text that elicited discussion of ethical issues whilst still remaining engaging. In some ways, it seemed to be the most popular part of the course. This was a much more positive result than I anticipated when I chose to assign it. Though I felt generally positive about my choice to include *Bad Blood*, given the many ways that the book lent itself to discussing a range of ethical issues, I was unsure whether students would find it valuable as a text or merely too unverifiable or suppositional.[83] Happily and somewhat unexpectedly, based on in-class discussions, individual conversations, and course evaluations, the students seemed even more interested in *Bad Blood* as a text to view ethical rules through than I did.

II. STUDENT REACTIONS TO *BAD BLOOD*

This Part moves beyond specific ethical concepts to describe how students reacted to the text and the ways in which they engaged with it throughout the term, as well as some of the drawbacks of using *Bad Blood* to help teach ethical rules and professional conduct. Although *Bad Blood* provided more than I expected in terms of material to cover in my course, it was not a given that students would respond positively to its inclusion. Because most law school courses use cases as the primary reading assignments, I foresaw a spectrum of responses to the inclusion of the book as a required text.[84] Somewhat

82. *See* MODEL RULES OF PRO. CONDUCT r. 5.2(a) (AM. BAR ASS'N 2020) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.").

83. Based on their interest in the book itself, and Holmes and Theranos more generally, I was not concerned about whether they would enjoy reading it. But enjoying a reading assignment and finding it valuable as part of a course are two different things.

84. *See* Syllabus, *supra* note 18.

to my surprise, however, students almost universally found *Bad Blood* to be a highlight of the course.

A. General Student Reactions

Based on classroom discussions and course evaluations, students seemed to generally enjoy the use of *Bad Blood* in the course.[85] By assigning secondary sources, such as *Bad Blood* and news articles describing current issues in the profession, I hoped that students would find the ethical rules and related issues more engaging.[86] I suspect that perhaps because of the relative novelty of the syllabus as compared to other courses like Constitutional Law, Corporations, or Evidence, *Bad Blood* excited students because it provided some variety from their traditional reading assignments in other law school classes.[87]

I solicited feedback on the use of *Bad Blood* throughout the semester in two ways. First, during student meetings, I informally asked students what they thought about the book and its use in class. Students were uniformly positive in response to this informal, unscientific survey. Because the book is readable, dramatic, and detailed, students latched on to the strong narrative drive. Moreover, because it described a milieu they could see themselves practicing in—namely, the world of large, elite law firms and prominent companies—the broader lessons of *Bad Blood* were intriguing and accessible.

Because much of the book describes questionable, aggressive, and unsettling behavior from lawyers and law firms, students also found *Bad Blood* helpful in contextualizing the ethical rules and principles

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85. *See generally* Course Evaluations from Students, *supra* note 42.

86. *See* Syllabus, *supra* note 18. Articles discussed a variety of topics, including diversity in BigLaw, the mechanics of litigation finance, criminal justice reform, innovation in the delivery of legal services, and criticisms of legal education and admissions to the bar, amongst others. *Id.*

87. *See id.*; *see also* Edwin W. Patterson, *The Case Method in American Legal Education: Its Origins and Objectives*, 4 J. LEGAL EDUC. 1, 2 (1951) (noting that the case law method of teaching that was introduced in 1870 at Harvard Law School has been adopted by the majority, if not all, of American law schools).

we discussed in class sessions.[88] Many reported skepticism or ambivalence towards the behavior of David Boies and other attorneys. Some mentioned that they understood more concretely the importance of having an ethical framework informed by professional ethical standards, as well as the need to incorporate their own individual perspectives in crafting that framework—if only to avoid situations like those that Boies and his colleagues found themselves in.

Students also described some unanticipated benefits from reading *Bad Blood*. For example, one student who planned to pursue a transactional practice mentioned that reading about transactional and corporate ethical issues (such as Boies's service as both a Theranos board member and as an attorney for the company) was helpful, given how law school generally, and the textbook and the MRPC more specifically, focus predominantly on litigation ethics.[89] Others described having learned about Theranos from *The Dropout* (the podcast series) or *The Inventor* (the HBO documentary) but appreciated the greater depth and detail that *Bad Blood* provided—particularly regarding the ethical issues for lawyers that the Theranos story provided.[90]

Beyond this informal request for feedback, I solicited student responses in a more structured manner. As a 2019–2020 Junior Faculty Teaching Fellow, a program run by Vanderbilt's Center for Teaching (CFT), I requested a Small Group Analysis (SGA) of the class to learn what aspects of the course were working well and which needed improvement or greater attention.[91] The CFT director administered the SGA for twenty minutes at the conclusion of a class

88. *See* CARREYROU, *supra* note 2, at 241–43; Course Evaluations from Students, *supra* note 42; Syllabus, *supra* note 18.

89. Course Evaluations from Students, *supra* note 42. *See generally* LERMAN & SCHRAG, *supra* note 30.

90. THE INVENTOR, *supra* note 18; *The Dropout*, *supra* note 18. *See generally* CARREYROU, *supra* note 2.

91. Junior Faculty Teaching Fellows of *Center for Teaching*, VAND. UNIV., https://cft.vanderbilt.edu/programs/jftf/ [https://perma.cc/KQ4N-CAHX]; Mid-Semester Feedback Through Small Group Analysis of *Center for Teaching*, VAND. UNIV., https://cft.vanderbilt.edu/cft/services/individual/small-group-analysis/ [https://perma.cc/97XT-TWRM].

session about halfway through the term. The CFT director asked students to describe what they thought the goals of the class were, what they enjoyed and wanted to change, and any additional feedback. This feedback was compiled and aggregated anonymously and then delivered in the form of a brief report.

