

Professional Lawyer  
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Feature

**\*4 PROFESSIONALISM CLEARLY DEFINED**

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ETH -- Ethics &amp; Conflicts of Interest

**Introduction**

A critical question for the legal profession is whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals. Take a moment and answer the question for yourself. The 2007 Carnegie Foundation for the Advancement of Teaching's substantial study, *Educating Lawyers: Preparation for the Practice of Law*, finds that legal education and the profession itself could do substantially better at socializing students into an ethical professional identity. [FN1]

Since the mid-1980s, the concept of “professionalism” has been the focal point for the organized bar's debate whether the profession is adequately renewing its public purpose, core values, and ideals in each generation of lawyers. [FN2] A significant theme in the early debates on professionalism was that recent trends in the profession had undermined some of the core values and ideals evident in the practicing bar in earlier periods of the profession's history. [FN3] The ABA's 1996 Haynsworth Report noted particularly “the loss of an understanding of the practice of law as a calling” and “the loss of civility.” [FN4] “Professionalism” for many lawyers has meant the bench and bar's response to these perceived losses in recent decades and the consequent loss of public standing. [FN5]

Arguments by generations of lawyers who graduated prior to the 1980s that ethics were higher and lawyer conduct more civil earlier in their careers, while understandable, are subject to the charge that such an “ethical golden age” did not exist, and in fact there were serious ethical problems of scoundrels, discrimination, and lack of diversity in the earlier time period. Claims of more ethical conduct or more civility in earlier periods are difficult to test empirically.

Moreover, debates over the comparative ethics of different generations of lawyers are not useful. The critical question at any point in the legal profession's history is not whether the profession had more civility or a deeper sense of calling at an earlier period. The critical question is whether the profession and each individual lawyer can do better than they are doing today in realizing the profession's public purpose, core values, and ideals?

The concept of “professionalism,” separated from any type of argument that an earlier golden-age existed

when ethics were better, is extremely useful to answer this question. Professionalism describes the important elements of an ethical professional identity into which the profession should socialize both law students and practicing lawyers. This approach to professionalism connects the public purpose, core values, and ideals of the profession with the goal of fostering an ethical professional identity within each lawyer.

*Educating Lawyers: Preparation for the Profession of Law* points out that some legal educators separate the minimum rules of ethical conduct -- referred to as “the law of lawyering” including the professional rules and the law of malpractice -- from wider matters of morality -- referred to as “professionalism.” [FN6] The authors indicate that the important elements of an ethical professional identity into which the profession should socialize law students and the practicing bar include both minimum standards below which the profession imposes discipline, and much wider matters of professional morality beyond the minimum standards. [FN7]

Part I of this essay describes the social contract of the legal profession with society and why the professionalism of each lawyer is critical to fulfill that contract. Part II explores the definition of professionalism currently in the scholarly literature, concluding that there is substantial lack of clarity and agreement regarding the term. Part III argues that a clear definition of professionalism is important, and Part IV closely analyzes the major statements of the bench and bar on professionalism to identify the key principles that define the concept. Part V, using the statements of the bench and bar about professionalism, synthesizes a clear and succinct definition of the term.

Part V puts personal conscience in a professional context as the foundation of professionalism and includes also in the definition that each lawyer should engage in a continuing reflective engagement, over a career, on the relative importance of income and wealth in light of the other principles of professionalism. These are controversial proposals that need reflection and debate, but reflection and debate are at the heart of renewing professionalism in each generation of lawyers.

## **I. The Legal Profession's Social Contract and Professionalism**

Since the late 1800s, the peer-review professions in the United States, including the legal profession, have gradually worked out stable social contracts with the public in both custom and law. [FN8] The public grants a profession autonomy to regulate itself through peer review, expecting the profession's members to control entry into and continued membership in the profession, to set standards for how individual professionals perform their work so that it serves the \*5 public good in the area of the profession's responsibility, and to foster the core values and ideals of the profession.

In return, each member of the profession and the profession as a whole agree to meet certain correlative duties to the public: to maintain high standards of minimum competence and ethical conduct to serve the public purpose of the profession and to discipline those who fail to meet these standards; to promote the core values and ideals of the profession; and to restrain self-interest to some degree to serve the public purpose of the profession. [FN9] The term “professionalism” -- the important elements of an ethical professional identity into which the profession should socialize students and practicing professionals - captures the correlative duties of the profession's social contract for each individual professional. [FN10]

A peer-review profession's ability to regulate itself translates into substantial autonomy and discretion for individual professionals. Peers practicing in the profession understand the complexity of the practice and protect a wide range of “judgment calls” as competent and ethical within the professional tradition. [FN11] In addition, in

the case of the legal profession, a lawyer's work representing a client requires a high degree of autonomy. Independent judgment in counseling and serving a client is a core value of the profession. [FN12]

Of course, professions can be structured according to different models to maximize benefits to society. In a purely market-competition model, society would view the members of the peer-review professions no differently than individuals in other occupations in terms of their dedication to self-interest. Society would subject the peer-review professions to the same combination of market competitive pressure and government regulation to protect the public as other occupations. In this purely market-competition model, the peer-review professions would lose peer review. They would no longer be permitted to set rules for, discipline, or license members of the professions or otherwise restrict entry into the professions.

Over the course of more than a century, the major peer-review professions have convinced the public that the social contract of these professions provides more benefits to the public than a purely market-competition model. However these social contracts are premised on the public's trust that a profession and its individual members are serious about professionalism. The public must trust that the profession will renew the social contract in each generation of the profession by socializing each new entrant into the important elements of an ethical professional identity.

High degrees of professionalism build confidence in the social contract. Failures of professionalism undermine the social contract. [FN13] These social contracts are always subject to renegotiation. After the failure of the accounting profession (particularly Arthur Andersen) to fulfill its social contract as an effective gatekeeper exercising its independent judgment to protect the public in recent corporate scandals, the public, acting through Congress with the Sarbanes-Oxley Act, redesigned the accounting profession's social contract to reduce significantly the profession's peer-review authority and autonomy. [FN14] The same legislation and subsequent Securities and Exchange Commission regulations sent a shot across the bow of the legal profession by substituting legislation and federal regulation requiring "up the ladder" reporting for what had been the profession's Model Rule 1.13. [FN15]

Paragraphs 10-12 of the Preamble to the ABA Model Rules of Professional Conduct state the social contract for the legal profession. Paragraph 10 provides "The legal profession is largely self-governing," with unique responsibilities "because of the close relationship between the profession and the processes of government and law enforcement." [FN16] The legal profession is the only peer-review profession whose members control one branch of government. Paragraph 11 states "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." [FN17] Paragraph 12 adds "The legal profession's relative autonomy carries with it special responsibilities of self-government .... Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." [FN18]

## II. The Definition of Professionalism in Legal Scholarship

Although professionalism is a highly useful term to describe the important elements of an ethical professional identity, scholars so far have been unable to construct and agree upon a widely-accepted clear and succinct definition of "professionalism." [FN19]

Legal scholarship regarding professionalism comes in three typical varieties. One brand discusses professionalism with no attempt to affirmatively state a definition of the concept itself. In these articles, the definition of professionalism is either assumed to be self-evident [FN20] or meant to be implicitly understood within the

context of the article's main focus. For example, this brand of legal scholarship often asserts that “professionalism” is in decline, while providing evidence of growing incivility among lawyers, increased legal malpractice actions and greater focus on profit and personal gain in the practice of law. [FN21] The suggestion then is that professionalism itself is principally high competence and civility within the practicing bar, including also a commitment to serve the public rather than self-interest. Commonly, this type of article does not provide the legal community with a positive working definition of “professionalism,” rather it describes problems in the profession and equates these problems with a *lack* of professionalism. [FN22]

The second variety of scholarship on professionalism does attempt to define the term by focusing on one or more characteristics that are the “core” of professionalism. Examples include a focus on professionalism as (1) a set of core values, [FN23] (2) professional standards created by the ABA, [FN24] (3) a commitment to public service, [FN25] (4) client-oriented service, [FN26] or (5) individual morality and respect for the human beings and the community the lawyers serve. [FN27] Finally a third brand of scholarship simply dismisses “professionalism” as a misguided concept. [FN28]

### **\*6 III. Why a Clear Definition of Professionalism is Important**

It is extremely useful to define clearly and succinctly the major elements of an ethical professional identity for the following reasons:

1. Without the guidance of clear principles of professionalism, the profession's current socialization of law students and practicing lawyers excessively emphasizes just the law of lawyering defined as the professional rules and the law of malpractice.
2. If the floor of the law of lawyering is the dominant focus of the socialization of the profession, then members of the profession will tend to understand ethical professional identity as simply compliance with the rules and avoidance of malpractice. For the vast spectrum of lawyer decisions with ethical dimensions beyond simple rule compliance or malpractice avoidance, extrinsic values relating to ranking systems of grades, income, or prestige will tend to dominate lawyer decision making rather than intrinsic values relating to the principles of professionalism. [FN29]
3. Confusion about the meaning of professionalism undermines the public's trust that the profession and each individual lawyer are serious about meeting their obligations under the social contract. A clear and succinct definition helps the public understand what goals the profession is trying to achieve with the socialization of its members.
4. Confusion about the meaning of professionalism much reduces the possibility that the concept will actually influence law student or lawyer conduct. Students and practicing lawyers will give more attention and energy to clear expectations that are clearly stated and rigorously evaluated.
5. With a clear definition of professionalism, legal education and the bar could move toward assessment of which pedagogies are most effective to help students and practicing lawyers to internalize and live the elements of the definition.
6. Assessment of professionalism in general, whether directed at effectiveness of instruction or whether individual members of the profession are internalizing and living the elements of the definition,

will give the profession more credibility with the public.

#### **IV. Professionalism Defined in the ABA and Conference of Chief Justice Reports and the Preamble to the ABA Model Rules**

Over the past quarter century, the major reports of both the ABA and the Conference of Chief Justices on professionalism and the values of the profession as well as the Preamble to the Model Rules have stated the major elements of an ethical professional identity including the correlative duties of the social contract for each lawyer.

