

**The Forum:**  
**Fear, Failure, and Perseverance: What does it mean to be a professional in a field where perfection is expected, but failure is inevitable?**

Faculty of Federal Advocates  
October 27, 2023

**Relevant Colorado Rules of Professional Conduct**

**I. 1.1 – Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

*Exemplary cases:*

One-year and one-day suspension warranted where respondent failed to serve a cross-claim, failed to respond to several motions, failed to keep client informed, advanced defense that was not warranted by the facts and existing law, and misrepresented to client the basis for the judgment in favor of the opposing party. *People v. Genchi*, 849 P.2d 28 (Colo. 1993).

Neglecting to file response to motion for summary judgment and to return client files upon request was sufficient to result in one-year and one-day suspension. *People v. Honaker*, 847 P.2d 640(Colo. 1993)

**II. 1.3 - Diligence**

A lawyer shall act with reasonable diligence and promptness in representing a client.

*Commentary excerpt:*

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

**III. 1.4 – Communication**

(a) A lawyer shall:

- (1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent . . . is required by these Rules;

- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Formal Ethics Opinion 113, "Ethical Duty of Attorneys to Disclose Errors to client" (adopted Nov. 19, 2005; modified July 18, 2015).

"As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments . . . including those developments resulting from the lawyer's own errors."

"Significant developments include matters adverse to the client's interest and those resulting from the lawyer's own actions, if the lawyer's actions are likely to result in prejudice to a client's rights or claim."

#### **IV. 1.6 – Confidentiality of Information:**

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (5) to secure legal advice about the lawyer's compliance with these Rules, other law or a court order.

#### **V. 8.3 – Reporting Professional Misconduct**

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

#### **VI. 8.4 – Misconduct**

A. It is professional misconduct for a lawyer to:

1. (d) engage in conduct that is prejudicial to the administration of justice.

### **Further Reading**

Neil W. Hamilton & Verna Monson, "Ethical Professional (Trans)formation: Themes From Interviews about Professionalism with Exemplary Lawyers," 52 Santa Clara L. Rev. 921 (2012).

# 113

## ETHICAL DUTY OF ATTORNEY TO DISCLOSE ERRORS TO CLIENT

**Adopted November 19, 2005. Modified July 18, 2015 solely to reflect January 1, 2008 changes in the Rules of Professional Conduct.**

### *Syllabus*

As part of the general ethical duty to keep a client reasonably informed about the status of a matter, a lawyer should fully and promptly inform the client of significant developments, Colo. RPC 1.4, including those developments resulting from the lawyer's own errors. As part of this broad duty to report, a lawyer has an ethical duty to make prompt and specific disclosure to a client of the lawyer's error if the error is material. A material error is one that will likely result in prejudice to a client's right or claim. In these circumstances, the lawyer should inform the client that it may be advisable for the client to consult with independent counsel regarding the error, which may include advice regarding the statute of limitations on a claim for legal malpractice. Colo. RPC 1.4(b). The lawyer need not and should not inform the client that a legal malpractice claim against the lawyer actually exists or has merit, or of the desirability of terminating the lawyer's representation. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

A lawyer may continue to represent the client in these circumstances only in compliance with Colo. RPC 1.7(a) and (b). In many, if not most, circumstances, the interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation. Continued representation may not be permissible if the lawyer might be influenced to pursue a strategy that would avoid liability for the lawyer at the expense of the success of the representation, or if there is a significant risk that the representation of the client will be materially limited by the lawyer's personal interest. Finally, the lawyer may not obtain a release of liability except in compliance with Colo. RPC 1.8(h).

This opinion addresses the lawyer's ethical duty to advise the client of relevant developments resulting from the lawyer's own errors. This opinion does not address whether the failure to disclose an error itself gives rise to a cause of action against the lawyer. See Colo. RPC, Scope, ("Violation of a Rule should not in and of itself give rise to a cause of action nor should it create a presumption that a legal duty has been breached.").

The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

### *Analysis*

#### ***Basis for the Duty in the Rules of Professional Conduct***

Lawyers must keep clients "reasonably informed about the status of a matter." Colo. RPC 1.4(a)(2). The lawyer's explanation must be "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b). The ethical duty to inform the client extends to keeping the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation. Comment, Colo. RPC 1.4. Additionally, "[a] lawyer may not withhold information to serve the lawyer's own interests..." Comment, Colo. RPC 1.4. Significant developments include matters adverse to the client's interests and those resulting from the lawyer's own actions, if the lawyer's actions are likely to result in prejudice to a client's rights or claim. In addition, failing to disclose an error to a client may rise to the level of conduct involving dishonesty, fraud, deceit or misrepresentation under Colo. RPC 8.4(c). Colo. RPC 8.4(c) may apply if the lawyer actively and intentionally conceals the facts and circumstances of the error from the client,<sup>1</sup> or misrepresents facts about the error, and the client loses a valuable right, such as a right of appeal,<sup>2</sup> or releases a claim against the lawyer for legal malpractice.<sup>3</sup>

In the context of this opinion, a breach of a duty of care that will likely result in prejudice to a client's right or claim will be referred to as an "error," and disclosing an error to a client will mean drawing a client's attention to an error and not simply relying on the flow of paperwork sent to the client in the ordinary course of a representation. When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client. "Error," as used in this opinion, is not meant to include an act or omission that a reasonable lawyer would conclude would not likely result in prejudice to a client's right or claim.

Various jurisdictions that have considered the issue have reached similar conclusions.<sup>4</sup> Some legal authorities rely on the lawyer's obligation under the equivalent of Colo. RPC 1.4(b) to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Colo. RPC 1.4(b).<sup>5</sup> Other authorities cite the lawyer's obligation under the conflict of interest rules to obtain the client's informed consent to continued representation, on the basis that the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client.<sup>6</sup> The conflict of interest rules would not apply, obviously, if the representation does not continue following the error.

#### ***Nature of Conduct that Triggers the Duty to Disclose***

The more difficult determination is whether a particular error triggers an ethical duty to disclose it to the client. This determination is important because an overbroad interpretation of the ethical duty to disclose may needlessly undermine the trust and confidence essential to a healthy attorney-client relationship.<sup>7</sup> Also, the ethical duty to disclose should remain primarily a basis for a lawyer's self-assessment, not

another arrow in the quiver of tactics employed in legal malpractice cases.<sup>8</sup> Whether a particular error gives rise to an ethical duty to disclose depends on whether a disinterested lawyer would conclude that the error will likely result in prejudice to the client's right or claim and that the lawyer, therefore, has an ethical responsibility to disclose the error. The failure to disclose an error does not (and should not), in and of itself, give rise to a cause of action against the lawyer, nor does it (or should it) create a presumption that a legal duty has been breached.

Professional errors exist along a spectrum. At one end are errors that, as stated above, will likely prejudice a client's right or claim. Examples of these kinds of errors are the loss of a claim for failure to file it within a statutory limitations period or a failure to serve a notice of claim within a statutory time period. The lawyer must promptly inform the client of an error of this kind, if a disinterested lawyer would conclude there was an ethical duty to do so, because the client must decide whether to appeal the dismissal of the claim or pursue a legal malpractice action.<sup>9</sup> Another example is the loss of a right of appeal for failure to file a timely notice of appeal. However, as discussed more fully below, the lawyer should be given an opportunity to remedy the error before disclosing it to the client.

At the other end of the spectrum are errors and possible errors that may never cause harm to the client, either because any resulting harm is not reasonably foreseeable, there is no prejudice to a client's right or claim, or the lawyer takes corrective measures that are reasonably likely to avoid any such prejudice. For example, missing a nonjurisdictional deadline, a potentially fruitful area of discovery, or a theory of liability or defense may, upon discovery, prompt regretful frustration, but not an ethical duty to disclose to the client. As one commentator remarked regarding similar circumstances, "Unless there are steps that can be taken now to avoid the possibility of future harm, there is probably no immediate duty to disclose the mere possibility of lawyer error or omission."<sup>10</sup> Lawyers should be given the opportunity to remedy any error before disclosing the error to the client. The later assertion of a legal malpractice claim does not mean that the allegedly negligent lawyer breached a duty to disclose the error to the client. Nor should the failure to disclose the error be construed as an independent claim against the lawyer.<sup>11</sup> Whether a lawyer has an ethical duty to disclose depends on the facts and circumstances known to the lawyer once he or she has realized the error, not those that appear only through the prism of hindsight.

In between these two ends of the spectrum are innumerable errors that do not fall neatly into either end of the spectrum and must be analyzed on an individual basis. For example, it is ordinarily not necessary to disclose questions of professional judgment where the law was unsettled on an issue or the attorney "made a tactical decision from among equally viable alternatives."<sup>12</sup> Under the doctrine of "judgmental immunity," these types of decisions are not, as a matter of law, considered errors, below the applicable standard of care, or negligent conduct. When reasonable lawyers may disagree about whether the state of the law was unsettled or the available alternatives were equally viable, however, the lawyer should err on the side of discussing the available alternatives with the client before pursuing a course of action.<sup>13</sup> The lawyer's choice between equally viable alternatives should not be considered an error as defined in this opinion. Examples of potential errors that may give rise to an ethical duty to disclose include the failure to request a jury in a pleading (or pay the jury fee), the failure to include an acceleration provision in a promissory note, and the failure to give timely notice under a contract or statute. The Committee agrees with the New York State Bar Association that "whether an attorney has an obligation to disclose a mistake to a client will depend on the nature of the lawyer's possible error or omission, whether it is possible to correct it in the pending proceeding, the extent of the harm resulting from the possible error or

omission, and the likelihood that the lawyer's conduct would be deemed unreasonable and therefore give rise to a colorable malpractice claim."<sup>14</sup>

### ***What to Tell the Client***

Although it can be difficult to determine whether a lawyer must call a client's attention to an error, it is relatively easy to describe what to say to the client when the lawyer has made the decision to disclose. Candor is a given. The result may be a surprisingly appreciative and understanding client. The lawyer need not advise the client about whether a valid claim for malpractice exists, and indeed the lawyer's conflicting interest in avoiding liability makes it improper for the lawyer to do so.<sup>15</sup> The lawyer need not, and should not, make an admission of liability. What must be disclosed are the facts that surround the error, and the lawyer should inform the client that it may be advisable to consult with an independent lawyer with respect to the potential impact of the error on the client's rights or claims.

It may be advisable, however, to inform the client that it may be prudent to consult with independent counsel regarding the statute of limitations on a claim for legal malpractice, especially if, notwithstanding the disclosure, the attorney-client relationship continues in the matter giving rise to the potential claim. The lawyer need not, however, advise the client of the viability of a legal malpractice claim, but simply inform the client that it may be appropriate to seek independent advice from a disinterested lawyer.

The Rules of Professional Conduct do not require the disclosure to be in writing, but failing to make a written record of it is imprudent and potentially defeating of one of the purposes of the disclosure: protection of the lawyer. The letter informing the client of the error should also recommend that the client consult independent counsel to discuss the consequences of the error. This notice may itself trigger the accrual of a legal malpractice claim and, hence, the relevant statute of limitations.<sup>16</sup> Even if the lawyer genuinely believes that it is in the client's best interests to continue the representation despite the error, the lawyer's own interests prohibit him or her from advising the client on this issue.<sup>17</sup> The lawyer should also consider the impact of disclosure of the error to the client on the lawyer's malpractice insurance coverage. The lawyer should review and consider any applicable malpractice insurance contract provisions, including notice to the insurer of potential claims, disclosure on applications for insurance, and "cooperation clauses" in the lawyer's policy.

### ***Conflicts of Interest in Continuing the Representation***

Continuing the representation is not an option if (a) the client terminates it, (b) the error effectively concludes it, or (c) the lawyer withdraws because the error creates a nonwaivable conflict of interest. If both lawyer and client desire to continue the representation, Colo. RPC 1.7(a)(2) requires the lawyer to consider whether the lawyer's own interests in avoiding liability may materially limit the representation. If the lawyer concludes that the lawyer's own interests may materially limit the representation, continued representation is permissible only if the lawyer "reasonably believes the lawyer will be able to provide competent and diligent representation to each affected client." Colo. RPC 1.7(b)(1).<sup>18</sup> Additionally, in order for representation to continue, each affected client must give "informed consent, confirmed in writing." Colo. RPC 1.7(b)(4).

Whether or not continued representation is permissible, either because there is no potential conflict or the potential conflict is waivable, depends on the nature of the error. In many, if not most, circumstances the

interest of the attorney in avoiding liability will be consistent with the interest of the client in a successful representation.<sup>19</sup> Withdrawal is typically not required if the error likely can be corrected during the course of the representation; the error is not likely to result in harm to the client's cause; the error does not prejudice the client's right or claim, or the error does not necessarily constitute an error at all.<sup>20</sup> As one court stated:

Many errors by a lawyer may involve a low risk of harm to the client or low risk of ultimate liability for the lawyer, thereby vitiating the danger that the lawyer's own interests will endanger his or her exercise of professional judgment on behalf of the client. Even if the risk of some harm to the client is high, the actual effect of that harm may be minimal, or, if an error does occur, it may be remedied with little or no harm to the client. In those circumstances, it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk.<sup>21</sup>

In any event, a lawyer may not procure a release of liability from the client except in compliance with Colo. RPC 1.8(h). That rule prohibits a lawyer from making "an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in association therewith."<sup>22</sup> Colo. RPC 1.8(h)(1) and (2). Colo. RPC 1.8(h) would be applicable, for example, if a lawyer agreed to handle the client's appeal free of charge in exchange for a release of liability.<sup>23</sup>

In other situations, a client cannot give informed consent, confirmed in writing, within the meaning of Colo. RPC 1.7(b)(4), because the lawyer's own interest in avoiding liability may materially limit the lawyer's representation of the client, within the meaning of Colo. RPC 1.7(a)(2)), by influencing the lawyer's strategy. For example, in a personal injury case arising from an automobile accident involving a Regional Transportation District bus, the plaintiff's lawyer fails to give RTD timely notice of a potential claim against it as required by the Colorado Governmental Immunity Act. The plaintiff's lawyer files an action against another driver, who is uninsured. The uninsured driver files a notice of nonparty at fault, identifying RTD. At trial, the plaintiff's lawyer emphasizes the evidence against the uninsured driver and downplays the evidence against RTD. The jury returns a verdict assigning 75% fault against the uninsured driver and 25% against RTD. The judgment against the uninsured driver is uncollectible, and the plaintiff's lawyer's liability to his client is limited to 25% of the total damages. Another lawyer representing the plaintiff might have emphasized the evidence against RTD or proceeded directly to an action against the plaintiff's lawyer for malpractice.

