UTK Law Faculty Publications

8-4-2015

Teaching the Newly Essential Knowledge, Skills, and Values in a Changing World

Paula Schaefer

Lisa Bliss

Robin A. Boyle

Sylvia B. Caley

Deborah L. Rhode

Chapter 6

TEACHING THE NEWLY ESSENTIAL KNOWLEDGE, SKILLS, AND VALUES IN A CHANGING WORLD

A. PROFESSIONAL IDENTITY FORMATION

1. TEACHING KNOWLEDGE, SKILLS, AND VALUES OF PROFESSIONAL IDENTITY FORMATION
By Larry O. Natt Gantt, II & Benjamin V. Madison III[1]

a. Introduction

BEST PRACTICES FOR LEGAL EDUCATION[2] called for law schools to embrace the learning objective that graduates demonstrate professionalism as a result of their legal education. It also identified the process of professional formation as a crucial part of the training students need in order to develop the competencies of the effective lawyer. EDUCATING LAWYERS[3] described this process as "professional identity" formation.

Helping students develop their "professional identity" is different from teaching them "professionalism," as the latter term is often interpreted. Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others.[4] Civility and respect for others are foundational to emerging lawyers' understanding of professional conduct, but professional identity engages students at a deeper level by asking them to internalize principles and values such that their actions flow habitually from their moral compass.[5]

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[1] The reader for this section was Susan L. Brooks.

[2] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007).

[3] WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

[4] *See, e.g.*, Robert F. Cochran, Jr., *Professionalism in the Post-Modern Age: Its Death, Attempts at Resuscitation and Alternative Sources of Virtue*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 305, 308–11 (2000) (discussing how the modern professionalism movement has focused on promoting outward conduct, as opposed to challenging lawyers to reflect on how their own moral values should impact their practice of law).

[5] Aristotle emphasized the need for values to become so internalized that persons act habitually in concert with those values: "It makes no small difference, then, whether we form habits of one kind [virtuous habits] or the other [habits prone to vice] . . . ; it makes a very great difference, or rather *all* the difference." ARISTOTLE, THE NICOMACHEAN ETHICS, bk. II, ch. 1 (David Ross, trans. Oxford University Press 1998) (340 B.C.) [hereinafter NICOMACHEAN ETHICS]. *See also* Chapter 6, Section A, Subsection 3, *Learning*

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It is a best practice to address professional identity formation explicitly and pervasively as part of the program of legal education. The training in professional identity formation discussed in this section promotes lawyer integrity by helping law students appreciate the indivisibility of their professional and personal selves.[6] Because the American legal system is adversarial, some lawyers may see themselves as players in a system with special rules that exempt them from accountability for their actions, so long as they can justify those actions as benefitting their client.[7] Instructing students in professional identity formation is, therefore, more significant in law than in most professions. Without such preparation, law practice can lure persons unwittingly into role-differentiated behavior in which they adopt a "principle of non-accountability."[8]

A growing number of scholars recognize that the process of becoming a legal professional is an internal process, not one in which lawyers race to meet external markers or rewards. Internalizing values that are consistent with the core values of the profession is what truly defines a professional.[9] Indeed, recent scholarship from many disciplines advocates that professional education should help students internalize professional values and derive satisfaction from acting consistently with them.[10] Moreover, as a professional school that "shapes identities,"[11] law school has a special place in promoting students' identities as legal professionals.

b. How Law Schools Can Better Cultivate the Formation of Professional Identity

Both BEST PRACTICES and CARNEGIE REPORT suggest that the process of forming students' professional identities requires exposing them to explicit areas of knowledge, skills, and values.[12] For instance, Chapter 2 of BEST PRACTICES surveys many studies of traits indicative of lawyer effectiveness, such as the influential study

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Professional Responsibility, below, for more on the extent to which Professional Responsibility courses should also build on a foundation of moral development.

[6] See Larry O. Natt Gantt, II, *Integration as Integrity: Postmodernism, Psychology, and Religion on the Role of Moral Counseling in the Attorney-Client Relationship*, 16 REGENT U.L. REV. 233, 248–51 (2003–04) [hereinafter *Integration as Integrity*] (discussing how integration across roles is central to personal integrity).

[7] *Id.*

[8] NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF PRACTICE AND THE PROFESSION 22 (5th ed. 2012) [hereinafter PROFESSIONAL RESPONSIBILITY].

[9] *See, e.g.*, Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity, and Happiness*, 11 CLINICAL L. REV. 425, 430–32 (Spring 2005) [hereinafter *Professionalism and Personal Satisfaction*].

[10] *See, e.g.*, Lea A. Theodore, et al., *Developing Professional Identity: Values, Behaviors, and Reputation*, *in* 2 HANDBOOK OF EDUCATION, TRAINING, AND SUPERVISION OF SCHOOL PSYCHOLOGISTS IN SCHOOL AND COMMUNITY 185 (2010) (addressing ways in which graduate programs in psychology can foster development of professional identity).

[11] CARNEGIE REPORT, at 2.

[12] *See generally* BEST PRACTICES; CARNEGIE REPORT. *See also* LARRY O. NATT GANTT, II & BENJAMIN V. MADISON, III, TEACHING METHODS AND EXAMPLES TO HELP STUDENTS DEVELOP A PROFESSIONAL IDENTITY (Carolina Academic Press) (forthcoming) (describing in detail authors' view of knowledge, skills, and values

conducted by Marjorie Shultz and Sheldon Zedeck.[13] The Shultz and Zedeck study suggests that certain character values and emotional intelligence skills are just as important to lawyer effectiveness as analytical skills.[14] Studies published since BEST PRACTICES and CARNEGIE REPORT affirm that effective lawyering requires more than analytical skills and legal knowledge.[15]

This section builds on BEST PRACTICES' thesis concerning what it means to be a legal professional first by identifying more specifically the content of that knowledge and the nature of those values and skills, and then by discussing particular teaching methods aimed at promoting students' professional identity formation.[16] Because formation of developing lawyers' professional identities requires pervasive efforts, a law school that has embraced the goal of formation ought to combine the practices suggested in this section with those in other sections.

i.   Knowledge

A pervasive theme of literature growing out of BEST PRACTICES is that law schools desiring to help students develop a professional identity must do more than teach students the legal doctrine about the normative responsibilities of the profession. Concentrating exclusively on the Rules of Professional Conduct has come to form the traditional core of training about the ethics of the profession. Even before students consider the values and skills of the legal profession, law teachers can introduce core principles on moral development, identity formation, and ethical decision-making from other disciplines in order to underscore the importance of developing a professional identity and provide a contextual framework for the specific values and skills discussed in the law school setting.[17] Consistent with adult learning theory, providing law students with this context will not only help them understand the values

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indispensable to professional identity formation, and including exercises and suggested teaching methods for such formation).

   [13] *See* BEST PRACTICES, Chapter Two, text at notes 132–44.

   [14] *Id.* at notes 103–267. The study is now published in Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 LAW & SOC. INQUIRY 620 (2011).

   [15] *See, e.g.*, Neil W. Hamilton, *The Qualities of the Professional Lawyer*, in ESSENTIAL QUALITIES OF THE PROFESSIONAL LAWYER 3 (Paul A. Haskins ed., 2013) [hereinafter *Qualities*] (discussing survey results from legal employers and clients which identify attributes of a good lawyer, such as "integrity," "honesty," and "trustworthiness"); DOUGLAS O. LINDER & NANCY LEVIT, THE GOOD LAWYER: SEEKING QUALITY IN THE PRACTICE OF LAW (2014) (drawing upon social science research and stories of individual lawyers to identify qualities of a good lawyer, such as being "empathetic" and "courageous" and having "ample willpower").

   [16] This section does not address in detail the role of clinical legal education and Professional Responsibility courses in this endeavor. Other sections of this book discuss best practices for cultivating professional identity in clinical education and in professional responsibility courses. *See* Chapter 5, Section F, subsections 2 and 3, *Delivering Effective Education in In-House Law Clinics* and *Delivering Effective Education in Externship Programs* above and Chapter 6, Section A, Subsection 3, *Learning Professional Responsibility*, below.

   [17] For instance, students' professional identity formation is likely to be enhanced if they are exposed to research by Lawrence Kohlberg and others on the stages of moral development. *See* LAWRENCE KOHLBERG, 2 ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT 174–76 (1984) [hereinafter MORAL DEVELOPMENT].

and skills discussed, it will also help them understand *why* these principles are important in the first place.[18] Moreover, as part of this context, law schools should inform students how empirical studies have found that moral and ethical development of the average adult continues well into mid-life, and likely later.[19]

ii.   Values

Throughout its history in this country, the legal profession has engaged in an ongoing discussion about the specific normative values of the profession. Some contend that the profession's commitment to normative values has declined since the early generations of American lawyers,[20] but respect for normative values has never completely faded from the legal culture.

A developing lawyer needs to consider the legal profession's normative values because formation as a lawyer includes more than simply internalizing and acting consistently with any values the lawyer holds dear. Although it is true that acting consistently with one's beliefs is a component of integrity generally,[21] integrity in the legal professional involves acting consistently with the core, accepted values of the legal profession.[22]

(a)   Eight Specific Values that Should be Taught to Law Students

The MACCRATE REPORT,[23] BEST PRACTICES,[24] and other publications[25] have promoted the idea that the profession needs to stand for a broad set of normative values. The MACCRATE REPORT listed four fundamental values of the legal profession: (1) providing competent representation; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession; and (4) professional self-development.[26] BEST PRACTICES provided greater emphasis than the MACCRATE REPORT on personal ethics

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[18] *See* BEST PRACTICES, at text at notes 455–74 ("Legal education would be more effective if law teachers used context-based education throughout the curriculum.").

[19] *See* KOHLBERG, MORAL DEVELOPMENT, at 174–76; *chart reprinted in* F. CLARK POWER ET AL., LAWRENCE KOHLBERG'S APPROACH TO MORAL EDUCATION 8–9 (1989); *see also* Neil W. Hamilton & Verna E. Monson, *Ethical Professional (Trans)formation: Themes from Interviews About Professionalism with Exemplary Lawyers*, 52 SANTA CLARA L. REV. 921, 927 n.14 (2012) (collecting authorities) [hereinafter *(Trans)formation*].

[20] John T. Baker, *Citizen Lawyers — The Past, Present, and Future of the Legal Profession*, COLO. LAW., Sept. 2009, at 99, 100.

[21] *See* Gantt, *Integration as Integrity*, at 248–51.

[22] *See* Krieger, *Professionalism and Personal Satisfaction*, at 426 (reasoning that students' "life experience will be enhanced on many levels if they culture their values and integrity to model the wise, compassionate lawyer-statesperson").

[23] AMERICAN BAR ASSOCIATION SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 7–10 (1992) [hereinafter MACCRATE REPORT].

[24] BEST PRACTICES, at text at notes 232–35.

[25] Since BEST PRACTICES, legal scholars have continued to stress the importance of identifying the normative values of the profession. *See, e.g.*, Hamilton, *Qualities*, at 12–13.

[26] MACCRATE REPORT, at 140–41.

by encouraging schools to cultivate the values of "[a] commitment to justice" and "[r]espect for the rule of law."[27] It also went further in recommending that law graduates embody the values of: (1) "[h]onor, integrity, fair play, truthfulness, and candor"; (2) "[s]ensitivity and effectiveness with diverse clients and colleagues"; and (3) "[n]urturing quality of life."[28] Indeed, the recent emphasis on professional identity formation has broadened the values discussion to include character-based values that should be internalized by the ideal legal professional.[29]

Leading sources[30] support the following eight values as core values law schools should teach their students in the process of helping them develop their professional identity: (1) integrity; (2) honesty; (3) diligence; (4) fairness; (5) courage; (6) wisdom; (7) compassion; and (8) balance.[31] This list expounds upon the list in BEST PRACTICES and focuses on character-based values that directly relate to the way in which lawyers exercise their discretion in professional decision-making. The last part of this section illustrates how law schools can help to cultivate these values in their students.

(1) Integrity — Being True to Self

The words "integrity" and "integration" sound the same for a reason: both deal with personal wholeness.[32] Individuals with integrity exhibit personal consistency by displaying the same core values in their public and private lives.[33] Professor Larry Krieger's work has demonstrated the links between personal integrity and emotional health and physical well-being.[34] Despite this link and the widespread recognition of the importance of integrity to the legal professional, law schools to date have more often undermined than they have enhanced students' personal satisfaction and well-being.[35] Law schools, therefore, must do more than talk about integrity; they must adopt specific strategies to promote this character attribute among their students.

(2) Honesty

The value identified in ethical standards more than any other as essential to the legal profession is honesty. The ABA specifically emphasizes honesty by adopting several Model Rules of Professional Conduct ("Model Rules") that implicate this value. These include the Model Rules on candor to the tribunal, fairness in dealing with opposing counsel, and honest communications with third persons.[36] Law schools

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[27] BEST PRACTICES, at notes 239 and 246.

[28] *Id.* at notes 253–67.

[29] *See, e.g.*, Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer's Professional Identity*, 28 MISS. C. L. REV. 339, 346 (2009).

[30] *See, e.g.*, Hamilton, *Qualities; see also* BEST PRACTICES, text at notes 132–42 (referring to studies identifying the values and traits characteristic of effective lawyers).

[31] Each of these values reflects Aristotelian virtues as embodied in the *Nicomachean Ethics. See* ARISTOTLE, NICOMACHEAN ETHICS. These values are also discussed below in Chapter 6, Section A, Subsection 2, *Integrating Professionalism into Doctrinally-Focused Classes.*

[32] Gantt, *Integration as Integrity*, at 248

[33] *Id.* at 249.

[34] *See* Krieger, *Professionalism and Personal Satisfaction*, at 431–35.

[35] *Id.* at 433–34.

[36] ABA MODEL RULES OF PROF'L CONDUCT R. 3.3 (Candor Toward the Tribunal); *id.* 3.4 (Fairness to

should establish early and often with their students that honesty is a core professional value.

(3) Diligence/Excellence

Diligence represents a foundational value embodied in lawyers' general obligation to be effective advocates for their clients. The Model Rules address this value in Model Rule 1.3.[37] The term *diligence* seems to connote merely enduring strenuous work and fails to capture the "excellence" or "craftsmanship" effective lawyers display. Law schools may want to consider explaining the full breadth of diligence as including these equally important qualities. By so doing, schools would focus more on the *process* of how one performs his job to the best of his abilities, instead of merely encouraging the meeting of objective, external standards.[38] A lawyer exemplifies master craftsmanship in the practice of law when she follows internal standards that lead her to perform a task with excellence because she knows the difference between a job well-done and a half-hearted effort.

(4) Fairness/Seeks Justice & Truth

BEST PRACTICES recognized the importance of seeking justice.[39] It stressed how modern-day lawyering has confused "justice" with "legality" and how legal education should reclaim its emphasis on justice.[40] Justice is more than the instrumental practice of being fair and respecting others; it ultimately deals with seeking truth.[41] All lawyers are responsible not only for their clients' interests, but also for the legal system as a whole.[42] In fostering their students' professional identity, law schools must do more to emphasize and encourage the development of students' commitment to fairness, justice, and truth both for clients and the system.

(5) Courage/Honor

Law students need to learn to have what one teacher calls "the courage to say 'yes' to those actions the person knows to be right."[43] "A person may be ethically sensitive, may make good moral judgments, and may place high priority on moral values, but if the person wilts under pressure, is easily distracted or discouraged [or] is . . . weak-

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Opposing Party and Counsel); *id.* 4.1 (Truthfulness in Statements to Others).

[37] ABA MODEL RULES OF PROF'L CONDUCT R. 1.3 (requiring lawyers to act with "reasonable diligence and promptness in representing a client").

[38] *See* Timothy P. Terrell, *Professionalism on an International Scale: The Lex Mundi Project to Identify the Fundamental Shared Values of Law Practice*, 23 EMORY INT'L L. REV. 469, 485 (2009) [hereinafter *Lex Mundi Project*] (reasoning that "excellence" does not connote achieving a certain objective, external standard, but rather has its focus on being "the best lawyer[] [you] can be").

[39] BEST PRACTICES, text at notes 238–46. On the importance of this value generally, see ANTHONY T. KRONMAN, THE LOST LAWYER 144–46 (1993).

[40] BEST PRACTICES, text at notes 242–46.

[41] *See* BEST PRACTICES, text at notes 255–59 (including as a value "sensitivity and effectiveness with diverse clients and colleagues," which relates to being fair).

[42] *See* ABA MODEL RULES OF PROF'L CONDUCT PMBL. ¶1 ("A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.").

[43] Terrell, *Lex Mundi Project*, at 511.

willed, then moral failure occurs because of deficiency in [moral character]."[44] Law schools thus must recognize the importance of moral courage and present students both with moral exemplars who have exhibited such courage and with decision-making scenarios that help students self-assess whether they would have the courage to do what they believe is right.

(6) *Wisdom/Judgment*

In Aristotelian philosophy, "practical wisdom is a virtue."[45] Indeed, Aristotle considered it the "master virtue."[46] Such wisdom goes beyond the content of someone's knowledge or the skill he uses to apply that knowledge, because it denotes internal prudence and solid decision-making in light of the core values of the profession.[47] The exercise of such wisdom emanates from a person's character — including not only her intellect but also her empathy.[48] A person of virtue is able to care for others and also to see the world through their eyes, while simultaneously having the detachment required to ensure that his emotions do not overly influence his reasoning.[49] People today continue to recognize this virtue when they see it in others. For instance, recent research has shown that good judgment is one of the key traits legal employers and clients want in their lawyers.[50]

(7) *Compassion/Service/Respect for Others*

The practice of law is often described as a "public" profession designed to serve both the clients and the community.[51] Institutional forces lead law students and lawyers to be more self-centered and less service-oriented.[52] Law schools themselves are often culprits in this change; studies demonstrate that students leave law school less service-oriented than when they entered.[53] Faith, philosophical, and cultural traditions spanning millennia promote service to others as a way for human beings to transcend their self-centeredness and find satisfaction.[54] Law schools need to explain

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[44] James R. Rest, *Background: Theory and Research*, *in* Moral Development in the Professions: Psychology and Applied Ethics 1, 23–24 (James R. Rest & Darcia Narvaez, eds., 1994) [hereinafter *Background*].

[45] Aristotle, Nicomachean Ethics bk. 6, ch. 5.

[46] Barry Schwartz & Kenneth Sharpe, Practical Wisdom: The Right Way to Do the Right Thing 11 (2010).

[47] *See, e.g.*, Best Practices, text at notes 175–81; Mark Neal Aaronson, *We Ask You to Consider: Learning about Practical Judgment in Lawyering*, 4 Clinical L. Rev. 247 (1998) [herinafter Aaronson, *Practical Judgment*].

[48] *See generally* Best Practices, note 180 (quoting Aaronson, *Practical Judgment*, at 258).

[49] *Id.*, text at notes 103–08.

[50] Hamilton, *Qualities*, at 3

[51] *See* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 Rutgers L.J. 721, 721–23 (2005).

[52] *Id.* at 767.

[53] *See* Krieger, *Professionalism and Personal Satisfaction*, at 433–34. Professor (now Judge) Patrick Schlitz writes powerfully about these forces in describing the modern-day practice of law as "the game." Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 Vand. L. Rev. 871, 903–07 (1999) [hereinafter *On Being*].

[54] In the appendices to his famous essay, "The Way" (also referred to as "The Tao"), C.S. Lewis collected evidence from various faith and cultural traditions spanning millennia which indicated that values such as compassion, empathy, and service to others appear universally as values human beings have incorporated

to their students why they should develop the habit of service. Students are more likely to find themselves fulfilled if they conceive of their profession as primarily a service to others.[55]

(8)   *Balance*

Lawyers historically have struggled with achieving a healthy balance between their professional and personal lives.[56] BEST PRACTICES thus stressed "nurtur[ing] quality of life" as a core value.[57] Many legal educators have also recognized the need for a greater emphasis on balance in the profession and within their own institutions.[58] The message of balance, however, will likely not make a difference unless law schools do a better job of exemplifying the importance of balance in their curricula, course design, teaching methods, and overall administration and management. Evidence gathered since the publication of BEST PRACTICES affirms that law students and lawyers still struggle with imbalance.[59]

c.   The Skills Necessary to Develop Professional Identity

To develop in students the values identified above, law schools need to consider ways to teach the skills that foster these values. The following skills merit serious consideration: (1) self-awareness; (2) empathy, ethical sensitivity, and other relational skills; (3) reflective and decision-making skills; and (4) the skill of self-motivation empowering the lawyer to act on her decisions.

i.   Self-Awareness

Although every skill or value cannot be cultivated solely by self-awareness, self-awareness appears to be a foundational skill on which developing lawyers should focus as they begin the process of forming a professional identity. Before we can know our values and identity, we need to know our strengths, weaknesses, and other traits — in short, to know ourselves. Without deliberate effort we are not likely to be aware of our weaknesses because "all of us believe that we see the world objectively . . . and . . . we tend to see ourselves as more fair, unbiased, competent, and deserving than average. . . . "[60] By recognizing this human tendency to be less than objective about

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into their societal norms. *See* C.S. LEWIS, *The Way*, *in* THE ABOLITION OF MAN 47, 83–101 (1971).

[55]   Indeed, medical research shows health benefits from volunteering and helping others. *See* Robert Grimm, Jr., et al., *The Health Benefits of Volunteering: A Review of Recent Research* (2007), *available at* http://www.nationalservice.gov/pdf/07_0506_hbr.pdf, *archived at* http://perma.cc/2NQE-FHP6.

[56]   *See, e.g.*, Schiltz, *On Being*, at 872–81 (discussing higher than average rates among lawyers of depression, anxiety, divorce, suicide, and substance abuse).

[57]   BEST PRACTICES, text at notes 262–67.

[58]   *See* Krieger, *Professionalism and Personal Satisfaction*, at 426–38; Schlitz, *On Being*, at 921–41.

[59]   A 2014 survey of 2721 attorneys in Virginia found that 32% of the respondents reported that either mental health or substance abuse problems had affected their personal or professional lives. *See* Report for the 2014 Lawyers Helping Lawyers and ALPS Survey on Substance Abuse and Mental Health (on file with authors).

[60]   JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS 387 (2012). Professors Robbennolt and Sternlight's book offers great promise for educating law students on matters essential for them to understand themselves and appreciate the challenges of acting according to values.

ourselves and our actions, students can learn the value of discussing situations they face with a mentor or colleague.

ii.   Empathy, Ethical Sensitivity, and Other Relational Skills

Empathy lies at the heart of ethical sensitivity.[61] Empathy has been defined as "the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another . . . . "[62] The difference between someone who is self-aware and one who has progressed to the stage of ethical sensitivity shows in the care with which he makes decisions. The ethically sensitive individual knows that her decisions make a difference — that the way she resolves problems affects not only her personally but also other people. When a person's actions conflict with his belief systems, his intuition warns that something is awry.[63] Disregarding these intuitions, as one author asserts, will "produce 'an ultimate dissatisfaction of the spirit and eventually social instability and massive losses in genetic fitness.'"[64]

The primary reason for these feelings is that the actor realizes she has either violated her internalized principles or hurt others. By relying on these internal warning signs, the ethically sensitive lawyer will be more likely to consider the consequences to others as well as the need to act consistently with his principles. The ethically sensitive lawyer may not be able to avoid certain consequences to others resulting from her resolution of an ethical dilemma. In her decision, however, she will have reflected on all options and have chosen the best alternative, one that can still have consequences for others, but that will avoid unnecessary harm.

Relational skills, in general, promote the values discussed above, such as fairness, compassion, and respect for others. These skills help in understanding another person's view because the law student or lawyer has taken the time to consider the other person's life situation and the pressures her legal problems have created.[65] They also involve communication skills such as understanding nonverbal communication and empathic listening.[66] Relational skills may be viewed as empathy in action.

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[61] Rest, *Background*, at 24 ("Moral sensitivity is the awareness of how an individual's actions affect other people. . . . . It involves imaginatively constructing possible scenarios and knowing cause-consequence chains of events in the real world; it involves empathy and role-taking skills.").

[62] Webster's Ninth New Collegiate Dictionary 407 (1990).

[63] *See, e.g.*, Darcia Narvaez, *Integrative Ethical Education*, in Handbook of Moral Development 703, 718–19 (Melanie Killen & Judith Smetana eds., 2005).

[64] Philip Kitcher, Vaulting Ambition: Sociobiology and the Quest for Human Nature 429 (1985) (quoting E.O. Wilson, *Comparative Social Theory*, The Tanner Lectures on Human Values, delivered at the University of Michigan, March 30, 1979).

[65] Because a separate section in this book addresses the need for cultural competence, that issue is not addressed here, but such competence is clearly part of a lawyer's understanding of other persons' situations.

[66] *See* Chapter 6, Section C, *The Relational Skills of the Law*, below.

iii.   Reflective and Decision-Making Skills

The self-aware, ethically sensitive, and empathic lawyer must also be able to reflect on issues that arise in practice and resolve ethical dilemmas, particularly those that arise in the face of uncertainty. Aristotle sets the standard for the kind of reflection to which anyone, including lawyers, can aspire. Aristotle's famous discussion in the *Nicomachean Ethics* about virtues explains that a person with practical wisdom must be able "to deliberate well."[67] Such a person has not only knowledge but also "intuitive reason"[68] and "understanding."[69] Law schools, thus, must equip students with practical decision-making tools that enable them to reflect on problems, including "unstructured" problems that have no simple or clear answer, and to resolve them thoughtfully.[70]

iv.   Self-Motivation

The discussion to this point has presumed that developing lawyers and those in practice care about making sound decisions. Nevertheless, a law student's capacity for self-awareness and ethical sensitivity translates into ethical decisions as a lawyer only if the lawyer has the motivation to follow through on what he concludes is the right thing to do.[71] Accordingly, law schools need to encourage the self-motivation that will empower lawyers to act on the decisions they reach.

d.   Teaching Practices to Develop Skills that Promote the Identified Values

The teaching methods suggested in this section presume that some skills, such as self-awareness, need to be taught initially as precursors to other skills, such as ethical decision-making. Although the overall process of such skill development is iterative and dynamic, exposing students to certain skills in a particular order reflects individuals' general stages of moral and cognitive development.[72]

i.   Teaching Methods to Enhance Self-Awareness

Three teaching methods show particular promise for teaching self-awareness.

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[67] ARISTOTLE, NICOMACHEAN ETHICS, bk. VI, ch. 5.

[68] *Id.*

[69] *Id.* bk. VI, ch. 10.

[70] *See* Timothy Casey, *Reflective Practice in Legal Education: The Stages of Reflection*, 20 CLINICAL L. REV. 317, 326–27 (2014) [hereinafter Casey, *Reflective Practice*].

[71] *See* Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. ST. THOMAS L. J. 366, 382–98 (2008) (discussing need in professional school to encourage acting on ethical values).

[72] *See* Casey, *Reflective Practice*, at 327–32 (summarizing select theories on the stages of cognitive and moral development and discussing how those theories are adapted to stages of reflection).

(a)   Journaling and Reflection Papers

Reflective journaling is well established in law schools as a method to help students develop self-awareness. According to one study, "The long list of impressive benefits of journal writing for students include[s] promoting self-awareness and reflection, enhancing learning from experience, releasing stress, and developing life-long self-directed learning habits."[73] For instance, clinics and externships have regularly included assigned reflection papers in which the student reflects on her experiences in the clinic or externship, including matters she observed that led her to consider questions of ethics, professionalism, or both.[74]

(b)   Class Discussion on Readings Likely to Evoke Emotional Reactions

Law teachers can promote emotional awareness by assigning readings that are likely to evoke emotional responses and then discussing the readings and the emotional reactions in class.[75] For instance, one law teacher chose readings offering "a grim portrayal of an actual lawyer's experiences in a law firm in which colleagues pressured him to conform to a variety of billing practices that he considered unethical and immoral."[76] The discussion explored the connection between students' visceral reactions and the unethical practices that prompted their reactions.[77]

(c)   Contemplative Practices

A growing number of law teachers are introducing their students to contemplative practices, such as meditation, to increase self-awareness.[78] Empirical studies have shown a wide variety of benefits that contemplative practices can offer lawyers. These benefits include: "improved concentration and a sense of calm, along with a decline in anxiety, hostility, and depression,"[79] "increase[d] positive feeling[s] and reduce[d] anxiety,"[80] and improved self-awareness, particularly of awareness of emotions.[81]

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[73] Gerald F. Hess, *Learning to Think Like a Teacher: Reflective Journals for Legal Educators*, 38 Gonz. L. Rev. 129, 130 (2002–03).

[74] *See generally* Kelly S. Terry, *Externships: A Signature Pedagogy for the Development of Professional Identity and Purpose*, 59 J. Legal Educ. 240 (2009); J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 Clinical L. Rev. 55 (1996) [hereinafter *Use of Journals*].

[75] Robin Slocum, *An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers*, 45 Creighton L. Rev. 827, 847–48 (2012).

[76] *Id.* at 847.

[77] *Id.* at 848.

[78] *See, e.g.*, Gretchen Duihame, *Practicing on Purpose: Promoting Personal Wellness and Professional Values in Legal Education*, 28 Touro L. Rev. 1207, 1234 n.144 (2012) (collecting numerous sources); Rhonda Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. Rev. 535 (2011) [hereinafter *Meditate*].

[79] Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 Harv. Negot. L. Rev. 1, 31 (2002).

[80] Magee, *Meditate*, at 541.

[81] *See* Clark Freshman, *Yes, and: Core Concern, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 Nev. L. J. 365, 371–88 (2010).

Indeed, some legal institutions have established institutes or programs in which students are able to practice mindfulness and meditation as a means to achieve balance and success — defined as law practice that exhibits quality and also supports a degree of equilibrium in one's life.[82]

ii.   Teaching Methods to Develop Empathy

As noted, psychologists have identified empathy as an essential component of the ethical sensitivity necessary to make wise ethical decisions. Ethical dilemmas almost always involve choices between different courses of action that affect other persons or institutions.[83] Law schools therefore should help students develop empathy to serve as the foundation for the ethical sensitivity lawyers need to make good decisions.

(a)   Approaches to Teaching Empathy

Important breakthroughs in the understanding of the neuroscience of empathy demonstrate that empathy can be taught. Providing students with materials that demonstrate the brain physiology of empathy can be a successful approach to teaching empathy, in that awareness of such information enhances student receptivity to the importance of the topic and reinforces how "practicing" the skill of empathy can and does increase capacity for empathic reaction.[84]

To develop students' skill in empathic sensitivity, law teachers have engaged in methods such as "instruction on empathy, active listening, parallel universe thinking, classroom simulations, and exposure to client experiences through 'windows' into their worlds (e.g., observations of court, visits to local welfare office or shelter)."[85] Experts reason, however, that developing the skill of empathy occurs best through experiential learning.[86] Moreover, coupling such learning with the practice of journaling and reflective writing facilitates students' ability to process how their learning experience has enhanced their empathy and understanding of others.[87]

Medical schools have been a leader in professional education in this area, and their methods are easily adapted to law school contexts. Medical schools recognize the importance of empathy to effective medical practice. They thus encourage students to develop this trait by discussing its importance in lectures and by following those

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[82] *See* SCOTT L. ROGERS, MINDFULNESS FOR LAW STUDENTS: USING THE POWER OF MINDFUL AWARENESS TO ACHIEVE BALANCE AND SUCCESS IN LAW SCHOOL (1999).

[83] *See* Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 347 (2011) [hereinafter *Ethical Challenge*].

[84] For an example of such research, see Lian T. Rameson et al., *The Neural Correlates of Empathy: Experiences, Automaticity & Prosocial Behavior*, 24 J. COGNITIVE NEUROSCIENCE 235 (2012).

[85] Jennifer Rosen Valverde, *Hindsight Is 20/20: Finding Teachable Moments in the Extraordinary and Applying Them to the Ordinary*, 20 CLINICAL L. REV. 267, 289 (2013) (citations omitted).

[86] *Id.* at 290.

[87] *Id.* at 291–94 (providing examples of student journal entries demonstrating students' empathic development from a service-learning experience).

discussions with role-playing and videos of doctor-patient interactions.[88] For instance, a doctor can fail to communicate empathy through the use of medical terminology, which creates "distancing."[89] Inventive approaches used in medical schools include having medical students take on the role of patients to "feel" what it must be like to have a certain medical condition or a frustrating hospital experience.[90]

Putting law students in the position of a client discussing his case with a lawyer could provide valuable insights that otherwise many students may not even consider.[91] Like the medical students in the role of patients, law students could be taught through role plays that empathic sensitivity to clients and others is a skill they need to develop.

(b)   Using Communication Models to Help Students Develop Empathy

Some communication models offer techniques law teachers can employ to help students develop empathy.[92] For example, the communication model known as Appreciative Inquiry (AI) provides an approach that fosters empathy. One exercise that can be used to demonstrate an appreciative approach to interviewing has students pair up, ideally with someone with whom the other is not well acquainted. Each student is then asked to share with the other a challenging work-related relationship or situation the student has faced where the student was able to transcend the challenge. Once each person has explained overcoming a challenge, the two join with another pair, thus, now forming a group of four. Each person then tells the story of how her partner overcame adversity and succeeded. "Hearing their partners tell others their success stories through the partners' interpretive lenses allows students to gain new insights into their own ability to navigate challenges in the workplace."[93] Students also cultivate greater empathy through such an exercise.

iii.   Teaching Practices to Cultivate Relational Skills

A growing number of law teachers are emphasizing the significance of helping students enhance their relational skills, including intercultural awareness.[94] Methods to enhancing law students' awareness of the relational nature of their role as lawyers

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[88] *See* Helen R. Winfield & Anna Chur-Hansen, *Evaluating the Outcome of Communication Skill Teaching for Entry-Level Medical Students: Does Knowledge of Empathy Increase?*, 34 MED. EDUC. 90, 91 (2000).

[89] *Id.*

[90] *See, e.g.*, Michael Wilkes et al., *Towards More Empathic Medical Students: A Medical Student Hospitalization Experience*, 36 MED. EDUC. 504, 504–05 (2002).

[91] For instance, by taking on the viewpoint of the client, the law student could appreciate more fully the devastating impact an injury has on a client's life. Role playing in which students assume the role of judges can also enhance students' understanding of judges' reactions to lawyer actions, such as discovery disputes.

[92] Susan L. Brooks, *Using a Communication Perspective to Teach Relational Lawyering*, 15 NEVADA L.J. (forthcoming).

[93] *See id.*

[94] *See* Chapter 6, Section C, *The Relational Skills of the Law*, and Chapter 6, Section E, *Intercultural Effectiveness*, below.

likewise support the dignity of all those involved in the legal system. For instance, Relationship-Centered Lawyering (RCL) encourages law students to consider values such as respect for the client as a whole person, the impact of matters on others with whom the client has relationships, and the well-being of the client in light of all the factors of which the lawyer becomes aware.[95] To develop RCL skills, students will need to become empathic listeners and demonstrate their empathy by responses that reflect their active listening.

iv. Teaching Methods to Develop Reflective and Decision-Making Skills

(a) Teaching Students to Reflect on the Values and Individuals Implicated in Ethical Dilemmas

Those who have studied ethical decision-making in the professions urge decision-makers first to consider all potential courses of action in response to a dilemma and to identify everyone who will be affected by each course of action.[96] Through this approach, the decision-maker can make an informed judgment in which he balances the effects of one course of action and the impact on those affected against the other course of action and the impact on those affected by that path.

One authority on ethical decision-making conducted an analysis of thirty-three studies on ethical education in the professions and found that fostering student dialogue was the optimal teaching method for this first stage of decision-making.[97] While recognizing the usefulness of dialogue, most law teachers who have addressed this question suggest that students should initially reflect on an ethical dilemma by journaling about the possible values at issue and about those affected by various courses of action.[98] After using journaling to ensure that students consider deeply the values at issue and the individuals affected, these law teachers encourage a teacher-led class dialogue.[99] To engender unfettered dialogue, the law teacher must create a safe space to ensure the classroom environment is one that will foster open but respectful discussion.[100] The course syllabus should underscore the expectation that

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[95] *See* SUSAN L. BROOKS & ROBERT G. MADDEN, EDS., RELATIONSHIP-CENTERED LAWYERING 5 (2010).

[96] *See, e.g.*, Hamilton & Monson, *Ethical Challenge*, at 350–53.

[97] Muriel J. Bebeau, *The Defining Issues Test and the Four Component Model: Contributions to Professional Education*, 31 J. MORAL EDUC. 271, 273 (2002); *see also id.* at 289 ("Unlike college education, professional school curricula seems not to promote moral reasoning development . . . *unless there is an ethics component that involves students in the discussion of ethical issues*.") (emphasis added). The "four component model" to which Doctor Bebeau refers derives from James Rest's Four Component Model in which the first component is "ethical sensitivity," the second is "moral reasoning and judgement," the third is "moral motivation and identity formation," and the fourth is "ethical implementation." *Id.* at 283–87.

[98] *See, e.g.*, Ogilvy, *Use of Journals*, at 57–59. *See also id.* at 93 (on dialoguing with students).

[99] *Id.*

[100] MICHAEL HUNTER SCHWARTZ, SOPHIE SPARROW & GERALD HESS, TEACHING LAW BY DESIGN 24–27 (2009) [hereinafter TEACHING LAW]. *See also* Chapter 4, Sections A and B, *A Review of Teaching and Learning Theory* and *An Effective and Welcoming Environment for Learning*, above.

students will treat their teacher and fellow students with respect.[101] Discussing ethical issues can be controversial, but part of the law teacher's responsibility as a role model for students is to demonstrate how discussions on passionate subjects can be conducted with civility and sensitivity.[102]

(b)   Teaching Deliberation and Decision-Making through Journaling and Reflection Papers

Journaling and other writing assignments that require students to reflect on ethical dilemmas are methods that help students identify the issues surrounding a decision and the implications of different courses of action. Teaching materials that include ethical and professional identity formation exercises are now available from the major publishers of law school texts.[103] For instance, one contracts casebook asks students to consider the ethics of including a contractual clause an attorney knows to be unenforceable.[104] Including specific exercises in doctrinal courses beyond the course in professional responsibility encourages students to see the professional values at issue in different doctrinal areas and how as lawyers they will be called upon in various settings to make decisions in the face of competing values.[105]

(c)   Analyzing Actual Decisions

Another useful method for teaching ethical decision-making is to give students case studies involving actual decisions that had to be made, and allowing them the opportunity to evaluate the process leading to the real decision and the result.[106] This method is specifically geared towards learners who may do better "by being exposed to moral philosophy in the classroom, discussing situations in which moral judgment is needed and reflecting on choices others made."[107] This method resembles the "case

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[101]   SCHWARTZ ET AL., TEACHING LAW, at 57.

