# LEARNING PROFESSIONAL RESPONSIBILITY
## FOR THE PRACTICE OF LAW:
## THE WAY FORWARD

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This article explains psychological and educational theories
that will help you understand the design of
The Client Relationship course
and prepare you to write the paper which counts as 30% of your course grade.


## Only the text is assigned.

## You do <u>not</u> have to read any of the footnotes.

Working Paper[1]
www.teachinglegalethics.org/learningpr

A course in legal ethics, typically called "Professional Responsibility," has been a required component of the curriculum in US law schools for over thirty years; at many schools it is the only required course after the first year.  The influential 2007 report from the Carnegie Foundation for the Advancement of teaching, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW ("CARNEGIE REPORT"),[2] describes the traditional approach to this course as limited to teaching "The Law of Lawyering": "Students learn the profession's ethical code as

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Extensive resources for teaching legal ethics and professionalism are now available on-line.  A useful starting point is the *International Forum on Teaching Legal Ethics & Professionalism*, a user-driven online community of over 500 ethics teachers, scholars, and practitioners worldwide that contains a resource library of not only articles and book chapters but also conference materials, reports, and an increasingly comprehensive directory of rules regulating both legal practice and legal education from around the world, available at www.teachinglegalethics.org. This website is now in the process of archiving presentations from six International Legal Ethics Conferences sponsored by the International Association of Legal Ethics. *See* www.teachinglegalethics.org/category/other-topics/ilec.  Materials and webcasts from twelve workshops of the National Institute for Teaching Ethics & Professionalism are available at www.niftep.org. See also Course Portfolios and conference materials posted by *Educating Tomorrow's Lawyers* at  http://educatingtomorrowslawyers.du.edu/ and 39 applications (with supporting materials) submitted in 2004, 2005 and 2006 for the National Award for Innovation and Excellence in Teaching Professionalism co-sponsored by the American Bar Association (ABA) Standing Committee on Professionalism and Conference of Chief Justices, available at http://clarkcunningham.org/Professionalism/Award-Home.htm. Print resources include Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029 (1997 – 1998); a number of law review symposia on teaching legal ethics (see www.teachinglegalethics.org/symposia-teaching-ethics); specialty journals on legal ethics, the legal profession, and legal education (see www.teachinglegalethics.org/journals-teaching-and-ethics); and a wide variety of reports by academics and bar organizations; *see especially*  Andrew Boon, LEGAL ETHICS AT THE INITIAL STAGE: A MODEL CURRICULUM (Report prepared for the Education & Training Committee of the Law Society of England & Wales 2010) *available at* www.teachinglegalethics.org/ModelEthicsCurriculum; Kim Economides & Justine Rogers, PREPARATORY ETHICS TRAINING FOR FUTURE SOLICITORS (2009) *available at* www.teachinglegalethics.org/economides-rogers-report;  and James Arthur et al, VIRTUOUS CHARACTER FOR THE PRACTICE OF LAW: RESEARCH REPORT (2014) *available at* www.jubileecentre.ac.uk/1553/projects/gratitude-britain/virtuous-character-law; and *see generally* www.teachinglegalethics.org/content/reports-and-studies)

[2] William M. Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, & Lee S. Shulman, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

represented in the [American Bar Association] Model Rules [of Professional Conduct], how those rules have been interpreted and applied, and the circumstances under which sanctions have been imposed. ... Often these courses are structured around legal cases that concern alleged violations of the Model Rules.  Students apply their analytical skills to these cases, approaching them in much the same way they have learned to approach challenging legal cases in torts or contracts."[3]  Learning professional responsibility only in terms mastering a set of rules imposed on practitioners by courts or other regulatory bodies, however, is increasingly viewed as unsatisfactory for both teachers and students[4] and as inadequate preparation for practice. Even worse, many educators, prompted by the critiques in the Carnegie Report, are coming to the conclusion that the traditional approach may potentially harm students, and the lawyers they will become, by:

- limiting the ability to identify ethical problems as they actually arise in practice and creating tunnel vision about what constitutes issues of professional responsibility;
- encouraging immature moral reasoning when faced with issues of complexity that require resolution of conflicting interests and values;
- failing to connect the hard choices implicated by professional responsibility with the need to develop a well-internalized professional identity that honors the public duties of the profession and puts service to others above self-interest; and
- obscuring the reality that professional responsibility requires not only sound ethical choices but also a wide range of competencies necessary to implement such choices effectively.