##### **A. The Stanley Commission Report**

The ABA formed the Stanley Commission in the mid-1980s in light of the growing concern of bar leaders, judges and lawyers both that the profession was moving “away from the principles of professionalism,” and that this shift in professionalism was “so perceived by the public.” [FN30] The Stanley Commission Report adopts a definition of professionalism that former Harvard Dean Roscoe Pound first penned in 1953:

The term refers to a group ... pursuing a learned art as a common calling in the spirit of public service -- no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. [FN31]

The Stanley Commission also included traits that distinguish a profession from other occupations. A profession is:

An occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions: (1) That its practice requires substantial intellectual training and the use of complex judgments; (2) That since clients cannot adequately evaluate the quality of the service, they must trust those they consult; (3) That the client's trust presupposes that the practitioner's self-interest is over-balanced by devotion to serving both the client's interest and the public good; and (4) That the occupation is self-regulating--that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest. [FN32]

##### **B. The MacCrate Report**

The 1992 ABA MacCrate Report adds to the understanding of professionalism through a focus on professional skills and professional values. [FN33] The report includes both a Statement of Fundamental Lawyering Skills and a Statement of Fundamental Values of the Profession. The Fundamental Lawyering Skills include:

1. Problem Solving;
2. Legal Analysis and Reasoning;
3. Legal Research;
4. Factual Investigation;

5. Communication (oral and written);
6. Counseling;
7. Negotiation;
8. Litigation and ADR Procedures;
9. Organization and Management of Legal Work; and
10. Recognizing and Resolving Ethical Dilemmas (principally focused on the Rules of Professional Conduct). [\[FN34\]](#)

The four Fundamental Values of the Profession are:

1. Providing Competent Representation;
- \*7 2. Striving to Promote Justice, Fairness and Morality (including pro bono service to the disadvantaged);
3. Striving to Improve the Profession; and
4. Undertaking Professional Self-development. [\[FN35\]](#)

### **C. The Haynsworth Report**

In the mid-1990s, the ABA built on the Stanley Commission Report and the MacCrate Report with the 1996 Haynsworth Report to “better inculcate a higher sense of professionalism among American lawyers.” [\[FN36\]](#) The Haynsworth Report's definition of professionalism particularizes Pound's 1953 definition to the specific context of the legal profession:

A professional lawyer is an expert in law pursuing a learned art in service to clients and in the spirit of public service; and engaging in these pursuits as part of a common calling to promote justice and public good. [\[FN37\]](#)

In addition to the definition, the Report includes lists of essential characteristics of the professional lawyer and supportive elements.

The essential characteristics of the professional lawyer are: (1) learned knowledge; (2) skill in applying the applicable law to the factual context; (3) thoroughness of preparation; (4) practical and prudential wisdom; (5) ethical conduct and integrity; and (6) dedication to justice and the public good.

Supportive elements include: (1) formal training and licensing; (2) maintenance of competence; (3) zealous and diligent representation of clients' interests within the bounds of law; (4) appropriate deportment and civility; (5) economic temperance; (6) subordination of personal interests and viewpoints to the interests of clients and the public good; (7) autonomy; (8) self-regulation; (9) membership in one or more professional organizations; (10) cost-effective legal services; (11) capacity for self-scrutiny and for moral dialogue with clients and other individuals involved in the justice system; and (12) a client-centered approach to the lawyer-client relationship which stresses trust, compassion, respect, and empowerment of

the client. [FN38]

#### **D. The Conference of Chief Justices' National Action Plan on Lawyer Conduct and Professionalism**

Despite the efforts of the ABA in 1986, 1992, and 1996, concerns about a perceived decline in lawyer professionalism and the decline's effect on public confidence in the legal profession and the justice system remained. In response to the continuing concerns, the Conference of Chief Justices (CCJ) adopted the National Action Plan on Lawyer Conduct and Professionalism in January of 1999. [FN39] The CCJ's National Action Plan defines professionalism with an aspirational focus.

“Professionalism is a much broader concept than legal ethics. For the purposes of this report, professionalism includes not only civility among members of the bench and bar, but also competence, integrity, respect for the rule of law, participation in pro bono and community service, and conduct by members of the legal profession that exceeds minimum ethical requirements. Ethics rules are what a lawyer must obey. Principles of professionalism are what a lawyer should live by in conducting his or her affairs. Unlike disciplinary rules that can be implemented and enforced, professionalism is a personal characteristic. The bench and the bar can create an environment in which professionalism can flourish, and these recommendations are intended to assist in that endeavor. But it is the responsibility of individual judges and lawyers to demonstrate this characteristic in the performance of their professional and personal activities.” [FN40]

The Action Plan emphasizes the role of personal conscience in achieving professionalism. “Professionalism ultimately is a personal, not an institutional characteristic .... No disciplinary system can enforce professionalism and no amount of exhortation by judges and bar leaders can instill it where it does not already exist. The vast majority of lawyers possess this characteristic to some degree or another. But far too many have allowed their sense of professionalism to become dormant. The institutional framework of the legal community can create a climate in which professionalism can flourish, but individual lawyers must be the ones to cultivate this characteristic in themselves.” [FN41]

The Action Plan also emphasizes the importance of peer-review and the responsibility of all lawyers “not to tolerate unethical or unprofessional conduct by their fellow lawyers.” [FN42] Last the Action Plan asks each lawyer “to exemplify the ideal of the lawyer-statesman -- that is, a professional who devotes his or her judgment and expertise to serving the public good, particularly through participation in pro bono and community service activities.” [FN43]

#### **E. The Preamble to the ABA Model Rules of Professional Conduct**

The Preamble to the ABA Model Rules of Professional Conduct provides additional insight on the meaning and scope of professionalism for lawyers. [FN44] The Preamble implicitly defines professionalism by stating several important elements of an ethical professional identity.

The Preamble's implicit definition flows from a number of paragraphs. Paragraph 1 asks each lawyer, as a member of the legal profession, to hold in proper tension sometimes conflicting roles as “a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” [FN45] Paragraph 4 requires that a lawyer, in all professional functions, should be “competent, prompt, and diligent.” [FN46] Paragraph 6 urges each lawyer to do public service to improve justice, specifically “to seek im-



provement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession .... [A]ll lawyers should devote professional\*8 time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.” [FN47]

Paragraph 7 of the Preamble stresses that a lawyer must (1) meet the minimum standards set by the Rules and other law, (2) strive to attain the highest level of skill, and (3) exemplify the profession's ideals of public service. It also emphasizes the role of each lawyer's personal conscience and the importance of healthy peer collegia (ethical peer cultures) in realizing these three goals, [FN48] stating:

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service. [FN49]

Paragraph 9 of the Preamble points out “[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living .... Such issues must be resolved through the exercise of sensitive professional and moral judgment ....” [FN50]

As discussed earlier, paragraphs 10 to 12 of the Preamble outline the social contract among the members of the legal profession and society whereby the society grants lawyers autonomy to govern themselves, and, in return, the members of the profession agree to meet correlative personal and collegial peer-review duties to the society. [FN51] Paragraph 12 specifically states “a lawyer is responsible for observance of the Rules of Professional Conduct” and “a lawyer should also aid in securing their observance [of the Rules] by other lawyers.” It ends with the caution that “neglect of these responsibilities compromises the independence of the profession and the public interest it serves.” [FN52]

All these paragraphs of the Preamble taken together implicitly define the elements of an ethical professional identity by calling on each lawyer to do the following:

- (1) to comply with the *ethics of duty* -- the minimum standards of competency and ethical conduct set forth in the Rules of Professional Conduct; [FN53]
- (2) to encourage other lawyers to be accountable for compliance with the Rules and ultimately to hold them accountable;
- (3) to foster in him or herself and other lawyers the *ethics of aspiration* -- the core values and ideals of the profession, including internalizing the highest standards for the lawyer's professional skills and ethical conduct. [FN54]
- (4) to be guided also by personal conscience;
- (5) to do public service to improve justice, particularly to provide service to the disadvantaged; and
- (6) to hold in proper tension the lawyer's roles as a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

## V. Professionalism Clearly Defined

The three ABA reports, the CCJ National Action Plan, and the Preamble to the Model Rules all state prin-



ciples of professionalism including the correlative duties of each lawyer under the social contract. I synthesize these common principles below in a clear and succinct list and then provide additional explanation for each listed principle.

### **A. Five Principles of Professionalism**

In my synthesis of the major ABA reports, the Conference of Chief Justices National Action Plan and the Preamble to the Model Rules of Professional Conduct, professionalism means that each lawyer:

- 1. Continues to grow in personal conscience over his or her career; [FN55]**
- 2. Agrees to comply with the ethics of duty -- the minimum standards for the lawyer's professional skills and ethical conduct set by the Rules, [FN56]**
- 3. Strives to realize, over a career, the ethics of aspiration -- the core values and ideals of the profession including internalizing the highest standards for the lawyer's professional skills and ethical conduct; [FN57]**
- 4. Agrees both to hold other lawyers accountable for meeting the minimum standards set forth in the Rules and to encourage them to realize core values and ideals of the profession; [FN58] and**
- 5. Agrees to act as a fiduciary where his or her self-interest is overbalanced by devotion to serving the client and the public good in the profession's area of responsibility: justice. [FN59]**
  - a. Devotes professional time to serve the public good, particularly by representing pro bono clients; [FN60] and**
  - b. Undertakes a continuing reflective engagement, over a career, on the relative importance of income and wealth in light of the other principles of professionalism. [FN61]**

### **B. Further Analysis of the Principles**

#### **1. Personal Conscience**

Personal conscience, the first principle of professionalism, is an awareness of the moral goodness or blameworthiness of one's own intentions and conduct together with a feeling of obligation to be and to do what is morally good. [FN62] Personal conscience in this definition includes (1) awareness that the person's conduct is having an effect on others, (2) a reasoning process to determine the moral goodness or blameworthiness of the person's intentions or conduct, and (3) a sense of \*9 obligation to be and to do what is morally good.

Personal conscience is the foundation on which a law student or practicing lawyer builds an ethical professional identity. Without this foundation, the remaining four principles of professionalism will collapse into a calculus of simple self-interest, including gaming the Rules of Professional Conduct themselves for self-advantage.