[102]   *Id.* at 126–28.

[103]   For example, Carolina Academic Press's Context & Practice series of casebooks edited by Michael Hunter Schwartz and Gerald F. Hess include experiential assignments and "professional identity reflection questions" in the context of teaching the subject matter of the casebook. Michael Hunter Schwartz, *Improving Legal Education By Improving Casebooks: Fourteen Things Casebooks Can Do to Produce Better and More Learning*, 4 ELON L. REV. 27, 52–54 (2011) [hereinafter Schwartz, *Fourteen Things*]. Other publishers have also developed materials designed to implement the recommendation of BEST PRACTICES and CARNEGIE REPORT, including the following series with the publisher noted: Skills & Values Series (LexisNexis); Developing Professional Skills Series (West Academic Press); Bridge to Practice Series (West Academic Press); The Learning Series (West Academic Press); and Experiencing Law Series (West Academic Press).

[104]   MICHAEL HUNTER SCHWARTZ & DENISE RIEBE, CONTRACTS: A CONTEXT AND PRACTICE CASEBOOK 372 (2009).

[105]   Schwartz, *Fourteen Things* at 53.

[106]   *See generally* Clarke Keefe Coleman, *Teaching the Torture Memos: "Making Decisions under Conditions of Uncertainty,"* 62 J. LEGAL EDUC. 81 (2012) (explaining how a case study of actual memoranda written by Justice Department lawyers in the wake of the September 11 World Trade Center attack, which authorized methods of interrogation many consider to be torture, can be used to foster development of students' moral judgment).

[107]   *Id.* at 92

method" approach that has been widely used by business schools since the 1920s.[108] Contrasted with the traditional law school "hypothetical," the case method uses actual cases to provide students with a context in which to apply moral principles to real-life scenarios.[109] This method, which has been adopted by educators in the fields of medicine, education, and government, would enhance legal education by providing law students with an opportunity to "exercise the skills of leadership and team work in the face of real problems."[110] Students thus would have a point of departure from which they, with further practice, can develop a decision-making framework that fits their values.

v.   Teaching Approaches to Help Students Develop the Motivation to Act Consistently with Their Decisions

Law teachers who want to help students develop ethical decision-making must also teach students how to develop the courage and motivation needed to follow through with their decisions.[111]

(a)   Using Stories to Challenge and Motivate Students

Some law teachers use stories to show that students who profess no clear lines exist between ethical and unethical behavior actually do, at least subconsciously, have ethical boundaries.[112] Story-telling in a manner that highlights the ethical decision-making, and in which characters are acting in ways that are unequivocally worthy (e.g., protecting innocent people from torture or death) or clearly blame-worthy (e.g., arbitrarily torturing or killing innocent people), helps students see that, at some level, they do believe in ethical boundaries. Story-telling could be accomplished in class by showing clips of movies depicting characters resolving challenging moral decisions and by assigning students to read written accounts of lawyers making difficult ethical decisions, such as William Wilberforce, John Adams, Abraham Lincoln, and Clarence Darrow,[113] and more modern accounts, such as the lawyers who fought against torture of detainees in the post-9/11 timeframe.[114] Law teachers could also invite

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[108] Celeste M. Hammond, *Borrowing from the B Schools: The Legal Case Study as Course Materials for Transaction Oriented Elective Courses: A Response to the Challenges of the MacCrate Report and the Carnegie Foundation for Advancement of Teaching Report on Legal Education*, 11 Tenn. L. J. Bus. L. 9, 10–11 (2009).

[109] *Id.*

[110] *Id.* at 13–16

[111] *See* Thomas Lickona, Educating for Character 57–58 (1991).

[112] *See* Christina Hoff Summers, *Teaching the Virtues, in* The Public Interest 12 (1993).

[113] *See, e.g.*, Robert Rubinson, *Professional Identity as Advocacy*, 7 Miss. C. L. Rev. 7, 11 (2012) (describing the account of John Adams who defended British soldiers in a massacre despite great pressure on and criticism of Adams); Arthur Weinberg, *You Can't Live There! The Sweet Case, in* Attorney for the Damned 229–63 (1989) (describing the account of Clarence Darrow's representation of African Americans who had defended themselves from a mob that gathered after they moved into an all-white neighborhood).

[114] *See* Ron Scherer, *Lawyers Who Defend Terror Suspects Have Thankless Task. Why Do They Do It?*, Christian Science Monitor, Apr. 14, 2013, http://www.csmonitor.com/USA/Justice/2013/0430/Lawyers-who-

guest speakers into the classroom to share their personal experiences in resolving moral dilemmas in practice.

Although the story-telling method is simple, its impact is powerful.[115] Providing examples of lawyers and judges who displayed courage in following their principles despite pressure to do otherwise offers powerful opportunities for students to consider whether they would be able to display courage in analogous situations.[116] For instance, lawyers exposed to the risk of losing social standing (and potentially income) by putting a client's right to representation ahead of personal interests can inspire law students. Such inspiration, in turn, can motivate the students to act in ways that place values such as justice, other-centeredness, and respect for others above their personal interests.

(b)   Relying on Present Moral Exemplars

Based on interviews with peer-recognized exemplars of professionalism, two scholars found that "exemplars understand professionalism in a qualitatively more complex, or expert manner, than do early career lawyers and entering law students."[117] Ideally, introducing students to lawyers who have displayed virtues for which the profession stands will lead students to do the same when practicing themselves.

Mentoring programs in which students are paired with a judge or practicing lawyer thus provide the added dimension of allowing students to learn from an expert in a way that motivates them to aspire to the professional standards of the mentor. In addition, having students gather oral histories of prominent lawyers and judges can encourage the students to see the way they can contribute to society through their work as a lawyer.[118]

Moreover, law schools should not ignore the role peers play in developing professional identity. Law students should be encouraged to discuss these issues with each other and to reach out to each other as they face issues that revolve around professional identity formation. Such collaboration in itself fosters students' professional identity, as it develops their ability to work with others in resolving the sometimes sensitive issues that relate to moral and ethical formation.[119]

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defend-terror-suspects-have-thankless-task.-Why-do-they-do-it

[115] The United States military uses the method of story-telling to train its officers. *See* CENTER FOR THE ARMY PROFESSION AND ETHIC, http://cape.army.mil/mission.php, *archived at* http://perma.cc/476D-UQDR); ETHICS MOVIE TRAINING http://www.usna.edu/Ethics/_files/documents/Ethics%20Goes%20to%20the%20Movies.pdf, *archived at* http://perma.cc/DJM7-QWCJ.

[116] *See, e.g.*, JACK BASS, UNLIKELY HEROES (1981) (discussing the judges who withstood significant pressures to promote racial equality in the years following *Brown v. Board of Education*).

[117] Hamilton & Monson, (*Trans)formation*, at 963.

[118] *See* WALTER BENNETT, THE LAWYER'S MYTH 118 (2002).

[119] For a discussion generally on the importance of developing teamwork skills in law students, see Chapter 6, Section D, *Teamwork*, below.

(c)   Assessing Students in Identity Formation

Finally, if teaching designed to cultivate professional identity is to be taken seriously — both by law teachers and by students — teachers need to assess their students' professional identity formation.[120] The discussion of assessment in an earlier section recognizes that students' reflection on values is a topic that can be assessed.[121] Law teachers thus should consider developing learning outcomes and assessment techniques that relate expressly to professional identity formation.[122]

e.   Conclusion

This section has identified both the components of professional identity and teaching strategies to help develop it. Law schools and law teachers should take seriously and build on recent research to aid students with professional formation. It is a best practice for law schools to adopt the appropriate teaching methods and contexts throughout their curricula to assure that every student has significant exposure and opportunity to develop professional identity.

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[120] *See generally* Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. St. Thomas L.J. 470 (2008).

[121] *See* Chapter 6, Section D, *Teamwork*, below.

[122] For examples of such assessment techniques, see Verna E. Monson & Neil W. Hamilton, *Entering Law Students' Conceptions of an Ethical Professional Identity and the Role of the Lawyer in Society*, 35 J. Legal Prof. 385, 411–12 (2011) (discussing rubrics and other methods to assess students' professional identity formation).

2. INTEGRATING PROFESSIONALISM INTO DOCTRINALLY-FOCUSED COURSES
By Paula Schaefer[1]

a. Introduction

Ultimately it falls upon individual teachers to decide how to incorporate professionalism issues into each course. This can be an especially difficult task for doctrinal teachers. The law — and not the practice of law — is the focus of most doctrinal casebooks. Law students typically do not act in role as lawyers in doctrinal classes, so they are not compelled to resolve professional dilemmas in class, as students would be in a clinical or simulation-based course. As a result, it takes some additional preparation and thought to introduce professionalism issues into these courses. Some teachers may resist making this change — not knowing which aspect or aspects of attorney professionalism should be the focus or fearing that time spent on professionalism will detract from the real subject matter of the class.

Integrating professionalism into the doctrinal classroom need not detract from student learning; in fact, teachers can expect the opposite. When professionalism issues are seamlessly integrated into a doctrinal course, students begin to see themselves as lawyers — not just students taking notes in preparation for an exam. This shift in mindset should enhance their understanding not only of professionalism, but also of the law of the course. That is because professionalism education provides context that can help students make sense of the law. For some students, it is this type of framework that can keep them fully engaged in the doctrinal subject matter.

BEST PRACTICES FOR LEGAL EDUCATION addresses the need for professionalism education throughout the book, because it recommends professionalism as one of the fundamental principles of all of legal education.[2] This section picks up on that call and provides detailed suggestions for teachers as they make a plan for integrating professionalism issues into a doctrinal class. This section begins by suggesting three aspects of attorney professionalism that teachers should consider as they develop course outcomes for doctrinal classes. The discussion then turns to various methods teachers can use to introduce attorney professionalism issues into the classroom.

b. Developing Course-Specific Professionalism Learning Outcomes

Teachers should look for opportunities to introduce professionalism issues that will be encountered by attorneys practicing in the subject area of law. This part suggests developing course learning outcomes that relate to three different aspects of a lawyer's professional obligations: (1) a lawyer's fiduciary duty to clients; (2) a lawyer's obligations under professional conduct rules; and (3) a lawyer's personal values.

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[1] The readers for this chapter were Phyllis Goldfarb, Doug Blaze, Benjamin Cooper, Alex Long, Buck Lewis, Brad Morgan, and Cassandra Burke Robertson.

[2] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP, text at notes 218–38 (2007) [hereinafter BEST PRACTICES].

i.   Course Learning Outcomes Related to Fulfilling Fiduciary Duties to Clients in the Subject Area of the Course

A central value of the legal profession is serving clients. Attorneys owe fiduciary duties of competence, diligence, and loyalty to clients.[3] One goal of a doctrinal class should be providing students with an understanding of how they can satisfy these fiduciary obligations while practicing in the subject area of law.

Teachers in doctrinal classes may believe they already give sufficient attention to the "competence" component of fiduciary duty; they select the content of the course, at least in part, to provide students with the legal knowledge necessary to navigate an area of law. But there is more to competence than knowledge of law. Competence demands that a lawyer act as a reasonable lawyer would in a given situation.[4]

To understand competence, then, students must understand the different roles lawyers play. Only then can students wrestle with what a reasonable lawyer should do in a given situation. By not explicitly addressing this issue, teachers may unwittingly give students the wrong impression about lawyer competence. In the doctrinal classroom, case law is the centerpiece of most readings and class discussions. Through case law, students are primarily exposed to the lawyer's role as zealous courtroom advocate — someone who presents the best arguments in favor of a client's version of the law or facts. Based on this recurring vision of lawyering, students may incorrectly conclude that lawyer competence is synonymous with courtroom advocacy or adversarial conduct. Students may not know that this is just a small part of being a lawyer. Competent lawyers must know how to conduct themselves in other roles, such as advising a client about a planned course of action, drafting documents on a client's behalf, or compromising with opposing counsel to resolve an issue.[5]

In developing course learning outcomes that focus on the competence aspect of professionalism, teachers should consider describing how the course will prepare students for practice in both litigation and non-litigation settings in the subject area of the law. For example, a course learning outcome in an employment law course

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[3] BEST PRACTICES, text at notes 218–24. A 1992 report of an ABA Task Force (generally known as the MACCRATE REPORT) described "the provision of competent representation" as one of four values of the profession. REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM 140 (1992). *See also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000) ("Rationale. A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of a fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital.").

[4] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(2) (2000) ("[A] lawyer must, in matters within the scope of the representation: . . . act with reasonable competence and diligence. . . . "); *id.* § 52 ("lawyer who owes a duty of care must exercise the competence and diligence normally exercised by lawyers in similar circumstances."); *see also* RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 8.08 (2006) ("If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.").

[5] Paula Schaefer, *A Primer on Professionalism for Doctrinal Professors*, 81 TENN. L. REV. 277, 283–85 (2014) [hereinafter *A Primer*] (discussing a lawyer's fiduciary duty of competence).

could be as simple as, "[s]tudents will be able to identify issues that a competent lawyer must address when counseling clients about employment matters and when representing plaintiffs or defendants in employment litigation."

Another fiduciary duty that should be considered in developing course learning outcomes is a lawyer's duty of loyalty to the client. This duty requires an attorney to keep client confidences, protect client property, not represent parties with conflicting interests, and not take an unfair advantage arising from the attorney-client relationship.[6] When planning the course, teachers should consider which loyalty issues frequently pose challenges for lawyers practicing in the area. For example, attorneys are often asked to represent multiple parties in estate planning. An outcome in an estates and trusts course might include: "[s]tudents will be able to identify and resolve potential conflicts of interest in estate planning."

ii.   Course Learning Outcomes Connecting Professional Conduct Rule Obligations with Course Content

Another professional obligation of a lawyer is to comply with professional conduct rules.[7] Accordingly, in developing course learning outcomes, doctrinal teachers should consider how professional conduct rules are relevant to the issues in their classes. From a conceptual standpoint, it is useful to understand professional conduct rules as falling into one of three categories:[8] (1) rules that guide attorneys in fulfilling fiduciary obligations to their clients;[9] (2) rules that describe the limits of what lawyers can do on a client's behalf;[10] and (3) rules aimed at promoting and preserving the integrity of the profession.[11]

Just as lawyers must confront issues implicating professional conduct rules in practice, students should be asked to resolve these issues as they arise in the cases

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[6] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(3) (2000) (describing the duty as encompassing the obligation to "comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client.").

[7] In most jurisdictions, these rules are based to some extent upon the ABA's *Model Rules of Professional Conduct*. A comparison of selected state professional conduct rules and the ABA Model Rules of Professional Conduct is available at http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts. html, *archived at* http://perma.cc/QXP6-QDUZ.

[8] Schaefer, *A Primer*, at 287–92.

[9] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.1 (competence); 1.2 (diligence); 1.6(a) (confidentiality); 1.7–1.10 (conflicts of interest); 1.13 (representation of organizational clients). *See also* Schaefer, *A Primer*, at 287–88 (providing additional examples).

[10] Even though a lawyer owes a fiduciary duty to the client, the lawyer also has obligations to comply with law, to act ethically, and to meet obligations as an officer of the court. Accordingly, the rules in this category recognize conflicts among the lawyer's various duties and describe when a lawyer may or must: comply with legal obligations; act in the interest of the court, an opposing party, or third party; or protect the lawyer's own interests. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16 (describing when a lawyer may or must withdraw from a representation). *See also* Schaefer, *A Primer*, at 288–91 (providing additional examples).

[11] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 7 (concerning attorney advertising). *See also* Schaefer, *A Primer*, at 291–92 (providing additional examples).

and problems discussed in the doctrinal classroom. Such issues cannot be resolved solely by reference to a lawyer's personal moral compass. Professional conduct rules represent the bar's decision (often guided by other sources of law) about how difficult ethical dilemmas should be resolved, such as when a client confidence should or should not be revealed to protect a third party.[12] Other professional conduct rules are a matter of day-to-day concern to lawyers practicing in certain areas of the law, such as the special obligations of prosecutors to the accused described in Rule 3.8 or the obligations of attorneys representing business organizations described in Rule 1.13.[13]

Doctrinal teachers may consider including course learning outcomes that reference the intersection between course subject matter and professional conduct rules. For example, a civil procedure course outcome could provide, "Students will be able to identify and resolve situations that implicate professional conduct rules related to attorney conduct in discovery."

iii.   Course Learning Outcomes Regarding a Student's Development of Personal Values

As discussed in the preceding section concerning professional identity formation, leading authorities suggest eight character-based values of the model lawyer. Their scholarship provides a vision of lawyering to which law students and their teachers should aspire. The professional lawyer should possess and demonstrate integrity, honesty, diligence, fairness, courage, wisdom, compassion, and moderation.

Rather than drafting a course outcome that references "professional values" without further explanation, teachers should specify the values students should expect to develop in the course. While numerous professional values may be integrated into any given course, a course learning outcome could reference two or three values that will receive special attention in the course. This decision may be driven by the values a law school has emphasized in its mission statement or in its articulation of professionalism. A course learning outcome might suggest a goal of understanding how a lawyer's personal values can be harmonized with a lawyer's other obligations practicing in the subject area. For example, "Students will be able to explain why a lawyer should defer to the client's decision about the goals of a case, even when those goals conflict with the lawyer's personal values." Other teachers may wish to include the values that they have always emphasized but have not previously referenced explicitly in course outcomes. For example, a trial practice course outcome could provide, "Students will demonstrate the ability to represent a client zealously at trial, while acting with integrity in interactions with all participants in the litigation process."

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[12] MODEL RULES OF PROF'L CONDUCT R. 1.6(b).

[13] MODEL RULES OF PROF'L CONDUCT R. 1.13, 3.8.

c.   Teaching Methods for Introducing Professionalism Issues into the Doctrinal Classroom

This part offers suggestions for teaching methods to facilitate integrating professionalism into the doctrinal classroom.

i.   Using Case Law

Doctrinal teachers can integrate professionalism themes into their classes using cases already in their textbooks. From the advice and services the client received prior to litigation to the way a lawyer conducted the litigation at the trial court level, all cases contain the fingerprints of lawyers. These cases provide opportunities to discuss every aspect of lawyer professionalism.

A lawyer's advisor role can be highlighted by asking students to present a case from the perspective of the lawyer who advised a client about the underlying conduct. A good case for this method is one in which the facts reveal that a lawyer was consulted about a legal question, negotiated on a client's behalf, or prepared documents that are now the subject of litigation. In all of these cases, the lawyer would have provided guidance to the client about the advisability of future conduct. Some of the following questions could facilitate a discussion of the competent legal advisor. What fact investigation and legal research do you think the lawyer completed prior to advising the client? Based on later events in the case, what advice do you believe the lawyer provided? Given what we know about the facts, do you think that advice allowed the client to adequately weigh the risk of this very litigation? If we assume that you are correct about the advice that was given, do you think the lawyer made any mistakes in the way he or she handled the matter? All of these questions consider both the substantive law of the class as well as lawyer competence as an advisor.

Other cases can be used to discuss how a competent lawyer conducts litigation. For example, civil procedure casebooks often include cases involving discovery misconduct. Teachers can ask students to present such a case from the perspective of the lawyer who advised the client to withhold responsive documents, who failed to advise a client to preserve evidence, etc. Teachers can ask students whether the lawyer or the client was in a better position to understand the legal obligation (students should see that it is the lawyer). Teachers should prompt students to explore the adverse consequences for the client (and perhaps also the lawyer) that arose because the lawyer did not provide appropriate guidance in discovery and ask what advice future lawyers should provide to avoid such results in practice.

Cases can also present opportunities to discuss how professional conduct rules should influence a lawyer's conduct. Returning to the discovery example, professional conduct rules (Rule 3.4 for jurisdictions that have adopted the Model Rules) prohibit a lawyer from unlawfully obstructing a party's access to evidence and prohibit failing to comply with a proper discovery request. These discussions can help students see the connection between professional conduct rules and other sources of law. If the teacher is uncertain of the exact text of a given rule, he or she can ask a student to

research the applicable rule (in the jurisdiction where the case was pending) and report it at the next class.

Finally, cases can be a springboard for discussing how character-based values are consistent with providing excellent representation to a client consistent with a lawyer's legal and ethical obligations. For example, a client is at a substantial advantage in litigation if her lawyer can get along with opposing counsel. Litigation is more productive and less expensive for clients when lawyers are fair and respectful to everyone involved. Consistently raising these issues enhances students' understanding of how the content of the course is relevant to their future practice and usually consistent with their personal values.

Of course, there are also situations in which a lawyer's personal values are inconsistent with what the lawyer is required to do according to a jurisdiction's professional conduct rules or in regard to obligations to a client. Discussing such situations can help future lawyers understand (1) that resolving professionalism dilemmas is complex in practice and (2) the danger of jumping to conclusions without fully researching an issue.

Assessment is possible — and necessary — when teachers use case law to discuss professionalism. Students may believe that anything professionalism-related is a matter of opinion and there is no right answer. It is essential that students be dissuaded of this notion. Teachers should point to concrete examples of the consequences of professional misconduct: the negative repercussions to a client of a lawyer's poor legal advice; the possibility of a malpractice lawsuit against the attorney; and the prospect of a disciplinary complaint with the bar.

Undoubtedly, there are many professional dilemmas for which there is not a single right answer,[14] but teachers should still share their perspective on the issue — particularly when the class discussion takes a questionable turn. Teachers with practice experience should explain how they learned firsthand that handling a matter in a certain way is advantageous to the client and good for the profession. Just as helpful, teachers should describe the times when they made mistakes in practice and the costs of those blunders. Even if a teacher did not encounter a given situation in practice, the teacher can consult a trusted practitioner and report to the class on that lawyer's perspective. Integrating professionalism stories from practice — whether from the teacher or another lawyer — provides memorable examples and helps students recognize these issues are real.

ii.   Experiential Exercises in the Doctrinal Classroom

Some educators teaching doctrinal classes already recognize the benefit of using experiential activities in class. By requiring students to act in the role of lawyers, these exercises help students understand doctrine and develop lawyering skills. The same exercises can be used to improve students' ability to identify professionalism challenges and reconcile a lawyer's various professional obligations and values.

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[14] *See* Chapter 6, Section A, Subsection 3, *Learning Professional Responsibility*, below, for a thorough discussion of encouraging moral development when teaching professional responsibility, which sometimes means asking questions for which there are no answers in the Rules of Professional Conduct.

A growing number of resources are available to help doctrinal teachers introduce such exercises into their classes. Subject matter specific websites contain compilations of exercises in various areas of law.[15] Groups such as International Forum on Teaching Legal Ethics and Professionalism,[16] the Legal Education, ADR, and Practical Problem Solving Project ("LEAPS Project"),[17] Educating Tomorrow's Lawyers,[18] and others provide experiential learning materials that can be used in courses across the curriculum.

Additionally, a number of individual textbooks[19] and several practice-focused series of texts and supplements[20] from every law school publisher contain experiential learning exercises for doctrinal classes. Addressing professionalism issues is central to students working through the questions and problems in these books.[21]

Numerous law review articles describe innovative exercises law teachers have developed to put students in the role of lawyers in the doctrinal classroom. The exercises they describe can be adopted by a teacher teaching the same class, or may serve as an inspiration to a teacher thinking about creating his or her own materials. Notable articles explain a simulation for a contracts class,[22] how to integrate transactional exercises in first-year classes,[23] and methods of integrating role-play exercises.[24] Other excellent articles describe experiential education in corporate law,[25]

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[15] *See, e.g.*, Family Law Education Reform Project, *available at* http://flerproject.org, *archived at* http://perma.cc/MT54-U7YP.

[16] International Forum on Teaching Legal Ethics and Professionalism, Teaching Materials, *available at*: http://www.teachinglegalethics.org/content/teaching-materials, *archived at* http://perma.cc/KH9Z-CC5P.

[17] LEAPS Project, Consultants and Materials by Subject Area, *available at* http://leaps.uoregon.edu/content/consultants-and-resources-subject-area, *archived at* http://perma.cc/MHV3-QE98.

[18] Educating Tomorrow's Lawyers, Course Portfolios, *available at* http://educatingtomorrowslawyers.du.edu/course-portfolios/, *archived at* http://perma.cc/JB53-C3TW. *See also* Chapter 6, Section G, Subsection 2.B, *Integrating Alternative Dispute Resolution and Problem-Solving Across the Curriculum*, below.

[19] *See* Legal Texts that Incorporate Practical Problem-Solving and Professional Skills Development, *available at* http://leaps.uoregon.edu/content/legal-texts-incorporate-practical-problem-solving-and-professional-skills-development, *archived at* http://perma.cc/7LX7-YBRC.

[20] *Id.* Current series include: Context & Practice (Carolina Academic Press); Skills & Values (LexisNexis); Developing Professional Skills (West Academic Publishing); Bridge to Practice (West Academic Publishing); The Learning Series (West Academic Publishing); and Experiencing Law (West Academic Publishing).

[21] For example, an exercise in Colleen Medill's book, Developing Professional Skills: Property, gives students the opportunity to learn about property law and attorney professionalism as they negotiate a commercial lease. Colleen Medill, Developing Professional Skills: Property (West Academic Publishing 2011). Students who complete this exercise will gain experience representing a client in a non-litigation setting, see the benefits of treating opposing counsel with respect, and gain an understanding of their obligation under professional conduct rules to be truthful in statements to others (Rule 4.1).

[22] Miriam R. Albert & Jennifer A. Gundlach, *Bridging the Gap: How Introducing Ethical Skills Exercises Will Enrich Learning in First Year Courses*, 5 Drexel L. Rev. 165 (2012).

[23] Celeste M. Hammond, *Integrating Doctrine and Skills in First-Year Courses: A Transactional Attorney's Perspective*, 17 Legal Writing: J. Legal Writing Inst. 409 (2011).

[24] Ann Juergens & Angela McCaffrey, *Roleplays as Rehearsals for "Doing the Right Thing" — Adding Practice in Professional Values to Moldovan and United States Legal Education*, 28 Wash. U. J.L & Pol'y 141 (2008).

family law,[26] civil procedure,[27] and land use law courses.[28]

Short problems can also be used to put the student in the role of lawyer to explore the law of the course and professionalism. Doctrinal teachers should consider developing problems based on recent cases, news items, issues discussed in blogs in the legal subject matter area, and clips from movies and television that have a connection to the course subject matter. Problems already in casebooks can be reframed to prompt a discussion of professionalism issues. For example, a problem in a business organizations text mentions in passing that a lawyer represented two women in forming a limited liability company. The conflict of interest issue is not meant to be the focus of the question, but should be addressed by the class just as a lawyer in the situation must confront the issue.[29]

Integrating service-learning or pro bono projects into doctrinal classes is another way to connect legal knowledge and professionalism. For example, one law school's disaster law course contains a service-learning requirement that sends students to the Mississippi Center for Justice for a week of work.[30] Another school offers "Community Law Practicums" that provide students with the opportunity to do work for selected community partners in coordination with related doctrinal classes.[31]

iii.   Other Avenues to Introduce Professionalism into Doctrinal Classrooms

Inviting members of the bench and bar to speak in a doctrinal class can add a valuable perspective on professionalism issues in a given area of practice. For example, a judge can educate e-discovery students about how costly it is to clients when attorneys engage in "over-discovery" and refuse to cooperate with opposing

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[25] Karl S. Okamoto, *Learning and Learning-to-Learn by Doing: Simulating Corporate Practice in Law School*, 45 J. Legal Educ. 498 (2008).

[26] Susan B. Apel, *No More Casebooks: Using Simulation-Based Learning to Educate Future Family Law Practitioners*, 49 Fam. Ct. Rev. 700 (2011).

[27] William R. Slomanson, *Pouring Skills Content into Doctrinal Bottles*, 61 J. Legal Educ. 683 (2012); Lloyd C. Anderson & Charles E. Kirkwood, *Teaching Civil Procedure With the Aid of Local Tort Litigation*, 37 J. Legal Educ. 215 (1987).

[28] Keith H. Hirokawa, *Critical Enculturation: Using Problems to Teach Law*, 2 Drexel L. Rev. 1 (2009).

[29] The referenced problem even goes on to explain that the lawyer was the father of one of the women and that he drafted the LLC agreement to favor his daughter, making her the sole manager with no term limit and providing no method for her removal. D. Gordon Smith & Cynthia A. Williams, Business Organizations, Cases, Problems, and Case Studies 111 (2012). Certainly, this problem is meant to be humorous and is intended to prompt a discussion of limited liability company law. It seems just as important, though, for students in a business associations class to recognize the lawyer violated a duty to his client and a related professional conduct rule by favoring one client over another.

[30] Susan Waysdorf & Laurie Morin, *Syllabus: Katrina and Beyond: Reclaiming Rights and Restoring Communities in the Face of Disasters*, Univ. of the Dist. of Columbia David A. Clarke Sch. of Law, *available at* http://c.ymcdn.com/sites/www.law.udc.edu/resource/resmgr/curriculumdocs/katrina_course_description_r.pdf, *archived at* http://perma.cc/7C7M-WRPD.

[31] *See Electives*, *available at* UNLV William S. Boyd School of Law, http://law.unlv.edu/academics/courses/list-of-electives.html, *archived at* http://perma.cc/7BWT-36LY (providing a description of the community law practicum course).

counsel.**32** Attorneys who have been engaged in high profile local litigation in the subject matter area are also good candidates for guest speakers. For example, one law school has invited local attorneys engaged in litigation concerning a bridge collapse to speak with law students.**33** It is easy to envision how lawyers from such a case — especially attorneys who represented opposite sides in the underlying dispute — can contribute to students' understanding of the law and attorney professionalism. Students will leave such a class with a greater appreciation of how the lawyers served their clients, the cooperation between counsel that is necessary in litigation even when the parties disagree, and the respect attorneys can show one another during and after litigation.

Doctrinal teachers might also consider assigning a book that integrates issues of professionalism and the subject matter of the course.**34** Civil Procedure teachers have assigned *A Civil Action***35** and *The Buffalo Creek Disaster***36** for their students; both books highlight professionalism issues in civil litigation. *The Smartest Guys in the Room,***37** a book that describes the collapse of Enron, can be a springboard for discussing what an attorney should do when a corporate client is engaged in fraudulent conduct. William Colby's book, *Long Goodbye: The Deaths of Nancy Cruzan,***38** is the story of a young attorney who took on the Cruzan family's right to die case pro bono. Colby litigated the case for years, including arguing the case at the U.S. Supreme Court. This book would be a good fit for a professional responsibility or law and medicine course. Teachers might also consider assigning biographies of famous lawyers and judges who have a connection to the subject area of the course.

d.   Conclusion

Doctrinal teachers have the tools necessary to integrate professionalism issues into their classes. Doing so does not require a shift away from doctrine, but only a slight change in orientation — adding a focus on the lawyers who practice in the subject matter area. Integrating professionalism topics into a class can be seamless. Rather than taking away from the subject matter of the class, professionalism discussions provide students greater context and enhance their understanding of the area of practice.

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32 U.S. Magistrate Judge Clifford Shirley, speaking in a class taught by Paula Schaefer, *Syllabus: E-Discovery — Fall 2014*, Univ. of Tenn. Coll. of Law 6 (on file with author).

33 Bobbi McAdoo, Sharon Press & Chelsea Griffin, *It's Time to Get It Right: Problem-Solving in the First-Year Curriculum*, 39 Wash. U. J.L. & Pol'y 39, 87 (2012).

34 Alternatively, books that are not closely related to course doctrine, but that will help students prepare for the challenges of practice, could be incorporated as an optional reading in any doctrinal class and discussed outside of class time. Some examples include: Kelly Lynn Anders, The Organized Lawyer (2009); Amiram Elwork, Stress Management for Lawyers (2007); Nancy Levit & Douglas O. Linder, The Happy Lawyer: Making a Good Life in the Law (2010); Michael F. Melcher, The Creative Lawyer (2007).

35 Jonathan Harr, A Civil Action (1995).

36 Gerald M. Stern, The Buffalo Creek Disaster (1977).

37 Peter Elkind & Bethany McLean, The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron (2004).

38 William H. Colby, Long Goodbye: The Deaths of Nancy Cruzan (2003).

3. LEARNING PROFESSIONAL RESPONSIBILITY
By Clark D. Cunningham[1]

a. Introduction[2]

"Teaching professionalism" is a recurrent theme and a high priority in BEST PRACTICES FOR LEGAL EDUCATION;[3] however, it is difficult to operationalize the useful information and advice on this theme found throughout the book[4] into specific plans of action either for the course required by the accreditation standards of the American Bar Association (ABA)[5] — typically called "Professional Responsibility" — or for a law school's overall program of instruction. BEST PRACTICES largely relied upon ideas and materials generated by the organized bar's professionalism movement; however, since publication of BEST PRACTICES, both teachers and scholars who generally support the ideals of the professionalism movement[6] have refocused the rather general aspira-

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[1] Readers for this section were Muriel Bebeau, Andrew Boon, Robert Burns, Roberto Corrada, Adrian Evans, Timothy Floyd, John Garvey, Neil Hamilton, Nicole Iannarone, Sally Kift, Patrick Longan, Paul Maharg, Timothy Mahoney, Michael Millemann, Donald Nicolson, Jerome Organ, Deborah Rhode, Hilary Sommerlad, Ann Southworth, Stephen Thoma, and Douglas Yarn.

[2] This section focuses on best practices for learning professional responsibility in the context of U.S. legal education. Portions of this chapter section are based on Clark D. Cunningham & Charlotte Alexander, *Developing Professional Judgment: Law School Innovations in Response to the Carnegie Foundation's Critique of American Legal Education*, in THE ETHICS PROJECT IN LEGAL EDUCATION 79 (2010), *available at* www.teachinglegalethics.org/developing-professional-judgment, *archived at* http://perma.cc/M45L-RMN7 [hereinafter Cunningham & Alexander, *Developing Professional Judgment*] and *Learning Professional Responsibility for the Practice of Law: The Way Forward* (working paper). More detailed citations and discussion of sources mentioned herein (and more global overview) *available at* www.teachinglegalethics.org/learngpr, *archived at* http://perma.cc/U2DC-4RC9. This section also draws from several presentations at the National Institute for Teaching Ethics & Professionalism (NIFTEP), particularly by Neil Hamilton in 2007 and Muriel Bebeau in Spring 2009 and Fall 2014, *see* www.niftep.org/workshops, *archived at* http://perma.cc/HH7Y-3PHY.

[3] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

[4] *See, e.g.*, BEST PRACTICES, text at notes 40–43 and 46–48 (educational goals), 65–75 (graduates conduct themselves unprofessionally), 96–100 (well-being of students), 111–114 (desired outcomes), 134 (ABA Professionalism Report), 153–157 (resolve problems responsibly), 175–182 (practical judgment), 218–267 (professionalism), 287–298 (teach professionalism pervasively), 483–503 (use context-based instruction to cultivate practical wisdom), 579–585 (simulation-based courses to teach ethical demands of practice), 819–868 (Model Best Practices Curriculum).

[5] ABA Standard 303(a)(1) requires "A law school shall offer a curriculum that requires each student to satisfactorily complete at least the following: (1) 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." ABA Standards and Rules of Procedure for Approval of Law Schools, Standard 303(a)(1), STANDARDS, www.americanbar.org/groups/legal_education/resources/standards.html, *archived at* http://perma.cc/WED3-W4NL [hereinafter ABA Standards]. 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."

[6] Extensive resources for teaching legal ethics and professionalism are now available on-line. A starting point is the *International Forum on Teaching Legal Ethics & Professionalism*, TEACHING LEGAL ETHICS, www.teachinglegalethics.org, *archived at* http://perma.cc/38S4-9STN. Materials and webcasts of the NATIONAL INSTITUTE FOR TEACHING ETHICS & PROFESSIONALISM, *available at* www.niftep.org, *archived at* http://

tional goals of "professionalism" into more specific objectives of developing professional judgment[7] and forming professional identity.[8] This reconception has been deeply influenced by EDUCATING LAWYERS[9] published by the Carnegie Foundation for the Advancement of Teaching ("CARNEGIE REPORT"), which concluded that the prevalent law school approach to teaching the required course in professional responsibility was not only inadequate but potentially harmful.

The CARNEGIE REPORT described conventional courses on professional responsibility as limited to teaching "The Law of Lawyering":

> Students learn the profession's ethical code as represented in the [ABA] 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.[10]

perma.cc/9K3B-YCBU. *See also Course Portfolios and Conference Materials*, EDUCATING TOMORROW'S LAWYERS, http://educatingtomorrowslawyers.du.edu/, *archived at* http://perma.cc/EV8J-HC5V, and teaching materials submitted for the National Award for Innovation and Excellence in Teaching Professionalism co-sponsored by the American Bar Association (ABA) Standing Committee on Professionalism, *available at* http://clarkcunningham.org/Professionalism/Award-Home.htm, *archived at* http://perma.cc/3XLL-X7AJ. Print resources include Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029 (1998); *Symposia on Teaching Legal Ethics*, TEACHING LEGAL ETHICS, www.teachinglegalethics.org/symposia-teaching-ethics, *archived at* http://perma.cc/6N7C-FYFB); *Journals on Teaching and Ethics*, TEACHING LEGAL ETHICS, www.teachinglegalethics.org/journals-teaching-and-ethics, *archived at* http://perma.cc/U2ZB-WJ5S; and *Reports and Studies*, TEACHING LEGAL ETHICS, www.teachinglegalethics.org/content/reports-and-studies, *archived at* http://perma.cc/4HV8-S7UQ (*see* especially reports by Andrew Boon; Kim Economides & Justine Rogers; Maxine Evers, Leanne Houston & Paul Redmond; and James Arthur et al.).