Both an opportunity and incentive for radical improvement in teaching professional responsibility in the US came into being on August 12, 2014, when the American Bar Association (ABA) House of Delegates concurred in major changes to accreditation standards for law schools promulgated by the ABA's Legal Education Section Council (which is the official accrediting agency).  American law schools will be required for the first time as a condition of continued accreditation to establish specific learning outcomes and to evaluate on an ongoing basis the "degree of student attainment of competency" in these outcomes.[5]  Although

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[3] CARNEGIE REPORT 148. Many professional responsibility teachers endeavor to do more than just teach the "law of lawyering," but even the most innovative report that they struggle against the dominance of the law of lawyering paradigm, which is reinforced by student hostility if they perceive they are being forced to take a class that is not "a real law school course," exacerbated by student anxiety over passing the multiple choice Multistate Professional Responsibility Examination (MPRE) which is required for bar admission in most states. The MPRE is the only component of the bar examination process that can be taken during law school, creating intense pressure for the professional responsibility course to be a "bar prep" class.  Ironically, the ABA accreditation standard which gave rise to the required professional responsibility course has always had much broader goals than just mastering rules of conduct.  *See, e.g.* ABA Standard 302(a)(5) (2010) (requiring "substantial instruction in … the history, goals, structure, values, rules and responsibilities of the legal profession and its members"). An accreditation interpretation that such "substantial instruction" must include "the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association," Interpretation 302-9, *id.,* has disappeared from the new ABA standards adopted in 2014.

[4] Bruce Green, *Less is More: Teaching Legal Ethics in Context,* 39 WM. & MARY L. REV. 357 (1998) ("teaching professional responsibility traditionally has presented an intractable problem").

[5] American Bar Association STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standards 302, 314 *available at* www.americanbar.org/groups/legal_education/resources/standards.html. [hereinafter ABA Standards]. These accreditation requirements and others discussed below become mandatory starting academic year 2016-17.  A

law schools are generally given flexibility to define their own learning outcomes, the new standards specifically require that those outcomes must include competency in the "exercise of proper professional and ethical responsibilities to clients and the legal system."[6]  This outcome requirement is distinct and in addition to an "input" requirement that each student satisfactorily complete one course of at least two credit hours in professional responsibility that includes substantial instruction in the history, goals, structure, values, and responsibilities of the legal profession and its members."[7]  Another "input" standard requires that each student complete at least six credit hours of experiential learning further specifies that if an experiential course is counted toward this requirement, it must "integrate doctrine, theory, skills, *and legal ethics*."[8]

Such new accreditation standards force law schools to ask what their graduates can *do* and not merely what they *know*.  What then would "competency" in professional responsibility look like?  According to the Carnegie Report: "Law school graduates . . . need *the capacity to recognize* the ethical questions their cases raise, even when those questions are obscured by other issues and therefore not particularly salient.  They need *wise judgment* when values conflict, as well as the *integrity* to keep self-interest from clouding their judgment."[9]

This description of educational outcomes, which might seem hopelessly aspirational at first glance, is in fact derived by the authors of the Carnegie Report from extensively validated social science research which has been used by other disciplines to design and assess ethics education  -- an approach termed "Guided by Theory, Grounded in Evidence."[10]

The Four Component Model

The social science research relied upon in the Carnegie Report has been led by the Center for the Study of Ethical Development (Center), established in 1982 at the University of Minnesota with James Rest as its first research director, and currently housed at University of Alabama with

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number of other countries have been ahead of the US in moving to a learning outcomes approach to curricular design. See in particular BACHELOR OF LAWS: LEARNING AND TEACHING ACADEMIC STANDARDS STATEMENT (Australian Learning and Teaching Council 2010) (endorsed by the Council of Australian Law Deans Nov. 2010) *available at* www.teachinglegalethics.org/australian-learning-outcomes-law .("Threshold Learning Outcome 2: Ethics and professional responsibility. Graduates of the Bachelor of Laws will demonstrate: a) an understanding of approaches to ethical decision-making, b) an ability to recognise and reflect upon, and a developing ability to respond to, ethical issues likely to arise in professional contexts, c) an ability to recognise and reflect upon the professional responsibilities of lawyers in promoting justice and in service to the community, and d) *a developing ability to exercise professional judgement*") (emphasis added) (the author was an international member of the Expert Advisory and Discipline Reference Group for this project); Maxine Evers, Leanne Houston & Paul Redmond, GOOD PRACTICE GUIDE (BACHELOR OF LAWS): ETHICS AND PROFESSIONAL RESPONSIBILITY (THRESHOLD LEARNING OUTCOME 2) (2011) (implementation of new threshold learning outcomes for ethics and professional responsibility for Australian law schools) *available at* www.teachinglegalethics.org/australian-good-practice-guide;

[6] ABA Standard 302(c).

[7] ABA Standard 303(a)(1). Prior accreditation standards required the same instructional content but did not specify a minimum number of credit hours of instruction nor that instruction be delivered as "a course."

[8] Standard (a)(3)(i)(emphasis added).

[9] EDUCATING LAWYERS at 146 (emphasis added).

[10] Muriel J. Bebeau & Verna E. Monson, *Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education*, *in* Darcia Narvaez & Larry Nucci (eds.), HANDBOOK ON MORAL AND CHARACTER EDUCATION (2008) (hereinafter *Guided by Theory*).