Bad Blood was one of the highest-scoring elements of the course. Students found the material engaging as a "real-life" example of how lawyers represent businesses and how the pressures of legal practice can lead lawyers to make questionable, if not unethical, decisions.[92] In fact, the book was the subject of some complaints—because students felt we were not discussing it *enough*. Though the targeted discussions of specific ethical issues were of interest to students, they clearly craved more in-depth analysis of the behavior of Theranos attorneys and its relevance for their own ethical frameworks.

B. In-Depth Discussion of Ethical Lawyering

Because students responded so favorably to the use of *Bad Blood* in the SGA and requested more in-class discussion of the text, I adjusted the remainder of the syllabus to more consistently discuss Theranos. Rather than discuss one-off ethical problems such as the McDermott conflicts of interest issue or the Chiat\Day false advertising hypothetical, discussed *supra* Section I.C, subsequent class discussions focused more broadly on issues posed by the company's practices.[93]

For example, I asked students to consider a moment of high tension in the book involving a former Theranos employee named Tyler Shultz.[94] He was the grandson of former Secretary of State George Shultz, whom Elizabeth Holmes had recruited to serve on

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92. Course Evaluations from Students, *supra* note 42.

93. This was in part because, in the second half of the semester, students were both more familiar with relevant ethical rules and had a more complete understanding of the issues implicated by Theranos because they were scheduled to finish reading *Bad Blood* with three weeks remaining in the term. Syllabus, *supra* note 18.

94. CARREYROU, *supra* note 2, at 241–44; G.S. Hans, Theranos Teaching Prompt: Tyler Shultz (2019) (class exercise) (on file with the Georgia State University Law Review).

Theranos's board alongside other luminaries, including fellow former Secretary of State Henry Kissinger and General Jim Mattis, who later served as Secretary of Defense.[95] Tyler Shultz was also a whistleblower who had tipped off New York regulators that Theranos was potentially in violation of state laws.[96] After leaving the company, Tyler Shultz served as a source in John Carreyrou's reporting for the *Wall Street Journal*.[97]

Theranos learned that Tyler Shultz had been talking to Carreyrou.[98] In one of *Bad Blood*'s most dramatic moments, two Boies Schiller attorneys went to George Shultz's house and laid in wait with an affidavit.[99] While the attorneys were upstairs, the elder Shultz tried to convince his grandson to sign the document attesting that he had never spoken to a journalist about his time at Theranos.[100] Eventually, the attorneys entered the conversation, pressuring Tyler Shultz and implying that Theranos could potentially sue him if he did not sign the affidavit and commit to cease all contact with Carreyrou.[101]

During class, I asked the students to reflect on this episode to discern what, if any, ethical concerns would arise if they had been in the position of the Boies Schiller attorneys. Specifically, I asked whether they thought the attorneys had violated any ethical rules and whether their decisions would be consistent with the students' individual ethical compasses.

Students generally thought that the attorneys had not violated ethical rules but that they had acted in questionable ways by trying to get a young man to sign a document without legal representation.[102]

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95. CARREYROU, *supra* note 2, at 181.
96. *Id.* at 195.
97. *Id.* at 231–32, 240.
98. *Id.* at 240.
99. *Id.* at 241–44.
100. *Id.* at 243–44.
101. CARREYROU, *supra* note 2, at 243–44.
102. Some students connected this act to the discussion of diligence and the pervasive perception that lawyers have to engage in zealous advocacy on behalf of their clients—though the Model Rule no longer uses that language in the text. MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020). Language on zeal is contained within the comment to MRPC 1.3, however. *Id.* cmt. 1.

The students observed that the distinction between what the Model Rules condone and what might be personally distasteful or unseemly was highlighted by this episode, as was the possibility of having one's conduct as an attorney reported in a bestselling book. Thus, the major lesson they learned was not that the attorneys behaved unethically as defined by ethical rules—which was certainly debatable—but rather that the rules provide necessary but insufficient guidance in helping attorneys determine what is moral in the course of practicing law.

At the end of the semester, I conducted another classroom exercise designed to elicit even broader feedback on the experience of reading *Bad Blood*.[103] Using a discussion-based poll, I asked students to anonymously respond to the prompt, "What has been the biggest takeaway from *Bad Blood* so far regarding your own ethical perspective?"[104]

Students responded with a range of reactions. Many comments highlighted the need for an internal ethical compass—that attorneys could not rely upon their superiors, their environment, or the ethics rules to provide sufficient guidance or safeguards against committing unethical conduct. Others pointed to the problematic structures of mixing legal representation and business relationships (such as board membership) or the challenges of whistleblowing on misconduct. Some students discussed attempting to separate their own work and perspective from that of their client—creating professional boundaries to avoid becoming swept up in a client's messy situation.

These responses demonstrated that students took a variety of lessons away from *Bad Blood*, some of which were tied to ethics rules and some of which concerned legal practice more generally. Some students highlighted the limitations of ethics rules in legal practice, but many others focused on lawyering more generally by highlighting the dynamics that arise between lawyers and clients, or

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103. *See* G.S. Hans, Theranos Teaching Prompt: Reacting to *Bad Blood* (2019) (class exercise) (on file with the Georgia State University Law Review) [hereinafter Reacting to *Bad Blood*].