#### **a. The Importance of Self-Scrutiny and Feedback from Others**

The MacCrate and the Haynsworth Reports and the CCJ National Action Plan note the importance over a career of self-scrutiny along with feedback from and moral dialogue with others to contribute to a lawyer's professional growth. [FN63] The skills of self-reflection, feedback and moral dialogue help a lawyer to learn from mistakes and to improve professional skills generally. These skills contribute partic-

ularly to growth in personal conscience in terms of awareness of impacts of conduct on others, the formation of first ethical principles, and a sense of obligation to live the law student's or lawyer's ethical principles.

#### **b. The Four Component Model and Personal Conscience**

Moral psychology also offers a useful analytical framework with which to explore and understand personal conscience. Personal conscience involves awareness of a moral issue, a reasoning process to determine the moral goodness or blameworthiness of alternative courses of conduct, and a sense of obligation to do what is morally good. Similarly the moral psychology literature starts with the question, “what must we suppose happens psychologically in order for moral behavior to take place?” Morality in this meaning focuses on the social condition that humans live in groups and what one person does can affect others. [FN64] In light of our understanding that what one person does can affect others, morality asks what do we owe others? What are our duties to them? What rights can they claim? Scholars posit that four distinct capacities, called the Four Component Model, [FN65] are necessary in order for moral behavior to occur:

1. Moral Sensitivity. “Moral sensitivity is the awareness of how an individual's actions affect other people. It involves being aware of different possible lines of action and how each line of action could affect the parties concerned. It involves imaginatively constructing possible scenarios and knowing cause-consequence chains of events in the real world; it involves empathy and role-taking skills.” [FN66] Moral sensitivity requires the understanding of one's own intuitions and emotional reactions. [FN67]

2. Moral Judgment. “Once the person is aware of possible lines of action and how people would be affected by each line of action (Component 1), then Component 2 judges which line of action is more morally justifiable - which alternative is just, or right.” [FN68] It involves deliberation regarding the various considerations relevant to different courses of action and making a judgment regarding which of the available actions would be most morally justifiable. It entails integrating both shared moral norms and individual moral principles. [FN69]

Shared moral norms and an individual's moral principles -- what philosophy calls normative ethics [FN70] -- flow from one of two general sources. A rational approach uses analysis and logic in any situation to reason out right conduct from a set of first ethical principles. This “ethics of principle” approach can be derived from (1) faith or religious teachings, (2) cultural norms, or (3) moral philosophy like Kant's categorical imperative or Mills's utilitarianism. A second general source emphasizes the virtues and good habits of character in any situation and is more intuitive about the right conduct that a virtue or habit of character demands in the situation. Some people using this “ethics of character” approach find the relevant virtues or habits of character in faith or religious teachings. Others look to moral philosophy or cultural norms. [FN71]

3. Moral Motivation and Commitment. Moral motivation and commitment have “to do with the importance given to moral values in competition with other values. Deficiencies in Component 3 occur when a person is not sufficiently motivated to put moral values higher than other values -- when other values such as self-actualization or protecting one's organization replace concern for doing what is right.” [FN72]

It is not only competing values that can halt moral action at this point, but competing drives and emotional states. For example, if someone must choose between having a steady paycheck to ensure her family has food on the table, with acting on her moral values, the drive to care for basic needs may override all else.

Current research is utilizing theories of professional identity development when discussing moral motivation and commitment. Professional identity development is particularly useful in explaining how a professional's conception of the self in relation to other people changes over time as the individual matures. "Our recent explorations into the development of the moral self illustrate how a young professional makes meaning of professional values and expectations. Entering professional school student conception of a professional identity is distinctly different from how moral exemplars understand professional identity and is profoundly influenced by his or her stage of identity development. Development evidence indicates that individuals move from self-centered conceptions of identity through a number of transitions, to a moral identity characterized by the expectations of a profession -- to put the interests of others before the self, or to subordinate one's own ambitions to the service of society or the nation. The fully integrated moral self (one whose personal and professional values are fully integrated and consistently applied) tends not to develop until mid-life -- if it develops at all. On the other hand, what seems to distinguish moral exemplars and sets them apart from ordinary good people is a kind of unity of self with moral concerns ...." [FN73]

4. Moral Character and Implementation. "This component involves ego strength, perseverance, backbone, toughness,\*10 strength of conviction, and courage. A person may be morally sensitive, may make good moral judgments, and may place a high priority on moral values, but if the person wilts under pressure, is easily distracted or discouraged, is a wimp and weak-willed, then moral failure occurs because of deficiency in Component 4 (weak character)." [FN74] Problem-solving skills including figuring out the necessary sequence of concrete actions and working around impediments and unexpected difficulties as well as interpersonal skills are important. Component 4 includes the knowledge, skills and abilities to manage conflicts, communicate effectively and minimize polarization. [FN75]

Lawrence Walker notes that, "Moral failure can be a consequence of a deficiency in any component: being blind to the moral issues in a situation, being unable to formulate a morally defensible position, failing to accord priority to moral concerns, or being unable or unwilling to implement action." [FN76] It is important therefore to attend to development of all four components.

A focus on fostering growth in personal conscience as understood in the context of the Four Component Model would mean engaging students and lawyers to develop in each of the four components. Education on professionalism would look to what the moral psychology literature has to offer on effective pedagogies and assessment tools for each component.

### **c. The Relationship between Personal Conscience and the Other Four Principles of Professionalism**

The relationship between the first principle of professionalism -- growth in personal conscience over a career -- and the other four principles is synergistic. For example personal growth in either the skill of self-scrutiny and encouragement of feedback from others or any of the capacities in the Four Component Model should help a law student or practicing lawyer grow in capability on any of the other four principles of professionalism. In addition as a lawyer grows in these dimensions of personal conscience, the lawyer is also a better counselor to help a client. A fully developed lawyer can help the client think through the situation from the client's shoes wherever that client is in terms of the skills and capacities of moral decision making. [FN77]

Similarly as a law student or lawyer over a career internalizes professionalism principles 2 through 5, he or she also is forming new dimensions and capacities of personal conscience. A lawyer fully integrated into an ethical professional identity has one conscience, but that conscience now includes capacities of awareness, reason-

ing and motivation regarding moral goodness or blameworthiness in both personal and professional contexts. When the lawyer is acting in a professional context, the personal conscience of the professional is embedded in an appropriate professional framework.

A different but related line of analysis separates “personal conscience” from “professional conscience.” The latter, Professors Fred Zacharias and Bruce Green argue, “embodies professional norms that derive loosely from the lawyer's professional relationship to the court, which is itself committed to promoting justice. The norms have not necessarily been expressed in the law; they are transmitted through professional socialization.” [FN78] Zacharias and Green argue that lawyers should rely on professional conscience in making some types of discretionary decisions under the law of lawyering.

The current disciplinary codes, Zacharias and Green point out, “identify two very different kinds of discretionary activity: (1) activity involving professional conscience, in which discretion should be exercised with a view to implementing appropriately the multiple interests and values that the lawyer is obligated to serve, and (2) activity involving personal conscience, in which different lawyers will have different approaches because their individual consciences may emphasize different values. With respect to the first activity, there are often right and wrong answers, and lawyers should expect the possibility of judicial remediation or criticism if they respond inconsistently with the collective professional conscience.” [FN79] Zacharias and Green provide an example of professional conscience flowing from Model Rule 3.3(a)(3)'s grant of discretion to a lawyer whether to introduce testimony that the lawyer reasonably believes is false. They conclude a lawyer should not interpret this grant of discretion to adopt a policy in all cases that the lawyer will always introduce helpful testimony “unless he is certain that it is false.” [FN80] Rule 3.3(a)(3), they argue, is intended to draw upon a lawyer's professional conscience and requires a lawyer to make a considered decision in each case, balancing the impact on the client if the testimony is withheld with the likelihood the testimony is false and the impact of the testimony on the decision maker. [FN81] An example of personal conscience is the discretion under the Model Rule 1.16 that “a lawyer has discretion to refuse a case; [or] to withdraw if the client insists on pursuing a repugnant objective.” [FN82]

The concept of “professional conscience” is a step in the same direction as the internalization of professionalism principles 2 through 5 proposed in this essay, but principles 2 through 5 provide a clearer definition of the specific elements of an ethical professional identity. The separation of “personal conscience” and “professional conscience” also does not recognize the interrelationship and synergy between personal conscience and the other principles of professionalism. Professor Robert Kegan's theory of professional identity formation development articulates a progression from a personal conscience that is self-centered, to one that is fully integrated with the principles of the profession, and freely chosen. It is about self-authoring one's identity as a professional, and choosing the guiding values that are at the core of both personal and professional identity. [FN83] Most important, defining personal conscience separate from professional conscience will socialize law students and lawyers to live professional lives where personal conscience is relevant in only a small subset of professional decisions. Socialization where students and lawyers see that an ethical professional identity builds on and further develops the personal conscience they brought into the profession and are developing throughout life will take much greater advantage of both the existing personal moral development that a law student brings to legal education or the subsequent personal moral development\*11 of a practicing lawyer. For these reasons, “personal conscience” and “personal conscience in a professional context” seem more useful descriptive terms rather than “personal conscience” and “professional conscience.” [FN84]

The greatest concern about “personal conscience in a professional context” as the foundation of profession-

alism is the fear that a lawyer's personal conscience will limit client autonomy and client equal access to justice. [FN85] The lawyer's personal conscience will trump client choices that are lawful. The central point of "personal conscience in a professional context" is that the lawyer's personal conscience is now informed and guided also by the role morality of the lawyer's function in the justice system. That role morality calls on the lawyer who accepts a representation to honor principles of client autonomy and equal access to justice. In the counseling role, for example, the lawyer's duty is to help the client think through the client's best interests in the situation *from the client's shoes including the client's morality*. The lawyer is not to impose the lawyer's morality on the client. This duty includes fairly and completely presenting the law applicable to the client's situation. However a lawyer who develops over a career in any of the capacities of the Four Component Model should be a better counselor for all clients and should better understand adversaries. For example, a lawyer whose own moral reasoning is at an early stage of development will be limited in his or her ability to counsel a client who is at a more developed stage of moral reasoning. The lawyer simply will not understand the client well. If the reverse is true, the lawyer will understand the moral reasoning of the client and can help the client think through the client's best interests from the client's shoes.

