

meiea[®]

MUSIC & ENTERTAINMENT INDUSTRY
EDUCATORS ASSOCIATION

Journal of the
Music & Entertainment Industry
Educators Association

Volume 12, Number 1
(2012)

Bruce Ronkin, Editor
Northeastern University

Published with Support
from



Slaying the Starving Artist Paradigm and Teaching Professionalism in the Entertainment Business: The Entertainment Law and Professionalism Clinic

Cheryl L. Slay
Belmont University

Introduction

This article describes the Entertainment Law and Professionalism Clinic (hereafter “ELP Clinic” or “Clinic”¹), an initiative designed to expose students to the practice of professionalism while serving their entertainment industry legal needs. The Clinic moves instruction outside the boundaries of the classroom by requiring students to exercise self-directed judgments about the use of business advisors. The first part of the article discusses general notions of professionalism and proposes a definition that may be applicable to training a corps of entertainment business professionals through a service project approach. Part two describes how the ELP Clinic, currently in use at Belmont University, was developed from my observations and student interactions as a teaching practitioner of law to: (a) serve student business and legal needs by providing cost-free legal advice; (b) teach students how, when, and whether to seek professional advisors and use the members of an advisory team; and, (c) teach and promote professionalism in the entertainment industry outside the classroom. An exhaustive study of professionalism is outside the scope of this article; rather, my objective is to examine the contours of professionalism within the framework of the Clinic, and to summarize insights from its implementation and underlying principles.

Defining Professionalism

Plying one’s trade in the arts can be both rewarding and unsympathetic, invoking images of starving artists and ruthless “jungles,” language coined to depict an exploitative industry that preys upon the martyrdom associated with artists whose preoccupation with producing art appears to supersede business judgment. The starving artist paradigm finds its roots in the realm of the visual arts, which has yielded some of our most inspiring

cultural contributions, yet many of the artists who gave us these treasures often died in ignominy, recognized posthumously as cultural icons whose achievements often failed to reflect financial success during their lives. For example, Van Gogh, the preeminent Dutch master, relied heavily on his family for ongoing support during his lifetime, though his *Sunflowers* painting sold for \$39 million in 1987, and others have fetched similar sums.² Though the types of transactions that drive the entertainment industry distinguish it from the fine arts, the entertainment business likewise boasts accounts of artists and composers mired in archetypal penury.

However, it is an archetype that entertainment and music business programs are poised to deem as little more than a caricature of the unwary, or germane to this discussion, the unprofessional. There are stories we celebrate, in which the scales are tipped to reverse the usual leverage scenarios that would otherwise beget inequities. In the area of copyright ownership of audio recordings, Ray Charles' business judgments resulted in calculated label affiliations and unprecedented (at the time) ownership of his masters as an example of what can properly be characterized as professionalism.

While I do not purport to suggest that dying penniless is the hallmark of a lack of professionalism, or that financial solvency is the penultimate measure of professional success,³ deriving a livelihood from performing a set of activities is fundamental to delineating the minimal parameters of professional behavior. Indeed, I would argue that endeavoring to produce more Ray Charles-like conduct (in terms of business acumen) is a legitimate driver in designing the entertainment business curriculum, i.e., to train a cadre of professionals. Webster's dictionary defines "professional" as "participating for gain or livelihood in an activity or field of endeavor often engaged in by amateurs;" and, "engaged in by persons receiving a financial return."⁴ This definition comports with entertainment business course offerings that develop core knowledge in accounting, finance, economics, marketing, artist management, intellectual property, contract law, and related courses—all fields that engage monetary outcomes founded on theories for developing not mere economic viability, but profitability as well. By teaching these principles we stipulate their necessity and significance, and may tacitly assume students will know how to use them.