The plaintiff's lawyer thus violated Colo. RPC 1.7(a)(2). His interest in limiting his liability to the client in a future legal malpractice claim caused him to adopt a litigation strategy that emphasized evidence that increased the fault attributable to the uninsured driver, thereby reducing the lawyer's liability exposure to the client and increasing the uncollectible portion of the judgment. Another lawyer representing the plaintiff would have emphasized evidence that decreased the fault attributable to the uninsured driver,



thereby increasing the lawyer's liability exposure to the client and decreasing the uncollectible portion of the judgment. Under the circumstances, the plaintiff's consent to the conflict was not validly obtained.

It is seldom so clear that a lawyer's independent judgment is materially limited by his or her interest in avoiding or reducing liability to a client. Indeed, the opposite problem may be more likely. To avoid the appearance of self-interest, a lawyer may be hesitant to adopt strategies that could leave that impression, including strategies that the lawyer genuinely believes to be in the client's best interests. A lawyer should consider this complication in deciding whether or not he or she wishes to continue the representation. If the representation continues, the lawyer may be able to avoid the appearance of self-interest by conferring with another lawyer about strategies that may, in the hindsight of a legal malpractice action, be labeled self-serving. The lawyer may also suggest the retention of co-counsel.

## Notes

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<sup>1</sup> CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995).

<sup>2</sup> *E.g.*, *Kentucky Bar Ass'n v. Cowden*, 727 S.W.2d 403, 404-05 (Ken. 1987).

<sup>3</sup> CBA Formal Ethics Opinion 85, "Release and Settlement of Legal Malpractice Claims" (May 19, 1995). Accord *In re Tallon*, 447 N.Y.S.2d 50, 51 (App. Div. 1982); see also *People v. Good*, 576 P.2d 1020, 1022 (Colo. 1978) (finding violation of former Code equivalent of Colo. RPC 1.8(h) where lawyer refunded retainer with check containing restrictive endorsement releasing claims against lawyer).

<sup>4</sup> See *Circle Chevrolet Co. v. Giordano, Halleran & Ciesla*, 662 A.2d 509, 514 (N.J. 1995), *relevant holding confirmed but decision abrogated on other grounds*, *Olds v. Donnelly*, 696 A.2d 633, 642 (N.J. 1997); *In re Tallon*, 447 N.Y.S.2d 50 (App. Div. 1982); New Jersey Supreme Court Advisory Committee on Professional Ethics 684 (March 9, 1998); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000); Association of the Bar of the City of New York Formal Opinion 1995-2 (Feb. 22, 1995).

<sup>5</sup> See *Circle Chevrolet, supra* (New Jersey Rule 1.4); N.Y. State Bar Association Opinion 734 (Nov. 1, 2000) (New York equivalent of Colo. RPC 1.4); Pennsylvania Bar Association Informal Opinion 97-56 (June 6, 1997) (Pennsylvania equivalent of Colo. RPC 1.4). Accord Restatement (Third) of the Law Governing Lawyers § 20, Comment c; American Bar Association Informal Opinion 1010 (Nov. 18, 1967).

<sup>6</sup> *E.g.*, *Circle Chevrolet, supra*, 662 A.2d at 514.

<sup>7</sup> See N. Moore, "Implications of *Circle Chevrolet* for Attorney Malpractice and Attorney Ethics," 28 *Rutgers L.J.* 57, 75 n. 85 (Autumn 1996) (suggesting that clients of lawyer, like patients of physician, do not want to "know every time the physician has doubts or second thoughts about any aspect of some ongoing treatment") (hereinafter "Moore").

<sup>8</sup> See Preamble, Scope and Terminology, Colo. RPC (purpose of Rules of Professional Conduct "can be subverted when they are invoked by opposing parties as procedural weapons"; "nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty"); Colo. RPC 4.5(a) (lawyer shall not threaten or present, or participate in presenting, disciplinary charges to gain advantage in a civil matter); see also *Weiss v. Manfredi*, 639 N.E.2d 1122, 1124, 616 N.Y.S.2d 325, 327 (N.Y. 1994) (attorney's failure to disclose malpractice does not give rise to fraud claim separate from customary malpractice action).

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<sup>9</sup> Moore, *supra* n. 7, at 73. See *Cowden*, *supra*, 727 S.W.2d at 404-05 (lawyer’s failure to advise client of dismissal of action for failure to file prior to expiration of statute of limitations was particularly important because dismissal may have been erroneous).

<sup>10</sup> Moore, *supra* n. 7, at 74.

<sup>11</sup> E.g., *In re Knappenberger*, 90 P.3d 614 (Ore. 2004) (attorney had no immediate duty to alert client regarding potential malpractice claim arising from opposing party’s filing of motion to dismiss appeal as untimely where lawyer reasonably believed motion had little chance of success).

<sup>12</sup> *Merchant v. Kelly, Haglund, Garnsey & Kahn*, 874 F. Supp. 300, 304 (D. Colo. 1995); *Myers v. Beem*, 712 P.2d 1092, 1094 (Colo. App. 1985).

<sup>13</sup> See Cmt., *Withholding Information*, Colo. RPC 1.4 (lawyer “may not withhold information to serve the lawyer’s own interest or convenience”).

<sup>14</sup> N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

<sup>15</sup> New York City Opinion 1995-2 (Feb. 22, 1995); S. O’Neal, “If You Make a Mistake, When and What Should You Tell Your Client?,” *2000-FEB W. Va. Law.* 24, 25 (Feb. 2000) (hereinafter, “O’Neal”).

<sup>16</sup> O’Neal, *supra* n. 15, at 25; see New York State Opinion 275 (1972) (upon withdrawing from representation, lawyer should recommend that client obtain other counsel) (cited with approval in New York State Opinion 734 (Nov. 1, 2000)).

<sup>17</sup> O’Neal, *supra* n. 15, at 25.

<sup>18</sup> See *In re Lawrence*, 31 P.3d 1078, 1084 (Or. 2001) (lawyer violated conflict of interest rule by failing to inform client in writing of potential conflict of interest caused by continuing representation of client in domestic relations matter following entry of default against client due to attorney’s neglect).

<sup>19</sup> See D. Karpman, “A Twilight Zone of Inharmonic Convergence,” *California Bar Journal* 20 (February 2004) (“it is doubtful that any other lawyer in the entire world would be as motivated to make sure the client is successful” than the one who commits malpractice and continues the representation); Pennsylvania Informal Opinion No. 97-56 (June 6, 1997) (law firm’s interest and motivation in trying to win appeal from dismissal of case based on law firm’s negligence are same as client’s interest and motivation in trying to win appeal).

<sup>20</sup> N.Y. State Bar Association Opinion 734 (Nov. 1, 2000).

<sup>21</sup> *In re Knappenberger*, 90 P.3d 614, 622 (Or. 2004).

<sup>22</sup> Colo. RPC 1.8(h).

<sup>23</sup> Formal Ethics Opinion 85, “Release and Settlement of Legal Malpractice Claims” (May 19, 1995).

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Leadership Roundtable Article

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## **ETHICAL PROFESSIONAL (TRANS)FORMATION: THEMES FROM INTERVIEWS ABOUT PROFESSIONALISM WITH EXEMPLARY LAWYERS**

- I. Introduction
  - A. The Need for a Paradigm Shift
  - B. Skepticism About Professional Formation
  - C. New Empirical Evidence Rebutting the Skepticism
  - D. Purpose of This Study and Overarching Research Questions
- II. Theoretical Perspectives
  - A. Building on Earlier Scholarship on Professionalism and Moral Identity
  - B. Background on Moral Identity
  - C. Moral Identity as Lifelong Growth in “Mental Complexity”
  - D. Summary and Research Questions
- III. Methodologies
  - A. Interview Method
  - B. Participants and Sampling
  - C. Data Sources
  - D. Interview Context and Process
  - E. Data Analysis
- IV. Results: Key Themes and Evidence of Developmental Stages
  - A. The Meaning and Elements of Professionalism
  - B. Participants' Response to the Interview
  - C. Major Themes
    - 1. Professionalism as Moral Compass or Moral Core
    - 2. Commitment and Responsibility to Others
    - 3. Toward a Living Definition of Professionalism
      - a. Continuous Dynamic Growth in Understanding
      - b. Reflection and Learning from Mistakes
      - c. Ways of Self-Transformational Growth
- V. Discussion and Conclusion
  - A. Comparison with Past Studies
  - B. Limitations of the Present Study and Future Research Topics
  - C. Implications for Law Schools
  - D. Conclusion

### **\*922 I. Introduction**

The purpose of this Article is to explore the critical need for a fundamental paradigm shift in legal education, focusing on fostering each student's ethical professional identity. The Article then defines the educational goal of fostering an ethical professional identity by reporting on an empirical study of how peer-honored exemplary lawyers understand an ethical professional identity. Higher education in other **\*923** professions faces similar challenges to define, foster, and assess the

elements of an ethical professional identity. This study provides a useful model for research or evaluation of ethical professional identity.

### A. The Need for a Paradigm Shift

There is growing pressure on law schools to do more to foster each student's ethical professional identity or professionalism.<sup>1</sup> For example, in July 2011, the Standards Review Committee of the ABA's Section of Legal Education proposed changes regarding professionalism to Accreditation Standard 302 on Learning Outcomes.<sup>2</sup> The proposed \*924 language requires the learning outcomes for each accredited law school to include competency as an entry-level practitioner in the following areas:

[T]he professional skills of . . . (ii) the exercise of professional judgment consistent with the values of the legal profession and professional duties to society, including recognizing and resolving ethical and other professional dilemmas.

. . . [and]

[K]nowledge and understanding of the following values: . . . (ii) the legal profession's values of justice, fairness, candor, honesty, integrity, professionalism, respect for diversity, and respect for the rule of law . . .<sup>3</sup>

These proposed changes to legal education's accreditation standards reflect an increasing awareness across the peer-review professions, including law, that higher education must do more to foster each student's ethical professional identity. In 2010, the Carnegie Foundation for the Advancement of Teaching completed over ten years of in-depth studies of education for the professions including the clergy, lawyers, engineers, nurses and physicians.<sup>4</sup> Lee Shulman, president of the Carnegie Foundation during these studies of the professions, emphasized “[i]n every field we studied, we concluded that the most overlooked aspect of professional preparation was the formation of a professional identity with a moral core of service and responsibility around which the habits of mind and practice could be organized.”<sup>5</sup>

\*925 In order to provide legal education and the profession with more insights on the challenge of professional identity, *Educating Lawyers* reports on an in-depth case study of sixteen law schools. Their direct and urgent advice has become something of a roadmap for law schools in meeting the changing demands of the profession and society.

Ours is an era marked by a growing body of lawyers trained by an increasing number of law schools who then enter unstable and highly competitive domains of practice . . . . The result has been confusion and uncertainty about what goals and values should guide professional judgment in practice, leaving many lawyers “wandering amidst the ruins of those past understandings.” Not in spite of but precisely because of these social pressures, legal education needs to attend very seriously to its apprenticeship of professional identity. Professional education is highly formative. Under today's conditions, students' great need is to begin to develop the knowledge and abilities that can enable them to understand and manage these tensions in ways that will sustain their professional commitment and personal integrity over the course of their careers. In a time of professional disorientation, the law schools have an opportunity to provide direction.<sup>6</sup>

*Educating Lawyers* continues:

To neglect formation in the larger public purposes for which the profession stands and their meaning for individual practitioners is to risk educating mere legal technicians for hire in the place of genuine professionals. \*926 Therefore, the goal of professional education cannot be analytical knowledge alone or, perhaps, even predominantly. Neither can it be analytical knowledge plus merely skillful performance. Rather, the goal has to

be holistic: to advance students toward genuine expertise as practitioners who can enact the profession's highest levels of skill in the service of its defining purposes.<sup>7</sup>

Educating Physicians, the last of the Carnegie studies published in 2010 based on an extensive literature review and fourteen site visits, puts even more emphasis on the importance of ethical professional identity for effective practice in a profession. “[F]ormation [i]s the fundamental goal of the learning process,”<sup>8</sup> and “professional formation [is] the purpose that should guide medical education.”<sup>9</sup>

## B. Skepticism About Professional Formation

There is substantial skepticism among legal educators as to whether legal education can foster each student's ethical professional identity.<sup>10</sup> For example, Richard Posner, an influential legal scholar and judge, believes “[a]s for the task of instilling ethics in law students . . . I can think of few things more futile than teaching people to be good.”<sup>11</sup> The Carnegie scholars studying legal education found extensive skepticism among law professors as to whether legal education can instigate the developmental changes that are part of ethical professional formation. Law faculties “often argue that by the time students enter law school it is too late \*927 to affect their ethical commitment and professional responsibility.”<sup>12</sup> Many faculty harbor concerns that the subjectivity of ethical values can potentially interfere with the all-important values underlying legal analysis: skepticism, intellectual rigor, and objectivity.<sup>13</sup>

## C. New Empirical Evidence Rebutting the Skepticism

This skepticism, based on the belief that moral character is formed by the time one reaches adulthood, ignores thirty years of accumulating empirical evidence in how education promotes moral development<sup>14</sup> and moral psychology<sup>15</sup> on moral formation that goes far beyond the idea that morality is a matter of “being good” or of the belief that complex socio-moral problems<sup>16</sup> can be reduced to “right and wrong.”<sup>17</sup> \*928 Harvard human development psychologists Robert Kegan and Lisa Lahey concluded, on the basis of such long-term longitudinal research, that some people continue to grow over a lifetime from an egocentric understanding of the world to a “more penetrating, more responsible, less egocentric grasp of reality.”<sup>18</sup> Similarly, empirical studies over the last thirty years on moral reasoning find that as we progress in our education and encounter challenging life experiences, our moral reasoning and judgment become more complex--moving from justifications based on self-interest to a fuller analysis of the implications of our conduct on others and society more broadly.<sup>19</sup>

\*929 Moral reasoning<sup>20</sup> may determine what we think is the morally appropriate answer to a moral problem, but does our conduct actually reflect our moral reasoning or does our self-interest take over? Moral psychologists Daniel Lapsley and Darcia Narvaez describe the role of moral identity as pivotal in closing the gap between moral reasoning and doing what we know is right.<sup>21</sup> A recent line of applied research on moral identity in education in the professions explores the importance and prioritization of moral values in competition with other values, addressing the gap between knowing what is the right course of action, and acting upon it in one's professional role.<sup>22</sup>