[7] Cunningham & Alexander, *Developing Professional Judgment*; Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195 (2012); BACHELOR OF LAWS: LEARNING AND TEACHING ACADEMIC STANDARDS STATEMENT (Australian Learning and Teaching Council 2010), *available at* www.teachinglegalethics.org/australian-learning-outcomes-law, *archived at* http://perma.cc/Y573-6V4X. *See generally* David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 31–64 (1995–96) [hereinafter Luban & Millemann, *Good Judgment*].

[8] Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763 (2012) [hereinafter Hamilton, *Fostering Professional Formation*].

[9] WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SCHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

[10] CARNEGIE REPORT, at 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

The Law of Lawyering approach potentially harms 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.

b.   The Four Component Model

The CARNEGIE REPORT based its critique on a vast body of social science research,[11] which has been developed and applied to professional education as the "Four Component Model."[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

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instruction" must include "the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association," ABA Interpretation 302–9, *id.*, has disappeared from the new ABA standards adopted in 2014.

[11] In particular, the CARNEGIE REPORT relied on the work of James Rest and Muriel Bebeau. The Center for the Study of Ethical Development was established in 1982 by Rest and Bebeau. The Center's website is the primary resource for the Defining Issues Test as well as number of other materials for assessing moral development. UNIVERSITY OF ALABAMA, CENTER FOR THE STUDY OF ETHICAL DEVELOPMENT, http://ethicaldevelopment.ua.edu/, *archived at* http://perma.cc/5A67-2R26 [hereinafter Bebeau, Defining Issues Test]. The Halloran Center for Ethical Leadership in the Professions has played a key role in applying the Center's work to legal education. *Halloran Center for Ethical Leadership in the Professions*, UNIVERSITY OF ST. THOMAS, http://www.stthomas.edu/hollorancenter/, *archived at* http://perma.cc/N6EG-PWJA.

[12] Muriel J. Bebeau & Verna E. Monson, *Guided by Theory, Grounded in Evidence: A Way Forward for Professional Ethics Education*, in HANDBOOK ON MORAL AND CHARACTER EDUCATION 557 (2008) [hereinafter Bebeau & Monson, *Guided by Theory.*] *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 U. ST. THOMAS L.J. 325, 346–49 (2012) [hereinafter Hamilton & Monson, *Legal Education's Ethical Challenge*].

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.[13]

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 as they prepare to comply with new accreditation standards, which now require law schools to ask what their graduates can *do* and not merely what they *know* and specifically require "ongoing evaluation . . . to determine the degree of student attainment of competency in the learning outcomes."[14] One of the mandated learning outcomes is competency in the "exercise of proper professional and ethical responsibilities to clients and the legal system."[15] What would "competency" in professional responsibility look like? The Four Component Model offers answers grounded in social science theory and tested by empirical research that provide methods for both teaching and measuring learning outcomes.[16]

i.   The First Component: Moral Sensitivity

Conventional Law of Lawyering courses typically fail to develop the first FCM capacity: "to notice moral issues when they are embedded in complex and ambiguous situations, as they usually are in actual legal practice."[17] 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."[18] Moral sensitivity in the context of professional practice does

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[13] The CARNEGIE REPORT paraphrases the first three FCM capacities as follows: "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." CARNEGIE REPORT, at 146 (emphasis added).

[14] ABA Standard 315.

[15] ABA Standard 302(c). This outcome requirement is distinct and in addition to the "input" requirement that each student complete a course in professional responsibility. ABA Standard 303(a)(1).

[16] See Hamilton & Monson, *Legal Education's Ethical Challenge*, which contains a summary of pedagogical approaches recommended by the CARNEGIE REPORT, 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.

[17] CARNEGIE REPORT, at 149.

[18] *Id. See also* Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357, 362 n. 29 (1998) [hereinafter Green, *Less is More*]; Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach about the Legal Profession*, 1 UC IRVINE L. REV. 73, 76 (2011) [hereinafter Southworth & Fisk, *Our Institutional Commitment*].

require knowledge of the profession's norms,[19] 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.[20] 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. A well-constructed problem for developing ethical sensitivity should "present clues to a problem . . . without actually signaling what the problem is."[21] Moral sensitivity often requires empathy and role-taking skills, involving both cognitive and affective processes.[22]

ii.   The Second Component: Moral Reasoning

The Center for the Study of Ethical Development has found, based on over 25 years of research, that there are three structures in moral thinking development:

- The Personal Interests Schema which prefers reasons based on avoiding harm, making reciprocal deals, and sustaining personal relationships;
- The Maintaining Norms Schema which prefers reasons based on clear rules that maintain the social order;
- The Postconventional Schema which prefer reasons based on ideals that transcend and can critique social norms.[23]

The Personal Interests Schema is typically dominant from childhood through early adolescence as individuals move from reasons based on harm avoidance through

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

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

[21] Hamilton & Monson, *Legal Education's Ethical Challenge*, at 399. *See* Helena Whalen-Bridge, *Teaching Process: Ethics Method Project* (meta-cognition approach used in large, introductory legal ethics classes), *available at* www.teachinglegalethics.org/teaching-analysis, *archived at* http://perma.cc/HP2J-5RVC, webcast presentation *available at* www.niftep.org/workshops/summer-2014-workshop, *archived at* http://perma.cc/CV7X-JWF6.

[22] Hamilton & Monson, *Legal Education's Ethical Challenge*, at 360 *See generally* Karen Barton, Clark D. Cunningham, Gregory Todd Jones & Paul Maharg, *Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence*, 13 CLINICAL L. REV. 1 (2006) [hereinafter Barton, Cunningham, Jones & Maharg, *Valuing What Clients Think*].

[23] Bebeau & Monson, *Guided by Theory*, at 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 & Darcia F. Narvaez, *Introduction*, *in* MORAL DEVELOPMENT IN THE PROFESSIONS 1–3 (1994) (describing Kohlberg's original theory); *see also* Steven Hartwell, *Promoting Moral Development through Experiential Teaching*, 1 CLINICAL L. REV. 505, 506–22 (1995) [hereinafter Hartwell, *Promoting Moral Development*].

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 is promoted by post-secondary education.[24]

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 rationales to resolve the dilemmas.[25] 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.[26] 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."[27]

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. To develop more mature moral 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.[28] One teacher has described how he designed an unconventional professional responsibility course that 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.[29]

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[24] Email correspondence from Stephen Thoma and Muriel Bebeau (on file with author).

[25] Bebeau, *Defining Issues Test*.

[26] CARNEGIE REPORT, at 133–34. *See also* Bebeau, *Defining Issues Test*, at 273–81. *Cf.* 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. 252 (2008).

[27] CARNEGIE REPORT, at 134.

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

[29] Steven Hartwell described his course over twenty years ago, Hartwell, *Promoting Moral Development*. He used out-of-class attorney-client simulations; students were not told beforehand what ethical issues were raised by the simulations: they met in small groups to identify ethical issues, decide a course of action, and justify that action in terms of moral principles. *Id.* at 522–23. *See also* Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115 (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* Neil H. Hamilton, Verna E. Monson & Jerome M. Organ, *Empirical Evidence that Legal Education Can Foster Professionalism/Professional Formation to Become an Effective*

Profession-specific measures of moral reasoning have also been developed 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 the prevailing codes of professional conduct.[30]

iii.   The Third Component: Moral Motivation

"[L]eading the professional moral life is incredibly challenging"[31] 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.[32] Competing influences include personal interests, such as desire for advancement and recognition, and peer pressure and economic forces to conform to workplace culture.[33] Perhaps even more corrosive to professional conduct are moral disengagement and the feeling that "someone else should do it."[34]

"Understanding the self as responsible is at least part of the bridge between knowing the right thing and doing it."[35] Social science research indicates that moral motivation is a function of how deeply moral values have penetrated an individual's conception of self and identity.[36] 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.[37]

Lawyer, 10 U. St. Thomas L.J. 11, 50–53, 55–62 (2012) [hereinafter Hamilton, Monson & Organ, *Empirical Evidence*] (reporting significant increases in N2 scores over course of three-year program of instruction at the University of St. Thomas School of Law).

[30] 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/, *archived at* http://perma.cc/B6WA-Q25B. 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.

[31] Muriel J. Bebeau & Stephen J. Thoma, *Moral Motivation in Different Professions*, in Handbook of Moral Motivation: Theories, Models, Applications 475, 480 (2013) [hereinafter Bebeau & Thoma, *Moral Motivation — Different*].

[32] Stephen J. Thoma & Muriel J. Bebeau, *Moral Motivation and the Four Component Model*, in Handbook of Moral Motivation, 49, 52 (2013) [hereinafter Thoma & Bebeau, *Moral Motivation — Four Component*].

[33] Bebeau & Thoma, *Moral Motivation — Different*, at 479. *See* Hilary Sommerlad, *The Commercialization of Law and the Enterprising Legal Practitioner: Continuity and Change*, 18 Int'l J. Legal Profession 73 (2011).

[34] *Id.* at 480; *see also* Thoma & Bebeau, *Moral Motivation — Four Component*, at 59–61.

[35] Bebeau & Thoma, *Moral Motivation — Different*, at 494.

[36] Muriel J. Bebeau & Kathy Faber-Langendoen, *Remediating Lapses in Professionalism*, in Remediation in Medical Education: A Mid-Course Correction, 103, 104 (2014) [hereinafter Bebeau & Faber-Langendoen, *Remediating Lapses*]; Bebeau & Monson, *Guided by Theory*, at 558.

[37] Bebeau & Faber-Langendoen, *Remediating Lapses*, at 106.

Research has correlated the moral motivation component of the FCM with a life-span model of self-development,[38] finding evidence of stages in an evolving identity moving from (1) individual achievement and approval, to (2) being a team player and ideally culminating in (3) the self-defining professional.[39] Combining the FCM with life-span research has supported the development of a validated measure of professional identity formation: the Professional Identity Essay (PIE).[40]

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.[41] 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 required by their professional role.[42] They are both strongly identified with their profession and able to critique it.[43]

Research has shown that educational interventions can help students develop an identity aligned with ethical perspectives.[44] 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."[45] Or, as one law student interviewed by the Foundation stated succinctly: "law schools create people who are smart without a purpose."[46]

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[38] Thoma & Bebeau, *Moral Motivation — Four Component*, at 57–59 (*citing* Robert Kegan's model); *see also* Hamilton, Monson & Organ, *Empirical Evidence*, at 19–20.

[39] Bebeau & Faber-Langendoen, *Remediating Lapses*, at 106; Bebeau & Thoma, *Moral Motivation — Different*, at 487–93.

[40] Hamilton, Monson & Organ, *Empirical Evidence*, at 53–55, 66–73.

[41] Thoma & Bebeau, *Moral Motivation — Four Component*, at 62. *See also* 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).

[42] *Id.* at 59, 62; Bebeau & Thoma, *Moral Motivation — Different*, at 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. 921 (2012). *See also* Cunningham & Alexander, *Developing Professional Judgment*, at 79, 84–85.

[43] Thoma & Bebeau, *Moral Motivation — Four Component*, at 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).

[44] Thoma & Bebeau, *Moral Motivation — Four Component*, at 56.

[45] Lee S. Shulman, *Foreword*, *in* Molly Cooke et al., Educating Physicians: A Call for Reform of Medical School and Residency ix (2010).

[46] Carnegie Report, at 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*, at 358–59. For example, Fordham now offers more than 10 different three-credit courses, any of which satisfies the ABA requirement. Each course is titled "Professional

What should students be learning about the purposes of the legal profession and, thus, the core values of a lawyer's professional identity? Several scholars who draw upon long academic study of the professionalism movement in law,[47] have combined the 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."[48] The same sources document that the most effective pedagogies combine "clinical education and practical experience, coaching, modeling, institutional intentionality, and scaffolding with feedback and reflection."[49] 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."[50]

Although 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,[51] guest speaking appearances, individual or small group meetings, and ideally, as actual mentors.[52]

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* Deborah L. Rhode, *Teaching Legal Ethics*, 51 St. Louis U. L.J 1043, 1052 (2007) [hereinafter Rhode, *Teaching Legal Ethics*].

[47] *See* articles by Neil Hamilton and Verna Monson, *available at* www.teachinglegalethics.org/category/teaching-topics/identity, *archived at* http://perma.cc/XN7H-PLG5.

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

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

[50] CARNEGIE REPORT, at 177–78.

[51] *See generally* articles, books, conference presentations, teaching materials and other resources available at www.teachinglegalethics.org/category/teaching-methods/stories, *archived at* http://perma.cc/FR67-3PK8.

[52] "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). *See* Clark D. Cunningham, *"How Can We Give Up Our Child?" A Practice-Based Approach to Teaching Legal Ethics*, 42 LAW TEACHER: INTERN'L J. LEGAL EDUC. 312, 320–28 (2008) (involving students in role plays based on actual experiences of exemplary lawyers).

iv.   The Fourth Component: Effective Implementation

The professional cannot stop with "What is happening?" (moral sensitivity), "What ought to be done?" (moral reasoning), and "Will I do what ought to be done?" (moral motivation or identity formation), but must also address "How can I effectively do this?", "What exactly should I say?", and "How should I say it?"[53] Thus, the teaching strategies for addressing the fourth capacity, implementation, should require students to develop action plans and even specific dialogue for resolving tough problems.[54] "Creative problem solving is critical" as is perseverance.[55] 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."[56] Therefore, teaching and assessment must "take place in role rather than in the more detached mode that the law-of-lawyering courses typically foster."[57]

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

i.   Features of a "Best Practices" Approach

For law schools in the United States, an ideal program of instruction for learning professional responsibility would include, in addition to learning the basic "law of lawyering," all of the following elements:[58]

(1) Before beginning educational interventions intended to develop professional responsibility, have all students for the relevant program complete the Defining Issues Test (DIT),[59] the Professional Identity Essay (PIE),[60] and,

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[53] Email correspondence from Muriel Bebeau (on file with author).

[54] Muriel J. Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. St. Thomas L.J. 366, 393 (2008).

[55] Thoma & Bebeau, *Moral Motivation — Four Component*, at 64. The fourth component is also described in terms of "moral character" and courage. Bebeau & Faber-Landendoen, *Remediating Lapses*, at 104.

[56] Carnegie Report, at 23.

[57] *Id.* at 178.

[58] 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) [hereinafter Curran et al., *Pushing the Boundaries*]; Luban & Millemann, *Good Judgment*; Donald Nicolson*, "Education, Education, Education": Legal, Moral and Clinical*, 42 Law Teacher: Int'l J. Legal Educ. 145 (2010) [hereinafter Nicolson, *Education*]; Rhode, *Teaching Legal Ethics*; Southworth & Fisk, *Our Institutional Commitment*; Carnegie Report; 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 referenced in note 6.

[59] 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/, *archived at* http://perma.cc/V6UF-2XS8.

ideally, a test of Intermediate Concepts relevant to legal practice.[61] 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[62] 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.

(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.[63]

(9) Use collaborative and team-based teaching methods.[64]

(10) Provide multiple opportunities to observe actual and simulated legal practice performed by expert practitioners and to reflect about the lessons for ethical

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[60] *See* Hamilton, Monson & Organ, *Empirical Evidence*, at 53–55, 66–73.

[61] *See* description in note 30.

[62] *See, e.g.*, Barton, Cunningham, Jones & Maharg, *Valuing What Clients Think* (validating simulated clients methodology to assess communicative competence); John B. Garvey & Anne F. Zinkin, *Making Law Students Client-Ready: A New Model in Legal Education*, 1 Duke F. L. & Soc. Change 101 (2009) (simulated client assessment for admission to practice without taking bar examination) [hereinafter Garvey & Zinkin, *Client-Ready*]. *See generally* International Forum on Teaching Legal Ethics and Professionalism, www.teachinglegalethics.org/category/teaching-methods/simulated-client, *archived at* http://perma.cc/MUT4-6GNM.

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

[64] *Id.* at 362–72. *See also* Barbara Glesner-Fines, *Team-Based Learning, available at* www.teachinglegalethics.org/category/teaching-methods/collaborative, *archived at* http://perma.cc/HN83-DZYW.

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,[65] and be challenged to exercise empathy, cultural sensitivity, diligence, perseverance, and courage.

ii.   Innovative Professional Responsibility Courses and Programs

The past decade has seen a number of law school innovations intended to improve the learning of professional responsibility that illustrate the use of many of these eleven practices. Several law schools have actually designed programs and assessment methods that explicitly reference the Four Component Model and related research.[66]

Among all methods of legal pedagogy, clinical courses involving client representation have distinctive potential for employing the above educational practices, especially items 7–11.[67] Although there is a rich literature about learning professional responsibility in clinics,[68] several challenges have been identified for using a clinical course to satisfy the ABA accreditation requirement for teaching professional responsibility:

- The clinical teacher may not have sufficient expertise in the substantive law, scholarship, and pedagogy of legal ethics;
- The responsibilities of supervision and assuring effective client representation may force the clinical teacher to identify and resolve ethical issues for the student rather than letting the student develop her own moral

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[65] Nicolson, *Education*, at 165.

[66] More detail on some of the approaches is discussed below. Charlotte S. Alexander, *Learning to Be Lawyers: Professional Identity and the Law School Curriculum*, 70 Mᴅ. L. Rᴇᴠ. 462 (2011) (describing "Fundamentals of Law Practice" course developed and co-taught in 2010 by Alexander and Clark Cunningham that combined simulations, classroom teaching, and fieldwork with small firms); Clark D. Cunningham, *Courage: Operationalizing Research on Virtue Ethics and Moral Development for Professional Education* (working paper) (Fundamentals of Law Practice expanded to add a clinical component representing domestic violence victims and to be further expanded to six credit course called "Transition to Practice" that will satisfy the ABA professional responsibility requirement; the aspiration is that Transition to Practice will use all eleven best practices for learning professional responsibility), *available at* www.teachinglegalethics.org/courage, *archived at* http://perma.cc/YUQ5-CS8L.

[67] *See* Rhode, *Teaching Legal Ethics*, at 1052. *Cf.* Cᴀʀɴᴇɢɪᴇ Rᴇᴘᴏʀᴛ, at 10–11, 160 (in medical education "beyond the inculcation of knowledge and the simulation of skills, it proves to be the assumption of responsibility for patient outcomes that enables the student for the first time to fully enter and grasp the disposition of a physician. . . . It is in these situations of intensive analysis of practice that the fundamental norms and expectations that make up professional expertise are taught. They are reinforced by the feedback that students receive as they attempt various approximations to expert practice.").

[68] *See, e.g.*, book chapters and articles by Liz Curran, Judith Dickson & Mary Anne Noone; Peter Joy; Bridget McCormack; Donald Nicolson; Joan O'Sullivan et al,; Antoinette Sedillo Lopez; and Julian Webb. *Available at* Tᴇᴀᴄʜɪɴɢ Lᴇɢᴀʟ Eᴛʜɪᴄs, www.teachinglegalethics.org/category/teaching-methods/clinical, *archived at* http://perma.cc/2EBT-FYBL.

sensitivity, reasoning, commitment, and implementation capacities;

- The clinical experience may expose the student to only one exemplar professional, the clinic teacher;

- Because clinics typically place a high priority on putting students in lead lawyering roles rather than the teacher (and opposing counsel in the poverty law arena, if there are any, are often negative examples of legal practice), students may have few opportunities to observe the work of an experienced exemplary professional;

- The urgency of client representation may not be conducive to reflection and critique on ethical issues;

- There may not be sufficient credit hours to allow time for teaching the "history, goals, and structure" of the legal profession along with its "values, rules and responsibilities";[69]

- Ethical issues presented by actual cases may not be sufficiently varied to support teaching about the major issues typically covered in a professional responsibility course.

At least four approaches have been tried to address these challenges.

- The same students take both a professional responsibility course and a clinic, and the ethics and clinical teachers collaborate to use clinic cases to teach ethics.[70]

- If the professional responsibility instructor is also an experienced clinical teacher, a regular professional responsibility course can be expanded by adding a client representation component for extra course credit.[71]

- For schools that have a number of clinics under a common administration, students in the professional responsibility course serve as the actual Ethics Committee for the various clinics (but do not directly represent clients).[72]

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[69] ABA Standard 303(a)(1) (2014).

[70] The leading article on this approach is Luban & Millemann, *Good Judgment*, at 64–85 (emphasizing role of Luban in prompting discussion and critique of Millemann's clinical supervision and direct client representation). *See generally* Teaching Legal Ethics, www.teachinglegalethics.org/category/teaching-methods/hybrid, *archived at* http://perma.cc/E65D-HMUJ.

[71] *See* David F. Chavkin, *Experience Is the Only Teacher: Bringing Practice to the Teaching of Ethics*, *in* The Ethics Project in Legal Education 52 (2010). Chavkin also used FCM-appropriate assessment methods such as reflective student writing and a final examination based on review of film clips of actual lawyers in action. *Id.* at 63–64. *See also* resources by Clark D. Cunningham, Lani Guinier, Natsu Saito and other articles, book chapters and materials *available at* www.teachinglegalethics.org/category/teaching-methods/hybrid, *archived at* http://perma.cc/6YKR-R5KX, and www.teachinglegalethics.org/category/teaching-methods/service, *archived at* http://perma.cc/SUH4-TDSM.

[72] *See* Cunningham & Alexander, *Developing Professional Judgment*, at 88–91 (describing course taught by Lawrence Marshall); Lawrence Marshall, *Professional Responsibility Course Portfolio*, *available at* http://educatingtomorrowslawyers.du.edu/course-portfolios/detail/professional-responsibility, *archived at* http://perma.cc/Z5VD-8CAV. Marshall had an inventory of problems that he could add to the course to teach issues that did not arise naturally from the current clinical caseload. *Id. See also* Nicolson, *Education*, at 170–71. In addition to the course described in Luban & Millemann, *Good Judgment*, the University of Maryland has offered other "hybrid" ethics-clinic courses that somewhat resemble either Marshall's

- A clinic can be created with a specific focus on ethics.[73]

At the time Best Practices was published, just a few law schools had experimented with combining legal ethics and practice skills classes into a single simulation based course.[74] The teacher of one such course, which awarded nine credits for evidence, trial advocacy and legal ethics, reported that moral sensitivity was developed: "Simulation exposes students to the kinds of complex concrete situations in which moral issues can arise quickly and without red flags."[75] Simulations are, of course, well suited to promoting the fourth aspect of the Four Component Model, implementation, but this approach also enhanced moral reasoning, prompting students even to critique rules of professional conduct when their application appeared possibly unfair or unjust when role playing a concrete, complex situation.[76] Since 2007, a growing number of schools have significantly expanded the use of simulation to teach subjects previously considered only "classroom courses" and also have intentionally designed those simulations to raise ethical issues and develop professional identity.[77] This very promising development has given new life to the "pervasive method" of teaching ethics both in specifically designed courses and through incorporation of ethical issues into other courses throughout the three years of law school.[78]

For the first year of a "Model Best Practices Curriculum," Best Practices proposed that students be "introduced to the history and values of the legal profession . . . the roles of lawyers . . . and challenges facing the legal profession."[79]

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approach or Chavkin's. Email correspondence from Michael Millemann (on file with author). Deborah Rhode has long encouraged the linking of a professional responsibility course to a clinic. Rhode, *Teaching Legal Ethics*, at 1053.

[73] *See* Curran et al., *Pushing the Boundaries*, at 114–21. *Cf.* Lawrence J. Fox, *Ethics Bureau at Yale Combining Pro Bono Professional Responsibility Advice with Ethics Education*, 62 J. Legal Educ. 551 (2013) (clinic provides guidance and expert witness reports to non-profit and pro bono lawyers, in particular documenting ineffective assistance in death penalty cases).

[74] *See* articles by Robert P. Burns and James E. Moliterno, Teaching Legal Ethics, www.teachinglegalethics.org/category/teaching-methods/simulation, *archived at* http://perma.cc/M9JU-XQYV.

[75] Robert P. Burns, *Teaching the Basic Ethics Class through Simulation: The Northwestern Program in Advocacy and Professionalism*, 58 Law & Contemp. Probs. 37 (1995) [hereinafter Burns, *Teaching Ethics*]. For the incorporation of simulation pedagogy into the required professional responsibility course, see, *e.g.*, articles, books, book chapters, conference presentations, and teaching materials by Robert P. Burns; Robert P. Burns, Thomas F. Geraghty & Steven Lubet; Clark D. Cunningham; Nigel Duncan; Carol Bensinger Liebman; Paul Maharg; and Ann Southworth & Catherine L. Fisk at www.teachinglegalethics.org/category/teaching-methods/simulation, *archived at* http://perma.cc/25BT-PVH2.

[76] Burns, *Teaching Ethics*, at 37-39.

[77] *See, e.g.*, articles, book chapters, conference presentations and teaching materials by David I.C. Thomson; Bill Sullivan & David Thomson; Roberto L. Corrada & David Thomson; Roberto L. Corrada; Stephen Gerst & Gerald Hess; John B. Garvey & Anne F. Zinkin; Clark D. Cunningham & Charlotte Alexander, *available at* www.teachinglegalethics.org/category/teaching-methods/hybrid, *archived www.teachinglegalethics.org/category/teaching-methods/pervasiveat* http://perma.cc/YUZ5-CTST.

[78] *See* book and articles by Deborah L. Rhodes at www.teachinglegalethics.org/category/teaching-methods/pervasive, *archived at* http://perma.cc/2V24-UCNA. Rhode's "pervasive method" was specifically incorporated as a Best Practices recommendation. Best Practices, Executive Summary and text at notes 287-98.

[79] Best Practices, text at notes 823-39.

This aspiration is increasingly becoming a reality in American law schools. One innovation is to move the required professional responsibility course into the first year in an enhanced format.[80] One pioneering example of such a course is described as going "beyond the review" of the ABA Model Rules of Professional Conduct both by putting the rules in the context of rich information about the culture and work environments of different practice settings, and by focusing heavily on decision-making in areas of broad discretion, thus supporting the development of ethical sensitivity and moral reasoning.[81] This course uses precisely those pedagogic strategies identified by scholars[82] for developing professional identity formation: deliberate teaching about professional norms, examples of exemplary professionals, and a system to promote student self-reflection about their own identity formation.[83] Another approach is to offer an entirely new course introducing students to the fundamental values of the legal profession in the first year while continuing to require completion of an upper level legal ethics course as well. The first course of this type, called simply, "The Legal Profession," has now been in operation for a decade at one law school: students continuously reflect on their own emerging professional identity through small group discussions, writing assignments, and required non-anonymous regular postings to a blog created for their small group.[84] This course also brings practitioners to the law school, in an interview format, called "Inside the Legal Profession,"[85] as well as requiring a paper based on an "oral history" with a distinguished local practitioner.[86] A rather different innovation is "Ethical Lawyering

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[80] *See* William D. Henderson, *The Legal Profession*, http://educatingtomorrowslawyers.du.edu/course-portfolios/detail/the-legal-profession, *archived at* http://perma.cc/BV9N-TKEG; Cunningham & Alexander, *Developing Professional Judgment*, at 91-93 (describing first year course developed by Henderson); *see also* Southworth & Fisk, *Our Institutional Commitment* (describing required first year four credit course at a different law school).

[81] Henderson, *Legal Profession*, at 1-2. *See also* Southworth & Fisk, *Our Institutional Commitment* (teaching first-year course with reference to specific practice settings, uses role-playing exercises, and bringing in over 30 guest speakers to provide inspiring examples of lawyers working in various practice areas); Ann Southworth & Catherine L. Fisk, The Legal Profession: Ethics in Contemporary Practice (2014).

[82] Particularly the work of Bebeau, Hamilton, and Monson.

[83] Henderson, *The Legal Profession*, at 2. Recommended teaching methods for the Best Practices first-year curriculum included "work in collaborative groups . . . reflective journals . . . [and] contact with practicing judges." Best Practices, text at notes 823-39.

[84] Three sources describe Mercer's "The Legal Profession" course: Patrick E. Longan, *Teaching Professionalism*, 60 Mercer L. Rev. 659, 663 (2009); Timothy W. Floyd, *Moral Vision, Moral Courage, and the Formation of the Lawyer's Professional Identity*, 28 Miss. C. L. Rev. 339, 351-52 (2009) [hereinafter Floyd, *Moral Vision*]; Daisy Hurst Floyd, *Cultivating Self-Reflection and Lawyer Integrity*, *available at* http://educatingtomorrowslawyers.du.edu/images/wygwam/images_content/Cultivating-Self-Reflection-and-Lawyer-Integrity.pdf, *archived at* http://perma.cc/LQP9-ZRFC. Further details about the course, which has changed significantly since the 2009 articles, are available at http://law.mercer.edu/academics/centers/clep/education.cfm, *archived at* http://perma.cc/HF4Y-CXGW. For other first year courses designed to teach about the values of the legal profession, see generally articles, conference presentations, teaching materials and other resources posted at www.teachinglegalethics.org/category/teaching-methods/first-year, *archived at* http://perma.cc/J74N-VJMV.

[85] Over a dozen of these interviews are available for webcast viewing at http://law.mercer.edu/academics/centers/clep/education.cfm, *archived at* http://perma.cc/4MQY-RJYL.

[86] *See also* Walter H. Bennett, Jr., *The University of North Carolina Intergenerational Legal Ethics*

in a Global Community," which uses two "mini-courses" in the first year of a Canadian law school to teach ethics and professionalism in the context of the globalization of legal practice.[87]

According to one of the leading scholars in the field, "education to promote ethical and professional development is most effective when it takes place over an extended time in the context of an overall program,"[88] a point echoed by both the CARNEGIE REPORT and BEST PRACTICES. This aspiration, too, is coming closer to reality at some law schools in the United States.[89] For example, the first year Legal Profession course described above is just the one component of that law school's professional formation curriculum, which continues in an upper level elective designed to build upon the foundation laid in the first year course by combining externship experience with extensive readings, reflective journaling, and discussion on the formation of professional identity.[90] Another school has established a program that integrates simulation-based courses in which ethical issues are embedded into a comprehensive program that spans the second and third years of law school, producing an extensive portfolio of lawyering work and reflection. Students who successfully complete this program can be admitted to practice upon graduation in the state where the school is located without taking a conventional bar examination.[91] Several of the leaders in the field have, for the first time, applied multiple FCM-based outcome measures to the complete program of instruction at an American law school.[92] The results showed that a three-year integrated professional formation curriculum, including a required mentoring program that extended over all three years, framed by a required first year course on Foundations of Justice, improved (1) moral reasoning, as measured by changes in DIT scores, and (2) understanding of professional identity, as measured by the Professional Identity Essay.[93]

Project: Expanding the Contexts for Teaching Professional Ethics and Values, 58 LAW & CONTEMP. PROBS. 173 (1995); Lois R. Lupica, *Professional Responsibility Redesigned: Sparking a Dialogue Between Students and the Bar*, 29 J. LEGAL. PROF. 71 (2005).

[87] *Ethical Lawyering in a Global Community* (course syllabus), *available at* www.teachinglegalethics. org/elgc-syllabus-osgoode-hall-law-school, *archived at* http://perma.cc/NC38-NYJV; Allan Hutchinson & Chantal Morton, *Osgoode's Required 1st Year Course: Ethical Lawyering in a Global Community* (webcast presentation), *available at* www.niftep.org/workshops/spring-2011-workshop, *archived at* http://perma.cc/ 2FQT-PSZW. *See generally* resources *available at* www.teachinglegalethics.org/category/teaching-topics/ global, *archived at* http://perma.cc/P94P-WUVZ.

[88] Bebeau, *Promoting Ethical Development*, at 391.

[89] *Cf.* Donald Nicolson, *Calling, Character and Clinical Legal Education: A Cradle to Grave Approach to Inculcating a Love for Justice*, 16 LEGAL ETHICS 36 (2013) ("Clinical LLB" in Scotland).

[90] Floyd, *Moral Vision* at 352-54 (course syllabus at 355-57). *See generally* articles, conference presentations, teaching materials and other resources posted at www.teachinglegalethics.org/category/ teaching-methods/externships, *archived at* http://perma.cc/D7U5-NKGF, and at www.teachinglegalethics. org/category/teaching-topics/identity, *archived at* http://perma.cc/TE6N-2ES7.

[91] Garvey & Zinkin, *Client-Ready*.

[92] Hamilton, Monson & Organ, *Empirical Evidence*, at 29-62 (describing their work at University of St. Thomas School of Law).

[93] *Id.* at 48-62. They further correlated these outcome measures with relevant data from the Law School Survey of Student Engagement. *Id.*

d. Conclusion

For decades, legal educators have bemoaned that, although the required professional responsibility course should be viewed as one of the most interesting and important courses in law school, "teaching professional responsibility traditionally has presented an intractable problem" leaving both teachers and students unsatisfied.[94] However, at the same time the CARNEGIE REPORT criticized both the professional responsibility course and the overall program of instruction at American law schools, it held out hope: "[T]his is a propitious moment for uniting, in a single educational framework, the two sides of legal knowledge: (1) formal knowledge and (2) the experience of practice."[95] A paradigm shift in the approach to learning professional responsibility "guided by theory and grounded in evidence"[96] could be the needed catalyst to transform the current approach to preparation for practice that focuses on what graduates know to a new competence-based model that meets the challenge of the CARNEGIE REPORT to combine "conceptual knowledge, skill, and moral discernment . . . into the capacity for judgment guided by a sense of professional responsibility."[97]

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[94] Green, *Less is More*, at 357-59.

[95] CARNEGIE REPORT at 12.

[96] Bebeau, *Guided by Theory*.

[97] CARNEGIE REPORT, at 12.

4. TEACHING LEADERSHIP
By Deborah L. Rhode

a. Introduction

It is ironic that the occupation most responsible for producing America's prominent leaders has traditionally done so little to educate them for that role. The legal profession has supplied a majority of American presidents, and in recent decades, almost half of Congress.[1] Lawyers occupy leadership positions as governors, state legislators, judges, prosecutors, general counsel, law firm managing partners, and heads of corporate, government, educational, and nonprofit organizations. Yet almost none of these lawyers receive academic training for their leadership responsibilities and their abilities as lawyers do not necessarily meet the demands of leadership.[2] This inattention to leadership development raises particular concerns for large law firms in light of a recent statistical study. It found that the most powerful predictor of large firm profitability is "the quality of partners' leadership skills."[3]

Lawyers also lead in a host of smaller, less visible ways — serving their local communities as volunteers on boards, mentoring other attorneys, modeling ethical behavior, and speaking up for justice when it is unpopular to do so. These attorneys also need leadership skills.

BEST PRACTICES FOR LEGAL EDUCATION[4] did not address how law schools can educate law students for leadership. However, the importance of leadership education is now beginning to attract increased attention. Leadership development is a forty-five billion dollar industry and at least 700 academic institutions have leadership programs, largely at the undergraduate level.[5]

A growing number of law schools are offering stand-alone courses or incorporating leadership skills elsewhere in the curriculum or in extracurricular activities. A growing array of teaching texts is available.[6] This section explores how legal education can help prepare students for leadership roles and the obstacles that stand in the way. A

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[1] Neil W. Hamilton, *Ethical Leadership in Professional Life*, 6 Sᴛ. Tʜᴏᴍᴀs L. Rᴇᴠ. 358, 361 (2009).

[2] For the inadequacy of law school curricula, see Nitin Nohria & Rakesh Khurana, *Advancing Leadership Theory and Practice*, *in* Hᴀɴᴅʙᴏᴏᴋ ᴏꜰ Lᴇᴀᴅᴇʀsʜɪᴘ Tʜᴇᴏʀʏ ᴀɴᴅ Pʀᴀᴄᴛɪᴄᴇ 3 (Nitin Nohria & Rakesh Khurana eds., 2010); *id.* at 370.

[3] Laurie Bassi & Daniel McMurrer, *Leadership and Large Firm Success: A Statistical Analysis*, *available at* http://www.mcbassi.com/resources/documents/WhitePaper-LeadershipAndLawFirmSuccess.pdf, *archived at* http://perma.cc/4NK4-MSPA.

[4] Rᴏʏ Sᴛᴜᴄᴋᴇʏ ᴀɴᴅ Oᴛʜᴇʀs, Bᴇsᴛ Pʀᴀᴄᴛɪᴄᴇs ꜰᴏʀ Lᴇɢᴀʟ Eᴅᴜᴄᴀᴛɪᴏɴ: A Vɪsɪᴏɴ ᴀɴᴅ ᴀ Rᴏᴀᴅ Mᴀᴘ (2007).

[5] *See* Doris Gomez, *The Leader as Learner*, 2 Iɴᴛ'ʟ J. Lᴇᴀᴅᴇʀsʜɪᴘ Sᴛᴜᴅɪᴇs 280, 281 (2007).