## 2. The Ethics of Duty

The Scope Note for the Model Rules of Professional Conduct states "Some of the Rules are imperatives, cast in the terms of 'shall' and 'shall not.' These define proper conduct for purposes of professional discipline. Others, generally cast in the term 'may,' are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment .... The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role." [FN86] The ethics of duty -- the obligatory and disciplinary elements of the Rules -- state the minimum floor of competence and ethical conduct below which the profession will impose discipline. An ethical professional identity requires each law student and practicing lawyer to understand and internalize the ethics of duty.

## 3. The Ethics of Aspiration - the Core Values and Ideals of the Profession

The ethics of aspiration call on each law student and practicing lawyer, over the course of a career, both to internalize and to strive to realize the core values and ideals of the profession.

The core values and ideals of the profession are apparent in both the Model Rules of Professional Conduct and the ABA Reports and CCJ Action Plan on professionalism.

### a. The Core Values of the Profession

- Competent Representation Including Reasonable Diligence and Reasonable Communication with the Client [FN87]
- Loyalty to the Client [FN88]
- Confidentiality of Client Information [FN89]
- Zealous Advocacy on Behalf of the Client Constrained by the Officer of the Legal System Role [FN90]

- Independent Professional Judgment [FN91]
- Public Service to Improve the Quality of Justice, Particularly to Maintain and Improve the Quality of the Legal Profession and to Ensure Equal Access to the Justice System [FN92]
- Respect for The Legal System and All Persons Involved in the Legal System [FN93]

#### **b. Ideals of the Profession**

- Commitment to Seek and Realize Excellence at the Principles of Professionalism and the Core Values and Ideals of the Profession [FN94]
- Integrity [FN95]
- Honesty [FN96]
- Fairness [FN97]

#### **4. The Duty of Peer-Review**

In the initial 1908 ABA Canons of Professional Ethics, peer-review was a central theme. Canon 29 spoke forcefully on the duty of lawyers to “expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession.” [FN98] The 1969 Model Code of Professional Responsibility [FN99] and the 1983 Model Rules of Professional Conduct also emphasize the critical importance of effective peer-review. [FN100]

Model Rule 8.3 provides that “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.” [FN101] Comment 1 to the rule explains “Self-regulation of the legal profession requires that members of the profession initiate a disciplinary investigation when they know of a violation of the Rules of Professional Conduct.” [FN102] Model Rule 5.1 specifically addresses the responsibilities of a partner or supervisory lawyer. Under Rule 5.1(a), “A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable management authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” [FN103]

Peers in the legal profession can also bring to bear informal pressure on unethical conduct. There are many occasions\*12 in the legal profession where peers observe a lawyer's work. Parties almost always choose to be represented by lawyers when the context is litigation with anything significant at risk. Lawyers carry out this work subject to observation by both judges and the peers who oppose them, who can bring to bear informal pressure or make a formal complaint to disciplinary authorities regarding a violation of the code of ethics.

Charles Wolfram also notes “A lawyer who seriously offends against widely held professional norms faces unofficial but nonetheless powerful interdictions. Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutting off of valuable practice opportunities .... denial of access to centers

of power and prestige .... and preclusion from judicial posts.” [FN104] Judges, who are lawyers, observe and review lawyers' work in litigation and also have the power to impose sanctions through fee awards, contempt of court powers, and disqualification motions.

The Model Rules and the ABA Reports tend to focus on the requirement that peers report misconduct below the floor of the Rules. This is important, but the creation of strong ethical cultures emphasizing excellence at the skills, core values, and ideals of the profession is even more important. As the recent corporate scandals in corporations with well-drafted written ethics codes but corrupt cultures demonstrated, unethical culture will trump rules.

There is some literature suggesting that this model of peer review may be based on the false premise that a collegium will supervise itself. A collegium in reality may have a strong tendency to become a “delinquent community.” In *Doctoring Together: A Study of Professional Social Controls*, Eliot Freidson studied a large medical group in the United States to observe how the day-to-day work of doctoring was controlled by the physicians. The doctors formed what Freidson calls a collegium, which insisted that self-government was solely its own legitimate function, but which left “individuals free to work in their own ways within the very broad limits set by obvious unethicity or incompetence.” [FN105] Freidson found that the collegium consistently abdicated the role of exercising organized sanctions, permitting all but gross and obvious deviance in performance, so long as inter-collegial relations remained manageable. [FN106]

These rules of silent acquiescence in the face of professional misconduct were designed, in Freidson's analysis, to leave each member of the collegium a maximum amount of autonomy in work performance and behavior. To describe this collegium, Freidson borrows the term “delinquent community” from sociological studies of French school children and personnel in French bureaucracies. In “delinquent communities,” members show “a conspiracy of silence against superior authority ... in an effort to create for each member a zone of autonomy .... Any change that is apt to ... restrict the individual zones of autonomy in favor of a systematized and rational approach to the problem, will be resisted with all the strength the group can muster.” [FN107]

The origin of the delinquent community of physicians, Friedson argues, lies in its position of vulnerable privilege. During the past century physicians gained an effective occupational monopoly over practice, but the monopoly was vulnerable to possible imposition of external control. The collegium defended this privileged position by preventing the public from both learning of its occupational excesses and imposing external control over the individual zones of autonomy. [FN108]

Wolfram observes that “Probably no other professional requirement is as widely ignored by lawyers subject to it. Lawyer complaints form a relatively small percentage of the complaints received by lawyer discipline agencies.” [FN109] Our profession's social contract with society asks us to take responsibility for the ethics of other members of the profession. This requires small acts of courage to speak to each other directly. It requires the collegium to foster a peer culture of high aspirations and ideals. [FN110] If we do not do so, we become the delinquent community that Freidson predicts.

## **5. The Duty to Restrain Self-Interest to Some Degree to Serve the Client and the Public Purpose of the Profession**

The social contract of the peer-review professions with the public requires that each member of the profession restrain self-interest to some degree to serve the public purpose of the profession and the client. If members



of a peer-review profession seek self-advantage to the same degree as individuals in other occupations, then society has no reason to grant the profession authority to regulate itself [FN111] and society would regulate the peer-review professions like other occupations.

For the legal profession, in the words of the Stanley Commission, “the client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good.” [FN112] The public good served by the legal profession is justice. The peer-review professions have always been about making a satisfactory living in addition to serving the client's interest and the public good. For lawyers, the degree of “overbalancing” the client's interest and the public good of justice against the lawyer's own self-interest is a difficult question explored further in the discussion of Principle 5.b. below.

The common law of fiduciary duty regarding a lawyer's duties to clients developed prior to the drafting of the 1969 ABA Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct. A lawyer owes a client the fiduciary duties of safeguarding confidences and property, avoiding impermissible conflicts of interest, dealing honestly with the client, adequately informing the client, following the instructions of the client, and not employing adversely to the client powers arising from the attorney-client relationship. [FN113] This body of law calls on the lawyer to restrain self-interest similar to what the law of fiduciary duty requires of other agents in fiduciary relationships.

The social contract of the peer-review professions requires each member of the profession to restrain self-interest to some degree also to serve the public purpose of the profession. A fair analogy is that a lawyer is an agent and fiduciary not just for the client, but also for the legal system, the purpose of which is justice. The first sentence of the Preamble to the Model Rules in effect states this concept by providing that a lawyer is “a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” [FN114] In this meaning an officer holds a position of duty, trust or authority, and a lawyer does in fact both hold a position of trust conferred by the court and exercise authority on behalf of the court whose purpose is justice: “Both the client and the court are sources of the lawyer's authority to act as lawyer, the former being the source of the specific authority to act in a particular case and the latter the source of general authority to act in any case.” [FN115] The agent lawyer owes fiduciary duties to both the client and the court. Principle 5.a. below explores further this concept of a fiduciary duty to over-balance the lawyer's self interest with devotion to the public good of justice as an officer of the legal system and a public citizen having special responsibility for the quality of justice.

#### **a. The Duty to Give Professional Time to Serve the Public Good, Particularly Pro Bono Assistance to the Disadvantaged**

One of the core values of the profession discussed earlier is the duty to contribute public service to improve the quality of justice, particularly to maintain and improve the quality of the legal profession and to ensure equal access to justice. [FN116] Professionalism Principle 4 -- the duty of peer review -- assumes that each lawyer gives uncompensated time necessary to assist in both assuring that peers meet minimum professional standards and fostering ethical peer cultures of high ideals.

The tradition of the peer-review professions also includes a “to whom much is given, much is expected” duty to provide pro bono or low fee assistance to the disadvantaged. [FN117] This duty to provide pro bono or low fee assistance to the disadvantaged is uniquely compelling for the legal profession in comparison with the other peer-review professions. The moral justification for the work of the other peer-review professions depends

to a much lesser degree on the proper functioning of the system within which the work is done than is the case with the moral justification for the work of the legal profession. A physician for example can serve the major public purpose of the profession, the health of individual patients, without significant concern that others will be negatively affected except to the degree that costly procedures may reduce the amount of resources available to others. However a lawyer in litigation will serve the major public purpose of the profession, justice, only when the adversary system is working properly. The adversary system is the society's best approximation of justice only with (1) a competent neutral decision maker and (2) competent representation for all affected persons. Paragraph 8 of the Model Rules' Preamble recognizes this, "Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." [FN118]

Therefore to claim that the lawyer's work serves justice, each lawyer should seek to ensure that all affected persons are competently represented. Paragraph 6 of the Preamble urges each lawyer to "devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel." [FN119] Model Rule 6.1 specifically states, "Every lawyer has a professional responsibility to provide legal services to those unable to pay" with an aspirational standard of at least fifty pro bono hours a year. [FN120]

#### **b. The Duty to Reflect on How Much Is Enough**

A common failing of all the definitions of professionalism is that they do not address adequately on the business aspects of the profession that may create tension between a lawyer's personal goals of income and wealth and the correlative duties, core values and ideals of the profession. The Stanley Commission Report states "All segments of the bar should ... resist the temptation to make the acquisition of wealth a primary goal of law practice." [FN121] The MacCrate Report notes that since the 1970s, large law firms have become more "profit-oriented" resulting ultimately in a change in large-firm culture "from that of a restrained professional organization to that of a competitive, entrepreneurial enterprise." [FN122] However the MacCrate Report does not specifically recommend any strategy to address this increased emphasis on profit.