Empirical “research reveals a developmental continuum of moral identity that proceeds in a sequence from self-interest to more other-centered ways of understanding the \*930 moral self.”<sup>23</sup> In addition, there is a growing body of empirical evidence showing that a developed ethical professional identity correlates positively with how clients and senior lawyers define professional effectiveness.<sup>24</sup> Considering these findings, as well as the evidence that refutes the assumption that education cannot foster change or growth in moral reasoning, a well-designed ethics curriculum would result in significant change in ethical capacities, including psycho-logical, emotional, and social abilities.<sup>25</sup> This growth in moral capacities can be framed as the acquisition of expertise or competence in moral character.<sup>26</sup> Overall expertise or competence of the professional has been called by David Leach as a “habit of reflective practice.”<sup>27</sup> The distinction between novices and experts, and definition

of levels of competence, has been emphasized by leaders in graduate medical education, which adopted a system of assessment of professionalism competencies in the past fifteen years.<sup>28</sup>

Finally, scholars studying the professions also reject the idea that the collective profession cannot have or, perhaps, should not have influence on the values and core ethics of aspiring members of the profession.<sup>29</sup> Instead, these scholars \*931 view the role of higher education for the professions as one of the “trustee institutions” whose aim is to “help prevent the profession from degenerating into technical work for hire, giving up ‘higher aims’ to become ‘hired hands.’”<sup>30</sup> These scholars argue that the purpose of the professions, and the authority and autonomy granted to the professions, is based on a balance of the economic interests of each profession with the duty to serve society.<sup>31</sup> They explain that as this balance becomes misaligned--through an over-focus on the market aspects of the profession, away from the central values and purpose of serving society--a devolving of the profession occurs, towards that of an occupation conducted simply for short-term profit.<sup>32</sup> Thus, at stake is the underlying social contract between the profession and society.<sup>33</sup>

#### D. Purpose of This Study and Overarching Research Questions

Part I of this Article defines the educational goal of fostering an ethical professional identity by reporting on an empirical study of the concept of professionalism involving in-depth interviews with peer-honored exemplary lawyers. The purpose of this study is to empirically explore how peer-honored attorneys, considered exemplars of professionalism, define the elements of professional identity, and second, how the exemplar of professionalism differ in their understanding of professionalism as compared to early career lawyers or law students. The reason for this second focus is to determine whether there are differences between experts and novices. The existence of a difference is an indicator of developmental capacity or competence, drawing on a methodology in character development research and industrial-organizational \*932 psychology.<sup>34</sup> The overarching research question was: How do peer-honored exemplary lawyers understand the meaning of professionalism?

In Part II, we provide an overview of our theoretical perspectives. In Part III, we report on our methodological approach. In Part IV, we report the results of our analysis and interpretation of in-depth interviews, focused around salient themes and issues of relevance to the legal profession. In Part V, we discuss our interpretations and implications for legal education.

## II. Theoretical Perspectives

### A. Building on Earlier Scholarship on Professionalism and Moral Identity

This study builds on three earlier ideas about professionalism summarized below.

(1) Law and Professionalism. Hamilton's analysis and synthesis of the ABA and Conference of Chief Justice Reports on professionalism defines three elements of professionalism including (a) the ethics of duty, (b) the ethics of aspiration, and (c) personal conscience.<sup>35</sup>

(2) Professionalism and Moral Psychology. Personal conscience<sup>36</sup> in Hamilton's synthesis is an analog to moral behavior defined in the scholarship and research of Rest<sup>37</sup> and Bebeau,<sup>38</sup> developed over a lifespan. Rest's Four Component Model or FCM includes (a) perceptual clarity \*933 and empathy, (b) moral reasoning and judgment, (c) moral identity or motivation, and (d) moral implementation.<sup>39</sup>

(3) Moral Identity: A Starting Point. The concept of moral identity is pivotal in closing the gap between moral reasoning (knowing what is right) and doing what we know is right.<sup>40</sup> Section B gives some background on scholarship concerning moral identity. In Section C, we utilize Kegan's constructive-developmental theory

to understand moral identity. In Section D we summarize the purpose of our study of lawyer exemplars of professionalism, and the overarching research question.

## B. Background on Moral Identity

What explains the underlying characteristics of professionals known consistently to act upon moral values? The concept of moral identity is used to describe a holistic combination of motivational, social, emotional, and cognitive capacities that shape our decisions and behavior. The integration of moral identity with the stations a person holds (for example, lawyer, parent, spouse, and friend) is the basis for the concept of integrity.<sup>41</sup> Howard Gardner and colleagues describe the construct as: “When a person thinks about self, or the self’s occupations, in moral terms, the person experiences a sense of moral identity.”<sup>42</sup>

Individuals recognized by others as representing the highest levels of moral identity are known as moral exemplars, often identified through nomination processes by peers within different occupational or professional fields.<sup>43</sup> Colby and Damon conducted in-depth interviews with twenty-two moral exemplars from a range of professions and occupations.<sup>44</sup> They found that exemplars viewed their moral self as integral to their broader self-conceptions.<sup>45</sup> Rather than describing their choices and behaviors as morally courageous, the exemplars instead saw themselves as simply doing the right thing.<sup>46</sup> Colby and Damon observed that,

Time and again we found our moral exemplars acting spontaneously, out of great certainty, with little fear, doubt, or agonized reflection. They performed their moral actions spontaneously, as if they had no choice in the matter. In fact, the sense that they lacked a choice is precisely what many of the exemplars reported.<sup>47</sup>

In the decade following the Colby and Damon study, Gardner and colleagues<sup>48</sup> conducted studies examining aspects of moral identity across nine professions over a ten-year period, including (1) journalism, (2) genetics and medicine, (3) law, (4) accounting, (5) fine arts, (6) education, (7) marketing, (8) banking, and (9) acting.<sup>49</sup> They defined work that is (a) high quality, (b) socially responsible, and (c) meaningful to the professional as representative of the concept of “good work.”<sup>50</sup> Like Colby and Damon, Gardner’s methodology used a nomination process to seek individuals considered exemplary in their field.<sup>51</sup>

Using the good work approach in a study of seventy-four lawyers in four practice areas [criminal law (twenty-five respondents), mergers & acquisitions (seventeen respondents), cyber-law (seventeen respondents), and small-town general practice (fifteen respondents)],<sup>52</sup> Gardner and colleagues found differences in how the occupational specialization or “communities” of lawyers conceptualized their identity as professionals, as well as their moral identities.<sup>53</sup>

Among the majority of M&A lawyers in the study, researchers noted only partial alignment of the majority of responses to the criteria for “good work” set forth above. Researchers found a need for greater focus on the social contract between the profession and society, and in particular, a need for a broader view of lawyers’ responsibilities:

The M&A lawyers were devoted to their work, indeed, most loved what they did and were fully engaged with the institution that supported their work. What got lost in the mix was the larger picture, not just the value of corporate responsibility, but the active role of the lawyer played in that equation and the lawyers’ responsibility to something greater than the client.<sup>54</sup>

In contrast, the dominant moral identity of small-town general practitioners (and a minority of M&A lawyers) was to “have an abiding responsibility [both] to their clients . . . [and] the common belief that their professional obligation is for the benefit of

the larger community; they feel an obligation to satisfy themselves beyond economic gains and they recognize the importance of respecting and working cooperatively with colleagues.”<sup>55</sup>

In a study of eight influential and effective Canadian lawyers (nominated by peers) using Robert Kegan's concept of self or identity (discussed in the next section), O'Donovan-Polten investigated the meaning of life-career success in the legal profession.<sup>56</sup> The lawyers interviewed discussed the importance of self-reflection in negotiating the meaning across different dimensions of their career experiences. O'Donovan-Polten found those lawyers' ideals<sup>57</sup> to be part of their core self-definition, motivated by social belonging and responsiveness to the needs of society. This parallels Colby \*936 and Damon's conclusion that among exemplars the moral self is inextricable from self-conceptions. O'Donovan-Polten states in her analysis that the lawyers she interviewed shared a desire to act upon their self-defined values.<sup>58</sup>

In a similar study of moral exemplars in dentistry, Rule and Bebeau, found (1) all dentists had self-defined moral values, (2) the moral self was consistent across situations, and (3) the self system drove their obligation to moral action--not a sense of unusual bravery or individual heroism.<sup>59</sup> For example, when a young dentist repeatedly voiced concerns about unsafe, and potentially lethal sedation practices to her supervisors, but those reports went unheeded, the dentist felt compelled to report it to authorities, risking retaliation from her employer.<sup>60</sup> When asked why she risked her career, she said simply, “There was no way I could leave the situation the way it was.”<sup>61</sup>

Rule and Bebeau found exemplars could step back and criticize the profession, while holding a deep commitment to their identity as professionals.<sup>62</sup> The dentists they interviewed were simultaneously able to reflect on their own limitations.<sup>63</sup> Reflection about the profession, their role, and their identity as professionals were common elements. When asked how their understanding of professionalism has changed over their career, these dentists discussed a more internalized, expanded sense of the profession's obligation to society.<sup>64</sup> Among their peers, these dentists were known as effective leaders--concerned not about enhancing their reputation by doing good, but because of a deeper, internalized motivation to be of service to others.<sup>65</sup>

### C. Moral Identity as Lifelong Growth of “Mental Complexity”

Building on these studies of moral identity, we use Robert Kegan's constructive-developmental theory of identity \*937 formation.<sup>66</sup> The fundamental premise of constructive-developmental theory is that adults can become increasingly self-aware of both egocentric views and hidden assumptions that might block our attempts to change, hamper our ability to empathize with others, or limit our potential effectively to lead others from an internalized, authentic source of authority.<sup>67</sup> This growth occurs through exposure to and reflection about ideas or situations that stretch our current patterns of thinking, instigating a change or adaptation of our view of self and others.<sup>68</sup> We consider this growth as a necessary aspect of developing competence and expertise in moral capacities.<sup>69</sup> These moral capacities are also critical to effectiveness for professionals.<sup>70</sup>

Constructive-developmental growth refers not only to growth in our patterns of thinking, but to the growth of our conscious awareness of emotions, motivations, and intentions. This growth is integral to our ability to operate effectively in the social world. Cognitive and emotional development enables more nuanced and effective ways of communicating with others, bridging across difference, and resolving conflict.<sup>71</sup> These holistic cognitive, emotional, and social capacities grow across one's lifespan progressing from self-centered to other-centered. Kegan describes this growth as increasing “mental complexity.”<sup>72</sup> Also called “orders of consciousness,” levels of mental complexity can be assessed using the Subject-Object Interview (SOI),<sup>73</sup> a minimally structured, forty-five minute to one-hour interview. Stages of \*938 mental complexity relevant to adulthood include:<sup>74</sup>

- The Instrumental Mind (Stage 2)<sup>75</sup> is characterized by external definitions of self, predominance of “either-or” thinking, limited perspective taking ability, and an egocentric view--characteristic of adolescence and early adulthood;<sup>76</sup>



- The Socialized Mind (Stage 3) is characterized by increased social perspective taking ability among allies or in-group, but understanding and expectations continue to be externalized, shaped by relationships, particular “schools of thought,” or by both;<sup>77</sup>
- The Self-Authoring Mind (Stage 4) involves the ability “to step back enough from the social environment to generate a ‘seat of judgment’ or personal authority that evaluates and makes choices about external expectations.”<sup>78</sup> The independence of judgment and problem solving abilities of stage 4 translates to greater fidelity to one's inner moral code. At stage 4, one is not easily swayed by group membership or loyalties;<sup>79</sup> and
- The Self-Transforming Mind (Stage 5) is characterized by the ability to examine one's self-authored personal authority, recognize the limits of any one system of constructing meaning, and seek out novel or alternative systems. A recognition of the interdependencies of different systems or ways of being, and an ability to reconcile contradictory or seemingly paradoxical ways of constructing meaning is a hallmark of the emergence of the self-transforming mind.<sup>80</sup>

Development proceeds not as an abrupt change, but as a gradual unfolding of new ways of understanding the self and others.<sup>81</sup> Rather than a complete shift in development, people retain earlier stage ways of constructing meaning. For example, self-authored (stage 4) individuals do not lose their ability or desire for social belonging, or the ability for perspective taking.<sup>82</sup> They are, instead, additionally grounded in such a manner that they are more resistant to forms of social influence that may violate their own inner moral code.

Appendix A provides a summary of past studies using the Kegan framework from law, military education, dental education, managers, graduate management education, and professional coaches.

#### D. Summary and Research Questions

The need for legal education to increase its focus on ethical professional formation<sup>83</sup> (guided by empirical evidence) is apparent. Substantial work remains to clarify the specific elements of an ethical professional identity that define the educational goal. With a clear definition of these elements, educators can design learning models, educational programs and curricula, and assessments to foster students' and practicing professionals' ethical formation.<sup>84</sup> With the \*940 goal of providing an empirically-validated definition of the elements of professionalism (professional formation), this study examined how peer-honored exemplary lawyers understand professionalism.<sup>85</sup>

The overarching research question was: How do peer-honored exemplary lawyers understand the meaning of professionalism? We also explored other questions including: Do exemplary lawyers, as experts in legal professionalism, differ in their understanding of professionalism from novices (i.e., early career lawyers or law students)? Do exemplary lawyers perceive their understanding of professionalism as stemming largely from formative experiences early in life, or has the meaning of professionalism evolved and changed throughout their careers? What are the implications with respect to legal education?

### III. Methodologies

We used methodologies informed by research in lifespan developmental psychology,<sup>86</sup> novice-expert studies in character development,<sup>87</sup> and the development of professionalism competencies in graduate medical education.<sup>88</sup> We sought to describe exemplary lawyers' perspectives and understanding of professionalism towards the goal of defining levels of competence or expertise.<sup>89</sup>

### \*941 A. Interview Method

We utilized an adaptation of the SOI<sup>90</sup> supplemented with questions about the meaning of professionalism and perceptions of change in how the interviewees defined professionalism over the course of their careers, including their recollection of particularly important influences or events.<sup>91</sup> The SOI interview is designed to elicit developmental stage differences related to the meaning of professionalism. We used five word prompts<sup>92</sup> (each written on an index card) including: (1) trust, (2) success, (3) disappointment in self or others, (4) crucibles, or painful, difficult decisions, and (5) love.<sup>93</sup> We informed them they could select any of the words to discuss in the interview, in any particular order, and that there was no need to discuss all of the cards. To minimize self-presentation effects or social desirability bias,<sup>94</sup> we informed them that the purpose of writing notes on cards was to jog their memory, that we would not read what they had written, and that they could \*942 keep the cards at the end of the interview.<sup>95</sup>

Hamilton served as the point of contact throughout the research process, because as a seasoned law professor and practicing attorney, he was viewed as an insider.<sup>96</sup> This is a key consideration in research involving potentially sensitive topics that increases the extent responses are candid and truthful.<sup>97</sup>

### B. Participants and Sampling

To identify lawyers formally recognized by peers in Minneapolis and the surrounding metropolitan area for exemplary professionalism or pro bono service to the community, we reviewed county and state bar association websites to identify professionalism award winners from the past ten years.<sup>98</sup> We chose to limit the sample to lawyers within Hennepin County due to time and resource constraints, and because of Hennepin County's diversity in size and practice area of law firms (compared to other counties). To further limit the scope, we also excluded judges, public defenders, prosecutors, or public administration attorneys, reasoning that these specializations would be the focus of future exemplar studies.