[6] Dᴇʙᴏʀᴀʜ L. Rʜᴏᴅᴇ & Aᴍᴀɴᴅᴀ K. Pᴀᴄᴋᴇʟ, Lᴇᴀᴅᴇʀsʜɪᴘ: Lᴀᴡ, Pᴏʟɪᴄʏ, ᴀɴᴅ Mᴀɴᴀɢᴇᴍᴇɴᴛ (2011) [hereinafter Rʜᴏɴᴅᴇ & Pᴀᴄᴋᴇʟ, Lᴇᴀᴅᴇʀsʜɪᴘ]; Lᴀᴡ ᴀɴᴅ Lᴇᴀᴅᴇʀsʜɪᴘ: Iɴᴛᴇɢʀᴀᴛɪɴɢ Lᴇᴀᴅᴇʀsʜɪᴘ Sᴛᴜᴅɪᴇs ɪɴᴛᴏ ᴛʜᴇ Lᴀᴡ Sᴄʜᴏᴏʟ Cᴜʀʀɪᴄᴜʟᴜᴍ (Paula Monopoli & Susan McCarty, eds. 2013); Dᴇʙᴏʀᴀʜ L. Rʜᴏᴅᴇ, Lᴀᴡʏᴇʀs ᴀs Lᴇᴀᴅᴇʀs (2013) [hereinafter Rʜᴏᴅᴇ, Lᴀᴡʏᴇʀs ᴀs Lᴇᴀᴅᴇʀs]; Rᴏʙᴇʀᴛ W. Cᴜʟʟᴇɴ, Tʜᴇ Lᴇᴀᴅɪɴɢ Lᴀᴡʏᴇʀ: A Gᴜɪᴅᴇ ᴛᴏ Pʀᴀᴄᴛɪᴄɪɴɢ Lᴀᴡ ᴀɴᴅ Lᴇᴀᴅᴇʀsʜɪᴘ (2009); Hᴇʀʙ Rᴜʙᴇɴsᴛᴇɪɴ, Lᴇᴀᴅᴇʀsʜɪᴘ ꜰᴏʀ Lᴀᴡʏᴇʀs (2d ed. 2007); Pᴀᴜʟ Bʀᴇsᴛ & Lɪɴᴅᴀ Hᴀᴍɪʟᴛᴏɴ Kʀɪᴇɢᴇʀ, Pʀᴏʙʟᴇᴍ Sᴏʟᴠɪɴɢ, Dᴇᴄɪsɪᴏɴ Mᴀᴋɪɴɢ, ᴀɴᴅ Pʀᴏꜰᴇssɪᴏɴᴀʟ Jᴜᴅɢᴍᴇɴᴛ: A Gᴜɪᴅᴇ ꜰᴏʀ Lᴀᴡʏᴇʀs ᴀɴᴅ Pᴏʟɪᴄʏᴍᴀᴋᴇʀs (2010).

threshold question is what we mean by leadership. Although popular usage sometimes equates leadership with power or position, contemporary experts generally stress processes and relationships. A status can give individuals subordinates; a leader is someone with followers.

b. Challenges in Leadership Education

Traditionally, leadership development has been missing or marginal in law school curricula, and what faculty teach has been profoundly disconnected from what leaders need. Legal education prides itself on preparing students to "think like lawyers." To that end, it focuses attention on analytic reasoning, substantive knowledge, and research and writing skills.[7] Yet these capabilities account for little of what makes for effective leadership. Empirical research finds that leaders' most essential qualities largely cluster in five categories:

- values (such as integrity, honesty, trustworthiness, and an ethic of service);
- personal skills (such as self-awareness, self-control, and self-direction);
- interpersonal skills (such as social awareness, empathy, persuasion, and conflict management);
- vision (such as forward looking and inspirational);
- technical competence (such as knowledge, preparation, and judgment).[8]

Not only are these qualities neglected in legal education, many of them are not characteristic of individuals who choose law as a career. Several decades of research find that attorneys' distinctive personality traits can pose challenges for lawyers as leaders, particularly when they are leading other lawyers. For example, attorneys tend to be above average in skepticism, competitiveness, "urgency," autonomy, and achievement orientation.[9] Skepticism, the tendency to be argumentative, cynical, and judgmental, can get in the way of inspiration, vision, and training that focuses on "soft skills." "Urgency," defined as the need to "get things done," can lead to impatience and inadequate listening.[10] Competitiveness and desires for autonomy and achievement can make lawyers overly self-absorbed, controlling, combative, and difficult to

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[7] *See* WILLIAM M. SULLIVAN, ANNE COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 186-94 (2007).

[8] For values, see WARREN BENNIS, ON BECOMING A LEADER 32-33 (2d ed. 1994) [hereinafter BENNIS, BECOMING]; MONTGOMERY VAN WART, DYNAMICS OF LEADERSHIP IN PUBLIC SERVICE: THEORY AND PRACTICE 16, 92-119 (2005); JAMES M. KOUZES & BARRY POSNER, THE LEADERSHIP CHALLENGE 21 (1995) [hereinafter KOUZES & POSNER, CHALLENGE]. For personal skills, *see* DANIEL GOLEMAN, RICHARD BOYATZIS & ANNIE MCKEE, PRIMAL LEADERSHIP: REALIZING THE POWER OF EMOTIONAL INTELLIGENCE 253-56 (2002) [hereinafter GOLEMAN, BOYATZIS & MCKEE, PRIMAL LEADERSHIP]. For interpersonal skills, see GOLEMAN, BOYATZIS & MCKEE, PRINAL LEADERSHIP, at 253-56. For vision, see BENNIS, BECOMING, at 33; KOUZES & POSNER, CHALLENGE, at 21. For competence, see KOUZES & POSNER, CHALLENGE; NOEL M. TICHY & WARREN G. BENNIS, JUDGMENT: HOW WINNING LEADERS MAKE GREAT CALLS (2007).

[9] Larry Richard, *Herding Cats: The Lawyer Personality Revealed*, 29 Report to Legal Management (Altman Weil), August 2002, at 1, 3-4 [hereinafter Richard, *Herding Cats*]; Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Personality Characteristics Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1349, 1390-91 (1997) [hereinafter Daicoff, *Know Thyself*].

[10] Richard, *Herding Cats*, at 4.

manage.[11] Lawyers also rank lower than the general population in sociability, interpersonal sensitivity, and "resilience" (the ability to respond constructively to criticism), all of which can be critical to leadership.[12]

Indeed, being the "smartest guy in the room," the quintessential achievement in many law school settings, is not always useful for leadership. The most intelligent person in a group is not the one most likely to become its leader.[13] One reason is that individuals who are gifted in analytic abilities are often lacking in emotional intelligence, and lawyers are no exception.[14]

A second challenge for leadership education involves cognitive biases that get in the way of students' recognizing problems in their own performance. One frequent bias is the "fundamental attribution error": people's tendency to attribute success to their own competence and character, and failure to external circumstances. A related problem stems from confirmation and assimilation biases. People tend to seek out evidence that confirms their preexisting, typically favorable vision of themselves, and avoid evidence that contradicts it. They also assimilate evidence in ways that favor their preexisting beliefs and self-image.[15] In one random sample of adult men, 70 percent rated themselves in the top quarter of the population in leadership capabilities; 98 percent rated themselves above average.[16]

A further obstacle to effective learning is the assumption that leadership education is a "touchy feely process," unworthy of attention from intellectually sophisticated individuals. Yet as one prominent consultant puts it, "the soft stuff is the hard stuff."[17] Effective leadership requires more than analytic skills, and high achievers in intellectual domains may not have developed corresponding interpersonal capabilities.

c. Learning Strategies

The first step in overcoming these obstacles to effective leadership education and development requires self- knowledge. For some individuals, that will require encouragement to envision themselves as leaders. Students must be reflective about what they want and what experiences and abilities will be necessary to achieve it.[18]

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[11] Richard, *Herding Cats*, at 9; Daicoff, *Know Thyself*, at 1422-24.

[12] Richard, *Herding Cats*, at 9; Larry Richard & Lisa Rohrer, *A Breed Apart?* 43–44, AMERICAN LAWYER, July/Aug. 2011; *Daicoff*, at 1392-94. For the difficulties in responding to criticism, see Richard, *Herding Cats*, at 9; 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, 588 (1997).

[13] EDWIN P. HOLLANDER, INCLUSIVE LEADERSHIP: THE ESSENTIAL LEADER-FOLLOWER RELATIONSHIP 25 (2009).

[14] *See generally*, GOLEMAN, BYATZIS & MCKEE, at 38-52.

[15] *See* TOM PETERS & ROBERT WATERMAN, IN SEARCH OF EXCELLENCE 58 (1982).

[16] David G. Myers, *The Inflated Self: How Do I Love Me? Let Me Count the Ways*, PSYCHOLOGY TODAY, May 1980.

[17] Richard J. Leider, *The Ultimate Leadership Task: Self-Leadership, in*, THE LEADER OF THE FUTURE: NEW VISIONS, STRATEGIES, AND PRACTICES FOR THE NEXT ERA 189 (Frances Hesselbein, Marshall Goldsmith & Richard Beckhard, eds., 1996).

[18] JOHN W. GARDNER, ON LEADERSHIP 117 (1990).

Prospective leaders need a sense of their "ideal selves": what positions do they aspire to hold, what qualities are they missing, and what is standing in their way? In gauging their leadership objectives, individuals need to be honest about their tolerance for risk, conflict, competition, and pressure.

Leadership education can help this process by forcing students to think deeply about their values, passions, and priorities, and what personal changes and sacrifices they are prepared to make to realize their leadership aspirations. Individuals also need a plan for diagnosing their learning needs, formulating goals, and identifying the capabilities that they will need to advance to their desired leadership roles. Students need to be proactive in seeking courses, summer work experiences, and extracurricular activities that will offer leadership training and opportunities.

d.   Leadership Curricula

Legal education can also do much more to teach crucial leadership skills directly and indirectly by focusing on topics such as problem solving, teamwork, influence, communication, organizational dynamics, and conflict management. Even seemingly fixed traits are worthy of emphasis. Law schools can teach about integrity in ways likely to be useful to future leaders. Case histories, role simulations, and media portrayals all can enhance skills in ethical analysis and build awareness of the situational pressures and cognitive biases that skew judgment.[19]

For example, the 2006 pretexting scandal at Hewlett Packard Company offers a rich example of how the good go bad.[20] In order to identify the source of leaks from the corporation's board of directors, the company's CEO, board chair, general counsel, and outside law firm all signed off on the use of deceptive tactics by private investigators, which eventually resulted in criminal charges and Congressional hearings. Students can explore what caused so many smart lawyers to make such disastrous decisions. Part of the problem involved framing the problem — stop the leak rather than address the board dysfunction that caused it. Another problem involved the diffusion and displacement of responsibility. The lesson is clear. Leaders cannot afford such outsourcing of ethical analysis.

Legal educators can also identify ways to integrate leadership throughout curricular and extracurricular programs. For example, corporate law can include examples of leadership failures such as Enron. Constitutional law can include examples of leadership successes, such as the strategies that led to *Brown v. Board of Education* and the same-sex marriage cases.[21]

Movies and literature can also be a way of broadening and deepening students' engagement with leadership issues. Classics such as *A Man for all Seasons, The Death*

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[19] Steven Hartwell, *Promoting Moral Development through Experiential Teaching*, 1 CLINICAL L. REV. 505 (1995); Neil Hamilton & Lisa M. Brabbit, *Fostering Professionalism through Mentoring*, 37 J. LEGAL EDUC. 102 (2007); HOW PEOPLE LEARN: BRAIN, MIND, EXPERIENCE, AND SCHOOL 51-78 (John D. Bransford et al., eds., 2000).

[20] RHODE & PACKEL, LEADERSHIP, at 115-21; RHODE, LAWYERS AS LEADERS, at 48-50.

[21] RHODE & PACKEL, LEADERSHIP, at 452-80.

of Ivan Illych, and *To Kill a Mockingbird* show lawyers coping with dilemmas that have broad resonance.

Finally, some law schools have developed lecture series or programs for leaders of student organizations that can provide firsthand accounts of leadership challenges. Such initiatives bridge theory and practice and show how leadership skills can help resolve concrete problems.

e.   Conclusion

Taken together, the efforts described in this section can help build an integrated approach to leadership education. Law schools have long served as a launching pad for our nation's leaders. Legal education has the opportunity and responsibility to prepare them better for that role.

B. PRO BONO AS A PROFESSIONAL VALUE
By Cynthia F. Adcock, Eden E. Harrington, Elizabeth Kane, Susan Schechter, David S. Udell & Eliza Vorenberg[1]

1. Introduction

The legal profession continues to struggle for effective solutions to the problem of achieving access to justice for all.[2] Law schools are key stakeholders but have been slow to embrace their responsibility in helping to solve the problem, including their role in instilling the professional value of pro bono service in law students.[3]

Responding to this gap in legal education, BEST PRACTICES FOR LEGAL EDUCATION identified the need for law schools to do better. It found that "[l]aw schools are not producing enough graduates who provide access to justice," particularly lawyers who engage in pro bono service,[4] and urged the following:

- Schools need to provide pervasive professionalism instruction and role modeling throughout all three years of law school, including instruction on the importance of pro bono service;[5]

- Schools need to offer co-curricular pro bono programs that aid in students' development of knowledge, skills and values;[6] and

- Schools need to coordinate pro bono programs with curricular offerings in the second year as part of helping students develop knowledge and understanding about professional skills, and values.[7]

However, no best practices were offered. Since 2005, the ABA has required law schools to "offer substantial opportunities" for "student participation in pro bono activities."[8] In response to the call for increased attention to values and skills

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[1] Readers for this section were Kristen L. Holmquist, Karen A. Lash, J.P. "Sandy" Ogilvy, Deborah L. Rhode, Pamela D. Robinson, Laren E. Spirer, and Jennifer Tschirch.

[2] The Legal Services Corporation called on the profession and law schools to address the justice gap and has set aside resources to help legal services offices and law schools to develop pro bono programs that meet the needs of communities that are the most underserved. LEGAL SERVICES CORPORATION, REPORT OF THE PRO BONO TASK FORCE (October 2012), *available at* http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf, *archived at* http://perma.cc/E5PQ-RLT7.

[3] For an overview of the history of pro bono programs in law schools, see Cynthia F. Adcock, *Shaped By Educational, Professional and Social Crises: The History of Law Student Pro Bono Service*, 1 ACCESS TO JUST. J. 1 (2014).

[4] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION 18 (2007) [hereinafter, BEST PRACTICES].

[5] *Id.*, text at notes 73-74.

[6] *Id.*, text at note 68.

[7] *Id.*, text at note 208.

[8] See current version at ABA Standards and Rules of Procedure for Approval of Law Schools 303(b)(2) (2014-2015), *available at* http://www.americanbar.org/groups/legal-education/resources/standards.html, *archived at* http://perma.cc/R6AX-3QES. Also on the importance of pro bono in law schools, see, *e.g.*, PRIVATE LAWYERS AND THE PUBLIC INTEREST: THE EVOLVING ROLE OF PRO BONO IN THE LEGAL PROFESSION (Robert Granfield & Lynn Mather, eds., 2009), Deborah L. Rhode, *Access to Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531 (2013), Deborah L. Rhode, *Essay: The Pro Bono Responsibilities of*

education and recognizing the need to address the reality that millions of people annually proceed in the courts without legal representation, the judiciary, the organized bar, and the legal academy have taken steps to emphasize pro bono service. In 2012, the New York Board of Law Examiners adopted a rule requiring the completion of 50 hours of law-related pro bono service as a condition of admission to the New York Bar, compelling law schools, albeit indirectly, to provide opportunities to students to perform pro bono.[9] Other states are considering, or moving to implement, their own versions of the New York requirement.[10] These new bar requirements emerged, in part, because of the absence of national law school accreditation standards that quantify the pro bono expectations of law schools and their students.[11] In the 2014 revision to the accreditation standards, the ABA has now taken an important step toward setting a national minimum expectation for performing pro bono, establishing in Interpretation 303-3 that "law schools are encouraged to promote opportunities for law students to provide over their law school career at least 50 hours of pro bono service." The ABA's Interpretation of Standard 303, along with new state bar pro bono requirements for admission to the bar, discussed below, necessitates that law schools reexamine how to best promote and support pro bono service.

According to the ABA Center for Pro Bono, law school pro bono programs have as the fundamental pedagogical goal "to teach all students why pro bono service is an important professional value and to introduce them to the ways in which they can contribute in their practice as attorneys."[12] This section identifies the best practices for law schools in the design and operation of an effective pro bono program that maximizes benefits for people in need, as well as for students, law schools, courts, and the justice system itself.

Lawyers and Law Students, 27 WM. MITCHELL L. REV. 1201 (2000), and Deborah A. Schmedemann, *Pro Bono Publico as a Conscience Good*, 35 WM. MITCHELL L. REV. 977 (2009).

[9] The Board cited the importance of teaching the values of the legal profession, and instilling in students a commitment to performing pro bono service in their careers as professionals. The rule defines pro bono service broadly to include traditional pro bono service performed without credit or pay, as well as clinics, externships, government service, and certain other experiences. *See* 22 N.Y.C.R.R. § 520.16.

[10] The California State Bar is moving toward implementation of admissions reform proposals that include: "An additional competency training requirement, fulfilled either at the pre- or post-admission stage, where 50 hours of legal services is specifically devoted to pro bono or modest means clients. Credit towards those hours would be available for "in-the-field" experience under the supervision and guidance of a licensed practitioner or a judicial officer." *Available at* http://www.calbar.ca.gov/AboutUs/BoardofTrustees/ TaskForceonAdmissionsRegulationReform.aspx, *archived at* http://perma.cc/9LMH-5KT2. *See also*, STATE BAR OF CALIFORNIA, TASK FORCE ON ADMISSIONS REGULATION REFORM: PHASE 1 FINAL REPORT, *available at* http://www.calbar.ca.gov/Portals/0/documents/bog/bot_ExecDir/ADA%20Version_STATE_BAR_TASK_ FORCE_REPORT_%28FINAL_AS_APPROVED_6_11_13%29_062413.pdf, *archived at* http://perma.cc/ 45PL-VQB8.

[11] RESOLUTION 1: IN SUPPORT OF ENCOURAGING PRO BONO SERVICE IN LAW SCHOOLS, CONFERENCE OF CHIEF JUSTICES (July 31, 2013), available at http://ccj.ncsc.org/~/media/microsites/files/ccj/resolutions/07312013- support-encouraging-pro-bono-service-law-schools-ccj.ashx, *archived at* http://perma.cc/5CE4-VQTB.

[12] ABA Standing Committee on Pro Bono and Public Service and the Center for Pro Bono, *Directory of Public Interest and Pro Bono Programs*, *Definitions of Terms Used*, *available at* http://apps.americanbar. org/legalservices/probono/lawschools/definitions.html, *archived at* http://perma.cc/7KMU-23Q5.

2.   Why Pro Bono?

In the law school context, pro bono service has a distinct definition. It typically refers to the law-related services provided to underserved individuals, organizations, and the government by students[13] and faculty members who receive no academic credit or financial compensation. This definition is different from that for lawyers, for whom pro bono service typically means the provision of legal services to underserved individuals and groups without charging a fee.[14] Thus, within law schools, the provision of free legal services through clinical courses or compensated employment is not pro bono activity. While each of these experiences can play an important role in the development of students' understanding of the access to justice gap and the lawyer's role in filling that gap, true pro bono experiences play a critical role because "the most important single function of pro bono projects is to open students' eyes to the ethical responsibility of lawyers to contribute their service" without expectation of compensation (financial or academic credit).[15]

It is valuable for students to engage in pro bono service without any corresponding compensation (including credit), since such service aligns with the pro bono obligations of most attorneys post-graduation. In addition, pro bono service enhances students' educational and professional development throughout law school, integrating all three domains of knowledge, skills, and values. It can bring the law studied in the classroom to life, by showing — not just telling — the different consequences that laws have in the real world context of clients' lives.[16] Pro bono service complements classroom learning by providing students with the opportunity to learn how law operates in the real world. It can deepen student understanding of a lawyer's professional responsibility to clients. Confidentiality, for example, becomes a real and heartfelt obligation when a client entrusts the student with private details about his or her family, home, or work life.

In addition to its pedagogical value, pro bono service furthers career development through exposure to different types of legal practice and legal institutions by introducing students to mentors and future employers. Pro bono projects can present

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[13] "Unauthorized practice of law" restrictions in all states prohibit students from engaging in the practice of law (pro bono or otherwise) unless the student is expressly authorized to do so pursuant to a "student practice" rule or order. Best practices in the pro bono area include clear instruction about student activities that require prior authorization and attorney supervision. Student practice authorization should be facilitated where appropriate. Notwithstanding the foregoing, many states permit non-lawyers to advocate in administrative proceedings, and this may provide ample opportunity for students to undertake pro bono service.

[14] Intention to not charge for legal services because a client is unable to afford the fees is important. Legal work is not pro bono when it is done with an expectation of payment, even though it goes uncompensated.

[15] AALS Comm'n on Pro Bono & Pub. Serv. Opportunities in Law Sch., Learning to Serve: The Findings and Proposals of the AALS Commission on Pro Bono and Public Service Opportunities 13 (1999) [hereinafter Learning to Serve], *available at* https://web.archive.org/web/20140826052935/http://www.aals.org/probono/report.html.

[16] When a civil procedure student sees how certain rules may present people with insurmountable obstacles, or a family law student sees the difference that restraining orders can make for domestic violence victims, pro bono service enhances their appreciation of the doctrinal material.

opportunities for students and alumni to collaborate and for students to work in interdisciplinary settings, strengthening ties throughout the law school and university communities. The pro bono activities of both students and faculty can bring positive attention and credit to the school from the media, alumni, prospective students, donors, and employers.

3.   Defining Pro Bono Programs in the Law School Context

A law school pro bono program is an administratively-supported program that urges and helps students (and often faculty members) to engage in pro bono service. It may include curricular components, community-based projects, or projects with courts, non-profits, legal services providers, the private bar, or a combination of some or all of these. The AALS has identified five types of formal pro bono programs:[17]

- *Public Service Graduation Requirement with Pro Bono Option:* Students must perform law-related public service or be exposed to poverty law through a class or independent study. Schools vary in how the graduation requirement can be met but always include pro bono service. Other service options are completion of an externship, clinic, or paid internship in a public interest setting.

- *Pro Bono Graduation Requirement*: Students must perform a set number of hours of law-related public service. Hourly requirements range from 20 to 70. Students receive neither academic credit nor pay for their service.

- *Community Service Graduation Requirement with Pro Bono Option*: These schools require students to perform a set number of public service hours. Both law and non- law-related service placements qualify. Students receive neither pay nor academic credit for their service.

- *Formal Voluntary Program Characterized by a Referral System with Coordinator(s):* Students are matched, through a formal pro bono program and referral system, with law-related pro bono opportunities in the community. A designated pro bono coordinator(s)/advisor(s) develops, promotes, and/or coordinates pro bono placements. In some schools, the coordinators/advisors provide administrative support to in-house and collaborative student group projects. Students participate voluntarily.

- *Formal Voluntary Program with Administrative Support for Student Group Projects:* Student groups engaged in law-related pro bono work receive administrative support ranging from staffing of a center where the pro bono projects may be located to administrative assistance in tracking hours volunteered.

In addition, some schools support student pro bono service informally, typically through projects that are student organized and run. These "Independent Student Pro Bono Group Projects" also exist at many schools with formal programs. They generally target a particular legal need, a particular segment of the population, or a

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[17] Cynthia Adcock, A Handbook for Law School Pro Bono Programs: The AALS Pro Bono Project 9-11 (2001) [hereinafter Adcock, Pro Bono Handbook].

particular type of skill development for students. Most groups work with a faculty supervisor and/or in collaboration with an outside organization.

Some schools recognize pro bono distinction. Students might be recognized at graduation as earning a J.D. with Pro Bono Honors, High Honors, or Highest Honors, based on the number of hours they earn.

4.   Best Practices for Law School Pro Bono Programs

It is a best practice for every law school to carefully design and operate a formal pro bono program with a goal that every student will participate in well-supervised pro bono activities.[18] According to the new ABA Standard, schools should offer sufficient opportunities for every student to perform at least 50 hours of pro bono service.

While the students' engagement in pro bono service is critical, understanding the unmet legal need and lack of access is central to learning the importance of pro bono work and, accordingly, should be anchored in the school's curriculum.[19] Law schools must help students understand the perspectives and needs of low-income populations, the extent and causes of the justice gap, and the cultural issues involved in providing pro bono assistance.

To ensure the quality and value of pro bono education, law schools must ensure that pro bono programs: 1) respond to community needs, 2) encourage students to participate in activities appropriate to their skill level, and 3) provide training and supervision that ensure the effort is useful to the community. The knowledge, skills, and values important to effective pro bono service can be taught through a range of methodologies and be infused into nearly every course throughout the curriculum.[20]

A law school culture of public service also makes a significant difference in student understanding of the pro bono ethic.[21] Administration and faculty should embrace and

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[18] In 1998, AALS president Deborah Rhode appointed a Commission on Pro Bono and Public Service Opportunities. The Commission recommended that law schools make well-supervised pro bono opportunities available to all students at least once during law school and that schools should either require participation or find ways to attract students to volunteer, and to adopt formal policies to encourage faculty members to perform pro bono work. LEARNING TO SERVE, at 1.

[19] Deborah L. Rhode, *Access To Justice: An Agenda for Legal Education and Research*, 62 J. LEGAL EDUC. 531, 546 (May 2013) ("To address . . . curricular gaps, schools should offer at least one course that focuses substantial attention on access to justice and should encourage integration of the topic and required skill sets into the core curriculum. . . . [A]ll law students should have some exposure to the expertise that it requires, including not only substantive knowledge but also cultural competence and related skills. . . . For example, constitutional, criminal and civil procedure classes could focus on limits on the right to counsel and its enforcement.").

[20] For example, in a property law course, faculty can involve students in a pro bono landlord-tenant matter; in an appellate advocacy course, the curriculum could include students drafting portions of an appellate brief for a legal services organization; and in a bankruptcy course, the class could provide assistance to pro se litigants facing bankruptcy.

[21] DEBORAH L. RHODE, PRO BONO IN PRINCIPLE AND IN PRACTICE: PUBLIC SERVICE AND THE PROFESSIONS 156 (2005) (A third of lawyers surveyed who indicated that a positive law school experience had encouraged involvement in pro bono service identified law school culture, which was "conveyed through a graduation

respect pro bono service in ways that are evident to students. Law schools should create opportunities for faculty to engage in pro bono service individually and with students, and publicly recognize and reward faculty pro bono service. Students consistently report that the single most influential activity in developing a sense of professional responsibility to the public good is student-faculty interaction.[22] Faculty involvement is, therefore, central to effectively instilling in students the ethic of pro bono service.

To meet the goal that every student will participate in well-supervised pro bono activities, a school should evaluate student participation and the success of its program on an ongoing basis. Some schools may reach the goal of full participation through a voluntary program, while others will adopt a mandatory requirement. However, best practices and the ABA Standards do not countenance a low rate of voluntary student participation year after year. Indeed, the recent adoption of a mandatory 50 hour pro bono service bar admission requirement in New York, consideration of a similar requirements in California, and the ABA's adoption of an Interpretation of the accreditations standard setting an expectation that students will have opportunities to perform at least 50 hours of pro bono, can be understood as a response to the academy's inability, to date, to ensure robust student participation.[23]

What follows are the specific best practices for operating an effective pro bono program.

a.   The Foundation: Strong Institutional Support

Developing and sustaining an effective formal pro bono program requires substantial support from the law school's faculty, staff, and administration. Accordingly, it is a best practice to assure that these leaders are well-informed about the ethical imperative of the profession, the latest information on the need for pro bono, the emergence of the access to justice movement, all relevant state bar admission requirements, the ABA accreditation standards and guidance, the AALS recommendations, and the benefits from successful pro bono programs that will flow to students and the law school.

A law school most effectively conveys the importance of pro bono service by adopting a clear policy that establishes the school's goals, strategy, and plan for creating a formal infrastructure to support pro bono. The policy should be widely disseminated within the law school community and published externally.

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requirement or the attitudes of faculty and students.").

[22] *See* Law School Survey of Student Engagement, Annual Survey Results 2006, 2010 & 2012, available at http://lssse.iub.edu/order_ar.cfm, *archived at* http://perma.cc/8ABB-P2AY.

[23] Jonathan Lippman, Chief Judge of the State of New York and Chief Judge of the Court of Appeals, Law Day Speech (May 1, 2012), available at http://www.nycourts.gov/whatsnew/Transcript-of-LawDay-Speech-May1-2012.pdf, *archived at* http://perma.cc/P9XX-U5TE.

i. Scope of Pro Bono Policy

The cornerstone of the school's policy is its definition of "pro bono." A definition consistent with ABA Model Rule 6.1 will have the greatest beneficial impact because it will prioritize the delivery of legal assistance to people of limited means and mirror the professional expectation graduates are expected to embrace. The policy should also set forth the goals of the pro bono program, who will be allowed/required to participate, how students will be supervised, and the timing and amount of pro bono service that will be expected. A policy on faculty pro bono service should be included or made separately. It should make explicit the favorable weight in promotion and tenure decisions of pro bono service by faculty members.

ii. Program Infrastructure

The decision about where to locate and assign responsibility for a pro bono program is an important one. Each school must decide the best "home" for the pro bono program based on the local culture and opportunities within the school, with the overriding goal being program impact. Most schools with a successful pro bono program have found it helpful to establish an independent program identity to highlight the importance of pro bono and avoid confusion with other public interest focused endeavors.[24] While there are many options, the most common are establishing an independent program or inclusion in one of the following: a public interest center, the clinical or other experiential education program, the career development office, or a professional development program. Wherever the location, the school must commit the funding necessary to provide adequate staff resources, physical space, and other infrastructure to support the program, as well as training and professional development opportunities for those managing and operating the program.

b. Design and Operation of Pro Bono Programs

There are numerous choices to make in developing a formal pro bono program and ensuring high quality pro bono projects. Each law school will want to consider a variety of factors, some unique to that school and some not,[25] while keeping in mind the goals of instilling the values of public service, training students in the real world practice of law, and providing access to justice. The chief goal — instilling the values of public service — can most effectively be achieved by a culture of respect for pro bono and by making that service a gratifying experience. Training students in the practice of law requires good supervision. Responding to unmet needs in the community entails identifying those needs in the law school's surrounding community.

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[24] ADCOCK, PRO BONO HANDBOOK 28.

[25] Such factors include whether the school is initiating or building upon a pro bono program, proximity to urban areas, access to local legal services organizations, and local pro bono culture.

i.   Developing Pro Bono Projects that Respond to Unmet Legal Needs and Engage Law Students

Responding to unmet legal needs in the community involves an assessment of why those needs remain unmet, and what role students can play in meeting those needs. Are the courts and/or civil legal aid programs overburdened with a particular issue such as consumer debt or foreclosure? Is there a population in the area with particular needs such as young immigrants, veterans, or disaster victims? Is there local economic or political activity impacting a particular population such as gentrification leading to landlord-tenant issues? How might law school pro bono projects be designed and students trained to help address those needs? Can the needs be met better through other experiential education programs in the school, such as clinics or externship placements?

To answer these questions, it is important that faculty and administrators reach out to the broad civil legal aid community, including community-based civil legal aid programs, courts, nonprofit social services organizations, law firms, bar associations, and Access to Justice Commissions. Outreach to the indigent criminal defense bar and to criminal justice organizations re-entry programs is also important. Developing relationships with all these entities and institutions will help law schools to achieve their articulated pro bono goals and have real impact.

The Access to Justice Commissions now established in more than 30 states[26] are increasingly responsible for responding to unmet legal needs. The Commissions are particularly good resources for guiding law schools toward projects that provide valuable experiences for students while also increasing the impact of their services. Best practices for these collaborations include describing pro bono projects on the law school's web site to improve internal and external understanding of the pro bono program; joining statewide access to justice planning efforts with community based civil legal aid programs, courts, and law firms to help guide pro bono service to unmet legal needs; and selecting an "access to justice liaison" in each law school to ensure communication with Commission leaders, as well as legal aid leaders, judges, and court officials, bar leaders, and other stakeholders.[27]

Through pro bono projects with attorney supervision, students can provide a variety of services to individuals, including assistance with intake to determine key issues or eligibility; assistance with legal forms, such as immigration applications; legal advice and representations; and legal research, including writing memos and drafting pleadings. Other law-related services students can provide include policy research, analysis, drafting, and advocacy; community education about areas of law

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[26] *See* Resource Center for Access to Justice Initiatives, Am. Bar Ass'n, State Access to Justice Commissions, *available at* http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html, *archived at* http://perma.cc/544Z-WPGD.

[27] *See* The Task Force to Expand Access to Civil Legal Services in New York, Report to the Chief Judge of the State of New York (November 2012), *available at* http://www.nycourts.gov/ip/nya2j/pdfs/NYA2J_2012report.pdf, *archived at* http://perma.cc/ALP9-RCH2 (describing steps to implement recommendations in New York).

such as "know your rights" presentations; language translations; and poll-monitoring.

Once needs have been identified, project ideas generated, and relationships nurtured, the pro bono director must develop each project. Development entails clarifying the goals for each project, creating a road-map for meeting those goals and, working closely with any partnering organization or attorneys, collecting and/or developing forms and tip sheets for students to use. The director must also determine appropriate levels of experience, training and supervision for participating attorneys and students, and develop mechanisms for students and clients to evaluate impact.

ii.   Meeting Participation Goals

Methods of motivating student participation will differ between mandatory and voluntary programs, as well as from one school to another. Communicating descriptions of pro bono service performed by faculty and pro bono opportunities for students creates a culture of respect, and helps generate interest. Modes of communication include advertisements or articles on the school's website, in social media, school promotional materials, posters, and "pro bono fairs." Material that includes reflective commentary by faculty or prior participating students is especially helpful.

To engage students broadly, however, it is also critical that the program encompass a broad range of opportunities. For some students, the venue — a courthouse or a law office — has its own draw; while for others, working on a particular issue such as domestic violence will create the excitement. For yet others, working directly with clients will be the motivating factor. An important consideration is including projects that will — because of the venue, exposure, or legal experience, or other factors — appeal to students for whom helping low-income communities is not necessarily, itself, the attraction. Anti-foreclosure projects, for example, give students exposure to banks and financial instruments, and immigration projects may give students an opportunity to use a second (or first) language in a legal context.

The structure of individual projects may affect interest and participation, and thus affect efforts to recruit students, supervising attorneys, and others. It is helpful to consider projects within three broad categories: 1) *Hours-Based*, in which students commit to a specific number of hours, 2) *Case-Based*, in which students work on a case or project until it is completed, or 3) *Short-Term*, in which students work on a case or project for a specified length of time such as during orientation or an alternative break program. Students can be very helpful in recruiting their peers and managing expectations.

Finally, given the recent changes in pro bono requirements for bar admission, with other states likely to follow, it is a best practice for law schools to ensure that students are well-informed about all pro bono service bar admission requirements and to ensure that their graduates are eligible for practice in the state of their choice.

iii.   Training and Supervising Students

Creating structures for training and supervising students will serve the interests of all constituents and increase the educational impact of the experience. All students participating in pro bono projects should receive training that includes readings, activities, or simulations that allow students to develop an understanding of the scope and consequences of the systemic lack of access to justice, as well as professionalism and ethical considerations important to providing services in a law school context. In addition, training for individual projects should include information on the client population, legal issues, and required legal skills. All students should also have an opportunity to reflect on and evaluate their pro bono experience and to obtain feedback from the supervisor or pro bono director.

To ensure appropriate attorney supervision for pro bono projects, the program should have a system to select effective supervisors or, where appropriate, provide training on effective supervision. Consideration should be given to establishing guidelines on expectations for supervising students and for managing students' expectations. Supervision may be monitored by visiting project sites and by soliciting reports from students, clients, or court personnel. Schools should obtain feedback from supervisors about the effectiveness of projects.

iv.   Tracking Outcomes

Establishing an effective system to match students to appropriate placements and to track outcomes in the pro bono program is key to understanding and highlighting the program's success and can help identify areas for improvement. Information about opportunities should include the client population served, the time and lawyering skills involved, and the legal issues addressed. Importantly, the tracking system should capture information relevant to specific program goals, such as the number of students and faculty engaged in pro bono service; the number of hours of service provided; the numbers and types of clients served; and student evaluation of — and reflection on — their experience. Tracking systems should also leave room for narratives of successful outcomes.

The information gathered can serve as a basis for an annual report of the program overall or each project's work. Such reports are extremely helpful on a variety of fronts. Internally, the reports help faculty and administrators assess the program's effectiveness in student engagement and in meeting legal needs and can be used to attract additional students, eager to join successful efforts. If made public through the school's website, newsletter, or a news article, such reports serve not only to keep faculty, staff, and alumni updated, but build respect and support for the program in the community. External communication about pro bono service projects also provides a means to recognize partner organizations and attorneys.

v.   Creating and Communicating Policies, Procedures, and Forms

Numerous policies, procedures, and forms are necessary for the operation of a successful formal pro bono program. While the specific needs of programs differ from one school to another, attention should always be given to critical ethical and legal issues such as confidentiality, conflicts of interest, unauthorized practice of law standards, Federal Labor Standards Act (FLSA), malpractice insurance, cultural competence, student practice rules, and rules related to "limited scope legal services." Existing resources can aid law schools in addressing these issues.[28]

A best practice is to keep both general forms and forms used in specific projects in a place accessible to students. While forms are often provided by a partner organization,[29] it is a good idea to consider what forms will help students and supervisors in managing their projects, especially with a new project. Good forms will help ensure competence and reflection. Examples include tip sheets with the elements of the relevant cause of action or defense, specific administrative rules or key statutes, time sheets, evaluation forms (for students, supervisors, clients, and others), budgets, retainer agreements, and semester or annual report forms.

vi.   Using Student Leaders

Pro bono programs can be utilized to develop student leaders. Students can serve on advisory councils, create and lead pro bono projects, encourage participation of peers, and advance the program in many other ways. Individual students and student organizations often lead the effort to create specific pro bono projects, and law school pro bono programs should be prepared to guide and support those efforts. Finally, students can be very helpful in recruiting their peers and managing expectations.

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[28] *See, e.g.*, Melanie Kushnir, *Building and Sustaining an Effective Law School Pro Bono Program with a Baker's Dozen Tips*, 39 Syllabus 1, 1 (Winter 2008); Carolyn Goodwin, *Resources for Law School Pro Bono* (2014) (copy on file with authors); Anna Strasburg Davis, *Transforming Legal Education One Pro Bono Project at a Time: A Practical Model for Law Schools*, Orange County Bar Association News (Orange County Bar Association, Orange County, C.A.), June 2014 (copy on file with authors).