The ELP Clinic represents the necessary intersection of two curricular objectives—imparting knowledge, and creating a laboratory for developing the acumen of professionalism;⁵ it is therefore the primary focus

here for advancing a contextual definition of professionalism. There are standards at work in other contexts that are worth a brief mention, as they are valuable to a discourse on professionalism. For example, principles embedded in professional codes of conduct like those used in law, medicine, and accounting, are also relevant for the entertainment industry.⁶ Accountability, the exercise of sound judgment, and personal integrity all apply to professionalism standards across the board.⁷ In an era marked by rampant piracy of creative products (a menacing example of an ethical and legal dilemma), teaching a code of ethics is clearly pertinent. A common theme for law and medicine is that “adherence to an ethical code of practice and its complexity has granted... the privilege of self-regulation.”⁸ Self-regulation is at the heart of ethical behavior, which is an important aspect of professionalism. Yet even for those professions which regulate ethical conduct, there is a personal dimension of professionalism that includes responsibility for oneself,⁹ along with other professional ideals. Likewise, professionalism issues within the entertainment industry are not limited to an ethics code.

Alternative to the code of conduct approach, professionalism has also been defined in terms of competence and skills mastery, particularly in terms of artistic performance.¹⁰ This definition is effective for building vocational excellence, but may do little to secure adequate remuneration.

The definition offered here is intended to augment, rather than replace, these definitions, to satisfy vital gaps that they do not address. Likewise, the Clinic facilitates professional conduct that lies outside these traditional definitions. Accordingly, professionalism is herein defined as:

The exercise of informed judgment about how best to manage business affairs (including career management); and, commitment to taking initiatives to actualize such judgments responsibly, to facilitate earning a livelihood that supports personal goals and needs.

Implicit in the definition is the need to become informed, either independently, or through the use of business advisors, and to be self-directed in the pursuit of information. An example of unprofessional conduct in entertainment that the proposed definition addresses—which the other definitions do not address—is the problem of unclaimed royalties. SoundExchange, the non-profit performing rights organization designated to col-

lect and distribute digital performance royalties, possesses approximately one million dollars of unclaimed royalties that are owed to both artists and record labels.¹¹ This predicament has existed for several years, despite information campaigns launched by SoundExchange,¹² the American Federation of Television and Radio Artists, industry conferences like South-by-Southwest, and articles by the popular and trade press. In applying the proposed definition to this issue, these monies likely remain unclaimed in part because of a lack of understanding about the scope of rights associated with intellectual property, or a lack of information about SoundExchange and its role. Another possibility is that the artists and labels in question spend more time on the business of creating than the business of collecting compensation. For any of these scenarios, adhering to the mode of professionalism described here would spawn the necessary vigilance to address these issues or engage an advisor to assist. Vehicles like the ELP Clinic encourage the practice of such vigilance by encouraging students to seek out this kind of information through business advisors.

The Entertainment Law and Professionalism Clinic: Responding to a Need

As an attorney faculty member providing instruction in courses on law,¹³ I am routinely approached after class sessions by students seeking legal advice for their private endeavors. This is likely a common occurrence for other attorney faculty teaching law, and schools may differ concerning conflict of interest policies governing the appropriateness of acting as counsel for enrolled students. Yet even if a university permits attorney faculty to advise enrolled students, complexities may make it impractical to do so, including managing the sheer number of requests that would possibly increase with spread word of a faculty member who provides free or low cost legal advice to his or her students. While it is sometimes possible to respond to requests for legal advice by transforming a private inquiry into a teachable moment, and reframing the student's question in terms of general concepts being taught in the course, there are many students whose queries require the attention of an attorney acting as advisor, not teacher, who can entertain the peculiarities of the student's circumstances and render the assistance every client seeks.

After declining a number of student requests for legal advice (in the interest of avoiding potential conflicts of interest), I observed two patterns: (1) our students were assiduously entrepreneurial, and desirous of making

good business decisions, which was their motivation for seeking my assistance. Many questions grew out of their involvement as artists, performers, writers, etc., while other students sought advice for web-based businesses or other enterprises for delivering entertainment products and services as non-artists; (2) inquiries generally confirmed that students were learning to apply the legal concepts being taught in my classes to their own situations but they still needed individual, client-centered (rather than purely academic) attention for their business activities.