Stephen Thoma as its Executive Director.[11] The Center's research was first applied to design a comprehensive ethics program for professional education by Muriel Bebeau, who served as the Center's Research Director after Rest, and implemented by her at the University of Minnesota's school of dentistry over the past 30 years.  Bebeau's curriculum has been widely adopted throughout American dental education and adapted for use in a number of other disciplines.

The central theory that guides Bebeau's educational design is the "Four Component Model" developed by Rest for explaining how cognition, affect and social dynamics interact to influence moral behavior.[12]  This "FCM" model identifies four different possible reasons why a well-intentioned professional might nonetheless engage in unprofessional conduct:

1) missing the moral issue;
2) defective moral reasoning;
3) insufficient moral motivation;
4) ineffective implementation.

The model then defines four corresponding capacities for conduct that would be deemed appropriate by professional norms; each capacity is necessary for professional responsibility, but none by itself is sufficient:

1) moral sensitivity that can interpret the need for a moral decision;
2) mature ethical reasoning that can reach a morally defensible decision;
3) identity formation that will support the prioritization of the moral decision over competing interests;
4) effectiveness in implementing the moral decision.

Because the FCM model supports the use of well-validated measures for assessing the effectiveness of ethics education, it will be very useful to law schools that are moving to an outcome based approach to curriculum design, as US law schools are now being compelled to do by new accreditation standards.[13]  The Four Component Model offers a way forward  grounded in social science theory and tested by empirical research that provide methods for both teaching and measuring learning outcomes. [14] I have modified some of the terminology for the context of professional responsibility in law.

**The First Component: Awareness**

According to the Carnegie Report, Law of Lawyering courses typically fail to develop the first

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[11] The Center for the Study of Ethical Development, http://ethicaldevelopment.ua.edu/ The Holloran Center for Ethical Leadership in the Professions at the University of St. Thomas School of Law in Minneapolis has played a key role in applying the Center's work to legal education. http://www.stthomas.edu/hollorancenter/ .

[12] *Guided by Theory* at 557-560; *see also* Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 UNIV. ST. THOMAS L. J.  325, 346-49 (2012).

[13] REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS, Standard 315.

[14] *See* Hamilton & Monson*, Legal Education's Ethical Challenge* (summary of pedagogical approaches recommended by Sullivan, EDUCATING LAWYERS, and later Carnegie reports on professional education for medicine, nursing, engineering, or the clergy, correlated with empirical research showing how these educational methods develop one or more of the FCM capacities).

FCM capacity: "to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice."[15]   Even more seriously "when legal ethics courses focus exclusively on teaching students what a lawyer can and cannot get away with, they inadvertently convey a sense that knowing this is all there is to ethics. ... [Thus] [b]y defining 'legal ethics' as narrowly as most legal ethics course is do, these courses are likely to limit the scope of what graduates perceive to be ethical issues."[16] Awareness in the context of professional practice does require knowledge of the profession's norms, [17] so learning the content and applications of the Rules of Professional Conduct and other components of the "law of lawyering" *is* a *necessary* condition for developing the first FCM capacity; such learning however is not by itself *sufficient* for becoming a morally sensitive lawyer.  Equally critical is the ability to engage imaginatively as a situation unfolds, constructing various possible scenarios, often with limited cues and partial information, combined with the ability to foresee realistic cause-consequence chains of events.[18] Therefore, both teaching and assessment strategies must avoid reliance on "predigested" or already interpreted fact scenarios, such as appellate decisions or casebook problems that identify the conduct rule to be applied (typically when the rule is complicated, vague or ambiguous thus engaging only conventional law school analytic skills). A well-constructed problem for developing ethical sensitivity should "present clues to a problem for the protagonist without actually signaling what the problem is."[19] Awareness often requires empathy and role-taking skills that elicit rather than interrogate the client's perspective, thus involving both cognitive and affective processes.[20]

## The Second Component: Mature Reasoning

Based on over 25 years of research, psychologists affiliated with the Center for Study of Ethical Development have theorized that there are three structures in moral thinking development:

1) The Personal Interests Schema which prefers reasons based on avoiding harm, making reciprocal deals, and sustaining personal relationships;
2) The Maintaining Norms Schema which prefers reasons based on clear rules that maintain the social order;

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[15] Sullivan, EDUCATING LAWYERS 149.

[16] *Id.  See also* Bruce Green, *Less is More: Teaching Legal Ethics in Context,* WM. & MARY L. REV., 1998, 39, 362 n. 29; Ann Southworth & Catherine Fisk, *Our Institutional Commitment to Teach about the Legal Profession*, 1 UC IRVINE L. REV. 73,76 (2011).

[17] Muriel J. Bebeau, *The Defining Issues Test and the Four Component Model: Contributions of Professional Education*, 31 J. MORAL EDUC. 279, 283 (2002).