[29] American Association of Law Schools, Public Service and Pro Bono Section, *available at* http://www.aals.org/, *archived at* http://perma.cc/F5VZ-FEY9; Am. Bar Ass'n, Directory of Law School Pub. Interest and Pro Bono Programs, *available at* http://www.americanbar.org/groups/probono_public_service/about_us.html, *archived at* http://perma.cc/4SCS-CXCS, The Ctr. for Pro Bono, *available at* http://apps.americanbar.org/legalservices/probono/lawschools/home.html, *archived at http://perma.cc/L3PN-5V48*; Nat'l Ctr. for Access to Justice, *available at* http://ncforaj.org/, *archived at* http://perma.cc/P7CF-JMLL; Equal Justice Works Guide to Law Sch. Pro Bono, *available at* http://www.equaljusticeworks.org/law-school/pro-bono, *archived at* http://perma.cc/G5SW-MCRV; Legal Services Corporation, Report of the Pro Bono Task Force (October 2012), *available at* http://www.lsc.gov/sites/default/files/LSC/lscgov4/PBTF_%20Report_FINAL.pdf, *archived at* http://perma.cc/84EF-D5W2; Resource Centr for Access to Justice Initiatives, Am. Bar Ass'n, State Access to Justice Comm'ns, *available at* http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html, *archived at* http://perma.cc/9PVP-RNMK; NALP, The Ass'n for Legal Career Prof'ls. Pub. Serv. Section, *available at* http://www.nalp.org/publicservicesection, *archived at* http://perma.cc/5V2M-5TRD.

vii.   Recognizing Excellence

Recognizing exceptional pro bono activities motivates students, faculty members, and lawyers in the community to participate in the school's pro bono program, shows that the law school values pro bono service, and provides important information to all stakeholders about the service that the students and faculty are giving to the community. Students can be recognized at a celebratory event, be given awards with or without a monetary value, and receive special recognition at commencement. Faculty pro bono service should be encouraged and explicitly considered favorably in promotion and tenure decisions. Both faculty and students can be recognized on school websites, in media releases, and in publicity at the school. Schools should also work with local media, bar organizations, governmental entities, and others to promote external recognition of pro bono accomplishments. Finally, it is extremely important to recognize outside supervisors, co-sponsors, bar associations, and Justice Commissions in order to maintain and strengthen those relationships.

5.   Conclusion

Developing a professional identity as a lawyer requires understanding the challenges confronting our justice system and the role of lawyers in ensuring access to justice. Pro bono service teaches the values of the legal profession, helps students acquire the skills of lawyering, and establishes links between students and their potential employers. It also makes the difference for people otherwise denied equal access to our justice system. With millions of people proceeding annually in civil cases without counsel, and with the right to counsel in criminal matters often compromised, pro bono service by law students and law faculty is important. Each law school needs to develop a pro bono program that considers the factors unique to the school and the surrounding community. But all law schools can and must respond to the legal profession's current challenges and an ever-widening justice gap by embracing their unique ability to instill values, and develop skills and a commitment to pro bono service in tomorrow's lawyers. Relying on best practices is essential to making that response meaningful.

C.   THE RELATIONAL SKILLS OF THE LAW

BEST PRACTICES FOR LEGAL EDUCATION[1] made the case for greater emphasis and intentionality connected to the teaching of "affective skills."[2] These skills included values, attitudes, and beliefs such as how students relate to clients, how they respond to ethical concerns, and how their values inform their role.[3] BEST PRACTICES did not elaborate much further on the topic other than to state that experiential courses are a natural place for the teaching of these skills. At least a handful of law teachers and scholars have been researching the relationship of these skills to success in the profession, and developing approaches and teaching techniques to help students cultivate these skills, which can also be thought of as relational skills. It is now a best practice for all law schools to take seriously the duty to educate law students on both the need for lawyers to develop competency in this area and how to enhance their relational skills.

The following two subsections describe, in greater detail than BEST PRACTICES did, the need for this education and the approaches that seem most effective so far. They set forth the relevant empirical data on the profession that demonstrate the fundamental nature of the skills, describe one approach to teaching these skills, called Relationship-Centered Lawyering, and then discuss three vehicles for integrating the teaching of relational skills into legal education: experiential courses, dedicated courses, and pervasive practices.

1.   TEACHING RELATIONAL SKILLS: THE EVIDENCE
   ## By Susan Daicoff[1]

a.   Introduction

Public opinion of lawyers has consistently suffered since the 1980s.[2] A 1993 study found that the public appeared to have little confidence in lawyers' ethics and perceived lawyers as money-grubbing.[3] More recent studies report that an alarming number of

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[1] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

[2] BEST PRACTICES, text at notes 546-47, 553-54.

[3] *Id.*

[1] The reader for this section was Susan L. Brooks.

[2] *See* sources collected at Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1345-1346 (1997); SUSAN DAICOFF, LAWYER, KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES 5-6, 99-112 (2004) [hereinafter DAICOFF, KNOW THYSELF]. *See also* Ronald D. Rotunda & John S. Dzienkowski, *Introduction § 1-7 The Public Image of Lawyers*, *in* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS — THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1-7 (2013-2014 ed.). Substantial portions of this paper are taken from other recent work by the author, *e.g.*, Susan Swaim Daicoff, *Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law*, 52 SANTA CLARA L. REV. 795 (2012) [hereinafter Daicoff, *Toolkit*].

[3] *See* Peter D. Hart Research Associates, *A Survey of Attitudes Nationwide toward Lawyers and the Legal System* (Jan. 1993).

people (up to 40% in one study; 75-80% in another) choose to handle their legal matters, in and out of court, without lawyers, because they cannot afford legal fees and believe that involving lawyers tends to make disputes more hostile and protracted.[4] A 2005 Wisconsin study reported that "divorces tended to take longer when litigants were represented by attorneys."[5] This data documenting societal dissatisfaction with lawyers[6] suggests a need for attorneys to improve their intrapersonal and interpersonal skills — skills often overlooked in legal education and professional development. Specifically, better lawyering skills, such as client communications, empathy, the ability to problem solve and explain the legal process to clients, and negotiation might ameliorate these dismal statistics. Lawyers should employ "procedural justice": social science research findings that litigants' satisfaction with legal processes and their perceptions of fairness are higher when they are given "voice," are treated with respect by those in authority, and have input into decisions (or, at least, are given explanations for the decisions).[7] Legal malpractice might even be avoided. Physicians have found that enhancing their abilities to explain medical matters to patients and apologizing when they make errors reduces the amounts paid out in medical malpractice damages claims and awards.[8] Lawyers who can sense (and adjust their approach) when their clients feel they are making the situation worse, are likely to be in demand.

Empirical research and survey data on lawyer effectiveness consistently find that certain skills are important to success as a practicing lawyer. Of these, many are skills outside the traditional competencies taught in law school: intra- and inter-personal abilities such as problem solving, communication skills, self-management competen-

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[4] Robert Thompson & Zachary Willis, *Cases without Counsel, New Project to Explore Experiences of Self-Representation in U.S. Family Court*, IAALS Online (blog), June 26, 2014, available at http://online.iaals.du.edu/2014/06/26/cases-without-counsel-new-project-to-explore-experiences-of-self-representation-in-u-s-family-court/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+du%2FIAALS+%28IAALS+Online+-+National+Conversations+About+Continuous+Improvement+of+the+American+Legal+System%29 14, *archived at* http://perma.cc/F362-535F, *citing* 2014 Fact Sheet: Self-Represented Litigants, Judicial Council of California; Maryland Access to Justice Commission (2012); and Increasing Access to Justice in Texas, Texas Access to Justice Commission. *See also* Judith G. McMullen & Debra Oswald, *Why Do We Need A Lawyer? An Empirical Study Of Divorce Cases*, 12 J. L. & Fam. Stud. 57, 57-59 (2010) [hereinafter McMullen & Oswald, *Why*?].

[5] McMullen & Oswald, *Why?*, at 59.

[6] *See* sources cited in note 5. *See also* Matthew L. Garretson, *Chapter 1. Counseling Clients about the Form of Settlement; I. Settler's Remorse — The Growing Trend in Professional Liability Complaints; Section 1:2 "Communications Breakdown," in* Matthew L. Garretson, Handling Healthcare Liens, § 1:2; Negotiating and Settling Tort Cases: Handling Healthcare Liens, Medicare Set-Asides, and Settlement Planning (updated February 2013).

[7] *See* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings, in* David B. Wexler & Bruce J. Winick, Law In A Therapeutic Key: Developments In Therapeutic Jurisprudence 3 (1996).

[8] *See* Michael B. Runnels, *Dispute Resolution & New Governance: Role of the Corporate Apology*, 34 Seattle U. L. Rev. 481, 484 (2011) ("the use of corporate apologies is both good business and good ethics"); Jonathan R. Cohen, *The Culture of Legal Denial, in* The Affective Assistance of Counsel 295–96 (Marjorie A. Silver ed., 2007) [hereinafter Silver, Affective Assistance].

cies, relationship development, negotiation, stress management, and more.[9] However, the dismal data on the public's opinion of lawyers, as well as studies on the personality strengths of those attracted to the law,[10] suggest that law students are not likely to excel in these areas. This section focuses on the need to explicitly train students in these "relational" skills in law school courses.

b. Definition of the "Relational" Skills of the Law

Certain lawyering skills are traditionally the focus of legal education: legal research and writing, legal analysis, oral and written advocacy, knowledge of substantive law and doctrine, as well as the ability to marshal and summarize facts, apply rules of law to facts, reach and articulate legal conclusions, brief cases, and distinguish cases. However, other skills important to lawyer effectiveness are often overlooked in legal education.[11] These include intrapersonal and interpersonal competencies such as practical problem solving, stress management, self-confidence, initiative, optimism, interpersonal communication, the ability to convey empathy to another, the ability to see a situation from another's perspective, teamwork, collaboration, client relations, business development, and the like.

Management consultants, coaches, and corporate trainers tend to refer to these skills as "soft skills" rather than "hard skills," where soft skills include attitudes and habits and hard skills include knowledge and specific technical, legal skills (such as legal analysis and drafting).[12] They argue that soft (not hard) skills are critical to employee retention and promotion and define soft skills as inclusive of concepts such as: leadership, executive image, strategic planning, interpersonal communication, listening, speaking, persuasion, diplomacy, flexibility, conflict management and resolution, time management, delegation, meeting management, team building, problem solving, and decision making.[13] Lawyers and legal educators sometimes dislike the term, soft skills,[14] because it may incorrectly suggest that these skills are less

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[9] Susan Brooks refers to these skills as "relational skills," acknowledging that they include intra- and inter-personal skills. Her subsection below explores how to train law students in these skills.

[10] DAICOFF, KNOW THYSELF.

[11] A bright spot may be American Bar Association Standard 302, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 2014-2015, http://www.americanbar.org/groups/legal_education/resources/standards.html, *archived at* http://perma.cc/6WDT-S6ZF, [hereinafter ABA Standards], which now requires education in some of these "other" skills, such as "problem-solving, the exercise of proper professional and ethical responsibilities to clients and the legal system, and other professional skills needed for competent and ethical participation as a member of the legal profession." Its Interpretation 302-1 states that these "other" skills *may* include "interviewing, counseling, negotiation, fact development and analysis, trial practice, document drafting, conflict resolution, organization and management of legal work, collaboration, cultural competency, and self-evaluation."

[12] *See* David Sorin & Anne Weisbord, *"Soft Skills,"* 29 PA. LAW. 17 (2007) (arguing that soft skills are important for lawyer success and including "[g]etting along with others, time management, delegation, communication, listening" in the set, yet these are often overlooked by employers; the authors explain that "Organizations typically hire for skills and knowledge. They then fire and promote on the basis of attitudes and habits." *Id.* at 18-19).

[13] *Id.*

[14] The term, "soft" skills of the law, differentiates them from the more traditional and visible "hard"

important than other skills. For this reason, the term "relational skills" is used here.[15] However, it is important to be clear that this term does not refer simply to social or interpersonal skills, as it includes intrapersonal competencies that are distinct from, although related to, one's relationships with others. It is not synonymous with "emotional intelligence" ("EQ")[16] (although EQ is included), because it reaches farther than EQ and is more specific to the legal profession. It is not simply synonymous with client relations skills.

c.   Empirical Support for the Importance of the Relational Skills of the Law

From 1988 to 2009, at least nine published empirical studies and surveys investigated what skills and competencies are needed to be an effective lawyer.[17] Five of these studies surveyed lawyers and nonlawyers about what competencies are most important to the practice of law.[18] Their findings are very consistent with each other. Of these, the most recent and most exhaustive study was performed by Shultz & Zedeck; they interviewed hundreds of attorneys, judges, law teachers, law students,

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analytical, argumentative skills of the law and denotes that they include intra- and interpersonal competencies that are often associated with the social sciences. This term is not resonant for many in the law.

[15] RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden, Eds., 2010).

[16] Emotional intelligence, or "EQ" as it is commonly known, is a concept developed by psychologist and researcher Daniel Goleman, in contrast to intellectual intelligence or intelligence quotient ("IQ"). It includes five categories of traits that have been found to correlate to lifelong success in a variety of areas. EQ also predicts a well-rounded type of success better than one's IQ alone. SILVER, AFFECTIVE ASSISTANCE, at 9-12, *citing* DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 14–27 (1997).

[17] Irene E. Taylor, *Canada's Top 30 Corporate Dealmakers*, LEXPERT MAGAZINE (Nov. 2002) [hereinafter Taylor, *Dealmakers*]; Irene E. Taylor, *Canada's Top 25 Corporate Litigators*, LEXPERT MAGAZINE (July 2002) [hereinafter Taylor, *Litigators*] (assessing traits differentiating "top" corporate litigators from other lawyers); Irene E. Taylor, *Top 40 Under 40*, LEXPERT MAGAZINE (Nov. 2004) [hereinafter Taylor, *Top 40*] (assessing traits differentiating "top" lawyers ages 40 and under from other lawyers); Irene E. Taylor, *Carpe Diem! Canada's Top 25 Women Lawyers*, LEXPERT MAGAZINE (Sept. 2003) [hereinafter Taylor, *Women Lawyers*] (assessing traits differentiating "top" women lawyers from other women lawyers) (all four Taylor studies available at http://www.praxispartners.ca/lex_02_03.html, *archived at* http://perma.cc/8QPJ-GC2V); Stephen Gerst & Gerald Hess, *Professional Skills and Values in Legal Education: The GPS Model*, 43 VAL. U. L. REV. 513, at 523–25 & 548 (2009) [hereinafter Gerst & Hess, *GPS Model*]; Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 L. & SOC. INQUIRY 620, 622–24 (2011) [hereinafter Shultz & Zedeck, *Predicting*]; Marjorie M. Shultz & Sheldon Zedeck, *Final Report: Identification, Development, and Validation of Predictors for Successful Lawyering* (Jan. 30, 2009) (unpublished manuscript) [hereinafter Shultz & Zedeck, *Final Report*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1353554, *archived at* http://perma.cc/UAA8-XBH8; Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993) [hereinafter Garth & Martin, *Law Schools*]; John Sonsteng & David Camarotto, *Minnesota Lawyers Evaluate Law Schools, Training and Legal Education*, 26 WM. MITCHELL L. REV. 327, 329–30 (2000) [hereinafter Sonsteng & Camarotto, *Minnesota Lawyers*]; John O. Mudd & John W. LaTrielle, *Professional Competence: A Study of New Lawyers*, 49 MONT. L. REV. 11 (1988) [hereinafter Mudd & LaTrielle, *Professional Competence*].

[18] Gerst & Hess, *GPS Model* at 523-25, 548 ; Shultz & Zedeck, *Final Report*; Garth & Martin, *Law Schools*; Sonsteng & Camarotto, *Minnesota Lawyers*, at 329-30; and Mudd & LaTrielle, *Professional Competence*.

and clients.[19] Echoing the earlier studies' findings, their results were empirically grouped into 26 characteristics in eight categories.[20] This list is:[21]

1: Intellectual & Cognitive
analysis and reasoning*
creativity/innovation
problem solving
practical judgment
2: Research & Information Gathering
researching the law*
fact finding*
questioning & interviewing
3: Communications
influencing & advocating*
writing*
speaking*
listening
4: Planning & Organizing
strategic planning
organizing & managing one's own work
organizing & managing others' work
   (staff/colleagues)

5: Conflict Resolution
negotiation skills
able to see the world through eyes
   of others
6: Client & Business Relations
entrepreneurship
networking & business development
providing advice & counsel
building relationships with clients
7: Working with Others
developing relationships
   within profession
evaluation, development & mentoring
8: Character
passion & engagement
diligence
integrity & honesty
stress management
community involvement & service
self-development

Of these 26 competencies, perhaps six (27%) are traditionally and uniformly taught in law school (marked *). Twelve to 18 more (69%) may appear in elective clinical courses, but students who opt out of clinics and externships may miss opportunities in law school to develop 73% of these critical competencies.[22] Even if students do enroll in clinics and externships, the programs may not explicitly train students in these competencies. Many law schools[23] appear to be revising curricula to correct this

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[19] Shultz & Zedeck, *Final Report*.

[20] *Id.*

[21] *Id.* at 26–27.

[22] Law clinics and externships may indeed provide opportunities for law students to acquire many, if not most, of the 26 skills, such as: listening, problem solving, practical judgment, negotiation skills, seeing the world through another's eyes, counseling clients, organizing and managing one's own work, organizing and managing others (staff/colleagues), passion and engagement, diligence, integrity/honesty, stress management, self-development, creativity/innovation, strategic planning, building relationships with clients, developing relationships within the legal profession, and community involvement and service. Some of the 26 skills may be entirely missing from legal education, such as: evaluation, development, and mentoring of others; networking; and business development. Certainly, the BEST PRACTICES efforts to reform legal education have vastly improved and should continue to improve law students' ability to acquire these skills.

[23] For example, Arizona Summit Law School has recently integrated a variety of practical skills training into its first-year curriculum.

"imbalance between legal education"[24] and the abilities those in the legal profession say are important for the practice of law; it is a best practice to do so.

Four Canadian studies actually assessed the skill level of various attorneys and performed a comparative analysis of lawyer groups, using emotional intelligence ("EQ")[25] as the measure.[26] They first compared lawyers to the general population and then explored what characteristics and traits differentiate "top" lawyers from the rest of the lawyers in the field.[27] In these studies, lawyers' intrapersonal EQ (specifically, their adaptability, assertiveness, problem solving, stress tolerance, optimism, and reality testing) and total EQ scores were higher than the norm, while their interpersonal EQ, empathy, and social responsibility scores fell below the norm. "Top" lawyers scored higher than other lawyers on *optimism, assertiveness, independence, and stress tolerance*, suggesting that these characteristics are helpful to success in the law.[28]

The findings are relatively consistent. They provide some empirical foundation for, and are likely to be helpful in, efforts to revise law school curricula. To summarize and organize the results, the lawyering skills studies demonstrate the importance of the relational skills and competencies, listed below. These skills and abilities are divided into four categories, loosely based on emotional intelligence theory:[29] (1) intrapersonal competencies (self-oriented) and (2) interpersonal competencies (other-oriented). Each is further broken down into two subcategories: (a) awareness, values, or abilities; and (b) management (ability to display behavior consistent with one's abilities).[30]

Intrapersonal (Self) Awareness, Values, & Abilities:[31] Practical judgment,[32] maturity,[33] passion and engagement,[34] motivation,[35] diligence,[36] drive for

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[24] Daicoff, *Toolkit*, at 824 n.128, *citing* MICHAEL KING, ARIE FRIEBERG, BECKY BATAGOL & ROSS HYAMS, NON-ADVERSARIAL JUSTICE 241 (2009).

[25] SILVER, AFFECTIVE ASSISTANCE, at 9–12, *citing* DANIEL GOLEMAN, WORKING WITH EMOTIONAL INTELLIGENCE 14–27 (1997).

[26] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; and Taylor, *Women Lawyers*.

[27] The concept of a "top" lawyer often raises questions about the definition and determination of a lawyer as "top." Taylor surveyed thousands of Canadian lawyers to determine who they perceived to be the "top" lawyers in four areas: lawyers under 40 years old, women lawyers, corporate litigators, and corporate dealmakers. Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; and Taylor, *Women Lawyers*. *See also Publications*, PRAXIS, http://www.praxispartners.ca/publications.html, *archived at* http://perma.cc/9XKQ-3289.

[28] There were also some differences between the top lawyer groups based on age, gender, and practice area; Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; and Taylor, *Women Lawyers*.

[29] These four quadrants come from the literature on emotional intelligence. *See* SILVER, AFFECTIVE ASSISTANCE, at 9-12, *citing* GOLEMAN, at 14-27.

[30] Note that Goleman had five categories; the fifth was "motivation," which is included in this Table 1 under self-awareness skills. *See* SILVER, AFFECTIVE ASSISTANCE.

[31] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[32] Mudd & LaTrielle, *Professional Competence*; Shultz & Zedeck, *Final Report*.

[33] *Id.*

[34] Shultz & Zedeck, *Final Report*.

[35] Mudd & LaTrielle, *Professional Competence*.

achievement and success and a need to compete and win,[37] intense detailed focus and concentration,[38] optimism,[39] self-confidence,[40] strong sense of self and self-knowledge,[41] integrity, honesty,[42] and ethics,[43] reliability,[44] independence,[45] adaptability,[46] creativity/innovation[47] (in a practical sense[48]).

Intrapersonal Management Competencies: Organizing and managing one's own work,[49] self-development,[50] continued professional development,[51] stress management,[52] general mood.[53]

Interpersonal (Other) Awareness: Understanding human behavior,[54] an intuitive sense of others by which one can "read" what is implicit or understand subtle body language and gestures,[55] ability to see the world through the eyes of others,[56] tolerance and patience,[57] ability to read others and their emotions.[58]

Interpersonal Management Competencies: Dealing effectively with others,[59] questioning and interviewing,[60] influencing and advocating,[61] instilling

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[36] Shultz & Zedeck, *Final Report*.

[37] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[38] *Id.*

[39] *Id.*

[40] Mudd & LaTrielle, *Professional Competence*.

[41] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[42] Mudd & LaTrielle, *Professional Competence*; Shultz & Zedeck, *Final Report*.

[43] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[44] Mudd & LaTrielle, *Professional Competence*.

[45] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[46] *Id.*

[47] Shultz & Zedeck, *Final Report*.

[48] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[49] Shultz & Zedeck, *Final Report*.

[50] *Id.*

[51] Mudd & LaTrielle, *Professional Competence*.

[52] Shultz & Zedeck, *Final Report*; Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[53] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[54] Mudd & LaTrielle, *Professional Competence*.

[55] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[56] Shultz & Zedeck, *Final Report*.

[57] Mudd & LaTrielle, *Professional Competence*.

[58] Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[59] Mudd & LaTrielle, *Professional Competence*.

[60] Shultz & Zedeck, *Predicting*.

[61] *Id.*

others' confidence in you,[62] assertiveness,[63] speaking,[64] listening,[65] providing advice and counsel to clients,[66] obtaining, building relationships with, and keeping clients,[67] developing business,[68] working cooperatively with others as part of a team,[69] organizing and managing others (staff/colleagues),[70] evaluation, development, and mentoring,[71] negotiation skills,[72] mediation,[73] developing relationships within the legal profession (networking),[74] community involvement and service,[75] problem solving,[76] strategic planning.[77]

Two observations may be worth noting. First, several of the nine studies mention nine qualities that may be particularly important in the legal profession: *drive, honesty, integrity, understanding others, obtaining and keeping clients, counseling clients, negotiating, problem solving, and strategic planning*. Second, there are some inconsistencies regarding lawyers' interpersonal competency. In surveys, those interviewed mentioned certain interpersonal skills as important for lawyers, but the Canadian studies found that neither lawyers as a whole nor "top" lawyers had high interpersonal EQ (as compared to the norm). In fact, some top lawyers intimated in their personal interviews that interacting gracefully with others was an area of challenge for them. To break this down further, the Canadian lawyers in general scored below the norm on "empathy," but the top Canadian lawyers generally had a high ability to "read" people.[78] This is consistent with lawyer personality research that indicates that empathy is often an area of challenge for those drawn to the law.[79] It is possible that lawyers are attuned to reading other people but not particularly skilled at empathizing with others' emotions. Two researchers have made an exhaustive review of the empirical research on lawyering effectiveness, which they then link to

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[62] Garth & Martin, *Law Schools*; Sonsteng & Camarotto, *Minnesota Lawyers*.

[63] Taylor, *Dealmaker*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[64] Shultz & Zedeck, *Predicting*.

[65] *Id.*; Gerst & Hess, *GPS Model*.

[66] Garth & Martin, *Law Schools*; Gerst & Hess, *GPS Mode.*; Shultz & Zedeck, *Predictng*; Sonsteng & Camarotto, *Minnesota Lawyers*.

[67] *Id.*

[68] Shultz & Zedeck, *Predicting*.

[69] Gerst & Hess, *GPS Model*.

[70] Shultz & Zedeck, *Predicting*.

[71] *Id.*

[72] Garth & Martin, *Law Schools*; Sonsteng & Camarotto, *Minnesota Lawyers*; Gerst & Hess, *GPS Models*; Shultz & Zedeck, *Predicting*.

[73] Gerst & Hess, *GPS Model*.

[74] Gerst & Hess, *GPS Model*; Shultz & Zedeck, *Predicting*.

[75] Shultz & Zedeck. *Predicting*.

[76] Gerst & Hess, *GPS Model*; Shultz & Zedeck, *Final Report*; Taylor, *Dealmakers*; Taylor, *Litigators*; Taylor, *Top 40*; Taylor, *Women Lawyers*.

[77] *Id.*

[78] Taylor, *Litigators*; Taylor, *Dealmakers*; Taylor, *Top 40*; Taylor, *Women Lawyers*. Even "top" lawyers did not score high on empathy, however. Taylor, *Women Lawyers*.

[79] DAICOFF, KNOW THYSELF, at 64-69, 74-76, 108-09 .

professional identity development;[80] they conclude from their review that interpersonal acumen is indeed important for lawyering effectiveness.

The ability to communicate empathy for another may be an improvement area, then, for lawyers. Although legal education has traditionally ignored explicit training in the relational skills of the law, it is a best practice to do so, in light of the strong evidence of the importance of the skills to effectiveness.

d.   Can the Relational Skills of the Law Be Taught?

Relational skills training is routinely done in graduate schools of clinical psychology, counseling psychology, and social work. For example, graduate students are videoed conducting mock interviews with simulated mental health clients and the videos are debriefed with the teacher. In these debriefs, the teacher may comment on the student's use of eye contact, open- and closed-ended questions, empathy (and the accuracy of that empathy), body posture, silence, and the like; make suggestions for improvement; and indicate how to improve. Perhaps due to robust malpractice liability reductions for physicians with good "bedside manner" and the ability to apologize for or explain errors, and patients' perception of physicians as distant and cold, medical school now often incorporates specific training on relational skills for medical students.

Similar granular-level education can be done in law schools, particularly in simulation-based or clinical classes. Optimally, the training should explicitly identify for students what skills are being acquired during the training, particularly as law students may not be attuned to these skills. Law faculty might use labels for each of the "relational skills" of the law, demystify them, demonstrate how to apply them in cases or case studies, and model how to intentionally develop those that are personal areas of challenge.

Finally, it is not true that these competencies are: (1) only developed in one's family of origin or through life experiences before law school; (2) inherent, unacquirable qualities (*e.g.*, one either has them or they do not); or (3) skills that law teachers are unable to teach and assess. There is no reason why the teaching methods used so successfully in other professions cannot be imported into legal education.

e.   Conclusion

Strong empirical evidence exists to suggest that lawyers who use, acquire, and hone their "relational" skills, meaning those intrapersonal and interpersonal skills relevant to the law, are likely to be more successful professionally. While some of these skills may not be areas of greatest strength for those drawn to the law, lawyers and law students need not be concerned that these are innate, immutable characteristics. Relational skills are acquirable, in law school or thereafter. Unfortunately, these are the very skills often overlooked in legal education. The need for change has now been demonstrated empirically. It is, therefore, a best practice to require and regularly

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[80] Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 29 GEO. J. LEGAL ETHICS 176-79 (2010) (discussing the relationship of relationship skills and emotional intelligence to lawyering effectiveness).

teach these skills in law school courses, if our graduates are to serve society well, and resurrect respect for the profession.

2.   CULTIVATING STUDENTS' RELATIONAL SKILLS
By Susan L. Brooks[1]

a.   Introduction

"[T]raditional techniques de-sensitize students to the critical role of interpersonal skills in all aspects of a professionally proper attorney-client relationship and, for that matter, in all aspects of an ethical law practice."[2] In response to critiques such as the one above from BEST PRACTICES FOR LEGAL EDUCATION, legal educators have been experimenting with teaching approaches that offer a more organized approach to supply the necessary grounding to guide law students toward a "professionally proper attorney-client relationship."

b.   Relationship-Centered Lawyering

Relationship-Centered Lawyering (RCL) is a framework identifying three areas of competency all law students need in order to cultivate relational skills.[3] The RCL structure is particularly useful when combined with both formal and informal methods that teach relational communication skills. The three components include: (a) exposing students to substantive theories about the person-in-context, (b) promoting the consideration of process-oriented choices that will improve procedural justice, and (c) appreciating and heightening awareness of interpersonal, cultural, and emotional considerations.

i.   Understanding the Person-in-Context

BEST PRACTICES advocated for the use of "context-based education throughout the program of instruction.[4]" The authors recognized that legal professionals need a highly contextualized understanding of the client, case, and situation. Contextualization also means the exploration of moral and ethical-social issues as integral elements of legal representation, including the qualities of compassion, respectfulness, and commitment. Law students exposed to these ideas will be more effective in navigating their work environments, and in appreciating the other contexts that affect their day-to-day professional lives.

Theoretical   models   from   outside   of   law   that   can   contribute   to   students'

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[1] The reader for this section was Susan Daicoff.

[2] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007), text at note 447 (*quoting* Lawrence S. Krieger, *Institutional Denial about the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence*, 52 J. LEGAL EDUC. 112, 125 (2002)).

[3] Substantial portions of this paper are taken from the author's other recent work. *See generally*, Susan L. Brooks, *Meeting the Professional Identity Challenge in Legal Education through a Relationship-Centered Experiential Curriculum*, 41 BALT. L. REV. 395 (2012); Susan L. Brooks, *Using a Communication Perspective to Teach Relational Lawyering*, 15 NEVADA L.J. (forthcoming 2015)). For a detailed description of RCL, see RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (Susan L. Brooks & Robert G. Madden, Eds., 2010) [hereinafter BROOKS & MADDEN, RELATIONSHIP-CENTERED LAWYERING].

[4] BEST PRACTICES, text at notes 454-55.

understanding of the importance of context include family systems theory, and attachment and network theories. By educating law students about these theories, the intention is *not* to turn them into social scientists or mental health professionals; rather, the theories help provide students with specific guidance about human development and interpersonal dynamics, as well as respect for the dignity of all clients and the need for greater empathy. Having increased awareness about these dimensions will help law students appreciate legal matters in an informed way that will contribute to their effectiveness as practitioners.

ii.   Promoting Procedural Justice

The second competency area, which can be identified as "procedural justice," explores how legal professionals can help improve clients' sense of trust and respect for the law and its actors, as well as the underlying values that guide the analysis of issues and decision-making. All encounters with the legal system, whether or not they are voluntary, involve process issues such as questions of trust, respect, fair-mindedness, judgment, and perceptions around the opportunity to be heard.[5] Relationship-centeredness requires attending to these factors, with the goal of enhancing positive feelings and minimizing anti-therapeutic costs.[6] Significantly, these factors generally support procedural alternatives to traditional adversarial legal avenues, such as mediation, restorative justice, and other more collaborative legal mechanisms.[7]

iii.   Appreciating Interpersonal, Cultural, and Emotional Issues

Knowledge of systems and human development alone will not ensure that a student becomes a good lawyer.[8] Effective interactions with clients and other individuals encountered in our daily work require attention to four key dimensions of oneself and others to build positive professional relationships: (1) culture,[9] (2) empowerment, (3) strengths, and (4) emotion. These perspectives are not monolithic; rather, each reflects a rich and diverse body of research and its accompanying literature.

By setting out these three competency areas, the relational lawyering framework offers a relatively simple and straightforward scheme for organizing a wealth of knowledge and presenting it in ways that can be useful for purposes of the wide range of roles students might play in the legal system.

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[5] *See* Tom R. Tyler, *Trust and Law Abidingness: A Proactive Model of Social Regulation*, *in* Brooks & Madden, Relationship-Centered Lawyering, at 202.

[6] Susan L. Brooks & Robert G. Madden, *Epistemology and Ethics in Relationship-Centered Legal Education and Practice*, 56 N.Y.L. Sch. L. Rev. 331, 345 (2011/2012).

[7] While this approach tends to support non-adversarial legal processes, it also recognizes that conventional adversarial processes may be more appropriate, depending on the particular situation. *See id.* at 351–53.

[8] *Id.* at 346.

[9] *See* Chapter 6, Section E, *Intercultural Effectiveness*, below.

c. Integrating Relational Lawyering into Legal Education

Assuming that this framework proves useful, it raises an obvious next question, which is exactly *how* to integrate relational lawyering into legal education. In other words, what does it look like to teach relational lawyering in the classroom and to infuse it into the law school culture?

i. Experiential Courses

"In in-house clinics and some externships . . . students' . . . values and practical wisdom can be tested and shaped before they begin law practice."[10] As was suggested in BEST PRACTICES, experiential courses provide particularly effective opportunities to help students cultivate relational skills. BEST PRACTICES strongly supported supervised practice as a valuable setting for purposes of teaching the standards and values of the legal profession and for inculcating a commitment to professionalism.[11] Since the time of its publication, more work has been done on using classroom-based simulations and other exercises that place students in the role of a lawyer to help them develop a wide range of relational skills. The bottom line is that by offering a broad menu and repeated opportunities for experiential learning in law school, both through simulation and real-world practice, students have the best possible chance to develop these skills, which will lead them to be more competent and caring professionals. To achieve this goal, law teachers and administrators need to be willing to invest in and to support high-quality experiential learning courses that embrace a relational framework.

Law teachers, particularly clinical law teachers, may need to re-evaluate their teaching methodologies, and to consider whether they are maximizing the pedagogical opportunities to help students fully reflect on and integrate the relational lessons learned from their experiences. For example, such methods would include exploring students' feelings and emotions when faced with challenging situations involving supervising attorneys, opposing lawyers, other professionals, and clients. Law teachers in experiential courses may want to seek further guidance and expertise to assist them in helping students to cultivate relational competencies, as well as facilitating meaningful reflection and providing effective feedback.

Even as students are given opportunities to cultivate relational skills through experiential courses, it is still necessary to think about other vehicles for teaching these skills in legal education. A second option is to offer courses dedicated to teaching relational skills.

ii. Dedicated Courses

Across the landscape of legal education, there are many examples of individual courses that are largely dedicated to teaching relational skills. Perhaps the most obvious examples are courses focused on interviewing and counseling clients, and negotiation, both of which are often taught and classified as experiential courses.

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[10] BEST PRACTICES, text at notes 498-99.

[11] *Id.*, text at notes 494-97.

Another framework for a growing number of course offerings is the teaching of mindfulness or contemplative practices. There are also examples of courses on interpersonal dynamics and similar courses, which are often taught or co-taught by law teachers with a background in mental health or other social science disciplines. Yet another framework being developed is that of communication, using relational communication models to provide specific tools and techniques.

One challenge in making these courses truly about relational lawyering is that much of the existing curriculum in law school has an *instrumental* approach. For instance, listening skills are often taught as a means to some other end, such as *getting a client to follow the lawyer's advice*, rather than having their own value in strengthening the lawyer/client relationship. In part, this instrumentalism manifests itself in the suggestion that there is a proper interview script or checklist of questions for keeping a lawyer and client focused on the "legally relevant" facts. Students might then be evaluated based upon their performance of the items on that list in a similar vein to judging an oral argument for a moot court competition.

A truly relational approach is not about performance. To teach relational skills, the approach itself must mean that the process — how people relate to each other — is as important, if not more important, than the outcome. Another key component is the ability to reflect on and to keep improving relationships in meaningful ways. If the learner can gain greater self-awareness and clarity about communication, he or she can reduce the defensiveness that often impedes communication. Reflection can also lead to other areas of personal growth, which will improve students' effectiveness in working with clients and others.

This concern about instrumentalism is indicative of larger and longstanding issues in legal education that go well beyond individual courses. As stated in Best Practices, "legal education is actually harmful to the emotional and psychological well-being of many law students."[12] Since its publication, there is a growing consensus on the need to be intentional in our efforts to transform the culture of law schools, which has sometimes been called the "hidden curriculum." Addressing the toxic aspects of legal education is essential to accomplish more fully the goals of teaching relational skills.[13] How law teachers treat students, broadly speaking, is a model through which we demonstrate how we expect them to interact with clients.

iii.   Pervasive Practices

Best Practices listed eight components of effective and healthy teaching and learning environments, adopted from other sources:[14] (1) foster mutual respect and a supportive environment, (2) have high expectations, (3) support student autonomy, (4) encourage collaboration, (5) make students feel welcome and included, (6) engage students and teachers, (7) take delight in teaching, and (8) give regular and prompt

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[12] *Id.*, text at notes 327-28.

[13] *See* Chapter 4, Section B, Subsection 1, Humanizing *the Delivery of Legal Education*, above.

[14] The list borrows from the work of Gerry Hess, who synthesized four different models to come up with the eight components.

feedback.[15] BEST PRACTICES added a ninth: Do no harm.

These components provide a solid foundation for teaching relational skills pervasively in law schools. Since the publication of BEST PRACTICES, the importance of these components has been supported by additional research[16] compiling empirical data to identify the qualities of the best law teachers: authenticity, thoughtfulness, positive thinking, empathy, humility, creativity, and attentiveness. The best law teachers listen carefully, use silence well, and facilitate community and collaboration.

These educational components and teaching qualities are reflected in a recent effort to operationalize the teaching of relational skills by identifying eight effective communication practices.[17] It is an emerging best practice for law teachers to consider how to apply the following practices in his or her interactions with students both inside and outside of the classroom, in order to help students form their identity and develop effective practices for relating to clients and colleagues in the future.