104. *Id.*

lawyers and their supervisors. For my course, which has a primary goal of teaching students the principles of legal ethics and a secondary goal of introducing them to the dynamics of the profession and lawyering, this was not a problem. But for instructors who choose to focus exclusively on the MRPC, the lack of a perfect fit between the Rules and the text may be a drawback.[105]

Once the students had completed *Bad Blood*, I devoted an entire class session to discuss what they had learned from the book for their own practice, and whether and how ethical rules could have prevented some of the harm and malfeasance described in the book. I asked students to consider the relevance of *Bad Blood* to the conduct of lawyers, how it demonstrates the relationships between lawyers and clients, and what legal ethics can and should do to constrain lawyers.

The responses were nuanced and varied. Some students discussed how hindsight bias could apply to the Theranos scandal—that the conduct seems more egregious or potentially unethical given that we now know the company was built on fraud and deceit.[106] Lawyers who find themselves working with similar clients—or even less egregious ones—may find it harder to make ethical, responsible choices because they cannot know the end of the story *ex ante*.

Other students noted how the Model Rules seek to simultaneously achieve multiple goals that do not always fit well together. For example, the Model Rules are designed to both *discourage* what its drafters consider "unethical" conduct through a variety of sanctions and *encourage* behavior that promotes certain values the drafters think are intrinsic to the profession.[107] Put another way, the Model Rules simultaneously attempt to incentivize and disincentivize specific types of subjective behavior, to mixed results.[108] Thus,

105. *See* Syllabus, *supra* note 18.

106. Reacting to *Bad Blood*, *supra* note 103; *see also* CARREYROU, *supra* note 2, at 296 ("[O]n March 14, 2018, the Securities and Exchange Commission charged Theranos, Holmes, and [CFO Sunny] Balwani with conducting 'an elaborate, years-long fraud.'").

107. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020).

108. *Id.*

relying upon the Model Rules as the *sole* source of ethical guidance would be insufficient should a lawyer find herself in a Theranos-like situation.

Many students highlighted how specific Model Rules, including Rule 1.8 (lawyers entering into business relationships with clients), Rule 1.3 (diligence), and Rule 1.13 (whistleblowing when representing an organization), could be modified to more clearly discourage the lawyers' conduct as described in *Bad Blood.*[109] These observations neatly teed up the second half of the class discussion. Students were divided into seven groups, six of which were tasked with either rewriting a specific Model Rule or adding a comment (or both) that would more clearly indicate that conduct described in the book constituted a violation of the Model Rules. The six Model Rule provisions that they were charged with modifying were:

- Rule 1.2(d): A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- Rule 1.3: A lawyer shall act with reasonable diligence and promptness in representing a client.
- Rule 1.8(a): A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client . . . [unless exceptions apply].
- Rule 1.13(b): If a lawyer for an organization knows that an officer, employee or other person associated

109. MODEL RULES OF PRO. CONDUCT rr. 1.3, 1.8, 1.13 (AM. BAR ASS'N 2020). *See generally* CARREYROU, *supra* note 2.

with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

- Rule 4.4(a): In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.
- Rule 8.4(d): It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.[110]

The seventh group served as the Ethics Committee, which would decide in an up-or-down vote whether to adopt the changes proposed by each group that had edited a Model Rule. The six teams that were rewriting the Rules had fifteen minutes to determine what changes they would make, and then they emailed those changes to me.[111] I put

110. MODEL RULES OF PRO. CONDUCT rr. 1.2(d), 1.3, 1.8(a), 1.13(b), 4.4(a), 8.4(d) (AM. BAR ASS'N 2020); Syllabus, *supra* note 18.

111. *See* Syllabus, *supra* note 18. This was a dramatically short period of time in which to complete the assignment, which I discussed with the class. *Id.* I considered providing the student groups with the assignment prior to class and asking them to complete it as homework, but time limitations made that impractical. *See* Reacting to *Bad Blood*, *supra* note 103.

each team's modification on a separate PowerPoint slide and then asked the Ethics Committee to review each and privately decide on their vote. Then, we went through each rule amendment, and the Ethics Committee revealed their vote and the reasons they had for coming to their decision. The team that had made each change discussed their determinations and drafting process to explain more fully what they were attempting to do with their proposed change.

This exercise had a number of pedagogical goals. First, I wanted to connect the Model Rules more directly to our discussion of Theranos. Rather than talking broadly about how ethics intersect with client representation, I hoped the students would more specifically relate specific rules to the conduct described in the book.[112] It was relatively easy for them to label the attorneys' conduct as arguably unethical; determining which rules—if any—were potentially violated was a more challenging exercise.

Second, even though a major theme in the course was discussing the shortcomings of the Model Rules and their occasional lack of clarity, drafting potential changes and determining the viability of proposals put students in the complex position of drafters rather than readers. It is easy to criticize the Model Rules when one reads their sometimes vague provisions; when one is put in the position of drafting a Rule, however, the challenges of drafting become more obvious.[113] One student noted that, throughout the term, it was frustrating to read a Model Rule, given the high level of abstraction

112. *Compare* MODEL RULES OF PRO. CONDUCT r. 1.8(a) (AM. BAR ASS'N 2020) ("A lawyer shall not enter into a busines transaction with a client . . . ."), *with* CARREYROU, *supra* note 2, at 201–12 (reporting that Boies accepted ownership in Theranos in lieu of his regular hourly fees).

113. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 8.4 cmt. 3 (AM. BAR ASS'N 2020) (defining what conduct constitutes discrimination and harassment for professional misconduct). Many critics have pointed out that Rule 8.4(g) does not extend enough protection because it "is not specific enough to exclude the harassment or discrimination it seeks to preclude." Kristine A. Kibes et al., *The Evolution of Model Rule 8.4(g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, A.B.A. (Mar. 12, 2019) (citing Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g) the First Amendment and 'Conduct Related to the Practice of Law,'* GEO. J. LEGAL ETHICS 241, 245 (2016)), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/PYB3-4G5C].

in its brief text, and then read a dozen interpretive comments.[114] But when put in the position of the drafter, it suddenly became much more appealing to tack on a comment to an existing Rule rather than modify the delicate, concise text of the Rule itself.