[18] Muriel J. Bebeau, James R. Rest, & Catherine M. Yamoor, *Measuring Dental Students' Ethical Sensitivity*, 49 J. DENTAL EDUC. 225 (1985).

[19] Hamilton & Monson, *Legal Education's Ethical Challenge* 399.  *See* Helena Whalen-Bridge, *Teaching Process: Ethics Method Project* (explaining meta-cognition approach used at large, introductory legal ethics classes at National University of Singapore in which students develop their own approaches to analyzing dilemmas without actually resolving them at that point), *available at* www.teachinglegalethics.org/teaching-analysis, webcast presentation *available at* www.niftep.org/workshops/summer-2014-workshop.

[20] Hamilton and Monson therefore recommend instruction in communication skills, taking examples from medical pedagogy which have been shown by research to improve ability to take the patient's perspective. *Id.* at 360.  *See generally* Karen Barton, Clark D. Cunningham, Gregory Jones & Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1 (2006)

3) The Postconventional Schema which prefer reasons based on ideals that transcend and can critique social norms. [21]

The Personal Interests Schema is typically dominant through early adolescence as individuals move from reasons based on harm avoidance through reciprocity to maintaining friendship. In late adolescence some shift to the Maintaining Norms Schema; the Postconventional Schema typically only begins to develop in young adults and seems to be promoted by post-secondary education.[22]

To assess the maturity of moral reasoning the Center for the Study of Ethical Development created an easily administered, and extensively validated, multiple-choice instrument, the Defining Issues Test (DIT), that presents ethical dilemmas and then measures the extent to which an individual prefers arguments based on personal interests, maintaining norms or post-conventional principles to resolve the dilemmas.[23] The Carnegie Report cites several studies showing that law students who completed a traditional professional responsibility course did not show significantly more sophisticated moral reasoning, as measured by DIT scores, at the end of the course than at the beginning; other studies show no improvement in DIT scores between the beginning and end of law school.[24] The Carnegie Report however goes on to state that "research makes quite clear … that specially designed courses in professional responsibility and legal ethics do support that development".[25]

Presenting the legal ethics course in terms of learning how to avoid discipline or malpractice liability, or to develop and preserve a good reputation in the legal community, appeals merely to the reasoning of the immature Personal Interests Schema.[26] To develop more mature moral

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[21] Bebeau & Monson, *Guided by Theory* 559. This approach is an evolution based on empirical research from the well-known theory of Lawrence Kohlberg that as individuals mature they pass through identifiable stages of moral development that can be identified by the type of moral reasoning typically used at that stage. James R. Rest, Darcia Narvaez, Stephen J. Thoma & Muriel J. Bebeau, *A Neo-Kohlbergian Approach to Morality Research*, 29 J. MORAL EDUC. 381 (2000). *See* James Rest and Darcia F. Narvaez, *Introduction in* MORAL DEVELOPMENT IN THE PROFESSIONS 1-3 (James Rest and Darcia F. Narvaez, eds., 1994) (describing Kohlberg's original six stages of moral reasoning); *see also* Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 506-22 (1994-95).

[22] Email correspondence from Steve Thoma on file with author.

[23] Bebeau, *Defining Issues Test.*

[24] Sullivan, EDUCATING LAWYERS 133-34. See also Bebeau, Defining Issues Test 273-81; Adrian Evans & Josephine Palermo, Almost There: Empirical Insights into Clinical Method and Ethics Courses in Climbing the Hill towards Lawyers' Professionalism, 17 GRIFFITH L. REV. (2008) (longitudinal study of 700 Australian law students from 21 law schools, finding that law schools have minimal impact on graduates' values formation but insertion of personally challenging circumstances into hypothetical ethical scenarios can allow students to more clearly identify their preferred decisions and the values sets which motivated those decisions)

[25] Sullivan, EDUCATING LAWYERS 134.

[26] Reliance in professional responsibility pedagogy on the Personal Interests Schema is illustrated by the following statement: "I always start my professional responsibility classes by telling my students that the most important class law students will take is the course *on the law governing lawyers*. All the *other courses* make the students *better lawyers for their clients*. But professional responsibility *teaches them about protecting themselves*." Lawrence J. Fox, *Ethics Bureau at Yale Combining Pro Bono Professional Responsibility Advice with Ethics Education*, 62 J. LEGAL EDUC. 551, 560 (2013) (emphasis added). (Fox has taught the professional responsibility course at Yale, Harvard and the University of Pennsylvania law schools and is co-author of a professional responsibility text book. The appeal to self-interest Fox makes to his students stands in striking contrast to his own long-time service to the legal profession and those in need: for example, he is the former chair of the American Bar Association (ABA)

reasoning, students must struggle with complex problems in which the protagonist is a lawyer facing competing duties, responsibilities and rights that cannot be resolved by application of a rule: because (1) the rule is vague or grants discretion, (2) the problem is not addressed by a rule, or (3) most challenging, a decision may be justified that the rule ought not to be followed.[27] In an article published 20 years ago that deserved much greater attention, Steven Hartwell described how he designed an unconventional professional responsibility course which combined the pedagogies described above for promoting both moral sensitivity and moral reasoning; he administered the DIT at the beginning and end of the semester each time he taught with these methods and student DIT scores increased significantly.[28]