(a)   Creating Safe Space

Developing the level of safety in the classroom in which teachers and students can be their authentic selves is no small achievement. A first step is to recognize that our dominant culture in the U.S., as well as our dominant legal culture, is driven by our emphasis on individualism and self-sufficiency. These emphases lead to loneliness and isolation within the legal culture and our legal institutions,[18] including the competitive atmosphere in the profession and in law schools. Law students, and lawyers, respond to this highly competitive culture by becoming guarded and self-doubting. Having a "harmless space" helps law students, as emerging professionals, to give and get support along with their classmates, and provides a powerful model for the attorney/client relationship.[19]

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[15] BEST PRACTICES, text at notes 321-22, *citing* Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, *52* J. LEGAL EDUC. 75, 77 (2002) (citations omitted). The ninth factor was added by Stuckey.

[16] *See generally* MICHAEL HUNTER SCHWARTZ, GERALD F. HESS & SOPHIE SPARROW, WHAT THE BEST LAW TEACHERS DO (2013).

[17] Susan L. Brooks, *Creating a Healthy Community in Law*, *in* TRANSFORMING JUSTICE: PISLAP READER (Marjorie Silver, ed.) (forthcoming).

[18] Rachel Naomi Remen, *The Doctor's Dilemma: Returning Service, Grace, and Meaning to the Art of Healing*, WHOLE EARTH MAGAZINE 7 (Summer 2000) [hereinafter Remen, *Doctor's Dilemma*]. Remen's description of the medical culture offers useful parallels to law and the legal culture. For instance, Remen's description of the loneliness and isolation that pervades medical education resonates strongly with similar concerns about the legal education.

[19] In order to create this safe space, the classroom needs to include experiential methods rather than be solely didactic or theoretical. Experiential learning encourages students to share ideas they might not be able to share elsewhere because they feel they are with others who can appreciate what they are going through. It is important to incorporate this practice early in the term, possibly by having the law teacher set out the idea of creating safe space as a goal, and engaging students in a discussion of what that might look like, and also what might get in the way. In one-on-one situations between a law teacher and a student, creating safe space includes the idea of asking permission to have a dialogue, especially in a situation in which a law teacher anticipates a difficult conversation.

(b)   Encouraging Everyone to Be Fully Present, and Be Their Authentic Selves

Authenticity is a collection of choices made every day, including the choice to be honest and the choice to let oneself be seen.[20] In order to encourage students to show up and be their authentic selves, law teachers need to consider revealing more of themselves, and perhaps even allowing themselves to be a little vulnerable with students. Creating an atmosphere in the classroom in which everyone is willing to take these kinds of measured risks is a key to creating a more caring and supportive community in law schools, and perhaps over time, in the legal profession. An effective technique that encourages presence and authenticity is having students work through questions or problems in pairs or in small groups. Many students, especially those that are more introverted, are more comfortable processing their ideas in pairs or small groups rather than in front of the whole class.[21]

(c)   Cultivating Resilience by Showing Courage and Compassion — Including Self-Compassion — and Fostering Connections

Resilience is about the potential for personal and relational transformation and growth that can be forged out of adversity. The literature on resilience refers to protective factors as "things we do, have and practice that give us the bounce."[22] Practicing courage, compassion, and connection helps individuals to cultivate a sense of worth. A key word here is practice. The reason for calling all of these ideas practices is to emphasize that they do not simply appear at some magical moment, and they do not remain fixed. As such, practicing compassion and connection only happens when individuals act in compassionate ways toward and connect with others.[23]

Law teachers need to learn, and to help students learn, to focus on healthy striving rather than perfectionism. Law teachers as well as law students fall prey to the notion that they must be perfect and, therefore, must appear perfect in front of each other. Students may not ask the questions that are really going through their heads and impeding their comprehension of a subject, and teachers may not probe students about their comprehension of the same subject, because each is holding onto the idea that doing so would expose imperfection.

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[20] Brene Brown, The Gifts of Imperfection: Let Go of Who You Think You're Supposed to Be and Embrace Who You Are 49 (2010) [hereinafter Gifts of Imperfection] (describing guideposts for "wholehearted living," many of which have been adapted and used in this section).

[21] "Pairing and sharing" or having students discuss an issue in small groups also allows everyone to participate. Sometimes this technique can be a useful prelude to a larger class discussion, and other times, it may make more sense to make the smaller discussions the primary teaching modality.

[22] Gifts of Imperfection, at 63.

[23] Courage is about willing to tell stories, and not being immune to criticism. Being willing to open up and reveal some aspects of one's true self is a risk that has to be taken to experience connection. Real compassion happens when we recognize our shared humanity. The core of compassion is acceptance — of oneself and of others. Importantly, acceptance and compassion can co-exist with boundaries and accountability.

(d)   Sharing Stories and Listening Generously to the Stories of Others

Storytelling can be a powerful tool in legal education as well as elsewhere. Stories generally remind people of their identities, of what is important, and of the potential of what they might be and do. A good story can help bring new perspectives to reflecting on experiences, which can help to generate deeper understanding.[24] Law teachers need to be encouraged to share stories in intentional ways, particularly when using theories or other explanations fails to capture the human dimension of what they are trying to convey.[25]

Generous listening is not about offering advice or solutions, and it is not about persuading the other person. It is simply holding the other person's story, and honoring it and valuing what that person is offering in that moment. Listening generously is a necessary skill for effective practice. Students frequently struggle with the contrast between their idealized vision of who they thought the client might be, and the real, flawed human being they experience before them. In situations where the client's story doesn't seem to match up to the student's own sense of what occurred, the student may jump to assumptions about a client being manipulative or untruthful.

The goal of this skill is to practice slowing down, so that one can use intuition constructively when engaged in conversation, rather than simply assuming that one's interpretation is correct. In the situation with the client whose story does not match up with the student's interpretation, the law teacher can help the student to develop an ability to hold space for uncertainty and to remain empathic toward the client and the client's story, as the student continues to dialogue, with both kindness and curiosity.

(e)   Focusing on Strengths

Focusing on strengths is another core component of how to integrate relational lawyering in a pervasive manner. Shifting the orientation of legal education and legal practice toward focusing on strengths rather than only focusing on problems or avoidance of risks, is truly radical and potentially transformative. Students' ability to recognize their own strengths and the strengths of their peers can translate into their ability to recognize their clients' strengths and to see them as whole human beings rather than simply as problems, cases, or files.

(f)   Engendering Hope and Creativity

As seen in the practice of resilience, hope is a future-oriented belief that fuels energy and efforts to rise above adversity. Hope is a cognitive process and not merely an emotion. It requires setting realistic goals, and figuring out how to achieve those

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[24] *See* Remen, *Doctor's Dilemma.*

[25] For instance, law teachers' ability to share law-related stories from their own lived experience reminds students that law is always about real people's lives, despite its tendency to function as a blunt instrument, rather than addressing the complexity of people's relationships and situations.

goals, including staying flexible and developing alternative routes. One must develop tolerance for disappointment and believe in oneself. Learning how to have hope as law students will translate directly into helping clients develop realistic goals and strategies.

Creativity is an expression of originality. When law teachers and students embrace creativity, they spend less time in the destructive activity of comparing. Comparison is about conformity and competition, which are potentially highly damaging parts of the culture of law school and the profession. Law teachers need to help students to believe that they can make a difference through their own unique and creative professional contributions. Moreover, law teachers need to encourage students to find meaningful work that will allow them to experience their own creativity. Ideally, such work needs to resonate with their intrinsic values, so they can embrace it as a "calling."

(g)   Finding Joy and Gratitude

Practicing joy and gratitude can bring healing and enhance commitment. Adherents of positive psychology view happiness as a state of being that transcends circumstances. A recent study at the University of California distinguished two types of happiness: one tied to doing meaningful work with long-term consequences, and the other tied to short term gratification. Interestingly, according to the study, those who fit the characteristics of the first form have more positive health indicators than those who fit the second form.[26]

Law school and legal practice may breed scarcity, and high levels of fear and anxiety. Rather than aiming only for the happiness that comes with instant gratification, law teachers and students can aim for doing meaningful work and treating themselves and others with compassion, as well as developing a sense of sufficiency rather than scarcity.

(h)   Making Room for Stillness and Reflection

A final practice is finding opportunities to cultivate calm and stillness. Making time and space for calm and stillness gives students an opportunity to set aside whatever else may have occurred before they enter the classroom. Stillness means quieting one's body as a way to deal with stress and anxiety and feeling overwhelmed.[27] Some law teachers set aside short periods of time for meditative exercises at the beginning of their classes. Another approach is to teach the use of breathing exercises, and encourage students to try pausing and taking some calming breaths when faced with stressful or otherwise difficult situations. Again, developing these habits will prepare students for working with clients, many of whom will also be experiencing stress and anxiety and feeling overwhelmed.

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[26] *See* description of study completed in 2013, available at http://newsroom.ucla.edu/releases/don-t-worry-be-happy-247644, *archived at* http://perma.cc/2ELH-Q92Z.

[27] It can be achieved by meditation/prayer/periods of quiet reflection and alone time. Stillness is about creating a clearing. The focus is on creating the opportunity for emotional openness, which need not always be through absolute stillness. Some people can achieve that clearing using walking or some other form of movement. Breathing is a great place to start to practice calm reflection and stillness.

d. Conclusion

It is an emerging best practice for law teachers to embrace their potential role in helping students cultivate relational skills. This role goes well beyond the teaching of formal classes. It includes informal interactions in office hours and in correspondence through e-mail messages and other means. It also includes being willing to address the aspects of the "hidden curriculum" that undermine efforts to help our students become competent and caring professionals. By being intentional in helping students with the relational skills that will contribute to students' professional formation and effectiveness as lawyers, law teachers and law schools can promote a healing culture within their institutions, and ultimately, it will follow students into their practice settings within the legal profession.

D. TEAMWORK
By Linda Morton & Janet Weinstein[1]

1.   Introduction

Teamwork requires: 1) individuals working together, 2) towards a shared objective, 3) to which they are accountable. The knowledge, skills, and values of teamwork are essential in today's law practice. The more conscious the process of teamwork is, the more dedicated the participants are to the group's success, and the more effective the results will be. The ability to understand and work in teams not only leads to greater success, but also greater career satisfaction. It is critical that law schools incorporate teamwork theory, skills, and values in their curricula. Moreover, in the clinical context, where students naturally work in teams on more extensive projects, teamwork should be taught explicitly, and where possible, in interprofessional settings.[2]

Best Practices for Legal Education urged law teachers to encourage collaboration among students, including team projects and group assignments.[3] Acknowledging that lawyers often work in teams, the section discussed the benefits of collaboration as producing better outcomes, improved learning, broader pro bono ethic, and healthier student relationships.[4] However, the text was not explicit as to how pervasive teamwork should be in a law school's curriculum, or how law teachers might teach it. This section explores those ideas.

2.   The Expanded Role of Teamwork in the Legal Profession

Taking a lesson from the business sector, the legal profession has recognized that collaborative approaches to most work are more efficient and produce better results.[5] Whether in the context of litigation or transactional work, lawyers often find themselves working with other lawyers and with experts from other disciplines. Effective teamwork requires lawyers to communicate clearly, share both the responsibility and the acknowledgment, understand how and when to lead, and value the work of others.

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[1] The reader for this section was C. Benjie Louis.

[2] Portions of this section are drawn from the chapter, *Collaboration and Teamwork*, by Linda Morton & Janet Weinstein, *in* Learning from Practice: A Professional Development Text for Legal Externs (Leah Wortham, Alexander Scherr, Nancy Maurer & Susan Brooks eds., 3d ed.) (forthcoming 2015).

[3] Roy Stuckey and Others, Best Practices for Legal Education: A Vision and A Roadmap (2007), text at notes 358-74 [hereinafter Best Practices]. For further discussion of the importance of teaching collaboration, see Susan Bryant, *Collaboration in Law Practice, A Satisfying and Productive Process for a Diverse Profession*, 17 Vt. L. Rev. 459 (1992-1993).

[4] Best Practices, text at footnotes 358-74.

[5] For empirical data on the notion that well-functioning teams produce "higher value" and "more sophisticated" work, see Heidi K. Gardner, *Effective Teamwork and Collaboration, in* Managing Talent for Success: Talent Development in Law Firms 150-54 (R. Normand-Hochman, ed., 2013) [hereinafter Gardner, *Effective Teamwork and Collaboration*].

This set of knowledge, skills, and values, sometimes labeled "Collaborative Intelligence," results in more efficient, more effective client outcomes, and an overall better experience for those engaged in it. Thanks to new collaborative online tools, such as Legal OnRamp, teamwork is more possible, as well as more efficient. With law practice developing in such areas as project management, unbundled legal services, multi-sourcing, and collaborative practice,[6] knowledge of and comfort with the teamwork process is essential. In a well-functioning team, the outcome of a team with collaborative intelligence is superior to the sum of its individual members' attributes.[7]

In addition to improved results and efficiency, teamwork adds to the enjoyment of work by offering a shared sense of accomplishment. The teamwork process also enhances individuals' self-awareness, career satisfaction, and relations with others. Partners who collaborate create a more harmonious environment. In the context of today's practice, it is not surprising that hiring attorneys are looking for good team players.[8]

3.   Developing an Institutional Culture of Teamwork

Although the legal profession has acknowledged the importance of teamwork skills, law schools have been slow to incorporate collaborative knowledge, skills, and values in their curricula. Moreover, teaching teamwork skills to law students can be difficult in the law school environment, which has traditionally emphasized individual work and competition. Due in part to stringent grading systems and curves, most law students quickly acclimate to this culture of competition. Teamwork is inapposite to these values, in that it requires group accountability, candid interpersonal communication, goal setting, and cooperation. Because these skills and values contrast sharply with more traditional law school values, both law teachers and students have difficulty incorporating them in their teaching and learning.

As a result, teamwork concepts must be taught more pervasively to gain acceptance, rather than only introduced in an experiential course. First-year law teachers, both doctrinally- and experientially-focused, must teach and have students apply basic principles of teamwork. Such principles include the personal traits that are conducive to teamwork, the stages that teams usually pass through, and processes for helping to ensure a successful team experience.[9] Law teachers can then assign students to team activities, so that students can experience and apply these principles.

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[6] *See* Chapter 6, Section G, Subsection 1, *Teaching Students to Be Healers: The Comprehensive Law Movement*, below.

[7] *See* Gardner, *Effective Teamwork and Collaboration*.

[8] The Ultimate Law Guide lists teamwork first among 15 skills identified (other than academic credentials) that are required to be a lawyer. *What skills are required to become a lawyer?* Ultimate Law Guide, http://www.ultimatelawguide.com/careers/articles/what-skills-are-required-to-become-a-lawyer.html, *archived at* http://perma.cc/SW36-EWAZ.

[9] For more detailed discussion of these principles, see Eileen Scallen, Sophie Sparrow & Cliff Zimmerman, Working Together in Law: Teamwork and Small Group Skills for Legal Professionals (2014); Janet Weinstein, Linda Morton, Howard Taras & Vivian Reznik, *Teaching Teamwork to Law Students*, 63 J. Legal Educ. 36 (2013). For more detailed discussion of teaching these principles, see Linda Morton & Janet Weinstein, *Collaboration and Teamwork, in* Learning from Practice: A Professional Development

Frequent opportunities to work in groups for a shared result (product and grade) will help convey the messages that lawyers work on teams and that it is important to be an effective team player. For collaboration to become part of the law school culture, law teachers should model teamwork in their teaching, as well as in their interactions with others. When possible, institutional outcomes and assessments should focus on group, rather than individual, work. As legal educators increase their own knowledge of and experience with more collaborative skills and values, a culture of teamwork within law schools can grow.

4.   Reinforcing Teamwork Knowledge, Skills, and Values in Experiential Courses

When students are assigned to a "real world" problem-solving task, they become much more invested in the outcome. In-house clinical courses provide a natural environment for students to work in teams. It is particularly rewarding for students in each team to work on projects designed by an entity outside of the school, and to have each team report its results to members of the entity with which it is working.

The open-ended nature of "real world" work brings forth situations that challenge the team in a way that usually necessitates candid discussion, self-awareness, and consideration of process. With more extensive, long-term projects, students experience the stages of team development, as well as their individual strengths and weaknesses in teamwork. They can improve in necessary lawyering skills such as peer feedback, leadership,[10] and communication.

Externships also provide a wonderful opportunity for students to reflect upon teamwork in law practice. In their journals and in class, students can discuss their observation of and participation in teamwork in their field placements. Extern students can also work in teams as part of their classroom component for the course. Simulation courses also provide clear opportunities for students to work in teams. Although the simulated scenario may have fewer surprises, the experience of working in a team on a long-term project for a grade makes the experience of necessary collaboration very real to students.

5.   The Importance of Interprofessional Teamwork

Lawyers frequently work in teams with experts and consultants from other disciplines. Students who experience positive outcomes in working with other professions ultimately become more collaborative team players in their careers.

Creating interprofessional student teams with other degree programs, such as social work or medicine, is optimal.[11] Although interprofessional teams can present more complicated logistics for law teachers, the student experience is both richer and deeper. Through such experience, law students broaden their knowledge of different

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Text for Legal Externs, Teacher's Manual (Leah Wortham, Alexander Scherr, Nancy Maurer & Susan Brooks, eds., 3rd ed., forthcoming 2015).

[10] *See*, Chapter 6, Section A, Subsection 4, *Teaching Leadership*, above.

[11] *See*, Chapter 6, Section H, *Interprofessional Education*, below.

types of professional training and learn to value the input of varied professional disciplines. As law students gain perspective on the limits of their legal training, they realize that most problems cannot be solved merely through knowledge of the law.

6. Conclusion

Law schools must infuse teamwork into their institutional culture in order to train students for today's practice. Impediments can be overcome when law teachers adopt a more collaborative approach in their own objectives, interactions, and thinking. Early, explicit training in teamwork for every student can provide a foundation for teamwork experiences across the curriculum, ensuring that all students graduate with skills and appreciation for collaborative work.

E. INTERCULTURAL EFFECTIVENESS
By Mary A. Lynch with Robin Boyle, Rhonda Magee & Antoinette Sedillo López[1]

1. Introduction

The legal profession has recognized the need for cross-culturally competent lawyers. The American Bar Association, state and local bar associations, and other professional development experts have called for lawyers to develop cultural competencies.[2] While the terminology used is not consistent,[3] at its core, this call expresses a commitment to legal education that embraces the strengths of diverse student bodies and client populations. Legal education should more effectively help students examine how legal structures can ignore, silence, and devalue alternative perspectives and diverse identities.

BEST PRACTICES FOR LEGAL EDUCATION[4] suggested that legal education should include training about cross-cultural competence, cited a landmark article,[5] and listed five habits described in the article.[6] The literature, conversation, tools, and vocabulary for teaching about all types of differences has greatly expanded since then. So has the examination of how intercultural perceptions and communications affect professional lawyering activities. Still, most schools do little to address the insights of this literature, whether to take full advantage of the diversity in law school classes or to address student preparation for the multicultural legal needs of our changing world.

This section seeks to assist legal educators in integrating intercultural learning goals throughout the curriculum. The section first describes the current status of law

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[1] Readers for this section were Janet Heppard, Amna Akbar, Andrea A. Curcio, and Susan Bryant.

[2] *See, e.g.*, Nelson P. Miller, *Beyond Bias — Cultural Competence as a Lawyer Skill*, 87 MICH. B.J. 38 (June 2008) [hereinafter Miller, *Beyond Bias*]. Miller identified five areas in which lawyers need to demonstrate cultural competence: communication, individual cognition, individual and family resources, cultural references, and relationships. *See also* ABA Standards for the Provision of Civil Legal Aid, Standard 4.5 (2006) (on offering culturally competent representation).

[3] The burgeoning literature in this area lacks a clear and consistent definition of the word "culture." Sometimes the term refers to social- and heritage-based identity groups (ethnicities, races, and so on). At others, it refers to professional identity characteristics. *See, e.g.*, Rhonda V. Magee, *Legal Education and the Development of Professional Identity: A Critical, Spirituohumanistic — "Humanity Consciousness" — Perspective*, 31 N.Y.U. REV. L. & SOC. CHANGE 467 (2006-2007) [hereinafter Magee, *Critical Perspective*]. Further, some are concerned that the term "culture," when used to refer to ethnic or racialized groups or individuals, and despite the best efforts of authors, verges on essentialism and reification. In light of this ambiguity and related concerns, some have come to use other terms in teaching, terms that address the underlying interpersonal dynamics that the word "culture" seeks to capture — such as conditioning, habits, and patterns — without reifying fluid socio-historical constructions. *See* Rhonda V. Magee, *Building on Color Insight: Teaching and Learning About Race Effectively Through Mindfulness-Based Color Insight Practices* (unpublished manuscript on file with authors) [hereinafter Magee, *Building on Color Insight*].

[4] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

[5] Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 64-78 (2001) [hereinafter Bryant, *Five Habits*].

[6] BEST PRACTICES, text at notes 258-62.

school engagement, the evolution of terminology and ideas, and the context for learning. It then suggests best practices for identifying, teaching, and assessing intercultural knowledge, skills, and values.

2.   Legal Education Lags Behind

Cultural awareness is critical to every course in law school, because "cultural experiences underpin how we read and interpret legal principles and rules and how we apply those rules to facts."[7] Legal educators, however, still lag behind fields such as medicine, healthcare, and psychology in teaching students to be effective practitioners in a multicultural world. Legal education does not systematically ensure that law students learn about concepts of privilege and difference. Nor do most law schools engage in identification and assessment[8] of intercultural learning objectives for their students.

Opportunities abound for effectively teaching how to practice law interculturally, the issues that pose barriers to effective intercultural communication, and intercultural sensitivity. To deepen their capacity to do so, however, teachers must identify universal human dignity as a value inherent in good lawyering, and self-awareness as a skill that is foundational to achieving the desired outcomes. The development of these skills must be supported with methods for exposing students to a variety of means of reflecting on their own biases and how those biases might interfere with the students' best efforts as lawyers.

3.   Why "Interculturally Effective?" — Evolving Terminology and Meaning

Scholars have struggled to develop shared terminology to keep up with the theoretical and experience-based development of ideas. This section, like much of the literature, will use many different terms such as cross-cultural lawyering, cultural competence, cultural sensibility, cultural humility, cultural curiosity, intercultural communication, and multicultural awareness. This spectrum of terminology is important because significant ideas and nuances are embedded within each term.

Cultural competence[9] in the context of legal education is often defined as the ability to develop knowledge, skills, and values to enable effective representation and

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[7] Andrea A. Curcio, Teresa E. Ward & Nisha Dogra, *A Survey Instrument to Develop, Tailor, and Help Measure Law Student Cultural Diversity Education Learning Outcomes*, 38 Nova L. Rev. 177, 190 (2014) [hereinafter Curcio et al., *Survey Instrument*]. Over a decade ago, Marjorie A. Silver argued eloquently that law students should be taught not only that "all lawyering is cross-cultural," but that our own cultural experiences inform our legal and factual analysis. Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 Fla. Coastal L.J. 219, 231 (2002). Critical Race, Lat-Crit, and feminist scholars have also made this point in a large swath of work. *See, e.g.*, Richard Delgado & Jean Stefanic, *Critical Race Theory: An Annotated Bibliography*, 79 Va. L. Rev. 461 (1993); Rhonda V. Magee, *Competing Narratives, Competing Jurisprudences: Are Law Schools Racist? and the Case for an Integral Critical Approach to Thinking, Talking, Writing, and Teaching about Race*, 43 U.S.F. L. Rev. 777 (2009).

[8] *See* Curcio et al., *Survey Instrument* for an instrument designed to fill that gap.

[9] The term "competence" has been criticized for suggesting an endpoint to reach as opposed to a

communication with individuals from a different race, ethnicity, gender,[10] sexual orientation, age, or cultural background than the lawyer.[11] At its core is the need for effective ***intercultural communication*** by lawyers. ***Cultural curiosity*** is viewed as an important attitude or value for improving competence. Note that these skills and values should not only facilitate communication by majoritarian white students, but also communication across differences and similarities by students of color, women, LGBTQQIA[12] students, students with disabilities, and those with other non-majoritarian identities in the legal profession.

New terms such as ***cultural sensitivity*** or ***cultural humility*** have been discussed in clinical and medical education.[13] These terms attempt to define culture more broadly to include a "much wider range of cultural factors," such as "socioeconomic factors that influenced people's world views."[14] For example, law teachers may explore ways of giving students opportunities to develop both commitments to and capacities of self-reflection; non-judgmental, non-harming self-critique; and inclusive, identity-safe[15] collaboration with others.

An important aspect of the newer terminology is an effort to encourage "students to examine whether their *own* world views or beliefs needed to shift."[16] In 2005, one commentator noted that legal education's post-*Grutter*[17] perspective on diversity in the classroom maintained the perception of diverse students as "the other" and

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spectrum of capacity and skill, an always developing and enriching journey of experiences and epiphanies. *See* Curcio et al., *Survey Instrument*, at 185-187.

[10] "Gender" competence includes effectiveness with both transgender and cisgender individuals. A cisgender person is someone who identifies as the gender/sex they were assigned at birth. Colloquially, cisgender is the "opposite" of transgender.

[11] *See* Katherine Frink-Hamlett, *The Case for Cultural Competence*, N.Y.L.J., 25 Apr. 2011.

[12] LGBTQQIA is generally known to stand for Lesbian, Gay, Bisexual, Transgender, Queer, Questioning, Intersex, Asexual. At times, the "A" can also mean Allies. We will use the specific terms when more appropriate and the more inclusive when that is the intent of the author. When we are attempting to include all sexually and gender diverse (GSD) individuals and groups, we will use the acronym LGBTQQIA.

[13] Cultural humility for lawyers may be defined as a lifelong commitment to self-reflection and compassionate self-critique; to addressing the power imbalances that impact both relational dynamics within the delivery of legal services and possible legal services outcomes; and to mutual, non-paternalistic partnerships on behalf of the full range of individuals and communities with which lawyers work. Curcio et al., *Survey Instrument*, at 187-88.

[14] *Id.*

[15] *Compare* Dorothy Steele & Becki Cohn Vargas, Identity Safe Classrooms: Places to Belong and Learn (2013) (discussing the four components of identity safety: student-centered classrooms; support for relationships within the classroom; diversity as a value; and caring made visible).

[16] *Id.*; Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 349 (1997) (emphasis added) ("Part III explores the empirical data gathered by social scientists operating in a counseling capacity, which demonstrate that race plays a significant role in counselor-client interaction. The data reveal that the race and behavior of the counselor can have an equally serious impact on the relationship as can the race and behavior of the client.").

[17] *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Law school applicants who were denied admission challenged the state school's race conscious admission policies, alleging the policies violated their equal protection rights. The U.S. Supreme Court held that the policies did not violate the Equal Protection Clause because the law school had a "compelling interest in attaining a diverse student body," and the admissions policies were narrowly tailored to serve that interest).

absolves White students and others in the dominant American culture from understanding their own race and background or experience and the ways in which the dominant culture — especially its legacy of discrimination — affects their interactions with other individuals.[18]

In a similar vein, traditional client-centered lawyering models may fail to incorporate the role of race and behavior of the lawyer and focus heavily instead on the identity and behavior of the *client*. Another risk is that of creating passive acceptance by lawyers of what a practitioner is told by *one* member of a culture about an entire culture. Examples of this phenomenon include fear of examining or challenging cultural norms in situations such as female genital mutilation or when cultural practices are used as a defense to domestic violence or to justify homophobia. Passive acceptance of another's cultural values, or cultural relativism, is not a requirement for effective representation of someone from another culture, rather it is intercultural understanding and effective communication that is key to the representation.

In response to some of these concerns, one group of scholars advocates the concept of "cultural sensibility as an 'openness to emotional impressions, susceptibility, and sensitiveness'[19] that allows change based . . . [on] interactions [and experiences] with people from different cultural backgrounds" than the law student's own.[20] Generational differences among students may add further challenges. Some scholars suggest using labels like "structured thinking" and "surfacing assumptions" to overcome generational pushback.[21] However, those labels may mask the very intercultural awareness that the teacher is seeking to show is critical for effective lawyering.

4.   The Context for Learning

Differences as well as similarities among clients, faculty, and law students provide rich learning experiences[22] and, at the same time, present challenges to effective lawyering and representation. For example, many Navajo people have a cultural aversion to discussing death or dead people, so estate planning or even interviewing them about violent crimes can pose challenges.[23] Cultures vary in their attitudes toward time and deadlines. Given historical patterns of oppression by the dominant

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[18] Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness*, 11 CLINICAL L. REV. 369, 371-72 (2005).

[19] Curcio et al., *Survey Instrument*, at 188, *citing* Niranjan S. Karnick & Nisha Dogra, *The Cultural Sensibility Model: A Process-Oriented Approach for Children and Adolescents*, 19 CHILD AND ADOLESCENT PSYCHIATRIC CLINICS OF NORTH AMERICA 719, 723 (Oct. 2010).

[20] *Id.*

[21] Emily A. Benfer & Colleen F. Shanahan, *Educating the Invincibles: Strategies for Teaching the Millennial Generation in Law School*, 20 CLINICAL L. REV. 1 (2013), *citing* Muneer Ahmad et al., *Teaching Our Students to Challenge Assumptions: Six Practices for Surfacing and Exploring Assumptions, and Designing Action*, Plenary Session of the American Association of Law Schools Clinical Conference (May 2007).

[22] Bryant, *Five Habits*, at 64-68 (describing degrees of separation and connection).

[23] KAREN K. KIRST ASHMAN, HUMAN BEHAVIOR IN THE MACRO SOCIAL ENVIRONMENT 397 (3d ed. 2011).

culture, individuals from some groups feel threatened when having to interact with authority or government agents. Some cultures view looking at another person in the eye as disrespectful, in contrast to dominant norms in the U.S., which consider that behavior a sign of candor.[24] In many cultures, grandparents and extended family members are considered part of the immediate family in contrast to the U.S. prioritization of the nuclear family.[25] Assumptions of uniform sameness made by either clients or lawyers from *similar* ethnic, race, or religious backgrounds can also hinder communication.

Ethnicity and identity factors are not the only cultural challenges to communication between lawyers and the people with whom they interact professionally. Experience and professional acculturation and socialization also play a role.[26] For example, veterans who return from extended deployment may have experienced trauma, and are likely to experience culture shock on return.[27] Lawyers and law students themselves experience an acculturation through law school and post-law school professional socialization.[28] As one scholar cogently stated, "difficulties arise" in seeking to introduce considerations of community-centered culture "in a profession long cast in terms of individuality and an acultural approach to the law."[29] Cultural context includes not only the values, norms, experiences, and beliefs that stem from one's culture, ethnicity, race, religion, nationality, gender, sexual orientation, and other identity markers, but also from one's life experiences.

Because in a traditional lawyer-client representation the power balance in the relationship usually tips toward the lawyer, the lawyer is at risk of making assumptions based on stereotypes that could adversely affect the client. And, clients may have suspicions and concerns about lawyers that pose barriers to effective

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[24] R.H., *Eye Contact: What Does it Communicate in Various Cultures?*, BRIGHT HUB EDUCATION (Jan. 20, 2012), http://www.brighthubeducation.com/social-studies-help/9626-learning-about-eye-contact-in-other-cultures/, *archived at* http://perma.cc/U72E-8HQ9.

[25] *See* Marianne Sawicki, *Empathy for the Devil: How Prisoners Got a New Property Right*, 116 PENN ST. L. REV. 1209, 1252 (2012); Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 COLUM. HUM. RTS. L. REV. 509, 510-12 (2010) ("U.S. immigration law reflects a legal construction of the 'family' concept that is largely premised on biology, is grounded in the traditional conception of a nuclear family, and excludes what this Article calls 'functional' families: formations which may not satisfy this narrow conception of family, but satisfy the care-taking needs of children").

[26] *See* Bryant, *Five Habits*, at 40, 68; Curcio et al., *Survey Instrument*, at 187-90.

[27] *See, e.g.*, Michael L. Fessinger, *Balancing the Reasonable Requirements of Employers and Veterans Living with Traumatic Brain Injury — The Modern U.S. Military's "Signature Injury" Is a Game Changer*, 53 WASHBURN L.J. 327, 336-37 (2014) (often, veterans are proficient with computers and have the technical skills sought by many employers, but they may lack the experience and mindset to find success after transitioning from the hierarchical culture of the military).

[28] Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference*, *in* SUSAN BRYANT, ELLIOT S. MILSTEIN & ANN C. SHALLECK, TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY AND PRACTICE OF CLINICAL PEDAGOGY, 350, 354 (2014) (hereinafter Bryant & Koh Peters, *Reflecting*); Curcio et al., *Survey Instrument*, at 187-90.

[29] Christine Zuni Cruz, *[On the] Road Back In: Community Lawyering in Indigenous Communities*, 5 CLINICAL L. REV. 557, 568 (1999).

communication with the lawyer.[30] Thus, lawyers-to-be need training to acquire the appropriate knowledge, skills, and values that will help them overcome barriers to effective client representation. At the same time, lawyers-to-be whose social or personal identities have been traditionally marginalized may benefit from opportunities to reflect on strategies for responding to the dissonance between their own culture or identity and that of the traditional, white-dominated, male-dominated, cisgender-dominated, and heterosexual-dominated lawyering culture.[31] They may also benefit from exposure to ways of addressing the application of stereotypes to them as members of traditionally excluded and marginalized groups.[32]

In preparing students for the world in which they will live and practice, faculty should assist students to develop a career-long commitment to engaging in efforts to enhance their awareness and sensibilities around real and perceived differences. Just as students and future graduates will likely serve an increasingly diverse array of clients, so, too, are they likely to interact with diverse communities and cultures. Law teachers should instill a degree of professionalism and competence necessary to serve the technical legal needs of this diverse client base and local communities of interest, and also prepare students for the challenge of effectively working with diverse, increasingly transnational, communities and concerns. Such capabilities involve a broad range of factors important to students' abilities to function effectively over the life of their careers, in a world with permeable boundaries across communities of difference. In addition to the knowledge and skills discussed below, the core value at the heart of effective functioning across cultures and geographic space is that of universal human dignity: a basic, foundational appreciation for the common humanity of oneself with and among all others — whether they are those against whom lawyers litigate disputes, or those with whom they engage, in common purpose, as advocates, representatives, or leaders.

5.   Identifying Learning Objectives

Intercultural lawyering education requires the fusion of all three traditional domains of legal education: knowledge, skills, and values.[33] The starting point is to identify and articulate learning objectives or competencies for intercultural learning. Thus, legal educators must break apart the generalized concept of intercultural

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[30] *See* Antoinette Sedillo López, *Making and Breaking Habits, Teaching (and Learning) Cultural Context, Self Awareness and Intercultural Communication through Case Supervision in a Client Service Clinic*, 28 Wash. U.J.L & Pol'y 37 (2008) [hereinafter Sedillo López, *Making and Breaking Habits*].

[31] Magee, *Critical Perspective* (discussing the identity dissonance that students from traditionally underrepresented communities and backgrounds often experience as a part of the professional socialization component of traditional legal education).

[32] *See*, *e.g.*, Claude Steele, Whistling Vivaldi: How Stereotypes Affect Us and What We Can Do (2011) (discussing the phenomenon of "stereotype threat," and ways of minimizing its effects); Tara Yaso, William Smith, Miguel Ceja & Daniel Soloranzo, *Critical Race Theory, Racial Microagressions, and Campus Racial Climate for Latino/a Undergraduates*, 79 Harv. Educ. Rev. 659 (2010).

[33] Legal Education and Professional Development — An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap (1992) [hereinafter MacCrate Report].

effectiveness. What are the specific student learning objectives?[34] What concepts and knowledge are critical to law students' understanding? What skills can legal educators expect law students to develop during law school? What attitudes are essential in order for law graduates to be effective?

Learning goals should not be set out in isolation. Effective cross-cultural education and training requires that students integrate their knowledge about difference with their skills and values. At a minimum, learning about intercultural concepts — such as knowledge about social and cultural identities common to one's own and to other cultures, the phenomenon of implicit bias, or the role of privilege in legal analysis — is not enough. Students need to use that knowledge to develop skills in areas such as communication and deep listening,[35] and they must do so with attitudinal values such as self-awareness, humility, and respect in order to be effective. Even those who attempt to identify these objectives separately note, "there is frequently some overlap and linkage."[36] Another scholar phrases it this way: "In reality, practicing with cultural competence is a fundamental lawyering skill, as is the ability to critically evaluate laws, culture, and societal systems from a variety of perspectives or lenses. Respect for difference and other cultures and belief is also a fundamental lawyer value."[37]

Moreover, the link between a range of intercultural skills and effective lawyering has been made. For example, in a widely known study,[38] the ability to "See the World Through the Eyes of Others" was identified as one of 26 lawyering effectiveness factors.[39] This factor involves understanding the position, view, objective and goals of others.[40] Although the study demonstrated the importance of the ability to understand others to professional legal development, it left for future researchers the challenge of identifying specific student learning objectives that would guide teaching and learning of that concept.

a.   Integrated Objectives: Habits and Factors

Before breaking down objectives into separate categories of knowledge, skills, and values, educators should pay attention to integrated objectives, habits, or factors central to the development of cross-cultural competency.[41] These habits are "under-

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[34] Other ways of characterizing competencies are as "student learning outcomes" or learning goals. *Id.* at 14.

[35] Bryant, *Five Habits*, at 55 (intercultural communication skills include deep listening skills). Enhanced listening skills are one of fourteen cross-cultural skills identified by J.H. Katz & F.A. Miller, *Skills for Working in Culturally Diverse Organizations*, OD Practitioner 25, 32-33 (1993), *cited in* Dan Landis & Rabi S. Bhagat, Handbook of Intercultural Training 293 (2d ed. 1996).

[36] Curcio et al., *Survey Instrument*, at 193.

[37] Mary A. Lynch, *An Evaluation of Ten Concerns about Using Outcomes in Legal Education*, 38 Wm. Mitchell L. Rev. 976, 1004-05 (2012).

[38] Marjorie M. Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 Law & Soc. Inquiry 620 (2011).