After compiling a master list of forty-five professionalism award winners, we randomly selected lawyers from a diverse range of organizations, including large and medium firms, \*943 legal aid organizations, and non-profits.<sup>99</sup> We also excluded lawyers who were retired, whose role was primarily teaching, or lawyers whom were personal friends or past colleagues. We first selected nine attorneys, and later added three more to increase diversity (i.e., type of organization and ethnic background). The final sample was diverse by gender (six men and six women); ethnicity (including one Native American and one Hispanic American); age (ranging from late forties to mid-eighties); and socioeconomic background (two lawyers in our sample were the first generation in their families to attend college and obtain a law degree).

All of the selected attorneys agreed to participate in a forty-five-minute interview, and to review the interview transcript to ensure accuracy. We provided participants a paper survey that recapped our questions, inviting afterthoughts about the interview. All were encouraged to add content or to redact statements that they later wished to exclude from quotations in research reports. Participants were told that any identifying information about them, their firm, or clients that arose in the interview would be altered in order to protect their confidentiality. Pseudonyms are used throughout this research report. Table 1 displays the twelve attorneys and general characteristics of each as an individual, as well as the nature of their organization.

Pseudonym	Primary Area of Practice	Role in Organization
Alicia	Small Non-Profit	President
Harold	Intellectual Property Law	Partner
Julia	Public Finance	Shareholder
Alfred	Litigation	Partner
Catherine	Employment	Partner/Principal
Lawrence	Appellate Law, Ethics	Shareholder
Carla	Legal Aid	Supervising Attorney
Joe	Litigation, Public Interest	Shareholder
Martha	Family Law	Shareholder

Henry	Banking	Senior Counsel
Michael	Litigation	Partner
Elizabeth	Litigation	Partner

Table 1. Exemplars: Pseudonyms, Primary Area of Practice, and Role in Organization

#### \*944 C. Data Sources

Data sources included (1) the twelve interview transcripts (a total of ninety-nine pages, single spaced); (2) two post-interview surveys reiterating key questions in order to triangulate our findings and check for consistency of responses; (3) biographical data from website reviews, (4) notes from interviews, and (5) email correspondence with participants, in which checks for clarification of interview content were conducted. Additional supplemental data, consisting of materials intended to illustrate key points in the interview, provided an additional source allowing triangulation of data sources to verify our interpretations and results.

#### D. Interview Context and Process

All interviews were conducted in the offices of our participants, of which ten out of twelve were located in \*945 downtown Minneapolis.<sup>100</sup> The two exceptions included the offices of Carla, a legal aid organization located in a diverse, low-income, commercial area of Minneapolis; and Alicia, who founded a non-profit providing legal services located in a small office in an urban neighborhood in Minneapolis.

After greeting each participant, participants learned the purpose of the interview and the Subject-Object Interview protocol, given the set of cards, and informed that they could take as much time as needed to jot down their thoughts related to each word and the concept of professionalism.<sup>101</sup> We strived to set as much of a conversational tone as possible, allowing the interview to flow, and to set the participants at ease. When they were ready to discuss their thoughts, we asked them to choose a card. Following the end of the SOI interview we asked respondent about their personal meaning of professionalism and whether they had perceived change over the course of their career.

#### E. Data Analysis

We conducted cross-case analysis,<sup>102</sup> involving both inductive and deductive analysis, identifying (1) salient themes related to professionalism, and (2) content related to developmental stage. We both independently reviewed each transcript, highlighting sentences or paragraphs that suggested themes, and noting content suggesting a developmental stage (i.e., that explained the underlying motivation and reasoning of the theme). As a lawyer and law professor, Hamilton's status as an expert ensured that selected themes would be relevant to the practice of law and \*946 to legal education. Monson next reviewed the themes identified by Hamilton, and conducted two additional layers of analysis: (1) a search for confirming or disconfirming evidence within the data, and (2) identification of phrases or paragraphs suggestive of developmental stage related to each theme. We met on three different occasions to discuss our coding and interpretations, and to agree upon a conceptual structure for reporting findings.

We also independently coded each individual case for developmental content, discussed each interview, and assigned a developmental stage estimate to each case.<sup>103</sup> We noted content that was ambiguous or unclear, or required clarification from our interview participants. One participant was contacted early on in the analysis to clarify some content related to retrospective self-assessment. Later in the research process, each participant was contacted to check on the accuracy of our transcriptions, to respond to our interpretations, and to ask participants for permission to use quotations in this research report.

In the next section, we report on the overall results of key themes, followed by examples of variation within those themes related to the developmental stage. Following these displays, we provide a more in-depth analysis using quotes from participants to illustrate their understanding of these various dimensions of professionalism.

#### IV. Results: Key Themes and Evidence of Developmental Stages

## A. The Meaning and Elements of Professionalism

We begin next with a description of how the attorneys we interviewed defined the meaning of professionalism, in what ways they perceived change over the course of their career, and in general, how they reacted to the interview process. We then examine excerpts representative of key themes from their definitions that illustrate differing paradigmatic beliefs held by lawyers we interviewed, as well as different stage-related excerpts that align with Kegan's developmental <sup>947</sup> theory. Part B explores the exemplary attorneys' view that professionalism is more a way of being than a set of technical skills or capacities--a living definition constantly undergoing development, rather than as an externally imposed code or technical definition. The volume of content and emerging themes from the interviews exceeded expectations and space limitations within this Article to fully report on each theme.<sup>104</sup> We thus limit the scope of this Article to most salient themes related to the meaning of professionalism. In the conclusion, we offer suggestions for further studies.

## B. Participants' Response to the Interview

Interviews took place in May and June of 2010. From our final sample of twelve, all attorneys agreed to the interview. All signed a standard research consent form in which we agreed to maintain the confidentiality of their statements in interviews, and agreed not to publish quotes without their express permission. The non-traditional format of the interview met some with surprise--comments included that it reminded them of a type of "Rorschach test," or that the nature of the words were surprising, but all indicated it was enjoyable and engaging. In only one out of the twelve interviews, the attorney chose to depart from the word prompts, and speak in an unstructured way about her definition of professionalism. We allowed each interview to flow in as close to a conversational manner as possible. The tone and pace of the interviews varied from formal and guarded, to more open and willing to freely discuss personal viewpoints about potentially sensitive topics or experiences, suggesting more candor.<sup>105</sup> In three cases, the respondents started out more guarded, but opened up as the interview proceeded.

The word prompts most frequently chosen by interviewees were "trust" and "success;" third, "disappointments in self or others." "Love" proved to be the <sup>948</sup> most difficult word for interviewees to connect with professionalism, with only four choosing to discuss the concept. Among those four, the focus was on their love for practicing the law or for their law firm, or to state that their interpretation of love was limited to family. We view the content from interviews relating love to professionalism is somewhat beyond the scope of this paper, and see it as a potential future research topic.

## C. Major Themes

Hamilton identified a total of eleven broad themes.<sup>106</sup> Towards gauging consistency of coding and interpretations, Hamilton re-coded the data over a three-month period on two separate occasions, comparing themes and selecting representative quotes most relevant to the law. Monson reviewed these themes and the data, identified conceptual overlap, and then Hamilton and Monson agreed on four generalized themes, three of which have sub-themes:

- 1) moral core or moral compass, including deep sense of responsibility to others; trustworthiness in relationships with others (including clients, colleagues, the profession, the justice system, broader society); and honesty with self and others as an important basis of trust;
- 2) counseling the client, including giving independent judgment; candid and honest counsel informed by the lawyer's moral core; and lawyer as facilitator in identifying client's long-term interest, <sup>949</sup> growth, or movement towards healing and forgiveness;
- 3) ongoing reflection and learning (1) from mistakes or losses, and (2) about the limitations of the status quo of legal practice, including professional setbacks, i.e., failing to meet internalized standards of excellence, or losing important cases; personal setbacks, i.e., experiencing depression or loss of loved ones; alternative methods of

practice (e.g., mediation); and the limitations of the justice system in serving the poor or oppressed, or imbalances of power; and

4) self-assessment of how the meaning of professionalism has evolved, including continuous dynamic growth in understanding and internalizing the meaning of professionalism (including reflection and learning from mistakes).

## 1. Professionalism as Moral Compass or Moral Core

Although all twelve lawyers discussed aspects of a moral core or moral compass, there was some variation in this theme with three of the lawyers expressing views that core morality is formed significantly but not completely in childhood, and that this trait is stable with some additional growth throughout life. The nine others observed that moral formation continues, as an ongoing process over a lifespan involving reflection and self-awareness.

## 2. Commitment and Responsibility to Others

As part of the moral core or moral compass theme, commitment and responsibility to others was an important subtheme mentioned by all twelve attorneys. “Others” referred to one-on-one relationships with clients or colleagues, as well as the firm or organization, the profession, and broader society. The following illustrates the qualitative differences in how our attorneys viewed responsibility to others.

Michael described his core value of service to the community as part of professionalism, illustrating how he conveys this value to associates at his firm:

**\*950** You have to do something . . . other than be a good lawyer. You have to do it not only for yourself and just feeling good about yourself and for community, but frankly, it is part of marketing these days. You have to be connected to people, you can't just go home after work and . . . play with your kids . . . I am constantly harping on them. . . . I look around in an associate meeting and I say “okay what are you guys doing . . . what groups are you involved with? What groups are you active with?”<sup>107</sup>

In contrast to Michael's view of community service as a partially external market-driven requirement, Michael stated that his core value of service started not from any marketing objective, but rather, it was “one step leading to another step associated with an interest associated with something that plucked at [my] heart strings at some point in time.”<sup>108</sup>

For Michael, that interest was helping children, first through his service as a county prosecutor in child abuse cases, and then through his leadership in forming a center for child law, as well as pro bono work to a large non-profit that serves children.<sup>109</sup>

Joe described similar motivations as Michael, describing how he is “deeply involved in diversity-related issues” and that the motivation was internal (i.e., “first of all it is enjoyment . . . I feel I am making a contribution.”)<sup>110</sup>

For Elizabeth, who had started out in a legal aid office after law school, her stature as a partner with a big firm afforded her the opportunity and flexibility to make a much larger impact in pro bono cases.<sup>111</sup> Most recently, Elizabeth discussed a pro bono case in a Southern state involving an African American teen charged with capital murder, which carried a possible death penalty.<sup>112</sup> Elizabeth's firm investigated, finding evidence that the teen should be exonerated of capital murder (no evidence of intent was **\*951** found).<sup>113</sup> For Elizabeth, pro bono work appeared to be a tremendous source of energy and meaning. She said:

[O]ne of the things that has been just a gift to my professional career is the ability to do this pro bono work . . . so there is that credibility you have from when you are in a firm like mine that can make you able to do [[more] . . .<sup>114</sup>

Last, one of our exemplars, Alicia, spoke about how volunteering her time was part of her identity, and that it meant she had accepted the tradeoff of a more modest lifestyle, with respect to income.<sup>115</sup> She stated:

[A]nother aspect of my life is volunteering . . . doing the right thing in all cost . . . maybe seeking who you are . . .  
I wish I really cared more about money . . . but there are other things that seem to be more important.<sup>116</sup>

A strong human rights advocate recognized for her service, Alicia spoke with great passion about her human rights work, and her view that professionalism entails “doing the right thing . . . no matter what the cost, seeking justice on behalf of those who have no access to justice . . . .”<sup>117</sup>

### 3. Toward a Living Definition of Professionalism

#### a. Continuous Dynamic Growth in Understanding

During the interview, the attorneys were asked to self-assess whether their understanding of professionalism had evolved throughout the years.<sup>118</sup> The results from this portion \*952 of the interviews support the idea that an individual's self-understanding of the concept of professionalism evolves to become more complex and internally defined. With this development comes increased cognizance of the dynamic tension between economic self-interest, and the roles representative of clients, officer of the legal system, and public citizen responsible for the quality of justice. We also heard that our respondents' self-understanding of growth and change is that it is not a result of incremental gains of knowledge, facts, or skill, but is a gradual transformation of thought or way of making sense of the world.