As encouraging as these patterns are, they signaled a common need for legal representation that, while not directly related to the curriculum, fully supports it. The breadth of the need was not feasible for me to single-handedly satisfy, nor to comfortably disregard. As a practitioner with an experiential understanding of the importance of sound legal advice I was compelled to hearten—in a concrete way—the business initiative these students displayed and that our curriculum seeks to instill. As an academic witnessing this void almost daily, I regarded this call to action as simply consistent with my charge to seize the intersection between instruction and the real world. On this basis I began to contemplate the best vehicle for obviating the need for legal advice among our entertainment business students, and proposed the concept described in the following sections, which was fully implemented.

Underlying Principles

Four theses underlie the Clinic and inform the definition of professionalism advocated here:

1. *Obtaining constructive advice is a skill.* Unfortunately, not all clients feel well-served by their business advisors. Litigation between managers/agents and their clients abounds. Therefore knowing when, whether, and how to meet with an advisor is important. For many students this is not common knowledge.
2. *Exercising informed judgment is preferable to reliance on hearsay or industry customs.* Knowledge is, indeed, power but incomplete or inaccurate information is its antithesis. While it may not be necessary to consult with an attorney on all matters, having a game plan for determining when such consultation will be pursued is

important, particularly in this era of DIY (do-it-yourself) that has, on the one hand, created extraordinary opportunities in entertainment and, on the other, left some participants struggling to do it *all* themselves without the benefit of advisors or good judgment.

3. *Managing business affairs requires strategy.* A classic scenario that cries out for advisory assistance is the David-Goliath situation in which the playing field between the parties to a transaction is not a level one. Strategizing with an advisor helps to balance the inequities. However, professionalism also requires adoption of a personal strategy that helps to establish a framework for what is acceptable in a transaction.
4. *Dealmaking is preferable to deal taking.* Another classic scenario ripe for displaying professionalism is one in which an industry participant is presented with a deal that is deemed acceptable simply because no other deal exists at the time. Professional judgment is often suspended, as is the exercise of initiative to evaluate the extent of financial or other benefits presented.

The ELP Clinic seeks to teach these principles through reflective seminars and clinical service.

Designing and Operating the Clinic

To maximize student benefit and participation, a foundational criterion for the clinic was to provide legal advice to our students at no cost, i.e., on a *pro bono* basis. To do so I adopted the legal clinic model, a traditional vehicle for *pro bono* representation.¹⁴ The one-day clinic is offered annually to students who sign up in advance to meet with a lawyer for a thirty-minute in-person consultation. Consultations are conducted in a single room where other consultations are occurring simultaneously; this format facilitates serving multiple students at one time.¹⁵ If the student's legal issue requires representation beyond the consultation, follow-up options are offered that may involve additional *pro bono* representation, or the student may need to pay to retain an attorney, depending on the circumstances.¹⁶

A three-way partnership supports the clinic's operation:

1. The state bar association's entertainment and sports law committee furnishes a pool of volunteer attorneys with the requisite expertise to staff the clinic. Although *pro bono* service is voluntary, many states have requirements for reporting the amount of *pro bono* service licensed attorneys provide, and *pro bono* service is nationally encouraged through state bar associations and the American Bar Association.¹⁷ By helping attorneys meet their state *pro bono* obligations the clinic creates a win-win, both for the university and for attorneys volunteering to staff the clinic. Faculty attorneys also volunteer to staff the clinic;¹⁸
2. The local Volunteer Lawyers for the Arts (VLA) organization provides administrative support that includes liaising with the bar association, scheduling appointments, performing intake tasks on the day of the clinic, covering volunteer attorneys on their professional liability insurance policy, compiling statistics on clients served, and supplying referral options for students requiring legal representation beyond the clinic appointment;
3. The university arranges for campus facilities to serve as the clinic's location, selects the clinic date in concert with the academic calendar, publicizes the clinic within the university community and to external entities, supplies the student client base, coordinates with the VLA, identifies statistics needed, apprises college and university administrators of the clinic's work, and has general oversight responsibility for the clinic to ensure that college objectives are met. As indicated in the clinic's underlying theses, those objectives are not limited to the provision of legal services.

Expanding the Clinic's Reach

Further examination of the Clinic's origins elucidates additional goals which extend beyond an interest in developing a mechanism for serving legal needs, as constructive as that is. However, my impetus to act also emerged from continuously teaching students how an understanding

of the law can preclude ill-fated business deals. In doing so the magnitude of not only imparting that information, but of challenging students to conscientiously adopt a sense of responsibility, i.e., professionalism, toward it, dawned. The clinic is essential as a laboratory in this regard. However, professional conduct is like the proverbial elixir to which a student can be led, but cannot be compelled to drink—unless a clear, persuasive picture can be painted to induce thirst.