Third and relatedly, students more acutely understood the complexities of statutory drafting and analysis.[115] Because the drafters of the Rules' revisions had to contemplate what effects their changes would make, and because the Ethics Committee had to determine how lawyers' behaviors would change as a result of modifications, the students were placed in the challenging position of attempting to "future-proof" attorney conduct. Preventing disfavored conduct while not affecting neutral or positive conduct is a constant challenge when contemplating changes to the Model Rules—doing so in fifteen minutes is nearly impossible. The exercise, therefore, emphasized how difficult it is to modify the Rules.

Finally, by juxtaposing different Rule provisions that, if modified, would potentially change how the Theranos saga played out, students gained a deeper understanding of how the Rules intersect with each other and to what degree the MRPC function or fail to function as a coherent whole. Students noted how different rule provisions could capture or prevent the same conduct.[116] For example, conduct prejudicial to the administration of justice (Rule 8.4(d)) potentially includes conduct that would embarrass, delay, or burden a third party (Rule 4.4(a)).[117] Although the class had previously discussed how the Rules intersect, students more directly engaged with the concept of the Model Rules as an overarching text through the process of drafting and evaluating amendments. They also noted how the piecemeal process of enacting and editing the Model Rules that they

114. Course Evaluations from Students, *supra* note 42.

115. *Id.*; *see also* Kibes et al., *supra* note 113 (describing how the addition of anti-discrimination language into Rule 8.4(g) has been a long, difficult process that has faced unconstitutionality claims regarding restrictions on free speech (first citing Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018); then citing Matal v. Tam, 137 S. Ct. 1744 (2017))).

116. Reacting to *Bad Blood*, *supra* note 103.

117. MODEL RULES OF PRO. CONDUCT rr. 4.4(a), 8.4(d) (AM. BAR ASS'N 2020).

undertook in their small group potentially explained the sometimes-discordant nature of the Rules as a whole.

It was difficult to determine whether the discussion of *Bad Blood* helped students understand the concepts of the Rules, in part because it was not possible to measure against a control group. As compared to the standard Professional Responsibility lecture I taught the prior year, the students seemed more specifically aware of how ethical rules relate to the actual practice of law and the limits of the rules in guiding lawyers on how to practice ethically.

Overall, the more sustained engagement with *Bad Blood* yielded more pedagogical benefits than discussing discrete issues. When students discussed the Fuisz/McDermott conflicts of interest hypothetical, for example, the discussions did not radically differ from any other conversation we had on a problem found in the textbook; only the source of the hypothetical had changed.[118] By contrast, longer discussions of the text drew out ethical issues and the students' self-image as ethical attorneys.

C. *Drawbacks to Assigning* Bad Blood

Though including *Bad Blood* yielded largely positive results, there were drawbacks to including the text in the course. As discussed *supra* Section II.B, including the book meant a reduction in the depth of coverage of core ethical concepts.[119] Moreover, because the book was not expressly designed to be used in a legal ethics course, much of the text was not directly relevant to what we discussed in class.[120] Finally, students did not have an opportunity to engage extensively with the book in the classroom until over halfway through the term, though they were supposed to read the book consistently over the course of the semester. Thus, they would often have reading assignments that we did not touch on in class sessions.

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118. CARREYROU, *supra* note 2, at 62, 64–66; Intuitions on Conflicts, *supra* note 22.
119. *See supra* Section II.B.
120. *See* Syllabus, *supra* note 18.

Some students noted an unanticipated drawback—the accrual of mental switching costs as they read the textbook, *Bad Blood*, and various secondary sources. Because the course attempted to introduce students to ethical rules as well as current dynamics in the profession, the varied materials and areas of focus meant that students engaged with a range of different subjects and texts. I viewed this dynamic as a feature rather than a bug, as it approximates how many lawyers experience practice—that is to say, constantly managing different matters and different skills (not to mention different types of texts, from cases to depositions to memos to contracts).[121] However, it was a departure from more standard courses that solely assign cases and statutes, which potentially explains some student reactions to juggling different styles of reading and analysis.

Ultimately, I was convinced that assigning *Bad Blood* was worthwhile in my efforts to both teach students the basics of the Model Rules and to introduce them to some of the ethical and cultural components of contemporary legal practice. For instructors who are more directly focused on ethical rules or on preparation for the Multistate Professional Responsibility Exam, including a text like *Bad Blood* could prove more distracting than beneficial. But for other instructors who seek to diversify their coverage in Professional Responsibility, it may be well worth it to include *Bad Blood* or other texts that highlight the complexities of analyzing ethical issues in contemporary professional settings for attorneys.

III. THE USES OF CASE STUDIES IN LEGAL EDUCATION

This Part seeks to contextualize my use of *Bad Blood* within the broader literature describing how other law school courses, including Professional Responsibility courses, have incorporated extended case

121. Course Evaluations from Students, *supra* note 42; *see also* Robert Bank, *Narrative*, *in* OUTSTANDING PUBLIC INTEREST LAWYERS IN ACTION: A DAY IN THE LIFE OF WASSERSTEIN FELLOWS 9, 9–13 (Harvard L. Sch. Bernard Koteen Off. of Pub. Int. Advising ed. 2011) (describing the typical day-to-day activities that a public interest lawyer juggles, such as attending meetings, corresponding with clients, and handling emergency interruptions).

studies. Articles describing these uses tend to fall into two categories. One category discusses the use of extended case studies or books like *A Civil Action*, *The Buffalo Creek Disaster*, or *Damages*.[122] The second focuses on how courses (often Professional Responsibility courses, though not always) use film and television clips or other short media to highlight specific ethical concepts and rules.[123] This Part discusses these two trends and seeks to synthesize them in my use of *Bad Blood*, arguing that using a more extended, nonfiction narrative in Professional Responsibility more effectively communicates to students how ethical issues can arise in legal practice and how lawyers address those issues.