The Haynsworth Report lists "economic temperance" as a supportive element. [FN123] The Haynsworth Report's recommendations urge that, "In particular, the ethical and other problems created by excessive billable hour and income requirements should be more openly acknowledged and remedied." [FN124] The Model Rules' Preamble suggests some restraint on self-interest, noting that tension may exist between "a lawyer's responsibilities to clients, to the legal system, and the lawyer's own interest in remaining an ethical person while earning a satisfactory living." [FN125] Yet, the Preamble gives no guidance concerning what is a satisfactory living.

Lawyers properly celebrate the virtue of self-sufficiency -- making a living and supporting others -- but law is a peer-review profession whose tradition and social contract call for some meaningful restraint on self-interest to serve the profession's public purpose. This is the essence of the social contract that the legal profession and each lawyer have with society. [FN126]

What is the remedy? There is no number that defines a satisfactory living for each lawyer. As with all aspirational ideals, the best the profession can do is to ask and encourage each professional to give serious and continuing reflective thought to the issue of how much is enough? Professionalism requires each lawyer to undertake a continuing engagement, over a career, on the relative importance of income and wealth in light of the four other principles of professionalism.

**\*14** While two ABA professionalism reports and the Preamble raise the question how much is a satisfactory living, that question is actually part of a larger question posed by the steadily increasing time demands of professional life in our culture. The larger question is how much life energy should be devoted to meeting professional duties (including making a satisfactory living) in comparison with the life energy devoted to other duties as a parent, spouse, adult child in support of elderly parents, friend, contributing member of non-professional communities and a whole person with dimensions other than work? There is much discussion and some action in the legal profession concerning flexible time and other work arrangements that recognize the non-professional time demands of different life stages -- particularly the child-raising years of a career.

## 6. Conclusion

To maintain and strengthen the social contract on a continuing basis in each generation, the profession must socialize both law students and practicing lawyers into the principles of professionalism -- the important elements of an ethical professional identity. This is the critical task for legal education, law firms and departments, bar groups and the bench. It is the mandate of professionalism that keeps self-interest in check and builds both the public trust that the profession is fulfilling both the social contract and each client's trust that the lawyer is restraining self-interest to serve the client's interests. [FN127]

Professionalism is and must be much more than excellent technical competence and civility. It is the bridge from making a satisfactory living to purpose and meaning in the work of a lawyer. William Sullivan emphasizes "By taking responsibility through one's work for ends of social importance, an individual's skills and aspirations acquire value for others. Professionalism thereby forms a crucial link between the individual's struggle for freedom in a fulfilling existence and the needs of the larger society ...." [FN128] Professionalism is the bridge from self-interest to a calling where the lawyer's livelihood acquires meaning by serving the public purpose of justice which is central to a highly interdependent society.

It is a paradox that the professional autonomy of each lawyer to employ his or her human capital to substantial advantage and personal satisfaction depends on each individual lawyer's acceptance and internalization of the correlative duties of the social contract -- the principles of professionalism. The lawyers who live the principles of professionalism create a public good for the profession as a whole -- a type of shared property available to all licensed lawyers. [FN129] The professionalism of these lawyers creates public trust that the profession is fulfilling the social contract, and the public therefore continues to grant the profession autonomy to self-regulate with substantial influence over the justice system. If too many lawyers become free riders, taking advantage of the shared property created by public trust while solely pursuing self-advantage, the public will lose trust and revise the social contract. Each lawyer will lose some autonomy in that revision.

Current scholarship tells us little about which approaches are most effective in socializing law students and practicing lawyers into the principles of professionalism. We need leadership from both legal education, the practicing profession, and the bench both to emphasize the importance for the profession that this socialization occur and to support efforts to assess which pedagogies are most effective to help adult professionals grow over a career into an ethical professional identity.

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made a strong contribution to the analysis of the existing scholarship on professionalism and Ph.D. candidate Verna Monson did the same for the discussion of the Four Component Model. Professors Rob Atkinson, Thomas Morgan, and Thomas Shaffer, ABA Professionalism Counsel Art Garwin and my colleagues, David Bateson, Lisa Brabbit, Hank Shea, Greg Sisk, Susan Stabile, and Rob Vischer, made useful suggestions on revisions of the paper.

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[FN1]. WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 126-47 (Jossey-Bass 2007). The Carnegie Foundation's series of similar studies on educating clergy, physicians, engineers, and nurses urges the peer-review professions, all of which face the same critical question of whether they could do better at socializing students into the public purpose, core values and ideals of the profession, to learn from each other how to assist this acculturation most effectively. CHARLES FOSTER ET AL., *EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IMAGINATION* 8-12 (2006).

[FN2]. See generally “... *In the Spirit of Public Service: a Blueprint for the Rekindling of Lawyer Professionalism*, 1986 A.B.A COMM’N ON PROFESSIONALISM [hereinafter *Stanley Commission Report*]; *Teaching and Learning Professionalism*, 1996 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE PROFESSIONALISM COMM. [hereinafter *Haynsworth Report*]; A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (adopted January 21, 1999 by the Conference of Chief Justices) [hereinafter *Action Plan*].

[FN3]. *Stanley Commission Report*, *supra* note 2, at v, 1-3. See Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 CASE W. RES. L. REV. 531, 605 (1994) (noting that the scholarly discourse surrounding professionalism was primarily concerned with the perceived decline of professionalism and increase focus on commercialism of the profession, particularly in the 1980s); Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 3 (1993) (describing the standing of the legal profession at its “lowest ebb in the history of our country” due to the misconduct of lawyers and judges. The decline of professionalism is characterized by misconduct of legal professionals).

[FN4]. *Haynsworth Report*, *supra* note 2, at 2-4.

[FN5]. See MONROE FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYER’S ETHICS* 123 (3d ed. 2004).

[FN6]. WILLIAM SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 129 (Jossey-Bass 2007).

[FN7]. *Id.* at 14, 129.

[FN8]. WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 3 (2nd ed. 2004).

[FN9]. *Id.* at 21. Eliot Freidson posits professionalism as an alternative ideology for the organization of work in contrast to the dominant market competition ideology that assumes rational and fully informed consumers whose preferences are met by competition among producers resulting in lowest cost goods and services. In the dominant market competition ideology, consumer preferences direct what is produced, and management directs workers on how most efficiently to meet consumer preferences. In the ideology of professionalism, the public grants

members of an occupation control over their work. Freidson describes an ideal institutional professionalism with five interdependent elements: (1) specialized work that is believed to be grounded in a body of theoretically-based discretionary knowledge; (2) exclusive jurisdiction in a particular division of labor created and controlled by occupational negotiation between workers and management and consumers (ideally incorporated into and protected by law); (3) a sheltered position in labor markets that is based on qualifying credentials created by the occupation; (4) a formal training program lying outside the labor market that produces the qualifying credentials, which is controlled by the occupation and associated with higher education; and (5) an ideology that asserts greater commitment to doing good in the profession's area of responsibility than to economic gain and to the quality rather than the economic efficiency of work. ELIOT FREIDSON, *PROFESSIONALISM: THE THIRD LOGIC* 1-3, 127 (2001). The institutional professionalism Friedson proposes is essentially the social contract which the personal professionalism discussed in this paper supports. Thomas Morgan argues that the legal profession's social contract ended with the Supreme Court decisions that denied special protection from antitrust laws or First Amendment commercial free speech principles to the legal profession. September 7 2007 email from Thomas Morgan to the author (on file with the author). However the profession is still granted substantial control over entry, continued status, and discipline in the profession. Neither consumers or managers are free to employ anyone to do legal work. The judges who ultimately determine the rules governing the profession are all lawyers.

[FN10]. ROY STUCKEY ET AL, *BEST PRACTICES FOR LEGAL EDUCATION* 33 (2007) (citing to the work of Larry Krieger and Ken Sheldon, concludes that legal education could do substantially better regarding socialization of students into an ethical professional identity including legal education's tendency to undermine students' intrinsic values and motivation that would otherwise promote professionalism).

[FN11]. Peers in the practice distinguish understandable or “honest” mistakes from mistakes caused by gross negligence or willful indifference. Professional judgment requires the exercise of discretion under conditions of substantial uncertainty, and peers protect the autonomy to make honest mistakes. Peer review looks closely at the quality of the process through which the professional exercised professional judgment. ELIOT FREIDSON, *DOCTORING TOGETHER: A STUDY OF PROFESSIONAL SOCIAL CONTROLS* 129 (1975).

[FN12]. See *MODEL RULES OF PROF'L CONDUCT* R. 2.1 (2007) (emphasizing that in representing a client, a lawyer shall exercise independent judgment); *MODEL CODE OF PROF'L RESPONSIBILITY* EC 1-1 (1983) (emphasizing that every client is entitled to independent professional services); See also the discussion of the core value of independent judgment see *infra* Part IV.

[FN13]. Jordan Cohen, President of the Association of American Medical Colleges, makes the same argument for his profession. “Why is it important to maintain the medical profession's implicit social contract with society? For it is professionalism that is the medium through which individual physicians fulfill the lofty expectations that society has of medicine. If norms of physician behavior fall short of the responsibilities called for by medical professionalism, both presumed signatories to the social contract -- the profession and the public -- are destined to suffer irreparable harm.” JORDAN COHEN, *Foreword* to *MEASURING MEDICAL PROFESSIONALISM*, v (David Stem ed., Oxford University Press 2006).

[FN14]. Sarbanes-Oxley Act of 2002, *Pub. L. No. 107-204, §§ 103-106, 116 Stat. 745, 755-766* (2002). See generally JOHN COFFEE, *GATEKEEPERS: THE ROLE OF THE PROFESSIONS IN CORPORATE GOVERNANCE* (2006).

[FN15]. *Id.* at § 307; 17 C.F.R. § 205.3 (2007).

[FN16]. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 10-12 (2007).

[FN17]. *Id.* ¶ 11.

[FN18]. *Id.* ¶ 12.