This shared self-perception also contained the sense that ongoing learning was the norm, and that it was energizing. For example, Elizabeth stated “I am a partner . . . . How did this ever happen? And then I answered that question that I am still learning. I haven't learned everything, so I continued on happily . . . .”<sup>119</sup>

In the words of Martha: “I used to think of professionalism as rules or something outside of myself that was imposed on me and instead of thinking about it as a way of life.”<sup>120</sup> Lawrence shared this perception, noting that in starting his career, he relied on senior partners as mentors, and now, has taken on the role of mentor to younger associates.<sup>121</sup> Lawrence stated, “I have become the person whose approval I wanted . . . [I've grown] into the person that I wanted to become.”<sup>122</sup>

Catherine discussed her perception of change in terms of a better ability to set boundaries:

I had you know [when I first started practicing law], perfectly good intentions and a lot of brain power but very little sense when it came to boundaries. And um, if I ran \*953 into myself [laughs] I would say, you need some immediate remedial work on boundaries among other things. So yes, I think that it is absolutely born of experience um, but it requires more than simply experiencing of life or the profession or even a role as a manager. I think it requires of real . . . thoughtfulness, mindfulness, it requires caring about the people that you interact with and more than caring feeling an obligation to care, that makes sense? So yeah there is no doubt that I have grown and I am still growing. I mean I get better at it all the time and I make mistakes all the time.<sup>123</sup>

For Alfred, he now attributes his success to the contributions of those around him: “I have come to appreciate over the years how . . . much what I am able to achieve depends on those around me, and those I work with, and those that work for me than I ever did before.”<sup>124</sup>

This shift to increased understanding of inter-dependencies was shared by Michael, who stated, “I think I have . . . a better feel for how the system works and therefore a better judgment now than I had twenty years ago when I was more or less a pure advocate.”<sup>125</sup>

#### b. Reflection and Learning from Mistakes

An important theme related to professionalism as a growing, living phenomenon is how our exemplars experienced mistakes or failures. Part of that process, to Carla, was about becoming “self-aware--aware of if you are burning out or if you are becoming stale.”<sup>126</sup> For Carla, a legal aid attorney who represents children, the intensity of the work is counterbalanced by satisfaction she derived from doing policy work and mentoring younger attorneys.<sup>127</sup> For others, like Joe, the experience of losing a first trial brought important lessons that helped them be more effective in their careers. Joe said:

**\*954** [W]hen I lost a trial . . . for the first time I lost, it was just devastating especially because I thought I should win. I mean it was really, it was really a rotten experience. It turned out [to be] one of the best things that could have happened to me. And the reason was because it made it so I was able to give better advice that, that no matter how hard I worked there is a risk in a trial or a risk in a motion and the risk is that the judge or the jury might not agree with you. And candidly if you haven't lost a trial or you haven't lost a motion, I think it is hard for you to be a good adviser. Because you end up saying things like well I have never lost a trial, so the client thinking. I had this happen to me and the client thinks well, as long as I got you as a lawyer I am in good shape. Well that means that the client can't understand the sense of risk. It is crazy.<sup>128</sup>

Although our exemplars talked openly about losing cases, experiencing frustrations, or overcoming obstacles, only one of them candidly reflected during the interview on disappointment with self in professionalism. Julia stated:

[A] couple of years ago . . . I was disappointed with myself. You know, I made a decision and I stuck with it, even though [it] wasn't the most thought out decision but the thought did come to me that I had unearned my professionalism award. That was one case where I didn't think I acted very professionally. You know I took a position that was hard to substantiate. And then when I was challenged, I just didn't back down, which maybe the best thing to do, if you want to be successful you know. But I let myself down, time[] heals. And you don't trust others who let you down. So you know this particular person was disappointed in me and probably [will] never trust me again.<sup>129</sup>

Julia's reflection and admission of falling short of her internally defined standard of professionalism stands in contrast with other exemplars, such as Michael, who stated, “I don't recall scenarios when I was disappointed with myself in terms of ethics of professionalism.”<sup>130</sup>

#### **\*955** c. Ways of Self-Transformational Growth

We identified structural (i.e., developmental)<sup>131</sup> evidence of Kegan's Stage 5, self-transformation, within four of our exemplars. Part II.C. earlier defined Stage 5 to be characterized by the ability to examine one's self-authored personal authority to recognize the limitations of any single system of constructed meaning. A perspective-taking process for continually challenging their understanding was common among these four individuals. For example, Michael discussed a process he uses in preparing to go to trial:

I often consciously put my or almost automatically put myself in the position of the judge hearing the case and what would I do if I was the judge? What arguments would I respond to? What information would I need? How would I resolve an issue? And that's a way of thinking that I wouldn't have done even maybe ten years ago, maybe five years ago.<sup>132</sup>

Joe, who earlier recalled the experience of losing a case and realizing that it had been critical in helping more effectively prepare his clients and himself, summed up his philosophy of how he puts his ideas out for refinement through a process of perspective taking:

You have to find it; you have to find the other side's annoyingly good point because you can't just go for your conclusion. You got to figure out how to cope with what \*956 somebody else might have which might be a very good point so I think that the if I haven't traveled that pathway of uncertainty and maybe I am wrong and maybe the other side has way too many annoyingly good points you know. If I feel like I have traveled that pathway then I am able to say to myself, alright I think I trust myself with this current pathway.<sup>133</sup>

In contrast, Alicia reported using ethical analysis questioning the obligation of the profession to society. Alicia stated she asks herself, as she prepares a case, “[w]hat is my duty to law and seeking justice, what's my duty to judicial system, what's my duty in terms of you know legal professionalism, what's my duty to those seeking justice.”<sup>134</sup>

Martha provided insight into how transformation can take place beyond the level of individual, and throughout a field within the profession. Martha, the divorce attorney, discussed how she had helped lead a movement to shift divorce from an adversarial to a collaborative process by bringing in a psychologist to “divorce camp.”<sup>135</sup> She stated:

And we decided we were going to transform how lawyers in this state practice family law, which you know is a little arrogant at best. But we have, we have, and that's so powerful when you are there and someone stands up and says I am going to do that differently. I have been coming here and suddenly it daunts to me I am going to that differently. And so making that difference, but you cannot convince someone else to change until you have changed.<sup>136</sup>

Describing a technique to help move towards self-transformation, Martha posed the following questions, which she used in a process of ongoing refinement or testing of her core beliefs about professionalism:

[A]sking those questions that make you think, okay, what am I doing that for? Am I doing that for myself or am I doing that for my client? Why am I doing that? Am I doing that to win or am I doing that to move \*957 this family forward?<sup>137</sup>

## V. Discussion and Conclusion

Interviews with peer-honored lawyers exploring the meaning of professionalism revealed four primary, overarching themes, including the ideas that:

1. Professionalism is linked to a lawyer's moral core or moral compass, and includes a deep commitment to clients, colleagues, the firm, and broader society. The foundation of this moral core is trustworthiness, which serves to “hold together” the day-to-day functions of practicing law, and serves as an important marker in both establishing and maintaining a lawyer's credibility and reputation. A major part of this foundation of trustworthiness is honesty, with self and others. Honesty serves also as an internal mechanism that is part of an ongoing practice of self-reflection and growth.

2. Counseling the client with independent judgment and candid advice is central to the lawyer's role.



3. Self-reflection becomes habitual, and ongoing, and is related to ongoing growth in a lawyer's professionalism.
4. A lawyer's understanding of professionalism evolves over a career.

When asked directly if they perceived a change in how they viewed professionalism, all attorneys agreed that their understanding had evolved throughout their careers. Although all perceived a gradual change, three of the lawyers pointed to the importance of upbringing, family, virtues such as the “golden rule,” or innate personality traits as also important.

With recent increased focus on leadership in law,<sup>138</sup> the observance that, among exemplars who were in transition to \*958 Stage 5, conceptions of professionalism began to overlap conceptions of leadership seems particularly fruitful for further research to mine this relationship.<sup>139</sup> Our exemplars discussed a range of leadership actions that they associated with professionalism including: (1) playing a change agent role in transforming family law from an adversarial approach to one that facilitates a healing process, (2) addressing the holistic and legal needs of women victims of domestic violence in undeveloped nations, and (3) doing pro bono work on a Guantanamo Bay defense camp, defending a juvenile accused of murder in a rural town in the South, or working behind the scenes for policy change within state or local government towards improving how children in poverty are served by the system.

#### A. Comparison with Past Studies

Compared with our earlier studies of law students and early career lawyers,<sup>140</sup> exemplary lawyers' conceptions of professionalism show later stages of mental complexity defined earlier in Part II.C. Mental complexity is the move from an egocentric understanding of the world to a more penetrating, more responsible, less egocentric grasp of reality. This movement toward later stages of mental complexity provides justification for viewing the themes articulated by the exemplary lawyers as a benchmark for defining levels of competencies in professionalism. To illustrate, we include a figure that displays the overall results of estimating Kegan stages with past studies, shown in Figures 1 and 2.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

#### \*959 Figure 1. Stages of Professional Identity Among Law Students, Early Career, and Exemplary Lawyers

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

#### Figure 2. Stages of Professional Identity Development Among U.S. Professional Military

As Part II.C. explained, Stage 2 is the instrumental mind characterized by an external definition of self and an egocentric view. Stage 3 is characterized by increased social perspective taking ability among allies or the in-group, but understanding and expectations continue to be externalized. Stage 4 involves the capacity to step back enough from the social environment to generate a seat of judgment that evaluates and makes choices about external expectations. The independence of judgment here translates into a greater fidelity to one's inner moral code. Stage 5 is characterized by \*960 the ability to examine one's personal moral code and recognize the limits of any one system of constructed meaning.

A comparison of the bar showing the stages of mental complexity of entering law students with much higher proportions of earlier stage 2 and stage 3 than the bar for early-career lawyers or the bar for exemplary lawyers. Similarly, only one percent of entering law students is at Stage 4, whereas fifty percent of exemplary lawyers are at Stage 4, with sixteen percent at higher stages.

We want to emphasize that the purpose of this study was not to assess developmental stage for each participant. The estimates we report represent a snapshot of development for expert and novice groups, and any individual assessment intended for diagnostic purposes would require multiple measures, across time, in order to increase validity.<sup>141</sup> If we were to discuss the results of this

assessment with individuals, we would follow the practices of experts in this methodology who view the assessment process as collaborative and developmental, in a type of synthesis between coaching and assessment.<sup>142</sup>

## B. Limitations of the Present Study and Future Research Topics

This study has limitations. Ideally, we would have longitudinal data following a group of entering law students through their careers. We are working on a longitudinal data set. A longer interview would help with the process of probing for more stage-related content. Observing attorneys or having the results of 360-degree reviews in the course of practice would be useful to gauge the extent that espoused beliefs and values matched with behaviors. However, given the time pressures on practicing lawyers and concerns \*961 regarding client confidentiality, this may not be feasible. More extensive analysis of archival and biographical data would have added depth and richness to this dataset, and permitted greater chances to triangulate evidence across different data sources.

Another limitation is that our sample is limited to one region of the U.S. Criteria for professionalism awards and understandings of professionalism might vary by region. Also, the criteria for selecting award winners might vary between the nominating organization's committees, as well as vary from year to year. Given more adequate resources for follow-up studies, we would seek additional geographical locations to replicate this study, and consider an open nomination process that would permit individuals who do not belong to bar associations to be nominated. Open nomination processes are extremely time consuming and run some risks of claims that the investigators biased the selection process.<sup>143</sup>

The scope of this Article limited the extent we could fully cover the multiple themes that emerged from this data. A series of follow-up studies building on these results should guide law schools clear definitions and assessments of professionalism. At minimum, topics for future research should include (1) the importance of law school and law firm culture; and (2) the experience of women and non-white lawyers, both in the changes they observed over the past decades, and in how younger generations of women lawyers are experiencing socialization into the firms. Studies focusing on individual cases, delving more deeply into the stories of challenges and triumphs of exemplary professionals, represent another avenue of research. Other replications of this study should focus on (1) judges, (2) prosecutors or criminal defense attorneys, (3) in-house corporate attorneys, and (4) public administrative or non-profit attorneys.

Last, this topic could arguably be addressed by broad, population studies using surveys, in which we would attempt to estimate the extent that these themes were present among the population of practicing attorneys.<sup>144</sup> Although \*962 scientifically-administered surveys would permit broader generalization of some beliefs, the resulting information would lack the depth, meaning, and realism yielded from interviews and dialogs with participants.<sup>145</sup>

## C. Implications for Law Schools

Legal education must undertake a paradigm shift to focus on each student's ethical professional identity. This Article advances this educational goal by interviewing peer-honored exemplary lawyers to clearly define the elements of an ethical professional identity. Law faculty can design curriculum, programs and assessments to reach a clearly defined educational goal.<sup>146</sup>

\*963 The main findings of this study are that exemplars understand professionalism in a qualitatively more complex, or expert manner, than do early career lawyers and entering law students. Our exemplars' understanding of professionalism represents a high level of competence or expertise in professionalism, providing law schools and bar associations with a clear benchmark to use in defining levels of competencies in professionalism.<sup>147</sup> This methodology ensures the definition of the elements of professionalism is captured, not theoretically, but in a way grounded in the realistic context of practice.<sup>148</sup>

The Article proposes a shift from a static definition of professionalism and ethical professional identity, focused on ethics education about the Rules of Professional Conduct, to a constructive developmental definition that emphasizes also fostering each student's moral core of responsibility to others, trustworthiness and honesty, independent counsel to clients, and habits of seeking feedback, reflection, and self-assessment. The entire model recognizes that a student's stage of moral identity development will influence how the \*964 student understands an ethical professional identity, so legal education must engage each student at the student's current level of identity development.

Essentially we are proposing that a major goal of legal education should be to foster formation, in as large a proportion of students as possible, toward both the elements of professionalism as understood by peer-honored exemplary lawyers and an internalized ethical professional identity (Kegan's Stage 4). Carnegie argues that, for medical education, “[f]ormation is the most fundamental goal of the learning process.”<sup>149</sup> The same should be true for legal education.

We analyzed the empirical evidence of which pedagogies are most effective to foster formation of an ethical professional identity in a separate shorter article,<sup>150</sup> and we are working on a longer article reviewing this empirical literature. One critical insight in this literature is that since the students come to us at different developmental stages, and by definition, an earlier stage student will not understand a question relevant at a much later stage, the professor must ask a variety of questions relevant to the range of development stages of his or her students. Kegan and Lahey provide one important window on effective pedagogies to foster formation. They note that the conditions for optimal growth center on what they call “optimal conflict,” characterized by four conditions<sup>151</sup>:

- Challenges or problems must represent a “persistent experience of some frustration” or “quandary;”
- The problem must challenge one's assumptions and beliefs or “our current way of knowing;”
- The underlying issues must connect deeply to who we are and what we value; and
- Social support from instructors, supervisors, mentors, peers, and others must be effective to prevent the \*965 student from being overwhelmed or able to “escape or diffuse it.”<sup>152</sup>

There is a significant challenge to design assessment measures for these competencies that would meet the criteria for validity and reliability of psychological or educational measurement. For example, as part of this educational engagement, the Subject Object Interview methodology would be useful with law students or associates as a formative assessment within the context of leadership courses or mentoring programs.<sup>153</sup> Developmental feedback, based on the assessment results, is practical and realistic within the context of professional responsibility or clinical practice courses.<sup>154</sup> We urge the use of assessments that students can use to foster self-development of these professionalism elements.

#### D. Conclusion

Empirical evidence over three decades of research shows that ethical professional identity can grow across the lifespan. The exemplars we interviewed represent a benchmark for a high level of competence in professionalism; the finding that this expert group differed from novices supports the contention that growth occurs across the lifespan. With a clear definition, educators can design educational programs, curricula and assessments to foster students' ethical professional formation. This paradigm shift toward fostering students' potential for ethical professional formation and transformation is one that will ultimately better meet the needs of the changing nature of the legal job market and law firms because it promotes dynamic change and transformation in a variety of capacities and skills that contribute to effectiveness in the practice of law.<sup>155</sup> The students on this path realize both internal and external benefits.