A. Textual Case Studies in Legal Education

Many law school courses have incorporated books into substantive lecture courses. As noted *supra*, the most common examples of this seem to be Jonathan Harr's *A Civil Action*, Gerald Stern's *The Buffalo Creek Disaster*, and Barry Werth's *Damages*.[124] All three books describe the intricacies, dramas, and personalities at the heart of complex civil litigation, though each chooses different foci and perspectives.[125] For example, *A Civil Action* primarily focuses on Jan Schlichtmann's work representing eight Massachusetts families against two large corporations on a toxic torts case; *The Buffalo Creek Disaster* was written by an attorney at Arnold & Porter who represented West Virginia families whose lives were upended following a deadly flood.[126] *Damages* takes a more objective view, reporting on the perspectives of all sides of a medical malpractice

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122. *See* HARR, *supra* note 23; STERN, *supra* note 23; BARRY WERTH, DAMAGES (1998).

123. *See infra* Section III.B.

124. HARR, *supra* note 23; STERN, *supra* note 23; WERTH, *supra* note 122.

125. HARR, *supra* note 23; STERN, *supra* note 23; WERTH, *supra* note 122.

126. HARR, *supra* note 23; Raleigh Hannah Levine, *Of Learning Civil Procedure, Practicing Civil Practice, and Studying* A Civil Action*: A Low-Cost Proposal to Introduce First-Year Law Students to the Neglected* MacCrate *Skills*, 31 SETON HALL L. REV. 479, 490 (2000); STERN, *supra* note 23; Jason Schmieg, *Phrasing the Question: The Use of* The Buffalo Creek Disaster *in Teaching Civil Procedure*, 47 ST. LOUIS U. L.J. 149, 150–51 (2003).

case—the injured family, the defendant doctor, the lawyers, and the three mediators.[127]

Much—though not all—of the scholarly discussion on these books focuses on how these books can be incorporated into traditional first-year courses like Civil Procedure or Torts.[128] Many of the authors describe how the books helped tease out the connections among legal doctrine, fact investigation, and lawyering skills that new law students may particularly benefit from learning.[129] Moreover, given how many first-year students may feel inundated or alienated by materials like appellate cases, hornbooks, and treatises that they may not have encountered before, a general-audience, nonfiction "legal thriller" may prove to be a welcome counterpart to their other readings.[130]

Other authors report positive outcomes with using shorter case studies in upper-class courses like Corporations or Mergers & Acquisitions.[131] Professor Alicia Davis describes using case studies, modeled after the Harvard Business School's approach, in her Mergers & Acquisitions course to help educate her students on how to not just think like a lawyer but to think like a businessperson as well.[132] Other authors report similar positive experiences with using case studies for business law courses.[133]

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127. Melody Richardson Daily et al., Damages: *Using a Case Study to Teach Law, Lawyering, and Dispute Resolution*, 2004 J. DISP. RESOL. 1, 2 (2004).

128. Levine, *supra* note 126, at 480 (arguing for inclusion of *A Civil Action* in Civil Procedure to teach practical lawyering skills); Schmieg, *supra* note 126, at 149–50 (describing the analysis of litigation strategy in *The Buffalo Creek Disaster* in Civil Procedure); Daily et al., *supra* note 127, at 2 (discussing the development of a new, upper-class course focusing on *Damages*); Tom Baker, *Teaching Real Torts: Using Barry Werth's* Damages *in the Law School Classroom*, 2 NEV. L.J. 386, 386 (2002) (explaining how *Damages* illuminates the subtext of insurance in Torts).

129. Levine, *supra* note 126, at 480; Schmieg, *supra* note 126, at 149–50; Daily et al., *supra* note 127; Baker, *supra* note 128.

130. *See* Baker, *supra* note 128, at 388–89.

131. Alicia J. Davis, *Think Like a Businessperson: Using Business School Cases to Create Strategic Corporate Lawyers*, 59 ST. LOUIS U. L.J. 823, 827–29 (2015).

132. *Id.*

133. *See, e.g.*, Bradley T. Borden, *Using the Client-File Method to Teach Transactional Law*, 17 CHAP. L. REV. 101, 101 (2013) (describing incorporating business case studies into transactional law courses); Stephanie R. Sipe, *Maximizing Student Learning Through* Enron: *The Ultimate B-Law Case Study*, 24 J. LEGAL STUD. EDUC. 325, 325 (2007) (describing the Enron scandal as a rich opportunity for teaching students about "the law and its relationship to business practices").