With this in view, I developed a companion seminar on professionalism. The seminar was created in the clinic's inaugural year to emphasize the value of consulting business advisors, and to publicize the clinic as an immediate occasion to exercise professionalism.¹⁹ The seminar's purpose is to motivate students to reflect on past, current, or future entertainment endeavors, and to consider whether their approach to planning and conducting business transactions is strategic, informed, and intentional. In explaining that the expertise of lawyers, managers, agents, accountants, and other advisors should provide such assistance, I incorporate recommendations on criteria for selecting an advisor, how to maximize the advisor's expertise, when to seek it, and deciding how to use it. For example, in providing tips on when to seek legal counsel I recommend doing so before beginning a collaboration, before submitting creative products (whether a demo, manuscript, or film treatment), before the submission of ideas, before signing documentation, upon being offered a deal or contract, and in connection with other events. Consistent with the definition of professionalism proposed here, the seminar also seeks to heighten awareness of the negative, starving artist-like consequences that may attend to uninformed business decisions.²⁰ One benefit of offering the seminar outside the curriculum is the opportunity to speak candidly about the lack of professionalism that often pervades the entertainment industry, openly challenging the starving artist paradigm as an appropriate focus for examination, while offering an immediate solution via the clinic.

During the second year of implementation we further expanded the clinic's reach by granting the opportunity for students with a vocational interest in law to serve as clinic observers, to shadow a volunteer attorney during the consultation, and to discuss the practice of law with the volunteer. This addition was also in response to my interactions with aspiring lawyers enrolled in our undergraduate program²¹ who wanted to participate in the clinic despite the absence of any legal issue for which they needed to seek advice. The opportunity was extended to a small number of

students and is not a primary feature of the clinic. However, it is a fitting enlargement of the clinic's scope with respect to contemplating professional conduct, and shaping student perspective on the value of seeking and providing expertise from the viewpoint of the advisor.²²

Outcomes

Originally implemented in 2009, the Clinic completed its third year of operation in April 2012. The number of students attending the professionalism seminar is estimated at over one hundred per seminar. However, the number of clients served through the clinic represents a small segment of the student population.²³ Factors that may account for clinic participation levels may range from the need to expand publicity efforts, to the limited number of students that can be accommodated during a three-hour clinic held once per year. A salient factor is the fact that student participation is voluntary and entirely self-directed. It is plausible that even when students are aware of the opportunity to receive cost-free legal advice, have a need to do so, and have been given information about methods and reasons for doing so, they may elect to forego the use of a business advisor. Without collecting data from non-participants, any conclusions to be drawn about their exercise of judgment would obviously be based on conjecture. Nevertheless, with that acknowledgement it is reasonable to observe that business advice is not always sought by the general population. Likewise, it is reasonable to note that similar norms may exist within our student body. If I were to extrapolate the clinic data to the larger entertainment industry, I would suggest that if the number of entertainment professionals who have the resources to use business advisors (as students do through the clinic) but who choose not to is similar to the clinic results, the data may provide some insight into levels of professionalism within the entertainment industry that helps to explain the prevalence of the starving artist phenomenon. Students who participated in the clinic adhered to the proposed definition of professionalism and thereby positioned themselves to receive both the benefits of such conduct, and the intended benefits of the clinic.

Conclusion

Through the ELP Clinic we render a service to students who elect to receive it. Its implementation is predicated on recognized legal needs, specific theories concerning professionalism, and a desire to expand class-

room learning to encompass opportunities to practice professionalism. Students benefit on at least two levels: the clearest benefit is the receipt of high quality legal advice on pertinent matters related to the curriculum. The second is that students are being trained to conduct themselves as professionals. It would be overly simplistic to assert that professional conduct alone can eradicate the starving artist (or other arts entity) paradigm. However, if it is an archetype that entertainment and music business programs are poised to address at all, I consider the following insights from the ELP Clinic as exhortations to that end.