[39] *Id.*

[40] *Id.*

[41] Bryant & Koh Peters, *Reflecting*, at 350 and note 3; Legal ED, *available at* http://legaledweb.com/

girded" by three foundational principles:

- All lawyering is cross-cultural;
- The competent cross-cultural lawyer remains present with her client ever respecting her dignity, voice, and story; and
- The cross-cultural lawyer must know himself or herself as a cultural being to understand his or her biases and ethno-centric world views.[42]

For many, the habits have worked as effective tools.[43] Recently, the authors shared another tool, "Doubting and Believing."[44] They encourage the exercise of viewing the client's claim with *alternative* attitudes of total doubt or total belief to aid in identifying "assumptions that might be contributing to doubt and belief, as well as expanding understanding of those who assess credibility differently" than the emerging lawyers do.[45]

An inter-professional team of three scholars recently took a different approach. They identified five factors to assist law schools in conceptualizing "learning outcomes that will enhance law students' abilities to effectively represent clients in today's multicultural world and global legal environment."[46] They acknowledged that these factors involve a combination of knowledge, skills, and values:

1) Understanding how culture influences lawyers, judges and clients in context of the legal decision-making and legal representation;[47]

2) Self-awareness about the role culture plays in students' own perceptions of the legal system, legal rules, and interaction with others;[48]

3) Openness to learning about the role culture plays in the lawyering process;[49]

4) Understanding differing cultural backgrounds and lawyers' perceptions about client behaviors;[50] and

5) Identifying own unconscious biases and stereotypes.[51]

The seminal works just described provide a background for institutions and law teachers thinking about conceptualizing and drafting learning outcomes.

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practical-lawyering-skills, *archived at* http://perma.cc/2PT5-T437.

[42] Bryant & Koh Peters, *Reflecting*, at 350.

[43] *Id.* at 349 (They create: "1) a practice of self-awareness and self-improvement, day to day . . . and 2) a common vocabulary for discussion of this practice with others . . . . ").

[44] *Id.* at 364-72 *(see* discussion of the "Methodological Belief, Methodological Doubt, and the Doubting/Believing Scale").

[45] *Id.*

[46] Curcio et al., *Survey Instrument*, at 178.

[47] *Id.* at 211-13.

[48] *Id.* after table 4.

[49] *Id.* after table 5.

[50] *Id.* after table 6.

[51] *Id.* after table 7.

b.   The Triad of Knowledge, Skills, and Values

Fully aware of the problems inherent in grouping intercultural learning into three separate lists of knowledge, skills, and values outcomes because there is such overlap, some institutions and/or teachers, nevertheless, may find this traditional categorization helpful. Accordingly, this section includes the traditional approach.

i.   Intercultural Context Learning Objectives

The knowledge objective of intercultural learning outcomes involves understanding how culture, conditioning, identity, implicit assumptions, and implicit biases[52] affect "decision making, communication, problem solving, and rapport building."[53] It requires knowing that culture and individual experience affect foundational understanding of the role of law and lawyers[54] as well as familiarity with the range of tools used to improve intercultural performance. It is crucial that students have some knowledge about the various cultural, ethnic, racial, and tribal groups that exist among their own ranks and law school communities, and that they are likely to encounter among client populations. Some student learning objectives for the knowledge component of intercultural learning might include:

1) Students will demonstrate understanding that all lawyering is cross-cultural;

2) Students will demonstrate familiarity with a variety of cultural norms for communicating (*e.g.*, shaking or not shaking hands), negotiating (*e.g.*, written documents or oral commitment to finalize a deal), and decision-making (prioritizing individual versus communitarian goals), with an emphasis on knowing about individuals in their own region;

3) Students will demonstrate conceptual familiarity with the phenomenon of implicit bias, and the social science literature on the continuum of intercultural effectiveness;

4) Students will demonstrate knowledge about the potential impact of difference, privilege, and culture in the application of law to facts, in attributing meaning to behavior, and in the assessment of credibility;

5) Students will be able to demonstrate understanding of the potential impact of difference, privilege, and culture in legal representation of privileged and non-privileged clients including the red flags and pitfalls other lawyers have encountered;

6) Students will be able to demonstrate knowledge about the potential impact of difference, privilege, and culture in understanding and interpreting legal rules, legal systems, and legal issues;

7) Students will demonstrate understanding of power imbalances, role and hierarchy in legal systems and rules of law; and

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[52] Project Implicit, http://www.projectimplicit.net/index.html, *archived at* http://perma.cc/R67R-K4R7.

[53] Bryant, *Five Habits*, at 34.

[54] *See generally*, Beverly I. Moran, *The Disappearing Act: The Lack of Values Training in Legal Education — A Case for Cultural Competency*, 38 S.U. L. Rev. 1 (2010).

8) Students will demonstrate understanding of the habits of self-reflection and reflexivity, which lead to improved intercultural effectiveness and life-long learning in this area.

ii.   Intercultural Skills Objectives

Effective intercultural lawyers employ myriad skills. Intercultural skill-building includes practicing communication across differing identities, identifying differing cultural expectations and preferences, overcoming obstacles to problem-solving and communication, identifying one's own implicit biases, and using de-biasing tools to improve one's own intercultural effectiveness.

Skills objectives for law students might include:

1) Students will be able to identity and reflect on their own multi-faceted cultural and experiential background and on the history and cultural differences in their communities and region;

2) Students will be able to suspend judgment when listening to a client's narrative in order to see the world through the client's eyes and engage in "parallel universe" thinking in order to understand client behavior;

3) Students will be able to evaluate whether the legal system involved will credit or discredit the client's perspective and plan ways to overcome implicit bias;

4) Students will be able to demonstrate deep and active listening skills, adaptation to language or ability differences, and cultural sensitivity in client interviewing and counseling, and in other common forms of communication between lawyers and others;

5) Students will demonstrate continuing reflection upon the effectiveness of their intercultural interactions without veering into shame and judgment and with awareness that reflective practice leads to improvement;

6) Students will demonstrate facility with de-biasing tools such as parallel universe thinking, and methodological doubting and believing; searching for assumptions and intersectionality, and challenging or critiquing their effects as needed; and

7) Students will demonstrate adaptability and flexibility in engaging with cultural differences in a simulated or real lawyering setting such as a legal negotiation, in transactional planning, or while engaged in problem-solving.

iii.   Intercultural Attitudinal and Value Learning Objectives

The intercultural effectiveness literature emphasizes the importance of attitudes and values in order to behave in a non-judgmental, appropriately curious, respectful, humble and sensitive manner. Intercultural values also focus on the development of habits of reflection, the desire to develop non-discriminatory and inclusive lawyer behavior and the professional obligation to redress bias in the legal system. Some critical attitude and values outcomes for students are:

1) Students will demonstrate cultural humility and sensitivity when faced with a client whose culture differs from their own as well as open-mindedness about and respect for another culture or nation's legal system or approach to legal issues;

2) Students will demonstrate intellectual curiosity for lifelong learning about cross-cultural differences and similarities;

3) Students will work to recognize and redress power imbalances and access to justice issues, which disadvantage individuals whose culture, identity, and/or experiences are silenced or dismissed by the legal system in which the student operates;

4) Students will value awareness and identification of their own cultural identity and implicit biases and appreciation of de-biasing tools as a means to improve their effectiveness as lawyers; and

5) Students will demonstrate commitment to habits of reflection in order to develop non-discriminatory, interculturally aware, and inclusive lawyer behavior throughout their professional life.

Given the recent demand for intercultural legal education and the work done by legal education scholars to advance intercultural awareness and learning, law teachers are well positioned to, and should, systematically identify intercultural learning objectives for law students and lawyers.

6. Effective Teaching to Enhance Intercultural Knowledge, Skills, and Values

Effective teaching to enhance law students' intercultural knowledge, skills, and values requires teachers to appropriately design safe[55] learning environments.[56] It is a best practice for law schools to ensure that teachers create the conditions needed to help students develop their intercultural knowledge, skills, and values. It is also a best practice for law schools to ensure that each student has an intercultural learning experience.

a. Creating Learning Environments and Professional Development Opportunities to Enhance Intercultural Effectiveness

Teaching to enhance cross-cultural effectiveness requires attention to creating classrooms that honor and demonstrate the value of diversity and support the caring inclusion of all students' relevant experiences and perspectives. In the education field, the term "inclusivity" has come to stand for a foundational philosophy and set of

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[55] In this context, safe means that participants listen carefully, give each other the presumption of good faith, and do not hold inevitable mistakes against each other. It does do not necessarily mean comfortable, because talking about issues of difference and culture is often challenging and uncomfortable.

[56] For example, law schools could prioritize effective intercultural teaching in annual reviews and faculty development by providing teaching grants or by other forms of recognition for law teachers who engage in this work and increase their skill set.

practices aimed at respecting and creating effective learning spaces for all.[57] Commitment to the practices of human dignity and inclusivity in interactions with others may best be demonstrated by showing respect for all other persons, traditions, and cultures involved. A sense of respect for all others and a practice of engaging in inclusive interpersonal interactions may be part of a student's existing skills and values, but not always. Accordingly, legal educators should help law students learn these skills and values. They should support students in attaining outcomes that demonstrate competencies in this area.

These competencies must be identified as foundational values, and supported by a variety of opportunities for students to gain concrete knowledge and skills that prepare them to demonstrate them. However, raising these issues can feel uncomfortable. Teachers must make themselves vulnerable and also handle vulnerability that may be exposed in their students. Numerous resources can assist in promoting such reorientations within law schools.[58]

A law school's ability to teach all students these valuable skills requires a diverse student body with students from a variety of racial, ethnic, socio-economic, and cultural backgrounds. When the institution or classroom is less diverse, the law school will face additional challenges in creating an effective learning environment that does not place additional psychological burdens on non-majority learners. The same is true for experiential courses and the law students' opportunities to interact with a diverse range of clients and systems. At the same time, however, the more diverse the classroom, the more teachers must raise their capacities as teachers to build trust and connection with each student, and to navigate the often messy conversations that arise at the intersection of different lived-experiences and corresponding worldviews.

To help build competencies in these areas, law teachers can use materials and exercises on cross-cultural lawyering and cultural sensibility such as readings, websites, films, role plays, and literature to generate discussion.[59] A teacher who feels unprepared to facilitate such discussions might consider taking anti-racism training to develop her understanding. Teachers may also create faculty learning communities focused on assisting teachers' development in these areas. In creating materials, the teacher should take into account the characteristics of the students, the surrounding community, and the future clients the students will likely serve. The context

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[57] *See* SUSAN AMBROSE ET AL., HOW LEARNING WORKS: SEVEN RESEARCH-BASED PRINCIPLES FOR SMART TEACHING (2010) (discussing the importance of inclusive class climates to student performance); *see also* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, INCLUSIVE EDUCATION IN ACTION, POLICY GUIDELINES ON INCLUSIVITY IN EDUCATION (2009), *available at* http://www.inclusion-in-action.org/iea/dokumente/upload/72074_177849e.pdf, *archived at http://perma.cc/M7BS-JYLL* (discussing "inclusivity" as a human rights imperative for educators, essential to achieving equity in education for all, and important to the promotion of global peace).

[58] Attending an anti-racism training outside law school can provide tools for integrating many of these concepts into teaching in classrooms, clinics, externships, simulations, and one-on-one interactions. A recent example of such training is the anti-racism training being given by the Sargent Shriver National Center on Poverty.

[59] For suggestions about incorporating discussion groups within the classroom, see Johanna K. P. Dennis, *Ensuring a Multicultural Educational Experience in Legal Education: Start with the Legal Writing Classroom*, 16 TEX. WESLEYAN L. REV. 613, 618-21 (2010).

(geographic, demographic, and historic) of the community should also be taken into account in developing effective materials. The students and the surrounding community will differ from setting to setting, as will the future clients the students will serve. In short, just like law students, law faculty need both commitment and ongoing opportunities to develop the knowledge, skills, sensibilities, and values necessary to effectively guide students in preparing for an ever-more diverse and global legal environment.

b. Classroom

Classroom courses can incorporate multi-cultural perspectives. Cases in which the ethnicity, race or culture of the client affected the outcome can be discussed, with skillful facilitated discussion aimed at drawing out and supporting reflection on relevant aspects of the context. Another way to incorporate these issues into the classroom is for teachers to share their own experiences with the cultural, racial, or ethnic issues raised in cases and to invite students to share theirs.

As indicated above, however, addressing issues of difference requires careful planning and community building, and skillful facilitation. The goal of this type of discussion is to help students become more open-minded about difference, not to reinforce stereotypes, or make students feel attacked or judged. However, despite a teacher's best efforts, such difficulties will sometimes arise. Thus, it is critical to do as much as possible in advance to avoid turning cultural competence discussions into an outlet for stereotyping, blaming, or judgmental lecturing.

It is a best practice to develop ground rules for classroom discussions. A useful strategy is to invite students to co-create a learning community by agreeing on rules, such as letting each speaker finish, giving each other both full attention and the benefit of the doubt, staying calm while discussing disagreements, and listening respectfully. Modeling civil discourse and discussing the importance of listening helps students learn appropriate ways of engaging around controversial topics. Providing students with leadership concepts such as "candor with care" may also be helpful.[60] Here, as well, the literature provides useful guidance.[61] Questions to consider in establishing ground rules include:

1) What ground rules might be desirable for supporting participants in discussing difficult matters with greater authenticity and presence to a range of relevant difficult facts and experiences?

2) What challenges do class members expect as they seek to embrace accountability for co-creating non-judgmental, and safe (though not always comfortable) spaces within which each student may reflect more deeply on these issues — even in groups whose members differ across categories of identity and experience?

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[60] John C. Maxwell, *For Leaders: Balancing Care with Candor*, John Maxwell on Leadership (Dec. 20, 2010), http://johnmaxwellonleadership.com/2010/12/20/for-leaders-balancing-care-with-candor/, *archived at* http://perma.cc/SS86-6YFS.

[61] Bryant & Koh Peters, *Reflecting*, at 352-72.

3) What support would class members need in identifying and discussing their thoughts and emotional reactions to the material under consideration, and developing a capacity to reflect more objectively on those thoughts, emotions, and personal stories, rather than uncritically attaching to and identifying with them?

4) Can we work, individually and together, to surface assumptions, habits, biases, and blind spots that each of us brings to thinking about such matters?

5) Are class members willing to make personal commitments to ongoing self-exploration and interpersonal and inter-systemic work with others, aimed at increasing self- and other-awareness around these issues and the different and myriad ways they may arise in a given setting?

6) Are class members willing to commit to honoring our differences-in-community, by working to listen more deeply to one another's unique experiences, while working together and building on the lived-sense of common humanity that exists across these so-called differences?[62]

One method for building intercultural skills in a typical doctrinal course is to ask law students to identify alternatives that the lawyers in a doctrinal case might have used to fully develop the cultural issues. For example, one commentator has asked students whether they think a hotel manager might have called the police so quickly for a small disturbance in a fashion show if the show had not been sponsored by Ebony magazine.[63] Presenting information on various cultural contexts in a family law case is another common way to open the doors to this type of discussion.[64] All areas of law lend themselves to cross-cultural analysis once examined with an intercultural lens.[55]

Another way to invite reflection is to use role-plays and discussion problems in small groups to incorporate an aspect of cultural differences. For example, one teacher uses a problem involving damages for emotional distress in a company's failure to deliver dresses for a 15-year-old Mexican-American young woman's quinceañera, an important cultural and religious event for many Mexican and Mexican-American families.[66] He describes how the problem had the effect of making Mexican-American students insiders on the cultural knowledge and how they effectively educated the class on the importance of the cultural event.[67] Incorporating cultural issues in this fashion can

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[62] Magee, *Teaching Race*, at 20.

[63] Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Backgrounds in AntiTrust and Corporate Law Courses*, 23 St. John's J. Legal Comment. 667, 682-83 (2008) (*citing* Billops v. Magness Construction, 391 A.2d 196 (Del. 1978)).

[64] *See, e.g.*, Peggy Cooper Davis, Neglected Stories: The Constitution and Family Values (1997).

[55] *See, e.g.*, Amir N. Licht, *The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems*, 26 Del. J. Corp. L. 147 (2001) ("points out the growing awareness among practitioners and theorists of the relevancy of national culture to corporate governance and securities regulation. It shows that efforts to treat cross-cultural aspects so far have been few and sporadic and thus posits the urgent need for a systematic cross-cultural theory of corporate governance systems").

[66] Charles Calleros, *Traditional Office Memoranda and E-Mail Memos, in Practice and in the First Semester*, 21(2) Persp: Teaching Legal Res. & Writing 105 (Spring 2013) [hereinafter Calleros, *Traditional Office Memoranda*].

[67] *Id.*

help broaden students' perspective.

Other teachers use games, imagery, and exercises in classes. For example, to develop cultural competency, one teacher has created a cultural iceberg exercise designed to generate a discussion about what parts of culture are the tip of the iceberg and which lie below the surface,[68] while another distributes toy prisms to explore similar issues of visible and invisible differences.

Teachers can develop law students' self-reflection and compassionate self-critique in service of an attitude of cultural humility by incorporating methods such as reflective and reflexive writing, storytelling, and communication exercises. Smaller classes can be helpful in providing a safe space for developing social and emotional awareness, and to practice building better relationship and interpersonal communication skills within the context of course content addressing the intersection of law, culture, and community. For example, in a course dealing with race, law and policy, a law teacher might develop the content of the course to explicitly provide opportunities for intellectual, social, and emotional learning in every class.

With these objectives in mind, the teacher might design opportunities for the students in the class to do more than discuss a range of cases that demonstrate important decisions, rules, principles and jurisprudential disputes. She might also include carefully selected, appropriately tailored exercises that build students' abilities to reflect on their own experiences as sources of relevant knowledge about the application and effect of these laws in real lives. For example, one teacher invites students to reflect on and share their own experiences with the police as part of the discussion of *Whren v. U.S.*,[69] a case in which the Supreme Court ruled on the constitutionality of racial profiling in law enforcement.[70] She invites students to consciously reflect individually, in dyads, and as a group on the value of particular instances of diversity in the classroom. She explicitly seeks students' commitments to engaging in personal self-reflection and compassionate self-critique as part of their intellectual, social, and emotional responsibility as members of ongoing learning and professional communities. And she encourages them to assist their clients and colleagues in considering the impact of positionality, privilege, lived experience, and broader context to more fully achieve just results for individuals and communities.[71]

The classroom teacher may also use out-of-class activities such as field trips or exercises. He may ask students to live for one week on minimum wage and use only public transportation. Guest lectures by relevant community leaders can be helpful to expand perspective. Films or portions of films are useful. Old films like *Rashamon* or

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[68] To request a copy of Prof. Terry McMurtry-Chubb's classroom games and exercises, you may send her an email at Chubb_tm@law.mercer.edu. In addition to the iceberg exercise, she uses an exercise called, "The Human Race," which is meant to demonstrate that not everyone starts out at the same point in life, and is an exercise best done in a large room. And finally, she shares a checklist to make students aware of classism and a cultural literacy test.

[69] Whren v. U.S., 517 U.S. 806 (1996).

[70] *Id.*

[71] Rhonda V. Magee, *Legal Education as Contemplative Inquiry: An Integrative Approach to Legal Education, Law Practice, and the Substance of the Law We Make* (unpublished manuscript on file with authors).

A Jury of Her Peers can show the importance of understanding perspective. Newer films examining the many factors that can influence perspective are *Courage Under Fire*, *Crash*, or *Life of Pi*. Films can be tied into discussion of majority and dissenting opinions in cases that can be explained by the different perspectives of the judges, particularly if the judges are different genders, races, or otherwise have different backgrounds that can explain their perspectives on the case.[72]

In various ways, legal educators can provide more holistic opportunities for learning and growth, with the potential to support students' development of cultural humility, cross-cultural listening and communication skills, and ever-expansive inclusivity.

c.   Simulations

Simulations can be used to enhance intercultural knowledge, skills, and values both in doctrinally-focused courses and in courses designed to teach specific lawyering skills such as mediation, interviewing and counseling, and negotiation.[73] Simulation-based courses can be used effectively to train students about intercultural competence as long as the exercises are carefully designed to raise the issues. In a skills-focused class, attention to intercultural differences is important to ensure that students have sufficient knowledge to effectively represent a wide spectrum of clients. In addition, it is important to be sensitive to cross-cultural differences between law students and the client, between the client and witnesses, or between parties and jurists. Cultural knowledge and cultural sensibility should be incorporated into the student's preparation, particularly when the dispute or the creation of lawyer-client rapport may well pivot on intercultural differences or at least influenced by them.

The simulation or role-play should be structured to raise awareness of intercultural issues and to build skills in effectively using cultural knowledge. Care must be taken to ensure that students employ no stereotypes in either their enactment of the simulation or their use of intercultural knowledge. The simulation should include opportunities to demonstrate active listening, checking assumptions, and exploring the cultural context thoroughly. For example, a role-play based upon the quinceañera example described above, involving emotional distress involved in failing to deliver dresses for a quinceañera,[74] should thoroughly explore the cultural significance of the event. To prepare for this role play, the students would research how much planning goes into the event, how the event is viewed by the community, and the importance of the event to the young woman and to her family's social capital and status in the community.

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[72] For example, students in Constitutional Law class could discuss Justice Harlan's dissent regarding race in America in Plessy v. Ferguson, 163 U.S. 537 (1896), or the majority decision in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), which was penned by the first woman justice on the U.S. Supreme Court, Sandra Day O'Connor, and held that a state-supported nursing school's policy of denying qualified males like petitioner to enroll in its school violated the Equal Protection Clause of the Fourteenth Amendment.

[73] *See* Bryant, *Five Habits*, at 94.

[74] *See* Calleros, *Traditional Office Memoranda*.

Using interpreters as part of the role-play or simulation provides another opportunity to enhance intercultural competence skills. Students should understand the appropriate use of interpreters in interviewing and counseling clients and in court.[75] Teachers should emphasize the importance of ensuring that the interpreter is familiar with the non-English speaker's culture, both formal and informal versions of the language, and the need for the interpreter to translate accurately. Students who might be native speakers of the language can be very helpful in assessing the accuracy of the translation. Of course, students should not be asked to serve as interpreters in the simulations. They are being trained as lawyers, not interpreters, and thus, they should be trained on how to use interpreters effectively.

Faculty should plan for students to have sufficient time to reflect on the experience immediately after each simulation or role-play to maximize their learning. Faculty should also plan for multiple opportunities for students to receive non-graded, formative faculty feedback on the reflection so that students learn that intercultural effectiveness is a learned and practiced skill.

Some law schools offer courses focused primarily on cross-cultural lawyering issues. For example, one cross-cultural counseling course uses information about the brain to compare traditional legal analysis with real human decision-making focusing on lawyers' and clients' "Cultural Worldviews."[76]

d.   Externships

The classroom component of an externship should include some cultural competence training to help students face new situations in their placements. The variety of placements may range from working with indigenous people on a community project to a corporate law firm setting, from representing one individual with a disability in a Legal Aid office to working on a system change issue with a major public interest organization such as the Mexican American Legal Defense and Educational Fund, from clerking for a judge in a court populated by mostly majoritarian individuals to

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[75] *See, e.g.*, Ileana Dominguez-Urban, *The Messenger as the Medium of Communication: The Use of Interpreters in Mediation*, 1 J. Disp. Resol. 1 (1997).

[76] Iris Burke's course describes worldviews as follows:

Worldviews are not conscious "opinions" which we adopt because they make logical sense to us, and discard or change when we encounter new information. They are absorbed by osmosis from our experiences. They concern the most basic social questions:

I. the relationship of the individual to the group; and

II. the appropriate distribution of power and authority.

Cultural worldviews impact not only on substantive goals, but also on the processes that one finds appropriate in pursuing those goals, from threats and adversarial litigation to problem-solving collaboration.

Understanding differing cultural worldviews, and the power of their influence, allows lawyers to expand the conversation of goals and values with their clients, and to better understand client goals, which differ from what the lawyer would value. Lawyers who recognize their own cultural worldviews can better guard against allowing those worldviews to inappropriately influence the counseling process.

Professor Burke's Syllabus for Cross Cultural Legal Counseling, Fall 2014 (on file with section authors).

working at a prosecutor's office situated in a county in which many residents do not speak English. To maximize teaching moments, externship teachers could design classroom activities that introduce students to more multicultural issues than they experience in their placement.

Because of the dual supervision by both teachers and field supervisors, students may receive different messages from their placement supervisor and their law school teacher, or may observe legal practice or a legal setting that exhibits poor intercultural communication and awareness. Such realities make it all the more important that the classroom component, reflective journaling, and other forms of guided supervision from the law school be designed to raise awareness of and specifically focus on intercultural learning. Placements that prioritize and emphasize intercultural effectiveness can be used as resources from which all externship students can learn. Field supervisor training should include materials on intercultural effectiveness and discussions of how to mentor inclusively and how to model and teach intercultural effectiveness.

e. Faculty-Supervised Clinical Experiences

Faculty-supervised experiences in which law students represent clients provide rich teaching opportunities for intercultural skills building, because these issues often arise organically and can be incorporated into supervision and feedback, case rounds, and training sessions in a variety of formats.[77] Additionally, an important tenet of adult learning theory is that learning is most effective when it is directly applicable to experience.[78] In these closely supervised experiences, students can be reflective in action and faculty can assist students immediately and in the midst of representation. The faculty member can draw out issues of difference and power imbalances intrinsic to the representation. The faculty member can use one-on-one sessions to help the student become more self-aware. And, in the clinical setting, the entire clinic of students and teachers can help each other with "parallel universe thinking"[79] and other cross-cultural tools.

To avoid the risk that the students might develop stereotypes or pre-judgments about the client, some faculty prefer to introduce intercultural awareness material and issues after the student has had a chance to meet the client and begin the representation.[80] Learning the law and learning about the client at the early stages

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[77] *See generally* Charity Scott, *Collaborating with the Real World: Opportunities for Developing Skills and Values in Law Teaching*, 9 IND. HEALTH L. REV. 409 (2012) (AALS Symposium article); Sedillo López, *Making and Breaking Habits*; Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219 (2002).

[78] *See* Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 49 (1995).

[79] Parallel Universe Thinking is one of the habits described in the seminal work of Jean Koh Peters and Sue Bryant.

[80] Some identity or background issues relevant to the legal matter may require earlier training prior to a first interview such as representing a person with a disability or an individual whose primary language is not English. These situations require special accommodations and skill in navigating the initial interview. Another example might be clients who have suffered in long-term domestic violence situations and the need

can be overwhelming. As the student becomes more comfortable, the teacher can draw out some of the issues of difference and sameness, and help the student see that the best authority on the client's culture is the client. As the student develops more confidence, the teacher can gently probe issues of culture and/or power imbalance to help the student recognize how cultural issues can be addressed most effectively. Students who are excited about the opportunity to represent clients are usually very open to better understanding all aspects of a client's decision-making. The desire to be client-centered provides an optimal avenue for giving students positive feedback and gently helping the student look at issues from multiple perspectives. As the skills of the student improve, discussion about difference issues can occur at a more sophisticated level and the teacher can provide feedback to the student about the development of the student's knowledge, skills, and values, including the student's growth in culturally effective representation.[81]

7.   Assessing Intercultural Effectiveness

It has often been said that we assess what we value, and we value what we assess. If law schools and law teachers truly value intercultural effectiveness, they will want to know whether their curriculum and teaching improves their students' intercultural competencies. Schools and teachers will evaluate, assess, and document students' progress. In contrast to health professionals[82] and other educators,[83] legal professionals and legal educators have not spent significant energy and resources exploring and experimenting with assessment of intercultural competence.[84] This is

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for the law student to be well acquainted with the dynamics of domestic violence and trauma-informed practices before meeting the client.

[81] *See generally* Nelson P. Miller, et al., *Equality as Talisman: Getting Beyond Bias to Cultural Competence as a Professional Skill*, 25 T.M. Cooley L. Rev. 99 (2008).

[82] *See, e.g.*, National Consortium for Multicultural Education, http://culturalmeded.stanford.edu/, *archived at* http://perma.cc/UX5B-U7FM; *Cultural Competence Assessment Tools*, Office of Mental Health, http://www.omh.ny.gov/omhweb/cultural_competence/assessment_tools.html, *archived at* http://perma.cc/BY5Q-UVLA.

[83] *Self-Assessment for Cultural Competence*, American Speech-Language-Hearing Association, http://www.asha.org/practice/multicultural/self/, *archived at* http://perma.cc/E3AJ-NX4T.

[84] Of course, many exciting and interesting projects and parts of the academy focus on intercultural competency. Rachel Moran, *When Intercultural Competency Comes to Class: Navigating Difference in the Modern American Classroom*, 26 Pac. McGeorge Glbal Bus. & Dev. L.J. 109 (2013) ("Clinical educators already deploy a range of techniques to inculcate lawyering skills, and there is no single right way to teach intercultural competency. Some would like to see these skills infused into all or most courses in the curriculum. Critics worry, though, that any such mandate could disrupt the faculty's freedom to set goals and priorities for the substantive material that they teach. Reluctant teachers might do a superficial job of dealing with intercultural competency, which in turn might marginalize these skills even as they were officially integrated into much of the curriculum."); Bryant, *Five Habits*, at 35. Critical race, feminist, queer, disability law theorists, and legal writing communities have also made important contributions. In addition, there are, of course, specific projects at different schools. David Oppenheimer, et. al., *Berkeley Law's Student-Initiated Legal Services Projects*, 62 J. Legal Educ. 621 (2013). However, the current version of the ABA Accreditation standards fails to prioritize such learning and at the February 2014 ABA Standards Review Committee meeting, two members of the committee proposing to update and revise the standards declared they didn't even "know what such terms mean."

so despite the availability of such tools and resources[85] and their relevance to the practice of law.[86] It is time to address that gap.

As noted earlier in this section, intercultural effectiveness may not seem to be easy to assess. Does this learning fall into the knowledge, skills, or value domain? Is it about behaviors or habits? Since all domains are implicated, does this complicate assessment?

Of course, any assessment must be tied to the learning objectives, so a faculty member should start there. In other sections, this book describes assessment as a mechanism for (among other goals) gathering information about whether and to what extent students have achieved the targeted knowledge, skills, and values, and using the assessment to improve teaching. To improve law students' intercultural effectiveness, law teachers must assess their progress, provide the students feedback on that progress, and use the results of the assessment to adapt and improve their teaching and learning objectives and methods.

a.   Formative Assessment

BEST PRACTICES distinguished between formative assessment, which aims to assist a student in developing and is given at a time that permits incorporation and growth, and summative or evaluative assessment, which gives a student a single point of evaluative data, generally at the end of the grading period.[87] Those distinctions remain helpful. BEST PRACTICES also emphasized the need for multiple and varied assessment throughout the course of the semester and this remains a best practice.[88] A culture of continual improvement through reflective assessment is especially important for students to improve their intercultural effectiveness given the risk that addressing these issues can generate defensiveness or shame.[89] Some common methods of formative assessment for multicultural competence include:

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[85] *See e.g.* NATIONAL CENTER FOR CULTURAL COMPETENCE, http://nccc.georgetown.edu/resources/ assessments.html, *archived at* http://perma.cc/YSE7-T8DK; INTERCULTURAL DEVELOPMENT INVENTORY, http:// idiinventory.com/, *archived at* http://perma.cc/H9PK-PH67.

[86] *See* Miller, *Beyond Bias*, at 38 ("Cultural competencies cover a wide range of areas. Communication is primary. It is important how we speak and listen. Communication varies. What is understood and appreciated in one household will not be understood or may even be offensive in another household. And it is not only communication that varies. So, too, do individual cognition, individual and family resources, cultural references, and relationships. Lawyers should possess cultural competencies in at least those five areas. Lawyers who possess and exercise these skills are able to meaningfully serve diverse populations . . . Lawyers who do not possess and exercise these skills cannot serve diverse populations effectively."); ABA Standards for the Provision of Civil Legal Aid, Standard 2.4, http://apps.americanbar.org/domviol/trainings/ Interpreter/CD-Materials/civillegalaidstds2006.pdf, *archived at* http://perma.cc/SNU9-NGLX; La Fonte Nesbitt et al., *Using a Diversity Assessment to Fuel and Guide Diversity Training and Other Lessons Learned*, THE METROPOLITAN CORPORATE COUNSEL (March 2006) at 34, *available at* http://www. metrocorpcounsel.com/articles/6541/using-diversity-assessment-fuel-and-guide-diversity-training-and-other-lessons-learned, *archived at* http://perma.cc/X2UG-8B4R; Philip A. Berry, *Developing Talent in a Global Marketplace*, 17 INT'L H.R J. ART 5 (2008).

[87] BEST PRACTICES, text at notes 764-66.

[88] *Id.*, text at notes 767-781.

[89] Bryant & Koh Peters, *Reflecting*, at 350-52.

- Student self-identification of goals and self-evaluation of progress at periodic interviews similar to the assessment and evaluation method used in clinical teaching;

- Student journaling on the use of "parallel universe thinking,"[90] "standing in the shoes of the other,"[91] "Just Like Me" practice,[92] or other tools for improving intercultural analysis, communication, and compassion;

- One-minute papers on the knowledge factors of intercultural competence;

- Mid-semester evaluation of student performance in simulated exercises that raise intercultural communication challenges;

- Mid-semester evaluation of student responses to hypotheticals and problems that raise such issues;

- In-class quizzes or tests on implicit bias concepts or intercultural knowledge concepts;

- Multicultural rounds — faculty feedback or evaluation of contributions or "dialogic" progress similar to that used in clinical rounds;[93]

- Using rubrics with standardized clients in simulated role plays.[94]

b. Summative Assessment

Many law schools that have embraced student learning outcomes have charted their own path for assessment of cultural competence. For example, when one law school identified nine learning outcomes for its students, it included one on adoption of values including inclusivity.[95] One of the methods used to evaluate student learning and progress on this outcome is the assessment of student participation in activities "designed to improve the justice system and the profession, such as ridding both of bias" and student demonstration of "diversity skills, such as sensitivity to social and

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[90] The habit of "parallel universes" thinking invites students to look for multiple interpretations, especially at a time when the student is judging the client negatively. Bryant, *Five Habits*, at 70-71.

[91] Magee, *Teaching Race*, at 10-11.

[92] *Id.*

[93] *See generally* Bryant & Millstein, *Rounds: A Signature Pedagogy For Clinical Education*, 14 Clinical L. Rev. 195 (2007) ("One method used in the field of education to help teachers learn while on the job is to create 'professional development and inquiry groups.' These groups of six to ten teachers meet regularly to discuss teaching problems "by means of conversation that includes personal narratives of teaching experiences."); Christopher M. Clark & Susan Florio-Ruane, *Conversation as Support for Teaching in New Ways, in* D. Jean Clandinin & Christopher M. Clark, Talking Shop: Authentic Conversation and Teacher Learning 6, 12 (2001) ("Personal experience narratives" permit learners to communicate what they know and what they believe, to explore new ideas and challenge assumptions, and to expand their sense of what is possible).

[94] Antoinette Sedillo López et al., *A Medical/Legal Teaching and Assessment Collaboration on Domestic Violence: Assessment Using Standardized Patients/Standardized Clients*, 14 Int'l J. Clinical Legal Educ. 61 (2009).

[95] "Learning Outcome 9: Graduates will adopt the Marianist charism of faith, service, community and inclusivity in their professional and personal life." University of Dayton School of Law, Learning Outcomes & Criteria (March 2009) (on file with authors).

cultural difference."[96]

The formative assessment methods described above can individually and cumulatively provide information for a summative assessment. Other summative or evaluative methods include:

- Papers that demonstrate knowledge of the concepts and theories surrounding multicultural competence development;

- End-of-semester observation and evaluation of students' demonstrated multicultural competence while in "real lawyer" role in clinical or pro bono experiences or in a simulation course;

- End-of-semester doctrinal examinations that include intercultural concepts and issues in interpreting the application of fact to law;

- Pre- and post-course tests of attitudes.[97]

c.   Institutional Assessment of Intercultural Learning

As discussed in this book's section on assessment, institutions and teachers should assess both directly and indirectly. Direct assessments by institutions could include course assessments and common rubrics or employer, client or other external evaluator's assessment of student or graduate's multicultural competency. Indirect methods should also be used as a complement to direct methods. Such methods include student surveys which "are particularly good, not for measuring what students learned, but for revealing their attitudes and opinions about what they learned. Surveys are also useful to evaluate outcomes that only come to fruition in students' post-[graduation] careers."[98] Other ideas include questioning students about their learning during student exit interviews and conducting institutional review of syllabi and course evaluations to examine whether students are being encouraged to achieve facility in multicultural concepts and interactions.

Some common methods of assessment that could help assess multicultural competence involve:

- Pre- and post-experience surveys of law student knowledge or appreciation of multicultural competence. This could be done before and after the student experiences law school, a specified course or experiential learning activity, or a specified semester;

- Anonymous surveys focused on the appreciation/value of multicultural competence;

- Portfolios of student development of knowledge, skills, and appreciation of multicultural competence over three years outlining classes, experiential learning, and extracurricular involvement that increased learning;

- Evaluation at the beginning and end of the course or experience;

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[96] *Id.*

[97] Curcio et al., *Survey Instrument*, at 234; Appendix A, discussed below.

[98] University of Virginia, Office of Institutional Assessment and Studies, Assessment Guide: Seven Steps To Developing and Implementing a Student Learning Outcomes Assessment Plan (on file with authors).

- Surveys of summer employers or of clinic clients, pro bono student clients, judges, or others with whom law students interact asking for ratings of the students' skills in the area of multicultural competence.

One very promising assessment tool that should be explored is the five-factor survey instrument referenced throughout this section.[99] This statistically reliable survey instrument promises to "help faculties gauge their students' receptivity to learning about the role culture plays in the lawyering process and assist educators in identifying where to devote educational time and effort."[100] It can also "help faculties identify potential learning outcomes and track students' cultural sensibility develop-ment over the course of their legal education."[101]

8.   Conclusion

Best practices for teaching about intercultural effectiveness are still emerging as scholarship and teaching on these issues develop. Law school administrators should identify intercultural effectiveness as a criterion by which faculty and staff will be assessed in both hiring and promotion. Law teachers and law schools should identify intercultural effectiveness as a required student learning outcome for all students and create many opportunities for students to engage in this learning. Law teachers must continue to explore best practices for identifying, teaching and assessing law students' intercultural learning and add to this literature. And, law students should be encouraged to draw on their experiences and backgrounds, to learn from others, and to continue to develop capacities for intercultural effectiveness and good practice within increasingly diverse communities — both locally, and across our interconnected world.