#### \*966 Appendix A

#### *Summary of Kegan Identity Assessment Studies in Education in the Professions*<sup>156</sup>

Study	Stage 2	Stage 2 / 3	Stage 3	Stage 3 / 4	Stage 4	Stage 4 / 5
Bartone et al., 2007, professional military cadets (freshmen), n=38	8 (21%)	24 (63%)	6 (16%)	0	0	0
Bartone et al., 2007, professional military cadets (senior), n=38	2 (6%)	10 (31%)	14 (44%)	6 (19%)	0	0
Eigel, 1998, CEOs, n=21	0	0	0	0	17 (81%)	4 (19%)
Eigel, 1998, middle managers, n=21	1 (5%)	2 (10%)	7 (33%)	0	10 (48%)	1 (5%)
Monson & Bebeau, 2006, dental students (freshmen), n=94	12 (13%)	48 (51%)	18 (19%)	12 (13%)	4 (4%)	0
Hamilton, M., 2011, professional coaches, n=26	0	5 (19%)	6 (23%)	11 (42%)	4 (15%)	0
Monson & Hamilton, N., 2010, first-year law students, n=88	14 (16%)	22 (25%)	29 (33%)	22 (25%)	1 (1%)	0
Monson & Hamilton, N., 2010, early career lawyers, n=37	0	4 (11%)	19 (51%)	9 (24%)	5 (14%)	0
Roehrich & Bebeau, 2005, dental students (freshmen) n=46	6 (13%)	32 (70%)	4 (7%)	4 (7%)	0	0
Snook et al., 2007, Harvard MBA students, n=26		9 (35%)		7 (27%)		9 (35%)

## \*967 Appendix B

### Guidelines for Giving Developmentally Appropriate Feedback <sup>157</sup>

Feedback is an important component of learning. This section is concerned with the development of comments and questions that, in addition to being constructive, take into account how the student sees the self in relation to others. Individuals at different stages of identity have different concerns. Thus, questions that may make sense to a Stage 3 learner may not be understood by a Stage 2 learner and may be less likely to challenge further thinking.

Below are listed some prototypic questions to promote further thinking about what the respondent has written. To identify what kind of probe questions to include, ask yourself, is this an essay that reflects:

1. Individual competence or role enactment? (Primarily a Stage 2 Identity)
2. Team player orientation or sense of social obligation? (Primarily Stage 3 Identity)
3. Values orientation or professionalism? (Primarily a Stage 4 Identity)

If some of both, then the individual may be in the transition. Select questions from each level that will direct attention to the dimension that is missing.

#### For Stage 2 Identity

What is the respondent grappling with?

Concrete individualistic performance

How does he/she see the world?

Concrete and dualistic

### Probe Questions

Strategy: When the respondent sees things in dualistic terms: good and bad, right and wrong, black and white.

**\*968** Ask: Does everyone see it the way you do? How did the other person think about what you did or said? Is there any evidence to support your view? Some people think there are situations which are not clearly right or wrong. Can you think of such examples?

Strategy: When the respondent sees only his/her interest in the situation, encourage perspective taking.

Ask: What does (name other party) care about? How does the profession think about that? How would you feel if you were on the receiving end of that action? How would your friend (or family) feel? Do you actually know what your friend (parent, superior, subordinate) thought about what you did? Did you ask? It is helpful to ask and to collect evidence on how others see things.

Strategy: Take other's perspective with respect to their intent or experience.

Ask: Do you think the other person perceived what you did as helpful, disrespectful, dishonest, etc.

Strategy: Try to elicit an internal focus.

Ask: Would you feel guilty if you did that? If so, why would you feel guilt or shame?

Ask: What emotion would your parents or friends experience if you failed (cheated, lied, harmed someone, failed a course, or failed the bar exam)? How would their reaction make you feel? What if you succeeded (earned good grades, an offer in a top firm)? Maybe we can find some words that capture those feelings (self-confident, shameful, compassionate, remorseful). What sort of qualities would you like to strengthen in yourself?

Strategy: Try to elicit the respondent's experience of being regarded by others?

Ask: What do you want your friends (or superiors, subordinates, parents) to say about you? What kind of person would you like to become? How do you feel when your friends are worried about you (or proud of you, upset with you)? How do you feel when your family members or instructors are worried (or proud or upset or angry) with you?

**\*969** Strategy: Develop a perspective on failure. Help them see that failures can be opportunities for learning.

Ask: What can you learn from that experience? What would be the worst thing that would happen to you if you failed? What circumstances might lead you to repeat this failure?

### For Stage 3 Identity

What is the respondent grappling with?

Being a team member or team player

Concern for societal role, professional ideals

How does he/she see the world and the self?

Reflective and idealistic

### **Probe Questions**

Strategy: Take the respondent's perspective on what they accepted as a shared value.

Ask: How do you know that is true? What is your source of authority for that? Do different authorities disagree about that? What reasons do they use to come to their conclusions?

Strategy: Raise consciousness about likely conflicts between interpersonal allegiances and one's ideals.

Try to do two things:

1. Raise consciousness that conflict:

Ask: "What if you marry someone who wants you to stay home rather than have a career?" "What if your friend asks you to keep secret about something that harms someone else?" "What if a senior associate or partner asks you to lie in order to help a client?" "What if your client asks you to overlook an ethically questionable policy in an employee contract negotiation?"

2. Raise consciousness as to whether one's ideals can be met:

Example: Sometimes respondents get very frustrated when they know they should live up to some ideal standard, but do not see how to do it.

Ask: Have you worked out a way to really do what is right?

**\*970** Strategy: Develop a perspective on failure. Help them see that failures can be opportunities for learning.

Ask: What can you learn from that experience? What would be the worst thing that would happen to you if you failed? What circumstances might lead you to repeat this failure?

### **For an Emerging Stage 4 Identity**

**(someone in Stage 3 to Stage 4 transition)**

What is the respondent grappling with?

Constructing a discerning principled identity

Staying centered and responsibly attuned to and tolerant of complexity

How does he/she see the world and the self?

Developing and changing

Contextual and constructed

Ambiguous and paradoxical

Strategy: Because respondents are grappling with a number of issues and are already rather discerning, they may need help in finding mentors for their problems.

Ask: Who can you talk to about this issue? How do you know if you are seeing this issue clearly? What set of criteria do you use to judge whether your views on this matter are defensible? How do you deal with people who do not know where you are coming from? Is there another whole way of looking at this situation? How do you hold on to your core values in this sort of situation? What about this situation caused you to lose your focus?

Strategy: Locating decision criteria within the self.

Ask: How do you go about deciding what to trust when you get conflicting guidance from others? How do you resist falling back into accepting the status quo or standard solution when pressured to do so?

### Footnotes

<sup>a1</sup> Neil W. Hamilton is Professor of Law and Director of the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law where he teaches professional responsibility, administrative law, and ethical leadership. Hamilton's scholarship focuses on empirical approaches to instruction and research on professionalism or the formation of an ethical professional identity in legal education, which the Carnegie Foundation calls "the most overlooked aspect of professional preparation." Hamilton is a recent recipient of the "Outstanding Service to the Profession" award by Minnesota Lawyer.

<sup>aa1</sup> Verna Monson, Ph.D., is Research Fellow at the Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law. Dr. Monson is an educational psychologist specializing in ethics education in the professions, emphasizing the development of meaningful and sustainable methods of student assessment and program evaluation for legal education. Before joining the Holloran Center, Monson worked with the Center for the Study of Ethical Development at the University of Minnesota. She is a member of the American Educational Research Association, the American Evaluation Association, and the American Psychological Association.

We wish to give our most sincere thanks to each of the twelve lawyer exemplars who participated in our research. We were personally inspired by our conversations with them, and appreciate their willingness to review transcripts and respond to requests for clarification or permission to publish selected quotes.

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Last, many thanks to the student editors of the Santa Clara Law Review for their editorial review, comments, and suggestions, which were always approached with professionalism.

<sup>1</sup> The terms "professionalism" and "ethical professional identity" are used as synonyms in this literature. See Neil Hamilton, *Professionalism Clearly Defined*, 18 Prof. Law., no.4, 2008 at 4 [hereinafter Hamilton, *Defined*]; Neil Hamilton, [Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity](#), 5 U.

St. Thomas L.J. 470, 472-73 (2008) [[hereinafter Hamilton, Assessing]; Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 *Geo. J. Legal Ethics* 137, 141, 143 (2011) [hereinafter Hamilton & Monson, Empirical Relationship]. The Carnegie Foundation study of medical education uses “‘professional formation’ rather than ‘professionalism’ to emphasize the developmental and multifaceted nature of the construct.” Molly Cooke, David M. Irby & Bridget C. O’Brien, *Educating Physicians: A Call for Reform of Medical School and Residency* 108 (2010) [hereinafter *Educating Physicians*]. “By professional formation [Carnegie] mean[s] ‘an ongoing self-reflective process involving habits of thinking, feeling and acting.’ These habits of thought, feeling and action ideally develop in ways that allow learners to demonstrate ‘compassionate, communicative, and socially-responsible physicianhood.’” *Id.* at 41 (citations omitted). We also use transformational professionalism, linking lifespan developmental psychologist Robert Kegan’s work to Carnegie and to an assessment methodology that is used in organizational development. See Robert Kegan, *In Over Our Heads: The Mental Demands of Modern Life* 185 (1994); see also William M. Sullivan, Anne Colby, Judith Welsh Wegner, Lloyd Bond & Lee S. Shulman, *Educating Lawyers: Preparation for the Profession of Law* 17-19 (2007) [hereinafter *Educating Lawyers*]. We distinguish the concept of transformational professionalism, or a contextual expansion of consciousness that Kegan describes, from increased intelligence. Neuroscientist Antonio Damasio describes a parallel concept of “extended consciousness,” stating that it “is not the same as intelligence ... [[it] has to do with making the organism aware of the largest possible compass of knowledge ....” See Antonio R. Damasio, *The Feeling of What Happens: Body and Emotion in the Making of Consciousness* 198 (1999).

<sup>2</sup> See Draft for July Meeting, Program of Legal Education, American Bar Association 1 (July 9, 2011), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/legal\\_education/committees/standards\\_review\\_documents/july2011meeting/20110621\\_ch\\_3\\_program\\_of\\_legal\\_education\\_clean\\_copy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/july2011meeting/20110621_ch_3_program_of_legal_education_clean_copy.authcheckdam.pdf).

<sup>3</sup> *Id.*

<sup>4</sup> See Patricia Benner et al., *Educating Nurses: A Call for Radical Transformation* (2010); *Educating Physicians*, supra note 1; Charles R. Foster, *Educating Clergy: Teaching Practices and Pastoral Imagination* (2006); Sheri D. Sheppard et al., *Educating Engineers: Designing for the Future of the Field* (2009); *Educating Lawyers*, supra note 1.

<sup>5</sup> *Educating Physicians*, supra note 1, at ix. Our operationalization of Carnegie’s concept of professionalism, which includes a “moral core,” stems from two sources: (1) Hamilton’s review and synthesis of the professionalism literature in law and medicine, see Hamilton, *Assessing*, supra note 1, at 477-82, and (2) from the work of James R. Rest, see James R. Rest, *A Psychologist Looks at the Teaching of Ethics*, 12 *Hastings Center Rep.* 29, 29 (1982) [[hereinafter Rest, *Psychologist*] and James R. Rest, *Morality*, in 3 *Handbook of Child Psychology: Cognitive Development* 556, 556 (Paul H. Mussen et al. eds., 4th ed. 1983). Rest’s Four Component Model (FCM) of moral behavior posits that four distinct psychological capacities explain moral behavior, including (1) sensitivity (or perceptual clarity and empathy), (2) moral judgment and reasoning, (3) moral motivation (also character and identity), and (4) moral implementation. Rest, *Psychologist*, supra note 5, at 29. Rest’s FCM, applied to the professions, provides measurement tools and is informed by over three decades of research and curriculum development. Kegan’s theory of identity development is used as a proxy for component three: moral motivation and identity. See generally James R. Rest, *Moral Development: Advances in Research and Theory* 3 (1986) [hereinafter Rest, *Moral Development*]. For a review and discussion of research on ethical development in the professions, see generally Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 *U. St. Thomas L.J.* 366, 369-79 (2008) [hereinafter Bebeau, *Ethical Development*].

<sup>6</sup> *Educating Lawyers*, supra note 1, at 128.

<sup>7</sup> *Id.* at 160.

<sup>8</sup> *Educating Physicians*, supra note 1, at 41.



- 9 Id. at 60, 65 (“[T]ransformation of identity should be the highest purpose of medical education.”).
- 10 Neil Hamilton & Verna Monson, *Answering the Skeptics on Fostering Ethical Professional Formation (Professionalism)*, 20 Prof. Law., no.4, 2011 at 3 (2011) [hereinafter Hamilton & Monson, *Skeptics*]. We note that skepticism is a necessary element of scientific inquiry; as scholars, we rely on peer review for constructive criticism of our empirical work. We distinguish, however, healthy skepticism that is accompanied by a serious consideration of the merit of empirical evidence, versus skepticism based on intractable opinions or beliefs. In the social sciences, the use of peer review serves a vital function of maintaining standards for scientific evidence and the ability to discriminate between pseudoscience and credible empirically and theoretically grounded scholarship and research.
- 11 Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 Mich. L. Rev. 1921, 1924 (1993).
- 12 Hamilton & Monson, *Skeptics*, supra note 10.
- 13 See id.
- 14 For an overview of the use of developmental theory in higher education or organizations with respect to mentoring programs, see generally Eileen M. McGowan et al., *A Constructive-Developmental Approach to Mentoring Relationships*, in *The Handbook of Mentoring at Work: Theory, Research and Practice* 1, 5, 9, 12-14 (Belle Rose Ragins & Kathy E. Kram eds., 2007). For a comprehensive review of developmental outcomes research within higher education, see generally Ernest T. Pascarella & Patrick T. Terenzini, *How College Affects Students: A Third Decade of Research* 36-45 (2005). For a review of moral development in professions education, see generally Muriel J. Bebeau, *The Defining Issues Test and the Four Component Model*, *Contributions to Professional Education*, 31 J. Moral Educ. 271, 271-72 (2002) [hereinafter Bebeau, *Defining Issues*]; Muriel J. Bebeau, *Evidence-Based Character Development*, in *10 Lost Virtue: Professional Character Development in Medical Education: Advances in Bioethics* 47, 47 (Nuala Kenny & Wayne Shelton eds., 2006) [hereinafter Bebeau, *Character Development*].
- 15 See Rest, *Moral Development*, supra note 5. Critics of Rest and Kohlberg's approach to moral development will sometimes charge that these theories are biased against women, stemming from Kohlberg's original research conducted with boys. However, over three decades of research, involving hundreds of studies using Rest's *Defining Issues Test* (DIT), reveal no gender differences in moral reasoning, and when there are, women score higher. The origin of the gender bias criticism stems from Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 1 (1982).
- 16 Moral psychology differentiates between “macro-moral” issues and personal moral issues, with the former referring to the complex interdependencies between social institutions, for example, how a democratic society addresses the needs of all citizens, and the social contract between the professions and society. See James Rest et al., *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* 2-3 (1999).
- 17 See Hamilton & Monson, *Skeptics*, supra note 10.
- 18 Robert Kegan & Lisa Laskow Lahey, *Immunity to Change: How to Overcome It and Unlock the Potential in Yourself and Your Organization* xiii (2009). Kegan's theory of identity development describes stages or “orders of consciousness,” from infancy through the lifespan, challenging conventional notions that adults cannot continue to grow or change how they view the self and others past high school or college. Robert Kegan, *The Evolving Self: Problem and Process in Human Development* 11-12 (Second Vintage Books, 1982). Kegan's theory builds on the work of Jean Piaget (cognitive and moral development of children), Lawrence Kohlberg (cognitive moral development), William Perry (epistemological development of college students), and Jane Loevinger (ego development). Kegan describes his theory as “meta-psychological,” in that it integrates the cognitive, emotional, and social expansion of self or consciousness. See id. at 14-15. As a meta-theory, Kegan's ideas of development as an unfolding of hidden assumptions or motivations

