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Cheat, Prey, Shove: 3 Acts Forbidden by Ethics

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Seminar Written Materials

I. Introduction

Lawyers play a variety of roles...advocate, advisor and even marketer. The responsibilities vary in each context, but the one thing that is consistent is that lawyers must refrain from taking advantage of others. We're supposed to protect and serve the client and even when we act as an advocate, we're supposed to engage in a fair fight. It's not surprising, then, that there are a variety of rules that address our responsibilities when dealing with vulnerable people.

The categories of vulnerable people we'll address in this program are clients with diminished capacity, unrepresented individuals and people in need of legal services. We'll also touch a little on the related issue of bullying others, including other lawyers.

One note about the Rules: As I'm sure you're aware, the overwhelming majority of states in our country have adopted the ABA Model Rules of Professional Responsibility, so I'd like to refer to those Rules throughout this paper. Copyright restriction, however, prohibit me from doing so. As a result, all references in this paper to the "Rules" are actually references to the Delaware Rules of Professional Conduct, which are virtually identical to the ABA Model Rules (at least the as far as the parts that I'm quoting are concerned), but are not subject to the same copyright restrictions. There may be some minor differences in the text, but any difference does not impact the concepts discussed herein.

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II. Clients With Diminished Capacity

There are no clients more vulnerable than the client with diminished capacity. It's not surprising, therefore, that the rules put a heightened duty on lawyers when we deal with such individuals. The rule in play is Rule 1.14, which states:

Rule 1.14 Client With Diminished Capacity
(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

There are several parts of this rule that are interesting. First, look at how "diminished" is defined. It's not just mental impairment, but minority or other reason. In fact, the determination of "diminished" is not tied to any particular characteristic of the person, as much as it's about their ability to make decisions for themselves. So if we find that the client is of diminished capacity, what do we do then? Nothing. Well, nothing out of the ordinary-- 1.14(a) tells us to try to maintain a normal lawyer/client relationship. That means that we must continue to consult the clients pursuant to Rule 1.4. It also means that we need to consider the issues that are created by Rule 1.2.

Rule 1.2 Scope Of Representation And Allocation Of Authority Between Client And Lawyer
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
(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 1.2(a) sets forth the allocation of decision making responsibility between lawyer and client. Essentially it tells us that the lawyer makes the decisions about the means and the client determines the objectives of the representation. Unfortunately, there isn't a whole lot of guidance in the rules (or commentary) about how one defines "means" and "objectives". Thus, even in a perfect world, the limits of our decision making authority are not clearly defined-- it's even more murky in a situation when dealing with a client of diminished capacity. It seems almost impossible for a lawyer to maintain a normal relationship with a client who has diminished decision making capacity pursuant to Rule 1.14(a) when part of that normal relationship is allowing the client to make decisions about the objectives of the representation per Rule 1.2(a). It's not an issues that can be reconciled in the abstract. Like many other issues in the world of ethics, it depends completely on the facts of a particular situation.

Although this is a bit of a digression, consider the plight of the lawyer who has the "borderline" diminished capacity client. What about a situation where the client does not have any problem making adequately considered decisions, but those decisions appear to be warped, politically or otherwise. Take, for instance, the client who insists upon being sentenced to death in order to make a political statement. That might not seem like the right decision to the lawyer, but the client has considered its options and they've come down on the side of making a bold move. Then, it would seems that the lawyer's only option is to withdraw, pursuant to Rule 1.16(b):

1.16 Declining or Terminating Representation (in part)
**** * * (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:***
(1) withdrawal can be accomplished without material adverse effect on the interests of the client;
(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
(7) other good cause for withdrawal exists.

Keep in mind that there's a bit of pressure to try to deal with these issues as early as possible. Rule 1.16(b)(1) states that we're only allowed to withdraw when it can be accomplished without adverse effect on the client. That means that the chances of being allowed to withdraw decrease the deeper we get into the file. A prudent lawyer will, therefore try to see a bit into the future so as to bring these issues to the forefront before withdrawal becomes impossible.