Bebeau and Stephen Thoma have also developed profession-specific measures of moral reasoning that better reflect the content of professional education by using "Intermediate Concepts" that represent basic professional norms – rather than the more abstract moral schemas measured by the DIT – but are not as specific as codes of professional conduct.[29]

## The Third Component: Commitment

"[L]eading the professional moral life is incredibly challenging"[30] due both to the complexity of professional practice and the many pressures to act, or fail to act, in ways that are inconsistent with what the individual understands to be the moral decision.[31] Competing influences include personal interests, such as desire for advancement and recognition, and peer pressure and

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Standing Committee on Ethics and Professional Responsibility and received the ABA's Pro Bono Publico Award in 2005 and the ABA's Michael Franck Professional Responsibility Award in 2007.)

[27] *See* Hamilton & Monson, *Legal Education's Ethical Challenge* 350, citing Bebeau, *Defining Issues Test* 273, 289.

[28] Hartwell, *Promoting Moral Development*. In Hartwell's course very little time was spent discussing formal ethical rules or reported cases. Instead most of the course was built around extensive out-of-class attorney-client simulations; students were not told beforehand what ethical issues were raised by the exercises. Students then met in small groups to identify for themselves an ethical issue raised by the exercise, decided an appropriate course of action, and then were required to justify that action in terms of one or more moral principles. They were allowed to consult conduct rules for guidance but not to justify their decision. *Id.* at 522-23. A similar study of students in 2002 and 2004 produced comparable results. Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115 (2004-2005). Hartwell and the other law school studies cited by the Carnegie Report measured development of moral reasoning in terms of how often students preferred the Postconventional Schema (called "the P score"). More recent research using the DIT also measures how often a subject prefers *either* the Postconventional or Maintaining Norms Schema over Personal Interests ("the N2 score"). *See* Hamilton, Monson & Organ, *Empirical Evidence* 50-53, 55-62 (reporting significant increases in N2 scores over course of three year program of instruction at the University of St. Thomas School of Law in Minneapolis).

[29] Muriel J. Bebeau & Stephen J. Thoma, *"Intermediate Concepts and the Connection to Moral Education,"* 11 EDUC. PSYCHOLOGY REV. 343 (1999). *See also* Muriel J. Bebeau, TEACHING AND ASSESSMENT MATERIALS FOR A DENTAL ETHICS COURSE DESIGNED TO FACILITATE THE DEVELOPMENT OF MORAL REASONING AND JUDGMENT, *available at* http://ethicaldevelopment.ua.edu/. Bebeau is consulting with law school members of the National Institute for Teaching Ethics & Professionalism consortium to develop Intermediate Concept measures of moral reasoning for use in legal education; for further information, contact the author.

[30] Muriel J. Bebeau & Stephen J. Thoma, *Moral Motivation in Different Professions*, in HANDBOOK OF MORAL MOTIVATION: THEORIES, MODELS, APPLICATIONS 475, 480 (Karin Heinrichs et al eds., 2013).

[31] Stephen J. Thoma & Muriel J. Bebeau, *Moral Motivation and the Four Component Model*, in HANDBOOK OF MORAL MOTIVATION: THEORIES, MODELS, APPLICATIONS 49, 52 (Karin Heinrichs et al eds., 2013).

economic forces to conform to workplace culture.[32] Perhaps even more corrosive to professional conduct are moral disengagement and the feeling that "someone else should do it."[33]

"Understanding the self as responsible is at least part of the bridge between knowing the right thing and doing it."[34] Social science research indicates that ethical motivation is a function of how deeply values have penetrated an individual's conception of self and identity.[35] Such commitment can be enhanced if the individual is developing a professional identity that incorporates into the construction of the self the purposes and public duties of the profession, such as placing the interests of the client, the justice system and the public before self-interest.[36]

Research has correlated ethical commitment with Robert Kegan's life-span model of self-development,[37] finding evidence of stages in an evolving identity moving from (1) striving for individual achievement and approval from others to (2) being a team player and ideally culminating in (3) becoming a self-defining professional.[38] Combining the FCM with Kegan's research has supported the development of a validated measure of professional identity formation: the Professional Identity Essay (PIE).[39]