are useful in leadership or executive coaching, or organizational change. Applied to morality, Kegan's theory aligns with the ideas of Piaget, Kohlberg, or Perry that with development, there is increased complexity of thought, awareness of others, and that with expanded consciousness, conscience or moral responsibility grows. Thus, at latter developmental stages, there is increased appreciation of diversity, capacity for critical thinking, and awareness of ethical issues. For an extensive review of Kegan's theory in relation to other lifespan developmental theories, see generally id. (Second Vintage Books, 1982). For a succinct discussion on the integral relation between consciousness, conscience, and moral responsibility, see generally Viktor E. Frankl, *The Doctor and the Soul: From Psychotherapy to Logotherapy* (1986). Additional evidence that adults can grow in consciousness (and conscience) is emerging from neurosciences. See, e.g., Heleen A. Slagter et al., *Mental Training as a Tool in the Neuroscientific Study of Brain and Cognitive Plasticity*, 5 *Frontiers Hum. Neuroscience* 1 (2011), [http://www.frontiersin.org/human\\_neuroscience/10.3389/fnhum.2011.00017/full](http://www.frontiersin.org/human_neuroscience/10.3389/fnhum.2011.00017/full).

- 19 See Bebeau, *Ethical Development*, supra note 5, at 380; see generally Kegan & Lahey, supra note 18, at 13-14.
- 20 Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 *Psychol. Rev.* 814, 814 (2001). The idea that judgments based on intuition are more prevalent, and, in some cases, superior to more deliberate, conscious reasoning, was made popular by author Malcolm Gladwell in *Blink*. See Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* 14-17 (2005). Gladwell reviews scholarship on cognitive information processing, citing evidence that “rapid cognition,” or what he calls “thin slicing” can be superior to more deliberate, effortful cognitive processing. Id. at 18-23. For a discussion of moral intuition in relation to the culture of law, see generally Milton C. Regan Jr., *Moral Intuitions and Organizational Culture*, 51 *St. Louis U. L.J.* 941 (2007).
- 21 Daniel Lapsley & Darcia Narvaez, *A Social Cognitive Approach to the Moral Personality*, in *Moral Development, Self, and Identity* 189-212 (2004) (Daniel Lapsley & Darcia Narvaez eds., 2004) [hereinafter Lapsley & Narvaez, *Social Cognitive Approach*]. Note that there is some correlation between these two different capacities that are both necessary for a moral action to occur. The difference between the two capacities is easiest to see in extreme circumstances. For example, many people in Nazi Germany or the Stalinist Soviet Union knew the right thing to do in terms of moral reasoning, but their moral commitment and identity failed.
- 22 See generally Augusto Blasi, *Bridging Moral Cognition and Moral Action: A Critical Review of the Literature*, 88 *Psychol. Bull.* 1, 1-45 (July 1980); see also Lapsley & Narvaez, *Social Cognitive Approach*, supra note 21. In legal education, moral identity research is a recent line of inquiry. See Verna E. Monson & Neil W. Hamilton, *Ethical Professional (Trans)formation: Early Career Lawyers Make Sense of Professionalism*, 9 *U. St. Thomas L.J.* 129 (2012) [hereinafter Monson & Hamilton, *(Trans)formation*], available at <http://ssrn.com/abstract=1733282>; see also Verna E. Monson & Neil W. Hamilton, *Entering Law Students' Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 *J. Legal Prof.* 385 (2011) [hereinafter Monson & Hamilton, *Entering*], available at <http://ssrn.com/abstract=1581528>.
- 23 See Hamilton & Monson, *Skeptics*, supra note 10, at 4.
- 24 See Hamilton & Monson, *Empirical Relationship*, supra note 1, at 137, 141.
- 25 See Bebeau, *Ethical Development*, supra note 5; Muriel J. Bebeau & Verna E. Monson, *Professional Identity Formation and Transformation Across the Life Span* 1, 18 (2011); see also Howard Gardner, Mihaly Csikszentmihalyi & William Damon, *Good Work: When Excellence and Ethics Meet* 11 (2001) [[hereinafter *Good Work*]]; Hamilton & Monson, *Skeptics*, supra note 10, at 3-5.
- 26 Daniel Lapsley & Darcia Narvaez, *Character Education*, in 4 *Handbook of Child Psychology: Child Psychology in Practice* 189, 282 (William Damon et al. eds., 6th ed. 2006) [hereinafter Lapsley & Narvaez, *Character Education*].

- 27 David Leach, Commentary, Competencies: From Deconstruction to Reconstruction and Back Again, Lessons Learned, 98 Am. J. of Pub. Health 1562, 1564 (2008).
- 28 Id. at 1562. David C. Leach, former Executive Director of the Accreditation Council of Graduate Medical Education (ACGME), led medical schools through a multi-year process of gaining consensus on defining what professionalism competencies should be required and assessed. Id.
- 29 See Ann Colby & William M. Sullivan, [Formation of Professionalism and Purpose: Perceptions from the Preparation for Professions Program](#), 5 U. St. Thomas L.J. 404, 423-24 (2008) (discussing institutions of professions education serving in the role as “trustee institutions” of the profession); see also William F. May, [Money and the Professions: Medicine and Law](#), 25 Wm. Mitchell L. Rev. 75 (1999). The phrase “Hired Hands” is used in the title of a book by Rakesh Khurana, [From Higher Aims to Hired Hands: The Social Transformation of American Business Schools and the Unfulfilled Promise of Management as a Profession](#) (2007).
- 30 Colby & Sullivan, *supra* note 29, at 423; see generally Bebeau, [Character Development](#), *supra* note 14; Bebeau, [Defining Issues](#), *supra* note 14.
- 31 Bebeau & Monson, *supra* note 25, at 1; see also [Good Work](#), *supra* note 25, at 254-55.
- 32 See Colby & Sullivan, *supra* note 29.
- 33 See Hamilton, [Defined](#), *supra* note 1; Hamilton, [Assessing](#), *supra* note 1.
- 34 See Lapsley & Narvaez, [Character Evidence](#), *supra* note 26.
- 35 Hamilton, [Defining](#), *supra* note 1; Hamilton, [Assessing](#), *supra* note 1.
- 36 “Personal conscience” is an analog to Rest's Four Component Model of moral behavior. See Rest, [Moral Development](#), *supra* note 5, at 556. “Conscience” means moral awareness, moral sense, or moral responsibility to others. See generally Frankl, *supra* note 18 (discussing the etymological roots and meaning of consciousness and conscience). Psychologist Martha Stout points out that not all individuals possess a conscience, which clinically is referred to as sociopathy, which her research indicates represents approximately four percent of the population, or one out of every twenty-five individuals. Martha Stout, [The Sociopath Next Door: The Ruthless Versus the Rest of Us](#) 9 (2005). Dr. Stout makes the point that most sociopaths do not commit crimes or appear mentally unstable.
- 37 See generally Rest, [Moral Development](#), *supra* note 5.
- 38 See generally Bebeau, [Ethical Development](#), *supra* note 5.
- 39 Hamilton, [Defining](#), *supra* note 1, at 8; Hamilton, [Assessing](#), *supra* note 1, at 484-88.
- 40 See *supra* text accompanying note 21.
- 41 See Anne Colby & William Damon, [Some Do Care: Contemporary Lives of Moral Commitment](#) 293-312 (1992).

- 42 Good Work, supra note 25, at 163.
- 43 Colby & Damon, supra note 41, at 25, 298.
- 44 Id. at 313.
- 45 Id. at 298; see also James T. Rule & Muriel J. Bebeau, *Dentists Who Care: Inspiring Stories of Professional Commitment* 162-63 (Lindsay Harmon ed., 2005).
- 46 See Colby & Damon, supra note 41, at 303.
- 47 Id.
- 48 Good Work, supra note 25.
- 49 Id. at ix; see generally Colby & Damon, supra note 41; Good Work, supra note 25.
- 50 Id. at 313-18 app. A; see generally Colby & Damon, supra note 41; Good Work, supra note 25.
- 51 See generally Colby & Damon, supra note 41; Good Work, supra note 25.
- 52 Paula Marshall & Howard Gardner, *Good Work Project Rep. Series, The Collective Enterprise of Law: Three Types of Communities* 3-5 (June 2005), available at <http://www.goodworkproject.org/wp-content/uploads/2010/10/37-Law-Collective-Ent.pdf>.
- 53 Id. at 34.
- 54 Id. at 14.
- 55 Id. at 20, 24.
- 56 Sheelagh O'Donovan-Polten, *The Scales of Success: Constructions of Life-Career Success of Eminent Men and Women Lawyers* 4 (2001).
- 57 Id. at 172-73. We interpret “ideals” as an analog to values.
- 58 Id. at 183.
- 59 Rule & Bebeau, supra note 45, at 162-63.
- 60 Id. at 66.

- 61 Id.
- 62 Id. at 162-63.
- 63 See id.
- 64 See Bebeau, Ethical Development, *supra* note 5, at 371.
- 65 See generally Rule & Bebeau, *supra* note 45.
- 66 See generally Kegan, *supra* note 1, at 1-11.
- 67 See id. at 7, 9.
- 68 Id. at 7-10.
- 69 See Kegan & Lahey, *supra* note 18, at 6-7.
- 70 Hamilton & Monson, Empirical Relationship, *supra* note 1, at 137.
- 71 The answer to how people can know what is moral but fail to act upon their moral values, stems from empirical research in social psychology pointing to social influence and situational variables as co-determinants of behavior. See Kegan & Lahey, *supra* note 18, at 17-18.
- 72 “Mental complexity” is the move from an egocentric understanding of the world to a “more penetrating, more responsible, less egocentric grasp of reality.” Id. at xiii, 13-14.
- 73 See Lisa Lahey, Emily Souvaine, Robert Kegan, Robert Goodman & Sally Felix, A Guide to the Subject Object Interview: Its Administration and Interpretation 14-16 (1988) [hereinafter Subject Object Interview].
- 74 See Kegan, *supra* note 1, at 29-31, 314-15; see also Kegan & Lahey, *supra* note 18, at 16-20.
- 75 Stage 1 is omitted, as this is early childhood and not relevant to the present study. Stage 2, while it occurs primarily in adolescence, can continue well into one's twenties, and empirical research finds it common in professions education. Monson and Hamilton found Stage 3 the modal stage among entering law students. See Monson & Hamilton, Entering, *supra* note 22, at 388; Monson & Hamilton, (Trans)formation, *supra* note 22.
- 76 See Kegan, *supra* note 1, at 29.
- 77 Kegan & Lahey, *supra* note 18, at 17.
- 78 Id.

79 Id. at 17-19.

80 Id. at 17, 19-20.

81 Id. at 21.

82 Id. at 19-20.

83 The word “formation” has dual roots in the paradigm of human developmental psychology, which views the mind as an organism capable of growth with age and with experiences that nurture potential; and in education in the professions, including lawyers, clergy, engineers, physicians, and nurses. The use of the term implies a parallel process of developing professional knowledge and skills along with moral development. An opposing viewpoint is that the mind is shaped through learning acquired through instruction of knowledge or skills, and that this ability naturally varies in the population in the same way variation in height and weight occurs, and this potential is reached at the point of physical maturation. More recent theories of human potential, including moral formation, emphasize the potential for growth or “formation” to occur throughout the lifespan. Thus, “formation” is conceived in this literature as growth of the mind’s capacities, not as acquiring surface layer “skills” through learning based on punishment or reward. For a concise review of the term “formation” and its history, see Michael W. Rabow et al., *Professional Formation: Extending Medicine’s Lineage of Service into the Next Century*, 85 *Acad. Med.* 310, 310-17 (Feb. 2010). For an extensive review of lifespan developmental theory, see generally Kegan, *supra* note 18.

84 Neil Hamilton, *Foreword: The Formation of an Ethical Professional Identity in the Peer-Review Professions*, 5 *U. St. Thomas L.J.* 361, 361-63 (2008); Hamilton, *Assessing*, *supra* note 1, at 498.

85 Graduate medical education utilized the expert-novice approach to defining and assessing professionalism competencies, now part of a learning portfolio that tracks resident physicians’ milestones. See generally *The ACGME Learning Portfolio*, ACGME, [http://www.acgme.org/acWebsite/portfolio/learn\\_alp\\_aboutalp.asp#one](http://www.acgme.org/acWebsite/portfolio/learn_alp_aboutalp.asp#one) (last visited March 28, 2012). Defining professional competencies is also widely used in business and academe, and largely credited to a model developed by Hubert and Stuart Dreyfus. See generally, Stuart E. Dreyfus & Hubert L. Dreyfus, *A Five-Stage Model of the Mental Activities Involved in Directed Skill Acquisition* (1980); see also Bebeau, *Ethical Development*, *supra* note 5, at 390.

86 See Colby & Damon, *supra* note 41; see also Rule & Bebeau, *supra* note 45.

87 See Lapsley & Narvaez, *Social Cognitive Approach*, *supra* note 21.

88 David C. Leach, *Medical Professionalism and the Formation of Residents: A Journey Toward Authenticity*, 5 *U. St. Thomas L.J.* 512, 512 (2008); see also Leach, *supra* note 27.