In general, faculty describe using long-form texts to provide much-needed context on the legal doctrines that their courses primarily focus on.[134] The case studies and texts that faculty use seem designed to translate the law of torts, civil procedure, or corporate law into how the law actually works "on the ground," as well as describing how nonadjudicative systems like settlement or insurance intersect with doctrinal structures.[135] Because many (if not all) students will likely work both in settings that require them to apply their legal knowledge and on projects that are not purely legal, it is not surprising that faculty would report that connecting law into practice reaped benefits for student engagement and learning.[136]

B. Multimedia Case Studies in Legal Education

Beyond the uses of written texts, many faculty report using film and television clips to highlight specific principles of law. This is especially common in Professional Responsibility courses, although shows like *The Wire* and *Breaking Bad* have been used in criminal law, criminal procedure, and evidence courses.[137] There are obvious reasons to include clips from film and television in doctrinal courses. Because such materials are fictional and are usually designed to appeal to a mass audience, student engagement will naturally increase when film and television clips are incorporated.[138]

Of course, there are shortcomings in doing so, especially compared with the nonfiction materials described *supra* Section III.A.[139]

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134. Borden, *supra* note 133; Sipe, *supra* note 133; Davis, *supra* note 131.

135. Borden, *supra* note 133; Sipe, *supra* note 133; Davis, *supra* note 131.

136. Borden, *supra* note 133; Sipe, *supra* note 133; Davis, *supra* note 131.

137. *See, e.g.*, Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305, 1307–10 (2001); Steven Goldberg, *Bringing* The Practice *to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 421–22 (2000); Brian R. Gallini, *HBO's* The Wire *and Criminal Procedure: A Match Made in Heaven*, 64 J. LEGAL EDUC. 114, 114 (2014); Andrea L. Dennis, *Teaching* The Wire*: Crime, Evidence, and Kids*, 64 J. LEGAL EDUC. 111, 111 (2014); Adam M. Gershowitz, The Wire *As a Gap-Filling Class on Criminal Law and Procedure*, 64 J. LEGAL EDUC. 117, 117 (2014); Alafair S. Burke, *Got a Warrant?:* Breaking Bad *and the Fourth Amendment*, 13 OHIO ST. J. CRIM. L. 191, 191 (2015).

138. Menkel-Meadow, *supra* note 137; Goldberg, *supra* note 137, at 422; Gallini, *supra* note 137; Dennis, *supra* note 137; Gershowitz, *supra* note 137; Burke, *supra* note 137.

139. *See supra* Section III.A.

Fictional movies and television shows necessarily shortcut the normal timelines of procedures and transactions.[140] Characters—particularly lawyers, but sometimes judges, parties, and witnesses—are made into caricatures, acting in extreme ways that are somewhat unrealistic, and occasionally even engage in behavior that would get their testimony thrown out, their law licenses suspended, or their actions reported to a judicial oversight committee.[141] That is understandable, of course, as fiction needs to create dramatic tension through plot and character, but it can distort the audience's expectations and opinions of what lawyers and judges do.[142]

This is particularly true in Professional Responsibility, in which portrayals of lawyers and judges can influence what students think is permissible, standard, or appropriate. Though law students are likely not so naive as to think that what they see on television is reflective of reality, the sensationalization of legal practice in fiction can reduce its relevance to their learning process. How much can fictional lawyers really help students learn about ethical practice or follow the ethics rules when their behavior is so dramatic as to be unrealistic?[143] In my view, even the most discerning Professional Responsibility

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140. *See, e.g.*, Meredith Blake, *News Analysis: Dick Wolf Packed TV with Hero Cops*, L.A. TIMES (June 9, 2020, 3:48 PM), https://www.latimes.com/entertainment-arts/tv/story/2020-06-09/dick-wolf-law-and-order-chicago-pd-fbi-color-of-change [https://perma.cc/4QXT-AUUV] (noting that *Law & Order* shows nearly all criminal defendants going to trial, despite the fact that approximately 97% of criminal cases are resolved via plea bargaining). Anyone who has ever seen an episode of *Law & Order* knows how many liberties screenwriters are willing to take in portraying the practice of law. *See id.*

141. *See generally Law & Order* (NBC).

142. *See supra* Section III.A.

143. Georgetown University Professor of Law Carrie Menkel-Meadow argues that "modern lawyers demonstrate a full range of moral and ethical behavior, both personally and professionally, and that these depictions of lawyers in popular culture are actually extremely effective exemplars of legal ethics from which we can teach and learn much." Menkel-Meadow, *supra* note 137, at 1311. My contention is that in the nearly two decades since Professor Menkel-Meadow was writing, law students (and the public at large) have become less likely to think of lawyers as paragons like Atticus Finch—and even he is no longer a paragon. *See* HARPER LEE, TO KILL A MOCKINGBIRD (1960); Randall Kennedy, *Harper Lee's 'Go Set a Watchman,'* N.Y. TIMES (July 14, 2015), https://www.nytimes.com/2015/07/14/books/review/harper-lees-go-set-a-watchman.html [https://perma.cc/PXG9-N5ZJ]. I believe students are more likely to think of *Better Call Saul*'s Saul Goodman or *How to Get Away with Murder*'s Annalise Keating—both lawyers who stretch, if not break, ethical rules. *See generally Better Call Saul* (AMC); *How to Get Away with Murder* (ABC). Moreover, in the current political and cultural moment, I believe lawyers like David Boies are more likely to spring to mind for most Americans rather than a public interest attorney.

student who understands that fiction is not reality might still be influenced by the theatrical actions of the judge, district attorney, corporate lawyer, or public defender that they see on prime-time television in their future careers.