What are the characteristics of a self-defining professional? Studies of professionals identified by their peers as exemplary show they differ from persons with less developed identities in their ability to integrate membership in a professional community with their own moral agency.[40] Exemplary professionals (a) sense a connection between self and others, (b) can clearly articulate their professional authority and duties, (c) are confident in their ability to affect change, and (d) feel that moral action is obligatory, typically explaining their "hard choice" decisions as simply

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[32] Bebeau & Thoma, *Moral Motivation in Different Professions* 479. *See* Hilary Sommerlad, *The commercialization of law and the enterprising legal practitioner: continuity and change*, 18 INT'L J. LEGAL PROFESSION 73 (2011).
[33] *Id.* at 480; *see also* Thoma & Bebeau, *Moral Motivation and the Four Component Model* 59-61.
[34] Bebeau & Thoma, *Moral Motivation in Different Professions* 494.
[35] Muriel J. Bebeau & Kathy Faber-Langendoen, *Remediating Lapses in Professionalism*, in REMEDIATION IN MEDICAL EDUCATION: A MID-COURSE CORRECTION, 103, 104 (A. Kalet & C. L. Chou eds., 2014); Bebeau & Monson, *Guided by Theory* 558.
[36] Bebeau & Faber-Langendoen, *Remediating Lapses* 106.
[37] Thoma & Bebeau, *Moral Motivation and the Four Component Model* 57-59; *see also* Neil H. Hamilton, Verna E. Monson & Jerome Organ, *Empirical Evidence That Legal Education Can Foster Professionalism/Professional Formation to Become an Effective Lawyer*, 10 UNIV. ST. THOMAS L. J. 11, 19-20 (2012).
[38] Bebeau & Faber-Langendoen, *Remediating Lapses* 106; Bebeau & Thoma, *Moral Motivation in Different Professions* 487-93.
[39] Hamilton, Monson & Organ, *Empirical Evidence* 53-55, 66-73.
[40] Thoma & Bebeau, *Moral Motivation and the Four Component Model* 62. Recent research indicates that key elements of professional formation are also identified as competencies desired by employers when hiring new lawyers. Neil W. Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competences Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 S.C. L. REV. 581 (2014).

required by their professional role.[41] They are both strongly identified with their profession and able to critique it.[42]

Research has shown that educational interventions can help students develop an identity aligned with ethical perspectives.[43]  At the completion of the Carnegie Foundation's study of legal education and four other types of professional education, the Foundation's President concluded that "the most overlooked aspect of professional preparation was the formation of a professional identity with a moral and ethical core of service and responsibility around which the habits of mind and practice could be organized."[44]  Or, as one law student interviewed by the Foundation stated succinctly: "law schools create people who are smart without a purpose."[45]

What should students be learning about the purposes of the legal profession and thus the core values of a lawyer's professional identity? Neil Hamilton has drawn upon his long academic study of the professionalism movement in law,[46] and, together with Verna Monson and Jerome Organ, has combined insights from the five Carnegie studies of professional education in law, medicine, nursing, engineering, and for clergy with a wide review of social science research to conclude that the primary goal of professional formation should be the development of "an internalized moral core characterized by a deep responsibility or devotion to others, particularly the client, and some self-restraint in carrying out this responsibility."[47]  The same sources

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[41] *Id.* at 59, 62; Bebeau & Thoma, *Moral Motivation in Different Professions* 475, 483; Neil W. Hamilton & Verna E. Monson*, Ethical Professional (Trans)Formation: Themes from Interviews about Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 925 (2012)   When military lawyer Charles Swift was asked by an interviewer on National Public Radio whether he had considered that suing the Secretary of Defense on behalf of Osama Bin Laden's driver "might be a career killer," Swift responded: "I didn't think about it in those terms.  I thought about it as this is the ethical way I can do my job." Cunningham & Alexander, *Developing Professional Judgment* 79, 84-85; see also Clark Cunningham, *Teaching Demonstration: Representing Bin Laden's Driver available at* www.niftep.org/workshops/fall-2013-workshop.

[42] Thoma & Bebeau, *Moral Motivation and the Four Component Model* 62. Russell Pearce cautions against a "symbiosis" between professional identity as an American lawyer and a "bleached" out racial identity of "whiteness." Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L REV. 2081 (2005); *see also* Russ Pearce, *Professional Role, Identity, and the Rule of Law: Teaching Demonstration available at* www.niftep.org/workshops/summer-2014-workshop.

[43] Thoma & Bebeau, *Moral Motivation and the Four Component Model* 56.

[44] Lee S. Shulman, *Foreword*, in Molly Cooke et al, EDUCATING PHYSICIANS: A CALL FOR REFORM OF MEDICAL SCHOOL AND RESIDENCY ix (2010). *See also* Anne Colby & William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 UNIV. ST. THOMAS L. J. 404 (2008).