One more thing about Rule 1.14. That Rule is also interesting because of the additional responsibilities it creates for lawyers. Subsection (b) gives the lawyer permission to take reasonably necessary protective action and the person who needs to make the determination of whether that action is warranted is the lawyer. How does that make you feel? Do you feel comfortable being the person who has to make the determination as to whether a particular person is of diminished capacity? The reality is...it doesn't matter whether you like it or not. There is no one else who is in a position to make the decision and it's most likely left up to the lawyer because there really is no other choice.

III. Unrepresented Parties

When one has legal representation, that person has a certain level of protection. There is a person on their side who knows the system and understands the ramifications of every action. When a person is unrepresented, however, there is an increased likelihood that the party will make some move that is detrimental to their position. They are also ripe for being exploited by unscrupulous lawyers. Thus, Rule 4.3 governs how lawyers are supposed to behave when it comes to dealing with unrepresented people:

Rule 4.3 Dealing With Unrepresented Person
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

I like to say that Rule 4.3 means that we can't play stupid. Said another way, we can't play possum. The unrepresented person is vulnerable and we can't try to get them to do something that is going to act to their detriment. Thus, we can't act disinterested-- in other words, we can't pretend to be neutral. We need to own up to the fact that we have a proverbial dog in the hunt. Plus, there's an affirmative duty on us to clear up misconceptions. You don't see this almost anywhere else in the code because in most other situations we're playing against another lawyer. Presumably, that means that we're up against someone else who, because of their legal training, can protect themselves. The unrepresented individual, however, is vulnerable.

That's also the motivation behind Rule 4.2, which addresses our opponents who are represented by counsel.

Rule 4.2 Communication With Person Represented By Counsel
In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Why are we prohibited from communicating about the subject of the representation with someone when they have a lawyer? Because if we do so, we're having a conversation with them while they are unprotected. That's also why the restriction int he model rules is limited to conversations that deal with the "subject matter of the representation." Heck, if you want to talk to them about who got kicked off Project Runway the night before, I guess that would be fair game (unless, of course, you're involved in litigation regarding the show).

IV. People in Need of Legal Services

I am a child of the 80's, so what that means is I was taught that greed really is good (thank you Gordon Gecko). Now maybe that means that I have a warped sensibility when it comes to business, but there's something that can't be denied, regardless of your generation- if you see a customer that is in need of the services you offer, your instinct is to gravitate toward them. And why not? It seems to make perfect sense. But it's not so in the law.

Rule 7.3 tells us to do the opposite and it is therefore, in my humble opinion, the most counterintuitive rule in the proverbial book. Rule 7.3 states:

Rule 7.3 Solicitation of Clients
(a) A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:
(1) is a lawyer; or
(2) has a family, close personal, or prior professional relationship with the lawyer.
(b) A lawyer shall not solicit professional employment by written, recorded or electronic communication or by in-person, telephone or real-time electronic contact even when not otherwise prohibited by paragraph (a), if:
(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
(2) the solicitation involves coercion, duress or harassment.
(c) Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).
(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

What this rule is basically telling us is that when we come across someone that is in need of legal services, we need to run the other way. Okay, maybe that's a bit dramatic, but it's not too far off the point. The rule forbids the solicitation of legal services but for some very specific situations. The reason is clear- to protect the client. The drafters understand that lawyers can be quite persuasive when looking for work. Throw in the need to make a living and the chances that we will try to take advantage of another increases exponentially. Thus, while our general business instincts tell us that we should actively solicit work, the rules tell us that there are very specific ways to go about doing so.

The rules in section 7 of the code are concerned with the possibility that we might prey upon the client, instead of assist them. They try to curb the potential of bad acts and, toward that end, these rules also deal with lying and deception. Take Rule 7.1 for example:

Rule 7.1 Communications Concerning A Lawyer's Services
A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Most lawyers only consider this rule in the context of advertisements, but don't get lulled into a false sense of security. This rule applies any time a lawyer is acting in a self promotional manner. That's because what the drafters are concerned about is the propensity to manipulate others, in order to provide for our personal material gain. That sentiment is the underlying concept beneath most of the rules in this section. A review of Rule 7.4 confirms it:

Rule 7.4 Communication of Fields of Practice and Specialization
(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
(c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
(2) the name of the certifying organization is clearly identified in the communication.