[FN19]. Fred Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1307 (1995) (professionalism is an abused term and is often defined merely as “to act the way we want lawyers to act”); Timothy Terrell and James Wildman, *Rethinking Professionalism*, 41 EMORY L.J. 403, 406 (1992) (professionalism is an elusive concept and defining it is a lofty goal) [hereinafter Terrell and Wildman]; Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. TEXAS L. REV. 275, 277-278 (1994) (the concept of professionalism is widely discussed, passionately supported, has generated innovative programs, codes and experiments, but is little-defined); Deborah Rhode, *Opening Remarks: Professionalism*, 52 S.C. L. REV. 458, 459 (2001) (“A central part of the ‘professionalism problem’ is lack of consensus about what exactly the problem is.”); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 657 n.2 (1994) (noting there is a tendency to rely on metaphor in the use of the term professionalism, which may contribute to the absence of consensus as to the term's meaning).

[FN20]. Powell, *supra* note 19, at 278. Powell further notes that professionalism is often treated as a “self-evident concept requiring no definition.”

[FN21]. Susan Daicoff, *Asking Leopards to Change their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 549 (1998); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 564-566 (1994), (describing the demise of professionalism as congruous with the decline of the legal profession generally, symptoms being prevalent lawyer-bashing, negative stereotypes, and low scores on public opinion polls).

[FN22]. Robert L. Nelson, *Professionalism from a Social Science Perspective*, S.C. L. REV. 473, 479 (2001) (asserting that in trying to define professionalism “we mostly rely on post-hoc horror stories about what has gone wrong and use them to analyze the nature of the problem”).

[FN23]. Terrell and Wildman, *supra* note 19 at 406, 424-431 (arguing that the heritage of the profession of law is the basis of a “professional tradition” defined by a set of essential, timeless principles. Terrell and Wildman attempt to isolate those principles of professionalism and include, (1) ethic of excellence, (2) integrity: saying no to client demands at limits of law, (3) respect for the system and rule of law, (4) respect for other lawyers and others who serve legal system, (5) commitment to accountability to clients, (6) responsibility for adequate distribution of legal services); Buchanan, *supra* note 21, at 579 (suggesting the six standards of the highly selective International Society of Primerus Law Firms are the best model of professionalism and can facilitate the return of legal professionalism. The six standards are (1) integrity, (2) excellence of work product, (3) reasonable fees, (4) professional education, (5) civility, and (6) community service). Cramton, *supra* note 3, at 611 (arguing that a renewed vision of professionalism will include a lawyer who (1) cares about clients, engages in moral dialogue, protects client interests, (2) cares about equal access to legal services and efficiency in the provision of services, (3) considers moral conscience in daily practice). Philip S. Anderson, *Remarks of Philip S. Anderson*, 18 DICK. J. INT'L L. 43, 44 (2000) (identifying four core principles of the legal profession, including (1) spe-



cialized training and knowledge for the practice of law as a learned profession, (2) independent exercise and conflict free practice, (3) practice must observe ethical principles and those principles must be enforced and (4) a lawyer has an obligation to the public in addition to his or her client and an obligation to respect the rule of law).

[FN24]. Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 7 (1993), (Without attempting to formally “define” professionalism, Justice Burger associated professionalism with professional standards, specifically ABA standards. He asserts these standards need to be re-examined in order to address the “unprofessional” practices of Rambo-lawyering, lawyers' use of media, and “huckster-advertising.”)

[FN25]. Richard C. Baldwin, *Rethinking “Professionalism” -- and Then Living It!*, 41 EMORY L. J. 433, 436 (1992) (noting that though dialogue about professionalism cannot be limited to service to the poor, “the most important substantive value carried by our professional heritage” is access to justice for all members of society); Zacharias, *supra* note 19, at 1317-1318 (describing the birth of the emphasis on pro bono activities that many commentators describe as the “core” of professionalism as the elite Bar's response to a declining public image of lawyers).

[FN26]. *Id.* at 1315 (providing a history of the client-oriented theory of lawyering); See *Id.* at 1319-1320, n.54-57 for a discussion of the contributions of Monroe Freedman, a fundamental voice for a client-oriented model of lawyering, and the subsequent response and adoption of his ideas; Buchanan, *supra* note 21, at 574 (1994) (espousing a renewed “consumer-oriented” course for lawyers in their relationships to clients and public in order to mend current dismal reputation and revitalize professionalism.).

[FN27]. Robert E. Rodes, Jr., *Professionalism and Community: A Response to Terrell and Wildman*, 41 EMORY L. J. 485, 486 (1992), (critiquing Terrell and Wildman's six values because, as he asserts, they espouse a false theory of moral privatization and lack of shared values in the community); W. Bradley Wendel, *Morality, Motivation and the Professionalism Movement*, 52 S. C. L. REV. 557, 608 (2001) (“... essence of professionalism requires attending to the moral dimension of lawyering and seeking motivation in the intrinsic values that inform professional life.”); See generally, *Id.* at 599-601; Richard Wasserstrom, *Lawyers a Professionals: Some Moral Issues*, 5 HUM. RIGHTS 1, 8, 15 (1975) (arguing that the pervading view of “professionalism” is one in which the lawyer engages in role-differentiating behavior, inhabiting an amoral universe where he or she provides special competence to accomplish client objectives, but does not judge the character of the client, the client's objectives or the avenues through which they are pursued. Wasserstrom finds this view in some ways problematic, particularly in that amoral legal acculturation can begin to “dominate one's entire life.”)

[FN28]. See, Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 263 (1995) (challenging the work of the Bar and scholars on professionalism on grounds that movement has become an altogether too simplistic “crusade” based on an implicit assumption that there is one universal way to be a legal professional which categorically condemns certain conduct); FREEDMAN, *supra* note 5, at 23-25 (arguing that courtesy and civility guidelines and codes will undermine zealous advocacy); Kenneth L. Penegar, *The Professional Project: a Response to Terrell and Wildman*, 41 EMORY L. J. 473, (1992) (critiquing the functional structuralism of Terrell and Wildman's “Professionalism Project” noting that, “without [a] more complicated picture of reality, efforts to conjure a single image, consciousness, or ideal justification of lawyers' roles and work are likely to remain unconvincing.”).

[FN29]. SULLIVAN, *supra* note 6, at 148-51.



[FN30]. *Stanley Commission Report*, *supra* note 2, at v.

[FN31]. *Id.* at 10.

[FN32]. *Id.*

[FN33]. *An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE B., LEGAL EDUC. AND PROF. DEV. [hereinafter *MacCrate Report*].

[FN34]. *Id.* at 139-140.

[FN35]. *Id.* at 140-141.

[FN36]. *Haynsworth Report*, *supra* note 2, at 1.

[FN37]. *Id.* at 6.

[FN38]. *Id.* at 6-7.

[FN39]. *Action Plan*, *supra* note 2.

[FN40]. *Id.* at 2.

[FN41]. *Id.* at 6-7.

[FN42]. *Id.* at 7.

[FN43]. *Id.*

[FN44]. MODEL RULES OF PROF'L CONDUCT Preamble (2007).

[FN45]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (2007).

[FN46]. *Id.* ¶ 4. Rules 1.1 and 1.3 make the requirement of competence and diligence more specific.

[FN47]. *Id.* ¶ 6.

[FN48]. *Id.* ¶ 7.

[FN49]. *Id.*

[FN50]. *Id.* ¶ 9.

[FN51]. *Id.* ¶¶ 10-12. Some scholars argue that the social contract calling for some restraint on self-interest on which professionalism is based no longer exists in the profession (or in the alternative, that it never existed). Russell Pearce offers a Middle Range Approach between the professionalism and the business paradigms that rejects both licensing and exclusive lawyer self-policing, but permits the organized bar to control lawyer certification. Russell Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229, 1271 (1995).

[FN52]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 12 (2007).

[FN53]. LON L. FULLER, *THE MORALITY OF LAW* 3-9 (rev. ed., Yale U. Press 1969).

[FN54]. *Id.*

[FN55]. The MacCrate Report, the Haynsworth Report, the CCJ National Action Plan, and the Preamble to the Model Rules of Professional Conduct emphasize that a lawyer must continue to grow in personal conscience. The MacCrate Report emphasizes that the primary sources of ethical rules include, "A lawyer's personal sense of morality." *MacCrate Report*, *supra* note 34, at 204. The Haynsworth Report includes both an essential characteristic that a lawyer must demonstrate ethical conduct and integrity, and a supportive element that a lawyer should develop the capacity for self-scrutiny and for moral dialogue with clients and other individuals involved in the justice system. *Haynsworth Report*, *supra* note 2, at 6-7. The National Action Plan defines professionalism as a personal characteristic that each lawyer must cultivate in him or herself. *Action Plan*, *supra* note 2, at 6. The Preamble specifically provides that a lawyer is also guided by personal conscience and sensitive professional and moral judgment. MODEL RULES OF PROF'L CONDUCT PREAMBLE ¶¶ 7, 9 (2007). The Preamble to the ABA Model Code of Professional Responsibility is also explicit. "Each lawyer must find within his [or her] own conscience the touchstone against which to test the extent to which actions should rise above minimum standards." MODEL CODE OF PROF'L RESPONSIBILITY PREAMBLE ¶ 4 (1969). The introduction to the Restatement of the Law Third, The Law Governing Lawyers, provides, "other constraints, such as ideals and habits of morality, will often guide the conduct of a good person who also aspires to serve as an honorable public-spirited lawyer, and much more powerfully and pervasively than merely legal obligations. A good lawyer is also guided by ideals of professionalism and by an understanding of sound professional practice. Extensive consideration of such non-legal factors is not undertaken here. However they have obvious significance in a good lawyer's life and in the self-concept of the profession." 1 [RESTATEMENT \(THIRD\) OF THE LAW GOVERNING LAWYERS 3 \(2000\)](#). This list of five principles of professionalism is a revision of an earlier list of seven principles of professionalism that appeared in Neil Hamilton and Lisa Brabbitt, *Fostering Professionalism Through Mentoring*, 57 J. OF LEGAL EDUC. 102, 103-04 ((2007).