I use very few film or television clips and only do so in the unit on advertising and solicitation.[144] Because I pair the ethical rules on advertising and solicitation with a discussion of how American society perceives lawyers—which is partially informed by lawyer advertising and solicitation practices—I think it is appropriate to explore how popular shows, like *Breaking Bad* and *The Simpsons*, depict lawyer advertising.[145]

C. *Lessons from* Bad Blood *for Ethical Lawyering*

Although I would not argue that it is inappropriate to include movie or television clips in Professional Responsibility because of the tendency to exaggerate what lawyering looks like, I contend that a more realistic selection of texts better introduces law students to the spectrum of ethical behavior. Indeed, many of the stories—and not just those in *Bad Blood*—provide equally riveting lessons for students, with the added benefit of having its basis in reality.[146] Nonfiction lawyering narratives can thus provide engagement without unnecessary sensationalization that too frequently crops up in the depictions of lawyers in film or television.[147]

Below, I offer a few brief lessons for other instructors, which describe how *Bad Blood* helped students conceive of their own imminent role as new attorneys attempting to practice in ethical ways.

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144. Syllabus, *supra* note 18.

145. *Breaking Bad: Better Call Saul* (AMC television broadcast Apr. 26, 2009); Ashley Csanady, *Why 'No, Money Down' Is More than an Old Simpsons Reference*, NAT'L POST (Aug. 3, 2016), https://nationalpost.com/news/canada/why-no-money-down-is-more-than-an-old-simpsons-reference-according-to-the-ontario-court-of-appeal [https://perma.cc/T5AD-8CAC].

146. *E.g.*, CARREYROU, *supra* note 2, at 64–66 (providing real-world example of conflict of interest problems).

147. *See* Menkel-Meadow, *supra* note 137, at 1310.

1. *Lawyers in a Larger Social Context*

Students sometimes perceive corporate lawyers as interacting predominantly with other lawyers or senior businesspeople rather than with individuals. *Bad Blood* demonstrates, in actuality, that lawyers may also encounter, work with, or oppose "regular people."[148] For example, when Boies Schiller attorneys lay in wait to ask—or force—Tyler Shultz, a former Theranos employee and grandson of a Theranos board member, to not discuss his experiences at Theranos with anyone, students see how lawyers practice not just with their peers but also with third parties.[149]

Taken as a whole, *Bad Blood* provides a nuanced view of lawyering and its effects upon American society. Lawyers are portrayed varyingly as overreaching, aggressive, dedicated, professional, charming, thoughtful, and knowledgeable.[150] They encompass a relatively broad swath of the types of lawyers that law students may work with, for, and against during the initial stages of their legal careers. Seeing a range of lawyering styles and the practices of multiple lawyers (rather than a single attorney protagonist) helps students apprehend that lawyering takes a variety of forms—and that they, therefore, also can make choices in crafting their own identities as ethical attorneys.

2. *Norms in Practice Settings*

Some of the lawyers in *Bad Blood* work in large law firms, while others are in-house counsel or solo practitioners.[151] Different practice environments have different expectations and norms which lawyers must adjust to. By portraying a few different types of practice—as well as a few examples of how law firms operate, by contrasting

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148. CARREYROU, *supra* note 2, at 287.

149. *See supra* Section II.B. This discussion also highlights the ethical rules involved when lawyers contact unrepresented third parties. *See* MODEL RULES OF PRO. CONDUCT r. 4.3 (AM. BAR ASS'N 2020).

150. *See generally* CARREYROU, *supra* note 2.

151. *See, e.g.*, CARREYROU, *supra* note 2, 246–47 (noting that Tyler Shultz hired Stephen Taylor for representation while Boies Schiller, a large New York firm, represented Theranos).

Boies Schiller with McDermott—*Bad Blood* shows how lawyers interact with each other and with clients in a variety of ways.[152] Theranos's in-house attorneys work with employees (and managers) in different ways, including monitoring and termination.[153] *Bad Blood*, by contrast, portrays Boies Schiller attorneys as interacting with opposing parties and individuals.[154] Boies Schiller outmatches the Fuiszes in their lawsuit against Theranos, and their infighting exacerbates their familial relationships.[155] Each of these examples shows students how legal work can vary depending on what kind of legal organization one practices in and how much interpersonal dynamics affect lawyering and ethical decision-making.

3. *Self-Guidance and Superiors*

Attorneys who face ethical quandaries may not necessarily have sufficient resources or support to help determine how to resolve those issues.[156] Although colleagues and supervisors can provide guidance, they might also be encouraging attorneys to act in unethical ways. Because I asked my students to consider how they would act "in role" as a Theranos assistant general counsel or a Boies Schiller associate, I put them in the position of having to use their own ethical intuitions—bolstered by the MRPC—to determine how to manage ambiguous situations.

Some students are accustomed to consulting a statute, rule, or case to determine what the "correct" answer is to an issue or deferring to a supervisor when a situation is not easily resolved. Yet that is not always sufficient to help determine a path forward when faced with a real-world ethical dilemma.[157] By grappling with the challenges posed by the actions of Elizabeth Holmes, Theranos, and the

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152. *See generally id.*

153. *Id.*

154. *Id.* at 287.

155. *Id.* at 202.

156. Steven Vaughan & Emma Oakley, *'Gorilla Exceptions' and the Ethically Apathetic Corporate Lawyer*, 19 LEGAL ETHICS 50, 69 (2016).

157. Lisa G. Lerman, *Teaching Ethics in and Outside of Law Schools: What Works and What Doesn't*, 2006 PRO. LAW. 57, 58 (2006).

company's attorneys, students were placed in a primary role in determining how to conceptualize their response to an ethical challenge.

4. *Client Pressures*

Relatedly, because Holmes and Theranos CFO Sunny Balwani pressured their staff and attorneys incessantly, students confronted the possibility that clients would encourage, cajole, or force them to do unethical or potentially unethical things as attorneys.[158] Although the Model Rules set out specific rules regarding attorneys violating the MRPC or other laws, students also recognize that other considerations (such as professional limitations or economic concerns) may affect their abilities to push back on what clients ask them to do.[159] Moreover, such client requests might not always be clearly unlawful or unethical—clients or supervisors may only ask attorneys to toe the line versus break the law.[160] When might that be acceptable?