Impacting professionalism in the entertainment industry through the entertainment business curriculum is not automatic; it requires intentionality. The first step in building a program requires adopting a definition of professionalism, like the one proposed here, that applies to the entertainment industry and can be appropriately supplemented by definitions from other contexts. Further steps toward encouraging professionalism include an experimental approach that provides a laboratory for *practicing* professionalism. A bifurcated approach like that of the ELP Clinic facilitates both an instructional component designed to stir the professional sensibilities of students without the grade incentives of traditional coursework, as well as a clinical component wherein students are called to action—on their initiative alone—to develop the skills involved in making informed business judgments through strategic planning and business consultation. This kind of self-regulation is consistent with the definition of professionalism advanced here.

The ELP Clinic's success may be attributed to the underlying theses previously described, which are its guiding principles. The Clinic challenges the starving artist paradigm by recognizing that professionalism is an important aspect of entertainment business acumen, and offers a construct for refining and building upon academic knowledge with self-directed action. Projects like the ELP Clinic are beneficial not only for students, but for faculty who wish to seize the intersection between instruction and the real world, and can be achieved through organizational partnerships designed to work toward pedagogical goals and possibilities that have implications beyond the classroom for the entertainment industry as a whole.

Endnotes

1. The clinic is a project comprised of two parts: a legal clinic for providing counsel, and a professionalism seminar and reflective component. Together, both comprise the ELP Clinic.
2. Rita Reif, "Van Gogh 'Iris' to Be Sold," *New York Times*, September 3, 1987.
3. Some musicians may choose authentic expression of their own message and style over immediate monetary reward early in their careers. This can be an effective tactic if it is self-directed, deliberate, and strategic. When this kind of strategic impoverishment occurs, professionalism may be at work. However, I would suggest that this is not the average starving artist. Consequently, this article discusses the need for strategic options.
4. *Webster's Dictionary*.
5. In the context of teaching ethics through simulation as part of a professionalism curriculum, Robert Burns states: "Meaning is use. Knowing that and knowing how are deeply intertwined" to suggest that action builds on knowledge. See Robert P. Burns, "Teaching the Basic Ethics Class Through Simulation: The Northwestern Program in Advocacy and Professionalism," *Law and Contemporary Problems* 58, nos. 3 & 4 (1996): 38.
6. In non-entertainment spheres like securities, law, and health care, the stakes for professional misconduct are very high. In these disciplines a lack of "professionalism" may cost a patient her life, or land an executive in prison for manipulating the stock market or private funds (a la Enron) to his own advantage. Additionally, these are professions which are regulated by codes of professional conduct that are essential for providing guidance to practitioners. See Bill Wiersma, "Fixing the Trust Deficit: Creating a Culture of Professionals," *Leader to Leader* (Fall 2011): 45-50; See Diane Borders and James Benshoff, "The Mini-Conference: Teaching Professionalism Through Student Involvement," *Journal of Counseling & Development* (Sept./Oct. 1992): 39-40. See also Andrew Garman and Ru Pert Evans, et al, "Professionalism," *Journal of Healthcare Management* (July/August 2006): 219-222.
7. See Wiersma, p. 47-48, discussing professional mindsets in the context of securities, but drawing generally from his book *The*

Power of Professionalism.