[FN56]. All the professionalism definitions stress that a minimum level of competence is necessary. The Stanley Commission Report speaks of lawyering as a "learned art" and notes that it requires substantial intellectual training. *Stanley Commission Report*, *supra* note 2, at 10. The MacCrate Report stresses the necessity of providing competent representation. *MacCrate Report*, *supra* note 33, at 140. The Haynsworth Report notes the requirement by including the essential skills of learned knowledge and skill in applying the applicable law to the factual context. *Haynsworth Report*, *supra* note 2, at 6 -7. It also includes "maintenance of competence" in its supportive elements. *Id.* The CCJ National Action Plan includes "competence." *Action Plan*, *supra* note 2, at 2. The Model Rules' Preamble specifically requires a lawyer to observe the Model Rules. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 7, 12, 14. Rule 8.3 states that it is professional misconduct to violate the Rules which include Rule 1.1 on competence and Rule 1.3 on diligence. MODEL RULES OF PROF'L CONDUCT R. 8.3, R. 1.1, R. 1.3.

[FN57]. In the language of Dean Roscoe Pound, each lawyer should pursue the law as a "learned art in the spirit of a public service." *Stanley Commission Report*, *supra* note 2, at 10. Three of the four Fundamental Values of the Profession noted in the MacCrate Report spell out ideals that a lawyer should seek (*to which a lawyer should aspire*)--(1) striving to promote justice, fairness and morality, (2) striving to improve the profession, and (3) undertaking professional self-development. *MacCrate Report*, *supra* note 34, at 125. The Haynsworth Report

mixes minimum standards and aspirational ideals on its two lists of essential characteristics and supportive elements for the professional lawyer. *Haynsworth Report*, *supra* note 2, at 6-7. The CCJ National Action Plan is particularly forceful in stating that professionalism requires lawyers to exceed the minimum ethical standards. *Action Plan*, *supra* note 2, at 6-7. The Preamble to the Model Rules of Professional Conduct states directly that “a lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.” MODEL RULES OF PROF'L CONDUCT PREAMBLE ¶ 7 (2007).

[FN58]. Self-regulation is another common theme of these definitions of professionalism. Members of the profession are responsible for building healthy peer communities. The Stanley Commission Report notes that self-regulation is a defining characteristic of the profession, which has a responsibility to protect the public. *Stanley Commission Report*, *supra* note 2, at 10, 37. The MacCrate Report also notes that a lawyer is a member of a self-governing profession. *MacCrate Report*, *supra* note 34, at 141 and 206. The Haynsworth Report lists self-regulation as a supportive element to professionalism. *Haynsworth Report*, *supra* note 2, at 7. The CCJ National Action Plan provides that lawyers “should not tolerate unethical or unprofessional conduct by their fellow lawyers.” *Action Plan*, *supra* note 2, at 7. The Model Rules' Preamble speaks at length of the self-regulation of the legal profession and the profession's social contract with society. “A lawyer should also aid in securing their observance [of the Rules] by other lawyers.” MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 10-12 (2007). The Preamble also stresses the responsibilities that are implicated by self-regulation and notes that the profession risks loss of its autonomy if its members fail in their duties. *Id.*

[FN59]. The Stanley Commission Report states, “The client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving the client's interest and the public good.” *Stanley Commission Report*, *supra* note 2, at 10. The Haynsworth Report builds on Dean Roscoe Pound's definition of professionalism and emphasizes that a professional lawyer pursues “a learned art in service to clients and in the spirit of public service.” The Report's supportive elements include the subordination of personal interests and viewpoints to the interests of the clients and the public good. *Haynsworth Report*, *supra* note 2, at 6-7. Paragraph 1 of the Model Rules Preamble calls on each lawyer to hold in tension three major roles: (1) a representative of clients; (2) an officer of the legal system; and (3) a public citizen having special responsibilities for the quality of justice. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (2007).

[FN60]. Public service is an important element to all these professionalism definitions. Each lawyer should devote professional time to serve the public good, particularly by representing pro bono clients. “In the spirit of public service” is part of the title of the Stanley Commission Report. *Stanley Commission Report*, *supra* note 2 at 47. The MacCrate Report stresses that a lawyer should contribute to the profession's responsibility to represent pro bono clients. *MacCrate Report*, *supra* note 33, at 140. The Haynsworth Report's definition of professionalism retains the common phrase of “in the spirit of public service” and lists cost-effective legal services as a supportive element. *Haynsworth Report*, *supra* note 2, at 7. The CCJ National Action Plan exhorts lawyers to devote their judgment and expertise to the public good, particularly through participation in pro bono and community service activity. *Action Plan*, *supra* note 2, at 7. The Model Rules' Preamble also notes “As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and quality of service rendered by the legal profession .... [A]ll lawyers should devote professional time .... for all those who .... cannot afford or secure adequate legal counsel.” MODEL RULES OF PROF'L CONDUCT Preamble ¶ 6 (2007).

[FN61]. While some restraint on simple income and wealth maximization is implicit in the fifth element of pro-

fessionalism above (acting as a fiduciary where self-interest is over-balanced by devotion to serving the client and the public good) as well as in the first professionalism element above (development of personal conscience), and the professionalism theme in 5.a. (pro bono service), the increasing emphasis on billable hours and net profit per lawyer means that every lawyer, but particularly those in private practice, should reflect regularly on the question “how much is a satisfactory living?” Otherwise money will dominate as a measure of the value of the lawyer and the lawyer's work. *Stanley Commission Report*, *supra* note 2, at 15; *Haynsworth Report*, *supra* note 2, at 32. The Model Rules' Preamble also has a focus on balancing a lawyer's personal income and wealth goals with the other principles of professionalism. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 9 (2007).

[FN62]. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY UNABRIDGED (2002). A personal sense of morality and moral compass are sometimes used as synonyms for personal conscience but focus more specifically on a person's principles of right and wrong.

[FN63]. *MacCrate Report*, *supra* note 33, at 137, 205, 215, 218; *Haynsworth Report*, *supra* note 2, at 7; STUCKEY ET AL., *supra* note 10, at 66 (“The key skill set of lifelong learners is reflection skills”); *Action Plan*, *supra* note 2, at 205, 218.

[FN64]. This body of scholarship understands “morality” as rooted in the human psyche and the social condition that humans live in groups and what one person does can affect others. Rest noted “The function of morality is to provide basic guidelines for determining how conflicts in human interests are to be settled and for optimizing mutual benefits of people living together in groups. It provides the first principles of social organization; it remains for politics, economics, and sociology to provide the second-level ideas about the specifics for creating institutions, role-structure, and practices.” JAMES REST, MORAL DEVELOPMENT ADVANCES IN THEORY AND PRACTICE 1 (1986).

[FN65]. The first reference to the Four Component Model was in James Rest, *Morality*, in HANDBOOK OF CHILD PSYCHOLOGY: COGNITIVE DEVELOPMENT: VOL. 3 (P.MUSSEN, J.FLAVELL & E. MARK-MANN eds., 4th ed. 1983) at 556-628.

[FN66]. JAMES REST & DARCIA NARVAEZ, MORAL DEVELOPMENT IN THE PROFESSIONS 23 (1994).

[FN67]. *Id.*

[FN68]. *Id.* at 23-24. More recent scholarship on moral judgment is de-emphasizing any implication that there is a linear sequence of psychological processes leading to moral behavior. Recent articles frame the four component process as an interactive, dynamic process model. Muriel Bebeau & Verna Monson, *Guided by Theory, Grounded in Evidence: A Way Forward For Professional Ethics Education*, in HANDBOOK ON MORAL AND CHARACTER EDUCATION (D. NARVAEZ & L. NUCCI eds., in press).

[FN69]. Over a lifetime, the two most important factors influencing growth in moral judgment as measured by the moral reasoning tests developed in this body of scholarship are education and age, with education being a far more powerful predictor of moral judgment development. REST & NARVAEZ, *supra* note 66 at 15.

[FN70]. Normative ethics is aimed at judgments of right and wrong, virtue and vice. It provides criteria to support or refute claims of rightness or wrongness, or virtue or vice. Descriptive ethics is a social science aimed at empirically neutral description of the values of individuals and groups. Meta-ethics (sometimes called analytical

ethics) “examines the meaning and objectivity of ethical judgments. Meta-ethics is therefore at a level removed from normative ethics. At this remove, one might [for example] explore the differences among scientific, religious and ethical perspectives, the relation of legality to morality, or the implications of cultural differences for ethical judgments, and so forth.” KENNETH GOODPASTER & LAURA NASH, *POLICIES AND PERSONS: A CASEBOOK ON BUSINESS ETHICS* 523 (3d ed. 1998).

[FN71]. SULLIVAN, *supra* note 8, at 262 - 267.

[FN72]. REST & NARVAEZ, *supra* note 66, at 24.

[FN73]. Bebeau and Monson, *supra* note 68. See Neil Hamilton & Lisa Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 115-19 (2007) (explaining Kegan's most common stages of professional identity formation).

[FN74]. *Id.*

[FN75]. Verna Monson & Muriel Bebeau, *Defining Issues, Defining Realities: The Role of Moral Psychology in Advancing Business Ethics Education* (manuscript in draft).

[FN76]. Lawrence J. Walker, *The Model and the Measure: An Appraisal of the Minnesota Approach to Moral Development*, 31 J. OF MORAL EDUC. 353, 355 (2002).

[FN77]. In addition, clarity on a lawyer's own personal conscience enables the lawyer to explain the lawyer's moral perspective to the client. Vischer points out “an attorney's moral perspective often determines the advice she gives, and clients will be better off if that perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue. The attorney's moral experiences and perspective invariably shape her understanding of the client and the object of the representation, not as a result of her irresponsible exercise of professional discretion, but as a consequence of human function.” Robert Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. OF LEGAL ETHICS 229, 266 (2006).

[FN78]. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1, 32 (2005) (noting also that (1) a lawyer learns of these obligations through “socialization, professional lore, independent reflection on the expectations of the professional ‘office’ ...” and (2) the 1908 Canons, the Model Code, and the Model Rules “represent the bar's collective standards for professional conduct -- an attempt to help define professional conscience”). *Id.* at 35, 43.

[FN79]. *Id.* at 54-55.

[FN80]. *Id.* at 56.