What's the big deal if we call ourselves a "specialist?" After all, isn't it just "puffery?" Isn't it nothing more than talking ourselves up a bit in order to make us more attractive to the potential customer/client? Yes, that's exactly what it is, and it's not permitted in our profession. We are held to a higher standard, which basically means that puffery is off limits to lawyers. What may be harmless exaggeration in another profession is inappropriate manipulation in the practice of law.

V. Bullying Others, Including Other Lawyers

For those of us who have young kids, we can attest to the fact that bullying is a hot topic at every level- from elementary schools through college. But the topic is not restricted to educational institutions. Bullying occurs in the practice of law, as well, and it should not be tolerated in that forum either. Unfortunately, aggressive behavior is something that's considered a part of the practice for some, but the rules don't seem to support that view. Certainly our concepts of professionalism state that bullying is inappropriate, but particular rules address the situation as well. Take Rule 3.4:

Rule 3.4 Fairness To Opposing Party And Counsel
A lawyer shall not:
(a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;
(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
(1) the person is a relative or an employee or other agent of a client; and
(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Far too many of the prohibited items in Rule 3.4 are preferred tactics of the bullies in the practice. The “frivolous discovery requests” are a personal pet peeve. Furthermore, I’ve long been a proponent for increased sanctions for behaviors that run contrary to rules like this. I believe that if lawyers were subject to more frequent monetary sanctions from the court we’d see a little less of this behavior. Nothing says, “get in line” like getting hit in the pocketbook.

Rule 3.4 isn’t the only rule dealing with this type of behavior. Rule 4.4 may be even more on point:

Rule 4.4 Respect For Rights Of Third Persons
(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.
(b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably

should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Subsection (a) may be the ultimate anti-bullying rule in the code. After all, what can be more reprehensible than embarrassment, delay or burdening another party when there is no justification for such actions? Notice, also, the wording of the rule. The rule doesn't talk about the prohibition of acting in this egregious way toward another lawyer- it says "a third person". That's because this behavior could be directed at a variety of vulnerable people and it's prohibited in all such situations.

VI. Misrepresentation and Deception

When we talk about cheating, preying and shoving, we need to talk about lying. Let's fact it, misrepresentation is inherent in that type of behavior. So let's talk about the rules that deal with telling untruths.

Rule 3.3. Candor toward the tribunal
(a) A lawyer shall not knowingly:
(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take

reasonable remedial measures, including, if necessary, disclosure to the tribunal.
(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

This is the most complicated rule in the misrepresentation genre. It only seems logical, given the forum to which it applies. We need to be sure that our statements to tribunals are as far away from deception as possible. Not only do we want to avoid deception, but we may need to remediate situations where untrue testimony is provided to a tribunal. In that regard, this rule contains significant guidance regarding our duty to remediate false statements. Note something else in that regard: this is one of the rules where you should check to commentary. The commentary contains a lot of direction regarding how we remediate and the steps we must take when counselling a client who may have given false testimony to a tribunal. Furthermore, the commentary expands on the differing obligations in a civil and criminal context.

Rule 4.1. Truthfulness in statements to others
In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person; or
(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

What I find interesting about Rule 4.1 is the limited responsibility with respect to the failure to disclose. Of all the rules addressing misrepresentation, this rule appears to impose the minimum responsibility because it only prohibits the failure to disclose when it's necessary to avoid assisting in a crime or fraud. That's a pretty limited situation. I think it has something to do with the audience.

4.1 governs those situations where we are speaking on behalf of a client, but not necessarily to a tribunal or other authority (since those venues are governed by Rule 3.3). Thus, the rule is most likely in play when we are talking to an adversary. It makes sense that, given the adversarial nature to our system, we would have a limited obligation to disclose when it comes to the opposing lawyer.

> ***Rule 8.1. Bar admission and disciplinary matters***
> ***An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:***
> ***(a) knowingly make a false statement of material fact;***
> ***(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admission or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.***

Rule 8.1 deals with several specific instances of misrepresentation. Interestingly, this is the only rule that applies to lawyers before they become members of the bar. But it's not only applicable to almost-lawyers. In addition to bar applications we also need to be concerned about statements about CLEs. The item that I want to make sure I point out to you, however, pertains to disciplinary tribunals.