89 This goal relates to the ABA’s urging for law schools to assess competencies. See Neil W. Hamilton & Verna Monson, *Legal Education’s Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student’s Professional Formation (Professionalism)*, 9 *U. St. Thomas L.J.* (forthcoming 2012) (manuscript 6), available at <http://ssrn.com/abstract=2004749>.

90 We modified the protocol slightly by using only five-word prompts and reducing the time from one hour or more to forty-five minutes. But see Subject Object Interview, *supra* note 73 (explaining that it is recommended to give ten words and the participant flexibility to choose words most relevant to them). We also added general interview questions related

to the meaning of professionalism and to self-perceptions of change over time. For details for using the Subject Object method, see generally *id.*

- 91 This line of questioning was related to perception of change over time and stems from lifespan development and professions education. We were influenced by Colby & Damon, *supra* note 41, at 321, and also in general, by Rule & Bebeau, *supra* note 45.
- 92 We reviewed word prompts recommended from Subject Object Interview, *supra* note 73, choosing the words “success,” “trust,” and “conflicts,” all standard in the Subject-Object Interview. Collaboratively, we chose additional words or phrases, including “crucibles or painful and difficult decisions” and “love.”
- 93 Participants were given ten to fifteen minutes to free-write on the cards, noting any problem, issue, or story that related to the word in relationship to professionalism, giving a total of thirty to thirty-five minutes for the interview. The overall interview was shortened to permit time to focus on our direct questions about professionalism.
- 94 Self-presentation effects or social desirability bias occurs when research participants respond in the way that places them in a more favorable or flattering light, and not disclosing their true opinion or private belief. See, e.g., Jessica Messner-Magnus et al., *Social Desirability: The Role of Over-Claiming, Self-Esteem, and Emotional Intelligence*, 48 *Psychol. Sci.* 336 (2006).
- 95 See *id.*
- 96 The importance of “insider” perspectives in social science research relates to the research effort's credibility perceived by members and the tacit understanding of the “culture” of law. These practices are common in interpretivist research, action research. See generally Matthew B. Miles & A. Michael Huberman, *Qualitative Data Analysis* (2d ed. 1994).
- 97 See Irving Seidman, *Interviewing as Qualitative Research: A Guide for Researchers in Education and the Social Sciences* 8, 63-64, 89 (2d ed. 1998).
- 98 The associations and award lists we used included: (1) Hennepin County Bar Association 2001 Pro Bono Publico Public Sector Award, (2) Minnesota State Bar Association Professional Excellence Award, and (3) Minnesota Women Lawyers Myra Bradwell Award. These three associations represent approximately 23,000 lawyers. All of these awards stem from a peer nomination process. An internal committee reviews nominees, selecting the final recipients. In order to judge the comparability between the organization's criteria for selection, we requested the criteria from the associations' administrative representatives. As of the date of this publication, this documentation has not been obtained.
- 99 We do not list the organizations because of our confidentiality agreement with participants.
- 100 The metropolitan area of Minneapolis-St Paul is home to sixteen Fortune 500 companies, including multinational corporations 3M, Cargill, Medtronic, and United Health, among others. See Minnesota Department of Employment and Economic Development, [http:// www.positivelyminnesota.com/Business/Locating\\_in\\_Minnesota/Major\\_Companies\\_Employers/Fortune\\_500\\_Companies.aspx](http://www.positivelyminnesota.com/Business/Locating_in_Minnesota/Major_Companies_Employers/Fortune_500_Companies.aspx) (last visited March 28, 2012). It is also considered a major midwestern financial center. *Id.*
- 101 Informed consent was obtained prior to the beginning of the interview. For detailed procedures using the SOI, see Subject Object Interview, *supra* note 73.

- 102 Cross-case analysis of interview data refers to the focus on unifying themes or concepts throughout the cases; alternatively, a case study approach would describe single cases or individuals in depth. See Miles & Huberman, *supra* note 96, at 174.
- 103 Dr. Monson is trained in the administration and analysis of the Subject-Object Interview and is presently seeking certification.
- 104 We plan future studies based on emerging themes within this dataset to include, at minimum, the impact of law firm culture on professionalism and in-depth case studies on leadership and professionalism.
- 105 The distinction between interviewee's "public voice" and "inner voice" is a distinction related to whether the interviewee's words can be judged as truthful. See Seidman, *supra* note 97, at 63.
- 106 The eleven original themes identified by Hamilton included: (1) continuous dynamic growth in understanding and internalizing the meaning of professionalism; (2) the internalized moral compass or core values of the lawyer; (3) the habits of reflection and learning from mistakes as an important element of dynamic growth in understanding; (4) counseling the client and giving independent judgment; (5) deep sense of commitment and responsibility toward others; (6) importance of firm or department culture and mentoring junior lawyers; (7) relationships built on trust and being trustworthy; (8) moral courage; (9) respect for other people, including kindness and humility; (10) internalized standard of excellence at the technical skills of lawyering; and (11) gender differences in terms of boundaries of role, and the critical importance of mentoring. Because of conceptual overlap in these categories, and the limitations of the scope of this Article to address fully each topic, we are focusing this Article on the set of themes respondents emphasized most.
- 107 Interview with Michael, in Minneapolis, Minn. (June 11, 2010).
- 108 *Id.*
- 109 *Id.*
- 110 Interview with Joe, in Minneapolis, Minn. (June 7, 2010).
- 111 Interview with Elizabeth, in Minneapolis, Minn. (May 26, 2010).
- 112 *Id.*
- 113 *Id.*
- 114 *Id.*
- 115 Interview with Alicia, in Minneapolis, Minn. (June 9, 2010).
- 116 *Id.*
- 117 *Id.*



- 118 There is a distinction between “retrospective self-assessment,” a technique used in medicine and medical education in measuring professional competence, and the methods of Colby and Damon and others, which are derived from idiographic traditions such as assisted autobiography. The latter align most closely to our philosophy and method for the present study. See Colby & Damon, *supra* note 41, at 322. A comprehensive review of the research in medical education shows only a limited correlation between self-assessment of competence and actual performance, with the most high performers underestimating and low performers overestimating their abilities. See David A. Davis et al., *Accuracy of Physician Self-Assessment Compared with Observed Measures of Competence: A Systematic Review*, 296 *J. Am. Med. Ass'n* 1094, 1094 (2006).
- 119 Interview with Elizabeth, *supra* note 111.
- 120 Interview with Martha, in Minneapolis, Minn. (June 11, 2010).
- 121 Interview with Lawrence, in Minneapolis, Minn. (June 10, 2010).
- 122 *Id.*
- 123 Interview with Catherine, in Minneapolis, Minn. (May 25, 2010).
- 124 Interview with Alfred, in Minneapolis, Minn. (Apr. 18, 2010).
- 125 Interview with Michael, *supra* note 107.
- 126 Interview with Carla, in Minneapolis, Minn. (May 24, 2010).
- 127 *Id.*
- 128 Interview with Joe, *supra* note 110.
- 129 Interview with Julia, in Minneapolis, Minn. (May 26, 2010).
- 130 Interview with Michael, *supra* note 107.
- 131 The term “structure” is differentiated from “content” in developmental psychological theory. “Structure” refers to the degree of complexity of consciousness. It is the “why” of the individual, not the “what.” Structure refers to one’s reasoning, motivations, assumptions, or intentions that can be held out for conscious examination. At earlier stages, one’s motivations and assumptions are unconscious or hidden; as growth in consciousness proceeds, individuals can consciously identify underlying motivations and assumptions. For example, if a participant expounds upon the importance of cross-cultural experiences, that fact alone is insufficient to classify the individual as stage 3 or 4. If the participant explains that cross-cultural experiences are expected by teachers or peers, then that likely reflects the indelibility of the socialized (stage 3) meaning making structure. On the other hand, if the explanation is that cross-cultural experiences are important because of how immersion in a diverse cultural experience resulted in a re-evaluation of life goals, then this reflects the meaning making structure of stage 4, with its new capacity to consciously reflect upon how one is constructing meaning. Stage 3 is “going along with” the crowd; stage 4 is holding out one’s rationale and motivations and consciously reflecting upon them. See generally Kegan, *supra* note 1, at 20-36.

- 132 Interview with Michael, *supra* note 107.
- 133 Interview with Joe, *supra* note 110.
- 134 Interview with Alicia, *supra* note 115.
- 135 Interview with Martha, *supra* note 120.
- 136 *Id.*
- 137 *Id.*
- 138 See Neil W. Hamilton, [Ethical Leadership in Professional Life](#), 6 *U. St. Thomas L.J.* 358, 387-93 (2009) [hereinafter Hamilton, *Ethical Leadership*]; see also Deborah L. Rhode, *Lawyers and Leadership*, 20 *Prof. Law.*, no.3, 2010 at 4.
- 139 Professionalism and leadership are likely overlapping concepts, with respect to interpersonal skills, communication, strategic thinking, and values of service to others. Our personal view of professionalism encompasses theories emphasizing humility, service, and interdependence over competition. See, e.g., Ronald A. Heifetz, *Leadership Without Easy Answers* 20 (1994). Professionalism and ethical leadership are overlapping concepts since the foundation of both in ethical professional identity and ethical leadership is a strong moral core or personal conscience. See Hamilton, *Ethical Leadership*, *supra* note 138, at 365-68, 396. We think a lawyer who seeks to be an ethical leader with clients or law firm colleagues will need to demonstrate a strong ethical professional identity.
- 140 See Monson & Hamilton, *Entering*, *supra* note 22; Monson & Hamilton, *(Trans)formation*, *supra* note 22.
- 141 For example, William Torbert's studies of CEOs and managers utilize Loevinger's Washington Sentence Completion Test, which measures epistemological development, a construct close to Kegan's notion of mental complexity. See Kegan & Lahey, *supra* note 18, at 27.
- 142 See Marcia B. Baxter Magolda, *Learning Partnerships Model: A Framework for Promoting Self Authorship*, in *Learning Partnerships: Theory and Models of Practice to Educate for Self-Authorship* 37-62 (Marcia B. Baxter Magolda & Patricia M. King eds., 2004).
- 143 Open nomination processes for exemplar studies were used in Colby and Damon's study of exemplars, and Rule and Bebeau's study of dental exemplars. See Colby & Damon, *supra* note 41, at 25; see Rule & Bebeau, *supra* note 45.
- 144 Proponents of empirical studies aimed at objectively estimating the parameters of a population might criticize our methodology as subjective and biased. Self-report questions from surveys, however, are also subject to numerous forms of bias, and although scales might yield important information, quantitatively, given the complexity of the topic, and the nature of human beings, an approach that seeks in-depth understanding, from the perspectives of participants, is more useful. Readers interested in the philosophical and the methodological underpinnings of our study should refer to Colby & Damon, *supra* note 41, at 322-23. For readers concerned we might be embracing a postmodernist view that there is no objective, discoverable "truth" about professionalism, see Robert Kegan's discussion of postmodernism, in which he discusses the idea of "reconstructive postmodernism"--the concept that multiple truths may arise in our interviews or discussions with individuals, but that through dialog and synthesis of different positions, a new "truth" can be constructed. See Kegan, *supra* note 1, at 329. For a more general discussion about the nature of positivistic and naturalistic research paradigms, see Miles & Huberman, *supra* note 96, at 4-7.

- 145 Miles & Huberman stated, in 1994, “[t]he paradigms for conducting social research seem to be shifting beneath our feet, and an increasing number of researchers now see the world with more pragmatic, ecumenical eyes.” Miles & Huberman, *supra* note 96, at 5. However, the appeal of quantitative, test-based approaches to studying human abilities, in education and organizations, remains a societal bias, and is reflected by approaches such as “No Child Left Behind,” or in policies that require experimental methods to “prove” the effectiveness of a program. For human abilities that are complex, holistic methodological approaches are needed, both to study the phenomenon of interest and to promote development. See Hamilton & Monson, *Skeptics*, *supra* note 10, at 3-6, for a discussion of how a bias in favor of a quantitative paradigm is inadequate for assessment and development of complex abilities such as professionalism and moral development.
- 146 See generally Hamilton & Monson, *supra* note 89. See also Verna Monson, *Group Learning in Law Schools: A Key to Fostering Professional Formation* (Mar. 23, 2012), available at SSRN, <http://ssrn.com/abstract=2021455>.
- 147 The literature in medical education is especially informative about the concepts and processes of defining and measuring professional competencies. See Ronald M. Epstein, & Edward M. Hundert, *Defining and Assessing Professional Competence*, 287 *J. Am. Med. Ass'n* 226 (Jan. 2002); see also David C. Leach, *Competence Is a Habit*, 287 *J. Am. Med. Ass'n* 243 (Jan. 2002).
- 148 This is a strategic difference compared to other methodologies from industrial-organizational or clinical psychology that employ off-the-shelf tests of constructs associated with professionalism, with a similar purpose of defining competencies (i.e., knowledge, skills, and abilities). With these methods, the possibility exists that more advanced levels of competencies in character will go undetected (i.e., transformational professionalism). The resulting narrowed range of competencies means that the highest level of character development related to professionalism might not be articulated, thus missing an important opportunity to raise standards by providing key role models of exemplary professionalism. See Marjorie M. Shultz & Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering* 3 (2008). Shultz and Zedeck's work is critically important with respect to determining if an alternative law school entrance exam has improved predictive validity over current assessments; our point is not to criticize their effort, but to point out that the development of complex moral capacities is better accomplished with assessments that are formative, giving developmental feedback to foster growth. This suggestion is a central one from scholars of change in legal education practices. See, e.g., Hamilton, *Assessing*, *supra* note 1; Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* 26-27 (2007).
- 149 *Educating Physicians*, *supra* note 1, at 41.
- 150 See Hamilton & Monson, *supra* note 89.
- 151 Kegan & Lahey, *supra* note 18, at 54.
- 152 *Id.*
- 153 See McGowan et al., *supra* note 14, at 5.
- 154 Muriel J. Bebeau & Philip Lewis, *Manual for Assessing and Promoting Identity Formation* 117-20 app. B (2004).
- 155 See Hamilton & Monson, *Empirical Relationship*, *supra* note 1.
- 156 This table is a modification of one included in Monson & Hamilton, *(Trans)formation*, *supra* note 22.

157 Adapted from Bebeau & Lewis, *supra* note 153, at 111-13. For further in-depth discussion of language and constructive developmental viewpoints, see generally Robert Kegan & Lisa Laskow Lahey, *How the Way We Talk Can Change the Way We Work: Seven Languages for Transformation* 7-10 (2001).

52 SANCLR 921

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