Though Theranos provides an extreme example of how far a client might pressure an attorney to go, and because *Bad Blood* documents recent events in corporate practice, students understood that these challenges are not fanciful or imaginary. In the near future, students may find themselves having to tell clients difficult things or push back against committing unethical conduct. Determining how to best do so in the role of a client's attorney is a challenge—one that may persist throughout their careers. *Bad Blood* thus provides multiple opportunities for students to integrate ethical practice with client and professional considerations.[161]

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158. CARREYROU, *supra* note 2, at 77.

159. Rule 8.4 deems it professional misconduct to violate a MRPC or to knowingly assist or induce another to do so; to commit a criminal act that adversely reflects on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects; to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; or to engage in conduct prejudicial to the administration of justice. MODEL RULES OF PRO. CONDUCT r. 8.4 (AM. BAR ASS'N 2020).

160. *See* MODEL RULES OF PRO. CONDUCT r. 5.2 cmt. (AM. BAR ASS'N 2020).

161. *See, e.g.*, Intuitions on Conflicts, *supra* note 22.

5. *Law As a Tool*

Law and legal practice are not merely abstract concerns or questions about what the law is or ought to be. The law allows attorneys to advocate, manage, and potentially intimidate clients, opposing parties, and third parties.[162] The Shultz episode demonstrates how lawyers, by merely representing a client and implementing the client's stated goals (by encouraging Shultz to sign documentation preventing him from communicating with John Carreyrou or other journalists about his time at Theranos), act in ways that they might not have anticipated or might have considered *ex ante* as beyond the bounds of ethical lawyering.[163]

Legal doctrines and ethical rules are thus not self-contained but rather used to perform various ends—in this case, for business goals.[164] By contemplating how they may be asked to employ their expertise in furtherance of other goals or priorities, students directly engaged with whether and how ethical rules meaningfully limit their future work as attorneys. This exploration made clear not only the strengths and shortfalls of the MRPC but also the ways in which attorneys cannot rely solely upon ethical rules, given their generality, in providing guidance.[165]

Generally, these lessons demonstrate how students can engage more directly with the ethical rules and how they interface with legal practice. Allowing students to consistently engage with what those rules mean for their careers in an extended way, and to the degree that ethical rules can be considered a procedural regulation on the actual substantive practice of law, provided a fruitful lesson in what ethical lawyering actually means beyond what the rules say.

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162. MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020); CARREYROU, *supra* note 2, at 287.

163. *The Dropout*, *supra* note 18.

164. *See* MODEL RULES OF PRO. CONDUCT pmbl. (AM. BAR ASS'N 2020) ("[The rules] should be interpreted with reference to the purpose of legal representation and of the law itself.").

165. *Id.*

CONCLUSION

After my students finished reading *Bad Blood* and subsequent to our class discussion, I was curious to see how they integrated the discussion of the book into their overall comprehension of the course's goals. Two indicators helped answer these questions.

First, some students elected to use elements described in the book in their final papers. The final paper assignment was very open-ended: students wrote an eighteen-to-twenty-page research paper on a topic of their choosing relating to a dynamic in the profession and included an extended discussion of at least one ethical concept.[166] One paper analyzed how ethical rules create perverse incentives for lawyers to act aggressively in the service of "zealous advocacy" and to intimidate third parties, using Theranos as an example of why lawyers might feel they could push boundaries without concerns of professional liability.[167] The paper argued for increased limitations on attorney conduct in the MRPC to prevent attorneys from acting so aggressively.

Second, in my teaching evaluations, students overwhelmingly stated that they found *Bad Blood* to be a useful tool in developing their own understanding of the MRPC and of what ethical lawyering means. I used the text to highlight both specific MRPC provisions as well as more general principles regarding ethical lawyering, but an instructor could take a longer text in multiple directions to emphasize different pedagogical goals in a Professional Responsibility course.[168]

The experiences described herein, I hope, demonstrate the usefulness of assigning a long-form, nonfiction text in Professional Responsibility courses (whether instructors choose *Bad Blood* or other options).[169] Although specific shorter examples require less

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166. Syllabus, *supra* note 18.

167. *See* MODEL RULES OF PRO. CONDUCT r. 1.3 cmt. 1 (AM. BAR ASS'N 2020); CARREYROU, *supra* note 2, at 287.

168. Course Evaluations from Students, *supra* note 42; Syllabus, *supra* note 18.

169. There is no shortage of books describing a range of ethical and unethical lawyering. *See, e.g.*, CURTIS WILKIE, THE FALL OF THE HOUSE OF ZEUS (2010) (discussing ethical issues that led to the conviction of Dickie Scruggs, a billionaire trial lawyer from Mississippi). One other recent example,

investment from both the instructor and the students, *Bad Blood*'s in-depth narrative—and the fact that the book is grounded in reality rather than Hollywood tropes—provided a riveting, unsettling study of what ethical and unethical lawyering can look like and allowed students to deeply and extensively engage with complicated questions about the actions of attorneys and their effects upon clients, opposing parties, and the public at large.

Ronan Farrow's *Catch and Kill*, highlights a range of business, moral, political, and ethical choices that attorneys make. *See generally* FARROW, *supra* note 38. Because *Catch and Kill* addresses sexual predation, assault, and rape, the subject matter may prove too charged for some Professional Responsibility courses, as opposed to the corporate malfeasance described in *Bad Blood*. *Id.* Certain episodes, though, may provide useful learning opportunities for students. *Id.*