We can see from the text of the rule that it's improper to make a misrepresentation in connection with a disciplinary matter. But also note this related item: In many jurisdictions, failure to respond to a disciplinary tribunal is grounds for an independent grievance. In many cases it won't matter if you're ultimately exonerated for the underlying charge that got you into ethical trouble—if you fail to respond, you will still face a grievance.

Misrepresentations that may occur when we talk about ourselves or our services are covered by Rule 7.1. That rule is placed in the sections that deal with advertising, so it's common for lawyers to think that 7.1 is only invoked in cases of advertising. Personally, I think it's easier to think of it as being invoked in cases of "self-promotion." Every time you think you're acting in a self-promoting nature, Rule 7.1 could be in play.

Self-promotion is the cornerstone of any business's marketing effort. Major stars employ publicists and scores of other personnel whose sole job is to promote the celebrity and get them noticed and as we all know, many will sink to almost any level in order to get attention. As the old saying goes, "Bad publicity is better than no publicity." That's what the drafters of the rules of professional conduct were afraid of.

To a certain extent, lawyers are no different. We need to attract clients and self-promotion is certainly a way of doing that. But the drafters know that, if left to our own devices, many attorneys would likely indulge in ethically questionable tactics in order to get noticed and would end up denigrating the integrity of the profession in the process. Thus, it regulates advertising through Rules 7.1 and 7.2. There are other reasons that lawyer advertising is regulated, such as protecting the long standing professional traditions in the practice. The commentary to Rule 7.2 expresses that best when it states, "Advertising involves an active quest for clients, contrary to the tradition that lawyers should not seek clientele." Rule 7.2, Comment [1].

On the other hand, there are reasons to permit attorney promotion such as the desire to encourage competition among lawyers to keep the cost of legal services at a reasonable level for the public and the "interest in expanding public information about

legal services" Rule 7.2, Comment [1].

Two rules to be aware of when dealing with attorney advertising are Rules 7.1 and 7.2. Those Rules state:

> ***Rule 7.1. Communications concerning a lawyer's services***
> ***A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.***
>
> ***Rule 7.2. Advertising***
> ***(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.***
> ***(b) Except as permitted by Rule 1.5(e), a lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may***
> ***(1) pay the reasonable costs of advertisements or communications permitted by this Rule;***
> ***(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; and***
> ***(3) pay for a law practice in accordance with Rule 1.17.***
> ***(c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.***

Basically. Rule 7.2 tells us where we're permitted to advertise. The content of our advertisements, however, must be seen through the prism of Rule 7.1. By way of example, we are permitted to put an ad in an, "electronic communication," per 7.2, but the content of that communication may not contain a "material misrepresentation of fact," per 7.1. One of the underlying goals of these rules is to make sure that attorneys avoid deceptive tactics.

Deception is an issue that was dealt with by the Philadelphia Bar Association as well. In Opinion 2009-02, the bar dealt with permissible actions in the world of social

media. What's helpful to attorneys is that the decision hinged on the issue of deception (Note: The opinion is reprinted in its entirety in the Appendix). It's often been difficult to determine when a statement is permissible or so misleading that it violates the code. I think decisions like the Philadelphia opinion give that issue some teeth-- if you intended to deceive, then your statements/actions are probably in violation of the rule.

Faculty Biography

Stuart I. Teicher is a professional legal educator with Teicher Professional Growth, LLC in Washington, D.C., and focuses on ethics law and writing instruction. A practicing attorney for more than 25 years, his career is now dedicated to helping fellow attorneys survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms and legal departments, provides CLE instruction at law firm client events, and also gives keynote speeches at conventions and association meetings. He helps attorneys get better at what they do (and enjoy the process) through his CLE performances. He is the author of *Navigating the Legal Ethics of Social Media and Technology* (Thomson Reuters) and is a Supreme Court appointee to the New Jersey District Ethics Committee, where he investigates and prosecutes grievances filed against attorneys. Mr. Teicher is an adjunct professor of law at Georgetown Law, where he teaches professional responsibility, and he is an adjunct professor at Rutgers University in New Brunswick, where he teaches undergraduate writing courses.