[45] Sullivan, EDUCATING LAWYERS 142. An effective way of helping students understand the purpose of professional practice and motivating their interest in the course is to contextualize professional responsibility in specific practice settings.  Green, *Less is More* 358-59 (Fordham now offers more than 10 different three credit courses, any of which satisfies the ABA requirement. Each course is titled "Professional Responsibility: ___" with such subtitles as Ethics and Corporate Practice, Corporate Counsel, Ethics in Alternative Dispute Resolution, Ethics in Criminal Advocacy, Large Firm Practice and Transactional). *Accord* Rhode, *Teaching Legal Ethics* 1052; Southworth & Fisk, *Our Institutional Commitment* 77-78, 80, 84-85;  David B. Wilkins, *Redefining the "Professional" in Professional Ethics: An Interdisciplinary Approach to Teaching Professionalism*, 58 LAW & CONTEMP. PROBS. 241 (1995).

[46] *See, e.g.,* Neil W. Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAWYER 4 (2008); Neil W. Hamilton & Verna Monson, *Ethical Professional (Trans)formation;*  Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL Ethics 137 (2011); Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 UNIV. ST. THOMAS L.J. 470 (2008).

[47] Hamilton, Monson & Organ, *Empirical Evidence* 13-16. See also Hamilton, *Fostering Professional Formation* 794-97.

document that the most effective pedagogies combine "clinical education and practical experience, coaching, modeling, institutional intentionality, and scaffolding with feedback and reflection".[48] The Carnegie Report provides similar recommendations: "[C]ritical analysis of students' own experience in both simulated and actual situations of practice, including expert feedback, is a pedagogical process with enormous power. …The key components are close working relationships between students and faculty, opportunity to take responsibility for professional interventions and outcomes, and timely feedback."[49]

Although it is clear that developing professionals need positive role models, the lawyers students meet in the cases studied in a conventional professional responsibility course are typically careless, thoughtless or venal. In contrast, a curriculum carefully designed to promote professional formation will repeatedly present students with exemplary lawyers – through compelling stories,[50] guest speaking appearances, individual or small group meetings, and ideally as actual mentors.[51]

**The Fourth Component: Skill**

The professional cannot stop with "What is happening?" [awareness], "What ought to be done?" [mature reasoning], and "Will I do what ought to be done?" [commitment], but must also address "How can I effectively do this?", "What exactly should I say?", and "How should I say it?" [52]  Thus the teaching strategies for addressing the fourth capacity, skill, should require students to develop action plans and even specific dialogue for resolving tough problems.[53] "Creative problem solving is critical" as is perseverance.[54] As the Carnegie Report puts it, "the 'bottom line' [is] … not ... what [students] know but what they can do. They must come to understand thoroughly so they can act competently, and they must act competently in order to serve responsibly."[55]  Therefore, teaching

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[48] Hamilton, Monson & Organ, *Empirical Evidence* 13-16; Hamilton & Monson, *Legal Education's Ethical Challenge* 343-345.

[49] Sullivan, EDUCATING LAWYERS 177-78.

[50] *See* Rhode, *Teaching Legal Ethics* 1053-55 and sources cited therein; LEGAL ETHICS: LAW STORIES (Deborah L. Rhode & David Luban eds., 2006); Lisa G. Lerman & Philip G. Schrag, ETHICAL PROBLEMS IN THE PRACTICE OF LAW (2005) (teacher's manual includes disc of recorded interviews with lawyers whose stories are told in casebook).

[51] "When a young person, even a gifted one, grows up without proximate living examples of what she may aspire to become … her goal remains abstract.  … [A] role model in the flesh provides more than an inspiration; his or her very existence is confirmation of possibilities one may have every reason to doubt …" Sonia Sotomayor, MY BELOVED WORLD 178 (2013) (U.S. Supreme Court Justice Sonia Sottomayor describing importance of being mentored during law school by Jose Cabranes, then General Counsel of Yale University). *See* Cunningham, *How To Explain Confidentiality* 590-618; Cunningham, *How Can We Give Up Our Child* 320-28 (involving students in role plays based on actual experiences of exemplary lawyers).

[52] Email correspondence from Muriel Bebeau, on file with author.

[53] Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions, 5* UNIV. ST. THOMAS L.J. *366,* 393 (2008).

[54] Thoma & Bebeau, *Moral Motivation and  Four Component Model* 64. The fourth component is also described in terms of "moral character" and courage. Bebeau & Faber-Landendoen, *Remediating Lapses* 104. *Cf.* Nicolson, *Education* 154-59.  *See* Clark D. Cunningham, *Courage: Operationalizing Research on Virtue Ethics and Moral Development for Professional Education* (presented at VARIETIES OF VIRTUE ETHICS, Oriel College, University of Oxford  Jan. 9, 2015) available at www.teachinglegalethics.org/Courage.