[FN81]. *Id.*

[FN82]. *Id.*

[FN83]. See ROBERT KEGAN, *THE EVOLVING SELF* (1982).

[FN84]. See SULLIVAN, *supra* note 6, at 135 (“Professional identity is an important part of the individual's identity more broadly.”); Zacharias and Green mention but do not explore in depth the concept of “collective

professional conscience.” Zacharias, *supra* note 78, at 55. The concept that an organization like a law firm or department or an association of lawyers like the bench and bar in a practice area or a state has a conscience is an important idea beyond the scope of this essay. Ken Goodpaster's recent book, *Conscience and Corporate Culture*, offers a strong analysis that conscience is equally important in the culture of an organization and that organizations can do far better in orienting, institutionalizing, and sustaining conscience in the organizational culture. KENNETH GOODPASTER, CONSCIENCE AND CORPORATE CULTURE 4-9 (2007).

[FN85]. A major reason for concern about the role of a lawyer's personal conscience in representing clients, Vischer points out, is “a morality-driven vision of lawyering, it is feared, will quickly devolve into a lawyer-by-lawyer conception of lawyering, which in turn threatens individuals' equal access to justice.” Vischer, *supra* note 77, at 256. Arguing in the other direction, David Bateson notes that sophisticated clients control the lawyer.

[FN86]. *Id.* MODEL RULES OF PROF'L CONDUCT Preamble ¶ 14 (2007).

[FN87]. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.4 (2007); *MacCrate Report*, *supra* note 33, at 205, 207; STUCKEY ET AL., *supra* note 10, at 26-27.

[FN88]. MODEL RULES OF PROF'L CONDUCT R. 1.7-1.12 (2007); *MacCrate Report*, *supra* note 33, at 205. Loyalty includes recognition that the lawyer's self-interest in fees is in conflict with the client's interest and therefore the lawyer's fees should be reasonable and fair. MODEL RULES OF PROF'L CONDUCT R. 1.5 (2007).

[FN89]. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007). *MacCrate Report*, *supra* note 33, at 205.

[FN90]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 2 (“As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.”), ¶ 8 (“[W]hen an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”), ¶ 9 (“These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.”). Paragraph 1 of the Model Rules' Preamble makes clear that the lawyer is to hold in tension the roles of “a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” *Id.* ¶ 1. See *MacCrate Report*, *supra* note 33, at 205. Zealous advocacy focuses on maximizing client autonomy to achieve any lawful client objective through legally permissible means. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1969).

[FN91]. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007); *MacCrate Report*, *supra* note 33, at 151; *Stanley Commission Report*, *supra* note 2, at 28; STUCKEY ET AL., *supra* note 10, at 82.

[FN92]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (A lawyer is “a public citizen having special responsibility for the quality of justice.”), ¶ 6 (“As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession.”), ¶ 7 (“A lawyer should strive to .... exemplify the legal profession's ideals of public service.”). See *Haynsworth Report*, *supra* note 2, at 7; *MacCrate Report*, *supra* note 33, at 213; STUCKEY ET AL., *supra* note 10, at 84-88. The core value of public service focused on the maintaining and improving the quality of service provided by colleagues in the legal profession is developed in more detail in the fourth principle of professionalism. The core value of public service particularly focused on equal access to justice for the disadvantaged is developed in detail in professionalism principle 5.a.



[FN93]. MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 5, 9, R. 1.3 cmt. 1, R. 3.5 cmt 4, R. 4.4(a) (2007); *MacCrate Report*, *supra* note 33, at 204, 213; *Haynsworth Report*, *supra* note 2, at 7; *Action Plan*, *supra* note 2, at 37; STUCKEY ET AL., *supra* note 10, at 82.

[FN94]. The major ideal of the profession is to seek continuing growth toward excellence in both lawyering skills and ethical conduct over a career. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 7 (2007) (“A lawyer should strive to attain the highest level of skill, to improve the law and legal profession and to exemplify the legal profession's ideals of public service.”); *MacCrate Report*, *supra* note 33, at 136, 200, 219 (Lawyers should “seek to achieve excellence in [their] chosen field”); *Stanley Commission Report*, *supra* note 2, at 15, 17; STUCKEY ET AL., *supra* note 10, at 66.

[FN95]. The word “integrity” comes from the Latin *integritas* which means wholeness or oneness. A lawyer of integrity acts consistently with the lawyer's first ethical principles even when there is some cost involved. *Stanley Commission Report*, *supra* note 2, at 15,47; *MacCrate Report*, *supra* note 33, at 204; *Haynsworth Report*, *supra* note 2, at 7; STUCKEY ET AL., *supra* note 10, at 7, 84-88.

[FN96]. The Model Rules of Professional Conduct Rule 8.4(c) prohibits conduct involving dishonesty and Rule 8.3 requires reporting of another lawyer's violation of a Rule that raises a substantial question as to that lawyer's honesty. MODEL RULES OF PROF'L CONDUCT R. 8.4(c), R. 8.3 (2007). Paragraph 2 of the Preamble asks lawyers to negotiate “consistent with requirements of honest dealings with others.” *Id.* Preamble ¶ 2. *MacCrate Report*, *supra* note 33, at 204 and STUCKEY ET AL., *supra* note 10, at 80-82, 84-88. The focus of “honesty” in the advocacy context is that affirmative statements of fact by a lawyer are to be truthful; “honesty” in this context does not require revelation of material confidential facts unless there is either a legal duty to do so or the client consents.

[FN97]. Model Rule of Professional Conduct Rule 3.4 focuses on fairness to the opposing party and opposing counsel. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007). The ABA and CCJ reports on professionalism also emphasize fairness as a virtue for a lawyer. *Stanley Commission Report*, *supra* note 2, at 15, 47; *MacCrate Report*, *supra* note 33, at 36, 213; *Action Plan*, *supra* note 2, at 37; STUCKEY ET AL., *supra* note 10, at 84-88. The thrust of these references to fairness is that a lawyer in adversary contexts should conform to established and commonly accepted formal and informal rules and customs in dealing with adversaries. They create trust and efficiency which reduce transaction costs and benefit both the justice system and the clients overall. The lawyer should not “game” these rules and customs with either interpretations outside the spirit of the rules and customs or conduct that may escape the adversary's reasonable ability to monitor compliance. If the lawyer challenges existing understandings regarding these rules and customs, notice and transparency would be important.

[FN98]. ABA CANONS OF PROF'L ETHICS Canon 29 (1908).

[FN99]. MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1969).

[FN100]. MODEL RULES OF PROF'L CONDUCT R. 8.3-8.4 (2007).

[FN101]. *Id.* at R. 8.3.

[FN102]. *Id.* at cmt. 1.

[FN103]. *Id.* at R. 5.1(a).



[FN104]. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22 (1986).

[FN105]. FREIDSON, *supra* note 11, at 237, 239.

[FN106]. *Id.* at 237.

[FN107]. *Id.* at 243.

[FN108]. *Id.* at 244-45.

[FN109]. WOLFRAM, *supra* note 104, at 683.

[FN110]. The Preamble to the Model Rules of Professional Conduct emphasizes the importance of peer opinion in both paragraph 7 (“[A] lawyer is also guided by personal conscience and the approbation of professional peers.”) and paragraph 16 (“Compliance with the Rules .... depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.”). MODEL RULES OF PROF'L CONDUCT Preamble ¶¶ 7, 16 (2007).

[FN111]. Peer-review in turn translates into substantial autonomy and discretion for individual professionals,

[FN112]. *Stanley Commission Report*, *supra* note 2, at 10.

[FN113]. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 cmt. a (2000).

[FN114]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 1 (2007).

[FN115]. L. RAY PATTERSON, LAWYER'S LAW: PROCEDURAL, MALPRACTICE & DISCIPLINARY ISSUES 11-12 (4th ed. 1999).

[FN116]. *See* discussion *supra* in both notes 61 and 88.

[FN117]. COHEN, *supra* note 13, at vii; *MacCrate Report*, *supra* note 33, at 214-15, STUCKEY ET AL., *supra* note 10, at 24-26. Included in the calculus of what has been given is the autonomy of the profession to self-regulate which in turn creates autonomy for each lawyer's professional judgment.

[FN118]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 8 (2007).

[FN119]. *Id.* ¶ 6.

[FN120]. *Id.* at R. 6.1.

[FN121]. *Stanley Commission Report*, *supra* note 2, at 15. The Stanley Commission Report also cautions “activities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally”. *Id.* at 51.

[FN122]. *MacCrate Report*, *supra* note 33, at 79-80.

[FN123]. *Haynsworth Report*, *supra* note 2, at 7.

[FN124]. *Id.* at 32. Professor Rob Atkinson is highly critical of Pound's definition, which both the Stanley Commission Report and the Haynsworth Report utilize. Atkinson notes, "Pound implies that we should somehow be embarrassed that we make our living as lawyers." Rob Atkinson, *Growing Greener Grass: Looking From Legal Ethics to Business Ethics, and Back*, 1 U. OF ST. THOMAS L.J. 951, 985 (2004). Atkinson speaks of the lack of discussion in law school curriculum of what he calls the secondary minimal requirement to legal ethics-- how to sustain yourself. *Id.* at 967. To Atkinson, the notion of "sustaining yourself" is second to helping your client, but it still should occupy a very important part of the discussion. *Id.* at 964.

[FN125]. MODEL RULES OF PROF'L CONDUCT Preamble ¶ 9 (2007).

[FN126]. If the legal profession is indistinguishable from other occupations in terms of restraint on self-interest, then the profession should be regulated as other occupations are regulated. This is what the falling public perception on the ethics and standing of the legal profession is telling us. Over the past 25 years, while the opinion polls continue to indicate the public understands that the other peer-review professions have a unique morality, the public no longer believes that to be true of the legal profession and now is unable to distinguish the legal profession from other business occupations. *Firefighters, Doctors and Nurses Top List as Most Prestigious*, Harris Interactive, July 26, 2006, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=685](http://www.harrisinteractive.com/harris_poll/index.asp?PID=685).

[FN127]. *See* COHEN, *supra* note 13, at vii, viii.

[FN128]. SULLIVAN, *supra* note 8, at 31.

[FN129]. *Id.* at 181-82.

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