8. See Charlotte Tulinius and Bibi Holge-Hazelton, "Continuing Professional Development for General Practitioners: Supporting the Development of Professionalism," *Medical Education* 44 (2010): 44. See also Burns, *supra*, p. 38, concerning "self-imposed restrictions."
9. Susan Dorr Goold and David T. Stern, "Ethics and Professionalism: What Does a Resident Need to Learn?" *The American Journal of Bioethics* 6, no. 4, (2006): 11.
10. See Wiersma, p. 47 concerning the professional's bias for results.
11. A lack of professionalism is not limited to the creative personality, but includes business entities like record labels as well. To be clear, the reference here to starving "artists" is not meant to exclude record labels or other entertainment business professionals.
12. See <http://www.soundexchange.com/2011/10/21/soundexchange-and-cd-baby-to-artists-labels-come-claim-your-cash/>.
13. Copyright law, intellectual property, entertainment contracts, licensing, and entertainment law are topics typically covered by law faculty teaching in entertainment business programs.
14. One of the defining moments of my tenure as a law student was participating as a student attorney in one of the law clinics offered by my alma mater. After law school, I participated in entertainment law clinics and eventually served on the board of directors for Maryland Volunteer Lawyers for the Arts.
15. This setup is common for community clinics. The din of multiple conversations creates some privacy, however, confidentiality matters are discussed with clients, and any student uncomfortable with the format may opt out.
16. The thirty-minute consultation time frame is used for planning purposes—to set the student's expectation, and to estimate the number of volunteer attorneys needed. However, as a practical matter, depending on the total number of students being served, it is not uncommon for students to receive more consultative time when time permits.
17. See http://www.americanbar.org/groups/probono_public_service.html for a state-by-state analysis of pro bono policies.
18. Conflict of interest issues are less critical in the clinic environment since the representation is very short-term, and faculty may easily recuse themselves from serving clinic students enrolled in courses

- taught by the faculty member, knowing the student can still have her needs met by a different clinic attorney.
19. To incentivize participation in the seminar, students were permitted to earn seminar and convocation credit for attending. The number of students signing up for clinic appointments increases in response to the seminar, though we have not tracked the numbers closely.
 20. For example, I describe the circumstances surrounding Frankie Lymon's loss of songwriting credits, and the obscurity of the Funk Brothers (session musicians for "the Motown sound" at the height of Motown's success) who seemed to typify aspects of starving artist status until recent years, after production of the documentary *Standing In the Shadows of Motown* in 2002, directed by Paul Justman. See also the book of the same title by Allan Slutsky (the book focuses on bassist James Jamerson).
 21. Serving as a faculty advisor for student law organizations broadens my interactions with students around legal issues.
 22. Academic clinics are typically run by law schools to provide a practicum experience for law students. The ELP Clinic represents a different academic use for a clinical law program, though objectives can be combined for undergraduate institutions that have law school affiliates. For example, in April 2012 we extended the opportunity for students from the university's law school to serve the clinic by observing consultations to assist with the administrative tasks of the clinic.
 23. The number of student clients served in 2009 totaled 14; the total number served in 2010 was 9; total served in 2012 was 10. The clinic was staffed by 8 volunteer attorneys in 2009 and 2010, and that number was reduced by half in 2012 to more closely match the number of scheduled appointments. These numbers have worked well in managing clinic operations.

My thanks to Wesley Bulla, Dean, Curb College of Entertainment & Music Business at Belmont Univ.; Jason Rogers, V.P. for Administration and University Counsel, Belmont Univ.; Casey Summar, Exec. Dir., Tennessee Volunteer Lawyers and Professionals for the Arts; the Tennessee Bar Assoc. Entertainment & Sports Law Committee, and the faculty and students of Belmont Univ. for their support for the ELP Clinic, making its successful implementation possible.



CHERYL L. SLAY is an entertainment and intellectual property attorney and assistant professor of music business at Belmont University. As a professor she has taught and designed courses including Copyright Law, Music Industry Contract Law, Legal Issues in the Entertainment Industry, and Understanding the Jazz Business. She is co-author of the book *Music Copyright Law*, and a contributing author to the ABA-BNA published book *Trademark Infringement Remedies*. She has nearly fourteen years of experience in representing independent and

emerging filmmakers, novelists, record companies, musicians, technology companies, visual artists, and other arts, technology, and business professionals, and has seventeen years of experience in developing public policy through managing and advising public sector programs. Ms. Slay received her Bachelor of Arts degree from the University of Michigan, a Master of Public Administration from Atlanta University, and received her Juris Doctor degree from the University of Maryland School of Law. She completed the Harvard Law School Program of Instruction for Lawyers in International and Comparative Intellectual Property, was selected as a Maryland Bar Foundation Fellow, and is an alumna of Leadership Music. She writes and speaks extensively on arts and intellectual property law and policy, and has authored numerous publications on matters ranging from strategies for success in the music business to trademark issues in reality television, and is a vocalist with over twenty-five years of performance experience. Additional information is available at www.slaylaw.com.