[55] Sullivan, EDUCATING LAWYERS 23.

and assessment must "take place in role rather than in the more detached mode that the law-of-lawyering courses typically foster."[56]

Best Practices for Learning Professional Responsibility Guided by the Four Component Model

An ideal program of instruction for learning professional responsibility prior to receiving a license to practice law would include, in addition to learning the basic "law of lawyering," all of the following elements:[57]

1)	Before beginning educational interventions intended to develop professional responsibility have all students for the relevant program complete the Defining Issues Test (DIT),[58] the Professional Identity Essay (PIE),[59] and ideally a test of Intermediate Concepts relevant to legal practice.[60]  The results of these tests would never be used for student grades but would provide baseline data and results could also be provided back to students for formative assessment. Although anonymous to persons internal to the law school, results should be coded so student responses can be tracked over time.
2)	Use the DIT, PIE, test of Intermediate Concepts and performance based assessment[61] at the completion of the program to provide formative assessment and program evaluation.
3)	Provide early intentional instruction about the structure, values and duties of the legal profession to lay a foundation for professional identity formation.
4)	Introduce students to a variety of ethical theories and social science studies of the legal system to provide a basis to interpret and critique existing norms of legal practice.
5)	Enable students to learn about the wide variety of practice settings, how ethical challenges vary by setting, how institutional contexts can constrain ethical actions, and how exemplary professionals master their practice area by combining exceptional competence with high ethical standards.

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[56] Sullivan, EDUCATING LAWYERS 178.

[57] Among the important sources for these recommendations are all the works by Bebeau and her co-authors and by Hamilton and his co-authors cited herein; Robert P. Burns, *Legal Ethics in Preparation for Law Practice*, 75 NEB. L. REV. 684 (1996); Cunningham & Alexander, *Developing Professional Judgment*; Liz Curran, Judith Dickson & Mary Anne Noone, *Pushing The Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice*, INT'L J. CLINICAL LEGAL EDUC. 104 (Dec. 2005); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995-96); Donald Nicolson, *"Education, Education, Education": Legal, Moral and Clinical*, 42 LAW TEACHER: INTERN'L J. LEGAL EDUC. 145 (2010), Deborah L. Rhode, *Teaching Legal Ethics*, 51 ST. LOUIS U. L.J 1043 (2006-2007); Southworth & Fisk, *Our Institutional Commitment*; Sullivan, EDUCATING LAWYERS, Roger Burridge & Julian Webb, *The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in the Law School*, 10 LEGAL ETHICS 72 (2007); and the Reports listed in note 2.

[58] The DIT in a convenient on-line format can be purchased for a modest per-subject fee, that includes a free analysis of data, at http://ethicaldevelopment.ua.edu/

[59] *See* Hamilton, Monson & Organ, *Empirical Evidence* 53-55, 66-73.

[60] *See* note 35.

[61] *See, e.g.,* Barton, Cunningham, Jones & Maharg, *Valuing What Clients Think* (validating use of student interviews of simulated clients at Glasgow Graduate School of Law in Scotland to assess communicative competence); John B. Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 DUKE F. LAW & SOC. CHANGE 101 (2009) (using simulated client methodology validated by Barton, Cunningham, Jones & Maharg as summative assessment required for admission to practice without taking the conventional bar examination in New Hampshire for graduates who complete "two-year bar examination" program of instruction at University of New Hampshire School of Law).  See generally www.teachinglegalethics.org/SimulatedClients  .

6) Use small group instruction with realistic, complex, exciting and emotionally engaging simulation exercises that contain only clues to embedded ethical dilemmas to develop moral sensitivity, moral reasoning, and moral implementation capacities. Acting in role with self-assessment and personalized feedback from peers and teachers further promotes professional formation.

7) Recurrently expose students to professional exemplars by learning their stories, interacting with them, observing them in action, and developing mentoring relationships.

8) Provide repeated opportunities for dialogue with others about "tough calls" and reflection on matters involving the student's moral core.[62]

9) Use collaborative and team-based teaching methods.[63]

10) Provide multiple opportunities to observe actual and simulated legal practice performed by expert practitioners and to reflect about the lessons for ethical conduct in what was observed with the practitioner, a teacher who was not the practitioner, or both.

11) Provide multiple opportunities for students to engage in real-life work with authentic responsibility, so that the student can experience both satisfaction and regret for her actions,[64] and be challenged to exercise empathy, cultural sensitivity, diligence, perseverance, and courage.

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[62] Hamilton & Monson, *Legal Education's Ethical Challenge* 375.

[63] *Id.* 362-72. For a practical, step-by-step guide to using co-operative learning and peer feedback to teach professional responsibility *see* Barbara Glesner-Fines, *Using Team Based Learning in the Professional Responsibility Course* (Working Paper 2012), *available at* www.teachinglegalethics.org/team-based-learning-pr; *see also* Barbara Glesner-Fines, *Team Based Learning* (webcast presentation) available at www.niftep.org/workshops/summer-2012-workshop.

[64] Nicolson, *Education* 165.