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[99] Curcio et al., *Survey Instrument* , at 234, Appendix A.

[100] *Id.* at 233.

[101] *Id.*

F. SOCIAL JUSTICE ACROSS THE CURRICULUM
By Susan Bryant[1]

1. Introduction

BEST PRACTICES FOR LEGAL EDUCATION[2] emphasized the need to develop students' understanding of and commitment to justice. The discussion of the principle that "Graduates demonstrate professionalism" included the values of both "[a] commitment to justice"[3] and "[s]ensitivity and effectiveness with diverse clients and colleagues."[4] The volume also included references to race and gender in discussions of student's clinical experiences and under the Socratic Method,[5] and to social justice in discussions of collaboration and clinics.[6] The importance of including issues of social justice — including issues of race, class, gender, gender preference, and disability — across the curriculum was implicit in these references. This section builds on BEST PRACTICES by developing in greater detail the importance of educating students to meet their justice-seeking professional responsibility as well as identifying how that goal might be met.

2. The Importance of Teaching Social Justice

The importance of teaching about race, poverty, gender, gender identity, and other justice issues across the curriculum begins with several important observations about these issues and legal education. First, integration of these issues is critical to professional identity formation that recognizes lawyers as uniquely responsible for justice. Second, students need to understand how social justice issues permeate the law to exercise that responsibility effectively. Third, talking about these issues in classes recognizes the diversity of voices in the classroom and opens up conversation space for all students to learn and share insights.[7] Finally, all legal educators can identify and teach important social justice issues intrinsic to basic legal practice in any law school course and can develop classroom activities to accomplish these goals. Accordingly, it is a best practice for law schools to assure that every student learns the integral nature of social justice to the practice of law, and to assure that the subject is raised both early and often in a student's legal education.

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[1] Readers for this section were Jean Koh Peters and Ann Shalleck.

[2] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

[3] *Id.*, text at notes, 239-45.

[4] *Id.*, text at notes 259-61.

[5] *Id.*, text at notes 614-15, 631.

[6] *Id.*, text at notes 369, 606, 618.

[7] *See* Chapter 4, Section B, Subsection 2, *Using Interculturally Aware Teaching Methods*, above.

a.   Essential Learning about Being a Professional

The ABA Model Rules of Professional Conduct (the Model Rules) identify a lawyer as a "public citizen having special responsibility for the quality of justice."[8] Every report on the profession and legal education, including most recently, BEST PRACTICES and EDUCATING LAWYERS (the Carnegie Report) and, earlier, the MacCrate Report, stresses legal education's role in inculcating the professional values of achieving justice and providing access to justice.[9] EDUCATING LAWYERS noted, "Law schools play an important role in shaping their students' values . . . as well as their understanding of their roles and responsibilities as lawyers . . . "[10]

While the reports are clear that promoting and achieving justice are important professional responsibilities, they do not fully define the justice goals or the approaches that law school should take to elucidate for students what those goals mean. Allowing educators to assess what and how to teach about justice, the reports share a few assumptions. First, it is the law school's role to inculcate professional values about achieving justice. EDUCATING LAWYERS in particular noted that the failure of first-year classes to include questions of justice and morality in classroom dialogue ignores a key aspect of what it means to be a professional and communicates to students that these inquiries are not central to becoming a lawyer.[11] Second, promoting justice is not only about access to justice in the procedural sense of providing lawyers for clients (pro bono representation), but also about assessing the law's impact on the people it regulates and protects — particularly the disadvantaged — and engaging students to identify ways to change unfair laws or practices.[12]

b.   Educating Competent, Justice-Seeking Lawyers

To become lawyers who are capable of promoting and achieving justice, students need not only these professional values, but also cognitive abilities that help them recognize injustice as well as skills to address the injustice. Clinical classrooms, focused on building intercultural effectiveness and incorporating issues of race and social justice, are clear sites for teaching necessary knowledge and skills for students to become justice-seeking lawyers.[13] Students would be better prepared for both their

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[8] MODEL RULES OF PROF'L RESPONSIBILITY PREAMBLE, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html, *archived at* http://perma.cc/T7A2-TYHC.

[9] *See, e.g.*, WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT]; BEST PRACTICES; *Report of The Task Force on Law Schools and the Profession: Narrowing the Gap* [hereinafter MACCRATE REPORT]; ABA Section on Legal Education and Admission to the Bar 121–223 (1992) (identifying "striving to promote justice" as a fundamental value to be instilled in all lawyers).

[10] CARNEGIE REPORT, at 139.

[11] *Id.* at 58.

[12] MACCRATE REPORT, at 215 (commentary explicating the lawyers' responsibility for the quality of justice includes employing knowledge to reform the law, to recognize deficiencies, to change unjust rules to respond to needs of society).

[13] Susan Bryant & Jean Koh Peters, *Reflecting on the Habits: Teaching about Identity, Culture, Language, and Difference* and *Talking About Race*, in TRANSFORMING THE EDUCATION OF LAWYERS: THE THEORY

clinical work and work as lawyers if inquiries about these issues occurred in other classrooms. Routine inquiries about these issues may be used in other classrooms as well to expand students' "thinking like a lawyer" skills that develop competency in identifying injustice and imagining solutions. Below are the inquiries that educators can use to assist the students in their exploration, regardless of the subject matter or format of the class:

i.   Who Does the Law Privilege in the Ways It Frames Rights, Wrongs, and Remedies?

Whose experience shapes the law and who benefits from it? What information is needed and from what sources to answer this question? For example, many feminists have identified how the law privileges certain injuries over others. Many have identified problems with the concept of the abstract "reasonable person," arguing that this person is an implicit figure with a gender and race, and with economic sufficiency. This unacknowledged figure in the background works to privilege the common or dominant experiences and perspectives of white men and excludes or marginalizes women, people of color, or those who are poor.[14]

ii.   Does the Application of the Law Result in Disproportionate Effects on Less Privileged Groups?

Is there disproportionate regulation of disadvantaged groups? In these inquiries, some students conclude easily that group members engage in negative behavior that causes the disproportionate effect. But teachers can push beyond this, with questions such as: How can we know? What evidence do we have? Criminal law classes and family law classes are ripe for this kind of inquiry. Perhaps less obviously, equally

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AND PRACTICE OF CLINICAL PEDAGOGY (Susan Bryant, Elliot Milstein & Ann Shalleck, eds. 2014). The clinical education literature is filled with many examples of how teachers can inculcate these values and teach the skills and perspectives necessary to educate justice-seeking lawyers. *See, e.g.*, Sameer Ashar, *Law Clinics and Collective Mobilization*, 14 CLINICAL L. REV. 355 (2008); Juliet Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333 (2009); Jane Harris Aiken, *Striving to Teach "Justice, Fairness, and Morality,"* 4 CLINICAL L. REV. 1 (1997); Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37 (1995); Antoinette Sedillo Lopez, *Learning through Service in a Clinical Setting: The Effect of Specialization on Social Justice & Skills Training*, 7 CLINICAL L. REV. 307 (2001); Margaret E. Johnson, *An Experiment in Integrating Critical Theory and Clinical Education*, 13 AM. U. J. GENDER SOC. POL'Y & L. 161, 178 (2005).

[14] *See* Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 293-94 (1994) (introducing the idea that objectivity in law centered on a privileged white male perspective); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541 (1996); Margo Schlanger, *Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001); Margalynne J. Armstrong & Stephanie M. Wildman, *Teaching Race/Teaching Whiteness: Transforming Colorblindness to Color Insight*, 86 N.C. L. REV. 635 (2008); Beverly I. Moran, *Disappearing Act: The Lack of Values Training in Legal Education — A Case for Cultural Competency*, 38 S.U. L. REV. 1 (2010) [hereinafter *Disappearing Act*]; Deborah Zalesne, *Racial Inequality in Contracting: Teaching Race as a Core Value*, 2013 COLUM. J. RACE & LAW 23 (2013) [hereinafter *Racial Inequality in Contracting*].

compelling inquiries about disproportionate effect can take place in all classrooms.[15]

iii.   What Role Might Assumptions and Bias Play in Articulation or Application of Law?

Where is discretion and how might biased thinking influence the exercise of discretion?[16] Students should be encouraged to ask routinely how assumptions about race, gender, identity, poverty, etc., are being made to reach results. A simple question to prompt this inquiry is: How might thinking that uses stereotypes be operating?

iv.   How Does Context Matter?

Teachers can ask whether the findings would be the same if the parties were a different class, ethnicity, race, gender, or transgender. Would the effect be the same?[17] Should it be?

v.   How Could the Law be Written Differently to Take into Account Multiple Experiences and Address Identified Injustice?

Teachers can use perspectives readings to broaden dialogue about justice, routinely asking how the law might be written differently. What are the historical inequalities found in an area of study and what are remaining vestiges? Does a law that reads neutral have disproportionate effect because it fails to take history into account?

vi.   How can Lawyers Practice Differently to Take into Account the Injustice on the Books and in Application?

How can lawyers practice for disadvantaged groups and individuals in ways that make a difference in how the law is applied or written? While this question can be explored most immediately in clinics, asking the question early and often sparks an important inquiry for the students and communicates that issues of justice are inextricably imbedded in law study and in practice.

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[15] For a compilation of ideas and authors that span a variety of courses with ideas about how to teach about social justice values and integrate that teaching as an integral part of legal analysis and skill building, see Moran, *Disappearing Act*; Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239 (2007) (discussing how and whether these issues might be taught through a constitutional course on structure, separation of powers, and federalism).

[16] While discretion can be a method used to take into account different experiences and respect diversity, discretion can also be the vehicle for bias. *See* Pamela M. Casey, et. al., *Helping Courts Address Implicit Bias: Resources for Education*, *available at* http://www.ncsc.org/, *archived at* http://perma.cc/FWK5-3UY7.

[17] Isabelle Gunning, *Diversity Issues in Mediation: Controlling Negative Cultural Myths*, 1995 J. DISP. RESOL. 55; Zalesne, *Racial Inequality in Contracting*.

vii.   What are We Privileged Not to See?

How do our life experiences expose us to certain injustices and make us blind to others? Asking this question frequently opens up students to listening carefully to the stories and experiences of others.

c.   Using Experiential Learning to Build Student Understanding and Motivation

Experiential exercises can be used in any class, designed to assure that students see how social justice concerns are imbedded in a lawyer's daily practice. Even if the teacher did no more than teach the doctrine through a more contextual role play exploration, students can learn how lawyers should use inquiries about race and other social justice concerns to enhance representation. A teacher using a simulation such as the one described below communicates that being a lawyer necessarily involves studying justice concerns and illustrates how lawyers can use those to improve lawyers' work. Moreover, the following example also demonstrates how faculty members with varying perspectives can collaborate to create more effective simulation exercises.

As described below, teachers working collaboratively can design experiential exercises that fulfill dual goals of developing doctrinal understanding and enabling students to learn the lawyer's role in addressing justice issues imbedded in the law and lawyering. The described simulation illustrates how incorporating real lawyering activities involving factual analysis enables students to discover justice issues that are integral to their study of law and their ideas about the role of lawyers. Teams of teachers with diverse practice and teaching experiences can cull real world examples to engage and motivate student inquiry into social justice issues imbedded in the doctrinal concepts. Experience, even simulated, can be a powerful teacher of both doctrine and justice.[18]

When developing an experiential exercise, teachers can adopt an approach such as:

1) Identify teaching goals, including justice issues;

2) Prioritize them;

3) Design a hypothetical problem that includes each of these goals;

4) Design a specific lawyering activity in the problem that students will simulate;

5) Design a debriefing process, using targeted and open-ended questions;

6) Highlight the justice component if the students do not make the connections.

A criminal law teacher, two clinical teachers — one in immigration and one in criminal defense — and an experienced clinical teacher currently teaching large classroom courses gather to plan an exercise for the first-year criminal law class.[19]

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[18] *See* Mary Lynch, *The Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness* (manuscript on file with author).

[19] This is a true story. In a section program at the AALS annual meeting in 2014 on designing

The group begins to brainstorm about what the experience could and should teach students. They want the students to learn about the activities that lawyers do, criminal law doctrine, how race matters in criminal law, and something about the intersection of immigration and criminal law because these areas often overlap in ways students may not suspect, and clients encounter legal problems in packages that do not fit neat doctrinal categories.

They choose a fact investigation setting to teach students that facts do not appear in cases as fixed but instead are discovered and developed by lawyers who present them to courts and juries. They decide to use accessory crimes because students have difficulty with this area of doctrine and the clinic teacher identified accessory cases as a frequent type of clinic case. She describes working on shoplifting cases where co-defendants were often charged for activities that seem more like guilt by association than accessory crimes. By working through an investigation where the students have to pursue the facts that matter in making distinctions between innocent activities and activities that give rise to accessory liability, the students will get a better grasp on some of the major concepts in accessory crimes.

T*he experiential exercise that the team of legal educators design will ask the students to plan for and conduct an interview with a store detective after they are introduced to the client, a young Afro-Caribbean woman from the Dominican Republic whose story was summarized for the students. (She went to the store shopping with a friend who took merchandise. The client knew nothing about her friend's plans.) The role instructions for the store detective describe actions he observed that could be those of an innocent shopper as well as one trying to distract store personnel so that her friend can steal.*

The plan for the faculty member to debrief the exercise includes asking students to think about how the client's race might have influenced the store detective to identify, follow, interpret actions, and charge the client. The teacher will also ask how information about racial profiling might shape a fact investigation and how assumptions of guilt might be made based on race.

The debriefing should help students to see that facts are malleable and can lead to multiple interpretations. The hope, in turn, is that this will illustrate how bias can shape interpretation of facts and application of the law by the store detective. As well, the group wants the students to see how thinking about race is not an add-on to understanding practice, but key to good lawyering.

Finally, the team plans that the teacher should pose some questions for the students linking criminal and immigration practice, such as: "Assume you have developed a strong case to defend against the criminal charge but, if your client is found guilty, she may be subject to deportation. What if the

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experiential learning activities in the large classroom, the presenters asked the participants to form small groups and come up with an experiential activity that could be used in a large classroom. This is what one such group including the author created in a very short time period.

prosecutor offers a plea that avoids a charge that makes her susceptible to deportation? Should she take it even though she has committed no crime? How do you help her evaluate that decision?" The teacher can discuss these questions but can also leave them as thoughts to ponder as students leave class.

The students in this criminal law simulation will learn that social justice concerns are embedded in a lawyer's daily practice. As they explore the role race played in the law's applications, they see how it might function in identifying potential law violators and how individual law enforcers interpret behavior as innocent or criminal. The hypothetical allows exploration of how implicit bias operates and how racial profiling can include both explicit and implicit biases. Students can explore how the doctrinal rules leave interpretive space for those who enforce the law as well as those who prosecute and judge.

The simulation promotes insight into how race might have influenced the interaction between the detective and the client and how that insight would inform a different investigation plan and a case theory about what happened. Early in their legal education, students learn that lawyers should investigate the facts. As they investigate, facts that are pled unambiguously in a complaint often become more complex.

By connecting immigration concerns to this simulation, students are introduced to another social justice concern: the numerous collateral consequences of criminal convictions. Many students may not be familiar with the fact that non-citizens can be deported after being convicted of a crime. Students can explore disproportionate prosecutions as well as the effects of those prosecutions on more vulnerable populations.

An activity and conversation such as the one described in the exercise in a first-year class opens up inquiry into a number of social justice issues that the teacher could take in many different directions. What should the remedy be for racial profiling; what crime gets ignored when some are targeted and others disregarded? Why is identification of potential shoplifters viewed as a far greater harm than racial profiling? Is criminalization of racial profiling possible? Is criminalization a good remedy for solving a social problem such as racial profiling?

Students who engage in these inquiries are more likely to become lawyers who understand their special responsibility for justice with the knowledge and skills to strive for justice in their regular practice and in their pro bono work. With an understanding of how implicit bias functions, students who become judges, prosecutors, or other enforcers of law can play a significant role in achieving justice.

d.   Getting Beyond Impediments

Teachers who want to teach students insights about law, lawyering, and justice often list impediments of time, competence, and teacher's role that limit their ability to accomplish this goal.

Perhaps the most frequently mentioned impediment to including these issues is a lack of time. Of course, many of the suggested inquiries do take class time and cannot

be addressed in every class session. The key to meeting the time constraints is to find synergy between these inquiries and what is already being taught. For example, the criminal law simulation deepens learning about the doctrines of accessory crimes at the same time that it explores justice issues.[20] If teachers normalize these inquires,[21] students experience their value and ask themselves some of these questions as they read cases, even without prompting or the use of class time for every case discussion. Sometimes, teachers can also introduce questions for students to ponder without fully discussing them. For example, the simulation exercise described above can be used to introduce the intersection of criminal and immigration law without doing a full exploration of all of the justice implications at this intersection.

Competence concerns cause faculty to pause when identifying these issues and leading discussions about them. These can be difficult conversations to initiate and manage. Many law faculty are from dominant groups and do not have the experiential base to identify a privileged viewpoint or recognize the impact of the law. Fortunately, legal scholarship and textbooks identify where these issues are imbedded in the law and point out cases in traditional casebooks that raise these issues.[22]

Teachers also feel ill-equipped to deal with the classroom dynamics that these discussions can raise. They often do not have "answers" to some of these issues and the range of responses to the inquiry can be hard to manage. The legal doctrine students have learned insists on formal equality and often submerges the lived experience of racism, sexism, and other forms of oppression. Many students have the same difficulties as faculty in identifying what they are privileged not to see. Others, more experienced in constructive conversations about these social justice issues, at least with like-minded interlocutors, resist conversations where the instruction is too elementary or where others are likely to say hurtful or harmful things. For example, even students who recognize that others may need instruction may want a different conversation focused on action rather than awareness. Those same students may feel the strain acutely, constantly torn between raising the consciousness of other students who do not have their life experience, on the one hand, and needing the conversations to move deeper as their own experience and insight prompts more complex thinking.

Despite these challenges, committed teachers can develop competence in raising and teaching these issues through the many suggestions in the literature of law school and other teaching. Articles and books exist to help the teacher plan conversations

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[20] Debbie Zalesne has made a compelling case for integrating issues of race, class, gender, and other identities in the discussion of contracts as a means for teaching legal reasoning to students. The article discusses in detail how this inclusion contributes to students learning contracts doctrine as well as the impact of that doctrine on different groups of people. *See* Zalesne, *Racial Inequality in Contracting.*

[21] *See* Susan Bryant & Jean Koh Peters, *Talking About Race*, Chapter 16 *in* Susan Bryant, Elliot S. Milstein & Ann C. Shalleck, Transforming the Education of Lawyers (2014) (discussing the importance of normalizing difficult conversations about race by asking always what does race have to do with the case or project on which our clinical students are working).

[22] The articles already cited include numerous ideas about how to integrate social justice issues in specific courses. *See also* Patti Alleva & Laura Rovner, *Seeking Integrity: Learning Integratively from Classroom Controversy*, 42 Sw. U. L. Rev. 355 (2012-2013) (outlining a method for engaging students in difficult classroom conversations).

about specific cases as well as how to manage difficult conversations.[23]

Finally, role concerns inhibit raising these issues. Teachers may fear that students will accuse them of using their teacher power to engage in "political correctness" monitoring rather than teaching law. When teachers raise issues that relate to their own identity -- women teachers raising issues about male-normed rules, teachers of color raising issues of race, out gay teachers about gender identity — they may be especially burdened by student views that they are taking self-interested positions. While students see teachers as powerful figures, teachers, especially untenured teachers, often feel vulnerable to student evaluations. As a result, students and teachers alike often view these types of discussions as intrinsically risky, anxiety provoking, and unsafe.

However, not having these conversations carries risks as well. The failure to raise these issues marginalizes some students' experience and privileges others. For students whose experience is marginalized in classroom conversation, teachers risk disengagement from the inquiry.[24] For other students, the risk is an incomplete understanding of the law and its impact. As one scholar has noted:

> Those marginalized by the white, male perspective of law school are usually forced to learn the dominant perspective while already possessing a keen understanding of the "margin." However, those who are not outsiders will not likely see other perspectives unless they are taught or happen to come to law school with some experience that has given them some other perspective.[25]

3.   Conclusion

Legal educators who bring different teaching modalities, insights, and experiences to the table create a particularly powerful resource when they work collaboratively to design educational activities. Educating every student to become a competent lawyer imbued with a professional identity that includes responsibility for achieving justice is a best practice. All students must learn that justice concerns are not a side show, but are an essential part of what it means to be a lawyer.

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[23] The books and articles suggested in these footnotes are but starting ideas for inquiry into a rich literature about how to raise these issues and manage classroom conversations.

[24] Zalesne, *Racial Inequality in Contracting*, at 46.

[25] *Id.*

G.   PROBLEM-SOLVING AND CONFLICT RESOLUTION

1.   TEACHING STUDENTS TO BE HEALERS: THE COMPREHENSIVE LAW MOVEMENT
By Susan Daicoff[1]

a.   Introduction[2]

Noted experts on professional legal ethics and law professors argue that lawyers help people, just as doctors do, "if we are doing our jobs properly."[3] However, as evidenced by the crises in public opinion of lawyers and the legal system and in lawyers' wellbeing, lawyers' involvement is not always seen as helpful. Perhaps in response to this perception and also motivated by an intrinsic desire to help people (or, at least, do no harm), lawyers in the last twenty-five years have increasingly sought to develop ways of practicing and adjudicating law that are explicitly healing and positive in effect.

Best Practices[4] did not report on this movement in detail, nor did it call for educating students about the extent of the change in the profession, but it did catalogue the extent to which lawyers were being called on to incorporate a more complete range of skills, to become problem solvers, and to demonstrate professionalism.[5] Components of professionalism included a commitment to justice, honor, and integrity and sensitivity to diversity.[6] This section paints a more vivid picture of some important developments in practice that have heightened these concepts and practices and argues that it is an emerging best practice to educate and prepare students for this changing practice.

Some lawyers and judges began experimenting with ways to enhance the transformative potential of law, litigation, and dispute resolution, around 1990. These efforts have coalesced into an overall movement towards law as a healing profession. Specifically, these methods seek to heal or transform disputes, clients, communities, and society. The "vectors" of this movement include: therapeutic jurisprudence and the problem solving court movement, collaborative law, restorative justice, creative

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[1] The reader for this section was C. Benjie Louis.

[2] Substantial portions of this paper are taken from other works of the author, *e.g.*, Susan Swaim Daicoff, Comprehensive Law Practice: Law as a Healing Profession, Ch. 3 (2011).

[3] Ronald D. Rotunda & John S. Dzienkowski, *Introduction § 1-7 The Public Image of Lawyers*, in Ronald D. Rotunda & John S. Dzienkowski, Legal Ethics — The Lawyer's Deskbook on Professional Responsibility § 1-7 (2013-2014 ed.): "A friend . . . interjected, 'People often want to be doctors so that they can help people.' But lawyers *help people* too. Granted, unlike engineers, we construct no bridges. Unlike doctors, we mend no bones. Unlike architects, we design no buildings. Unlike artists, we paint no portraits. There is little that we do that the human hand can touch. But — if we are doing our jobs properly — we take on other people's burdens, we relieve stress, we pursue justice. We enable mankind to live a more peaceful and just life. We take the veneer of civilization and we make it a little thicker." [Italics added.]

[4] Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map (2007).

[5] *Id.*, text at notes 145-66, 212-17, 483-505.

[6] *Id.*, text at notes 239-60.

problem solving, transformative mediation, and related disciplines such as preventive law, procedural justice, and holistic justice. Many names are used to refer to this movement, such as comprehensive, transformative,[7] relationship-centered,[8] non-adversarial,[9] or integrative law.[10] The movement sometimes integrates mindfulness,[11] spiritual practices,[12] leadership,[13] or community transformation into legal practice.[14]

b.   The "Vectors" of the Comprehensive Law Movement

While distinguishable from each other, all of these vectors share two common goals that differentiate them from traditional approaches to law. First, all explicitly seek to improve parties' wellbeing (or at least not worsen it) as the parties go through a legal matter, case, or problem. However, each vector may define wellbeing differently, for example, as psychological wellbeing, relational health, moral growth, or lack of hostility. Second, they all take into consideration more than legal rights, obligations, and duties in resolving legal matters. They take a "rights plus"[15] approach, factoring in considerations such as relationships, morals, values, needs, goals, psychological dynamics, resources, beliefs, and communities, when assessing how to proceed to resolve the legal problem. While litigation may be the best choice for a client's wellbeing and overall goals, such as in the case of a client for whom litigation is personally empowering, methods other than litigation are often utilized instead.

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[7] JULIE MACFARLANE, THE NEW LAWYER: HOW SETTLEMENT IS TRANSFORMING THE PRACTICE OF LAW (2008) (exploring collaborative law, restorative justice, therapeutic jurisprudence, and problem solving courts).

[8] SUSAN L. BROOKS & ROBERT G. MADDEN, RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE (2010).

[9] MICHAEL KING, ARIE FRIEBERG, BECKY BATAGOL & ROSS HYAMS, NON-ADVERSARIAL JUSTICE (2009).

[10] J. KIM WRIGHT, LAWYERS AS PEACEMAKERS: PRACTICING HOLISTIC, PROBLEM-SOLVING LAW (2010).

[11] Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Douglas Codiga, *ADR Reflections on the Potential Growth of Mindfulness Meditation in the Law*, 7 HARV. NEGOT. L. REV. 109 (2002).

[12] MARJORIE A. SILVER, THE AFFECTIVE ASSISTANCE OF COUNSEL (2007); Marjorie A. Silver, *Lawyering and Its Discontents: Reclaiming Meaning in the Practice of Law*, 19 TOURO L. REV. 773 (2004).

[13] DEBORAH L. RHODE & AMANDA K. PACKEL, LEADERSHIP, LAW, POLICY, AND MANAGEMENT (2011) (exploring leadership skills for lawyers).

[14] Other potentially related efforts involve integrating spirituality, mindfulness, meditation, humanizing approaches, religious values, or secular humanist values with law; affective lawyering; and rebellious lawyering. *See, e.g.*, Forrest S. Mosten, *Lawyer as Peacemaker: Building a Successful Law Practice Without Ever Going to Court*, 43 FAM. L.Q. 489 (2009); Robin Wellford Slocum, *The Dilemma of the Vengeful Client: A Prescriptive Framework for Cooling the Flames of Anger*, 92 MARQ. L. REV. 481 (2009); Raymond H. Brescia, *Beyond Balls and Strikes: Towards a Problem-Solving Ethic in Foreclosure Proceedings*, 59 CASE W. RES. L. REV. 305 (2009); Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L J. 243 (2008); J. Kim Wright & Dolly M. Garlo, *Law as a Healing Profession*, 63 OR. ST. B. BULL. 9 (2003); Carole L. Mostow, *Holistic Lawyers Hope to Transform Conflict Resolution*, 12(4) PROF. LAW. 24 (2000).

[15] This term was coined by collaborative law pioneer and trainer Pauline H. Tesler in a personal conversation with the author around 1997. *See* http://lawtsf.com/attorneys/pauline-tesler/, *archived at* http://perma.cc/4LA8-JLPM.

These approaches can be divided roughly into two groups: those that provide a lens through which legal problems are viewed (e.g., therapeutic, preventive, holistic) and those that provide innovative and nontraditional processes and mechanisms for resolving legal matters (e.g., collaborative law, restorative justice, problem solving courts, transformative mediation, etc.). The "lens" vectors also assist lawyers and judges to practice or adjudicate law in traditional legal arenas and settings with a healing approach. For example, therapeutic jurisprudence scholars have explored how to adopt a therapeutic jurisprudential approach when practicing law in traditional court settings. The "process" vectors can be thought of as "alternative" alternative dispute resolution ("AADR") methods. These vectors seek to resolve legal disputes or lawsuits in forums and by means outside of traditional court or mediation processes, such as drug treatment courts, homeless courts, and restorative justice circles.

Brief descriptions of each vector are provided below:[16]

Therapeutic jurisprudence ("TJ") is a well-known, longstanding, and broadly applied approach to law and judging that views rules of law, legal procedures, and roles of legal actors as social forces that produce therapeutic or anti-therapeutic consequences, whether or not intended, upon those involved. TJ seeks to identify those consequences and then optimize the law's therapeutic consequences and minimize its anti-therapeutic consequences, without trumping legal rights. TJ has been applied in almost every area of law, including mental health law, family law, employment law, health law, elder law, appellate practice, policing, criminal law, criminal sentencing, litigation, and estate planning.[17] It is perhaps most evident in the problem-solving courts.

Procedural justice refers to research finding that, in judicial processes, litigants' satisfaction with and perception of the fairness of the process depend more on (1) being treated with respect and dignity by those in authority, (2) being heard and having an opportunity to speak and participate, and (3) the trustworthiness of the authorities (including whether their reasons for their decisions are explained), than they do on the actual outcome (winning or losing) of the legal matter.[18] These findings have influenced how lawyers and judges resolve legal matters. Specifically, legal personnel can enhance litigants' satisfaction if they provide an opportunity for "voice," treat litigants with respect, solicit input into decisions, and provide explanations for decisions.[19]

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[16] These are difficult concepts to convey in a few sentences, so these brief descriptions are inadequate. The reader is encouraged to consult the original materials published on each vector.

[17] *See* Dennis P. Stolle, David B. Wexler & Bruce J. Winick, Eds., Practicing Therapeutic Jurisprudence: Law as a Helping Profession (2000) (collecting many of the vectors in the same work, extending earlier efforts by Wexler & Winick). The founders of TJ are David B. Wexler, Professor of Law at University of Arizona and University of Puerto Rico, and Bruce Winick, Professor of Law at University of Miami. Its website is http://www.law.arizona.edu/depts/upr-intj, *archived at* http://perma.cc/KE9B-PDR9; it contains a listserve and an extensive bibliography.

[18] *See* Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications for Civil Commitment Hearings*, *in* David B. Wexler & Bruce J. Winick, Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence 3 (1996).

[19] Michael Jones, *Mainstreaming Therapeutic Jurisprudence into the Traditional Courts: Suggestions*

Preventive law is an approach to practicing law that, like preventive medicine, explicitly seeks to intervene in legal matters before disputes arise, to avoid litigation and other legal problems. It advocates proactive intervention and emphasizes the lawyer-client relationship, relationships in general, and planning.[20] For example, client affairs can be regularly audited for legal "soft spots" and careful planning can be done to avoid future legal problems.

The **problem solving court movement** refers to specialized, therapeutic jurisprudential, multidisciplinary, "problem solving" courts focused on resolving the nonlegal issues underlying legal problems, instead of punishing defendants or assigning fault. They utilize the court process to resolve criminal cases in an informal, problem solving, collaborative, interdisciplinary, and rehabilitative way. Examples are drug treatment courts, mental health courts, domestic violence courts, homeless courts, veterans' courts, and unified family courts.[21] These courts emphasize rehabilitation and are usually structured quite differently than traditional courts. Drug treatment courts, for example, report impressive drops in recidivism.

Holistic justice is a grass-roots movement among practicing lawyers which takes a broad approach to law and seeks explicitly to integrate lawyers' and clients' moral values and beliefs into the resolution of legal matters.[22]

Creative problem solving is an approach to lawyering that is explicitly humanistic, interdisciplinary, creative, and preventive. It seeks to prevent legal problems, if possible, and creatively solve those that exist. One creative problem solving center's website explains that legal problems are increasingly more "human" and require a broader approach for their resolution.[23]

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for Judges and Practitioners, 5 PHOENIX L. REV. 753 (2013) (providing actual scripts judges can use in court).

   20 *See, e.g.*, THOMAS D. BARTON, PREVENTIVE LAW & PROBLEM SOLVING (2009) (integrating TJ, CPS, and PL); ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS AND NON ADVERSARIAL LEGAL PROCESS (1997) (the "textbook" for preventive law; now in its second edition). Its founder was the late Louis Brown and it is associated with Professor and Dean Emeritus Edward Dauer at the University of Denver College of Law. California Western School of Law houses the National Center for Preventive Law and it has its own textbook, reporter, and website: http://www.preventivelawyer.org/main/default.asp, *archived at* http://perma.cc/KH3L-S6EE.

   21 *See, e.g.*, Peggy Fulton Hora, et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999) (discussing drug treatment courts) and the excellent collection of materials at the website of the Center for Court Innovation, http://www.courtinnovation.org, *archived at* http://perma.cc/D64W-DSEV, which has been collecting information for 18 years on problem solving courts. *See also* James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2003).

   22 Like holistic medicine, it takes a broader view of legal problems and possible solutions. It was formerly associated with the now-disbanded International Alliance of Holistic Lawyers, whose founder was practicing lawyer William Van Zyverden in Vermont.

   23 Creative problem solving is associated with the McGill Center for Creative Problem Solving at California Western School of Law (website: http://www.cwsl.edu/main/default.asp?nav=creative_problem_solving.asp&body=creative_problem_solving/home.asp, *archived at* http://perma.cc/RBE4-BHVW) which sponsors a number of law school courses on CPS, national and international projects, and conferences. *See, e.g.*, James M. Cooper, *Toward a New Architecture: Creative Problem Solving and the Evolution of Law*, 34(2) CAL. W. L. REV. 297 (1998) (advocating creative problem solving skills in the practice of law, legal education, and other professional fields); Janeen Kerper, *Creative Problem Solving vs. The Case Method: A*

Collaborative law is a nonlitigative, collaborative process employed mainly in family law, where the spouses and their partisan attorneys resolve the issues outside of court in a series of four-way conferences. The attorneys and parties agree to voluntary disclosure of information and the attorneys are contractually forbidden from representing their clients in court should the agreement process break down.[24] Often, neutral (and partisan) financial, psychological, child, and vocational experts are an integral part of the conferencing; they provide perspective that assists the parties in their decision-making processes. Collaborative law has grown rapidly since its inception in 1990.

Restorative justice is an approach to criminal justice and criminal sentencing that views crime as a tear in the social fabric between community, victim, and offender. As a result, these are the three stakeholders who resolve crime, not through traditional criminal courts, but through dialogue, conferencing, and restitution.[25] Apology and forgiveness are often involved, but not required. Models vary from post-sentencing victim-offender mediation to sentencing done via large group community conferencing and from an alternative diversion from criminal court to a stand-alone process independent of the criminal court process.

Transformative mediation views conflict as a destabilizing "crisis in human interaction" rather than a violation of rights or conflict of individual interests. Its approach to mediation seeks to transform the parties and increase their moral growth by having the mediator aim at two goals, having the parties: (1) regain their sense of strength and self-confidence (the "empowerment" shift) and (2) expand their responsiveness to each other (the "recognition" shift), much like empathy or the ability to stand in another's shoes.[26]

Marvelous Adventure in Which Winnie-the-Pooh Meets Mrs. Palsgraf, 34(2) CAL. W. L. REV. 351 (1998) (introducing the emergence of creative problem solving as a legal discipline in response to the need for change in legal education); Thomas D. Barton, *Conceiving the Lawyer as Creative Problem Solver*, 34(2) CAL. W. L. REV. 267 (1998) (discussing a symposium issue to educate creative problem solvers). One issue of the California Western Law Review (volume 34, issue 2) in 1998 was devoted to creative problem solving.

[24] *See, e.g.*, PAULINE H. TESLER, COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION (2001) (introducing the concepts and methods of collaborative law as founded by Minnesota divorce attorney Stuart Webb and advanced by California family law attorney Pauline Tesler); website of the International Academy of Collaborative Professionals at http://www.collaborativepractice.com/, *archived at* http://perma.cc/244B-HCCX (last visited July 7, 2014). *See also* Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004); Susan Daicoff, *Collaborative Law: A New Tool for the Lawyer's Toolkit*, 20 U. FLA. J.L. & PUB. POL'Y 113 (2009).

[25] Restorative justice is one of the most well-known vectors. There are restorative criminal justice programs across the United States and in Canada, the United Kingdom, Australia, and New Zealand. *See* the website for the Center for Restorative Justice and Peacemaking at the University of Minnesota, directed by Professor Mark Umbreit, at http://www.cehd.umn.edu/ssw/rjp/, *archived at* http://perma.cc/9J6Q-E7UC. *See also* Michael S. King, *Critique and Comment: Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice*, 32 MELB. U. L. REV. 1096 (2008).

[26] ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT (1st ed. 1994).

c. Examples of the Comprehensive Law Approaches in Action

Here are a few possible examples of applying some of the comprehensive law approaches:

Example 1. An indigent client owns a house but cannot live there because his roommate has successfully obtained a restraining order against him. The client is now homeless. The traditional legal move might be to begin a formal legal eviction proceeding. However, the comprehensive lawyer might employ listening and empathy and discover that the two roommates were longstanding friends; the client regrets the broken friendship. The lawyer marshals her best creative problem-solving skills to phone the roommate and ask: "What would it take to put this friendship back together, lift the restraining order, and permit my client to move back into his house?" The call is costless and immediate; the eviction takes time and money (or, at least, a motion for a fee waiver). More than legal rights may be restored in this approach.

Example 2. A homeowner's neighbor has sued her for damage done by her dogs to the neighbor's house, alleging a breach of the subdivision's covenants. The neighbor has also filed a criminal complaint against the homeowner for the dogs' behavior and has begun regularly calling the authorities (code enforcement, homeowners' association, etc.) to complain about various actions of the homeowner (outside lights, unmowed grass and weeds in yard, misplacement of garbage cans, etc.). In response, the homeowner successfully obtained an injunction restraining the neighbor from making further excessive civil or criminal complaints to the authorities about the homeowner's actions. Both, therefore, have grievances against each other which have resulted in civil and criminal cases being filed. A traditional legal move might be to file an answer, move to dismiss the civil complaint, and aggressively defend the criminal citations (if any), denying all culpability. The comprehensive lawyer might, upon further exploration, discover that these neighbors have a long-standing feud between them that is being expressed in the courts. This lawyer might suggest a more effective means of resolving this feud than through litigation, which will not solve the underlying problem. As long as these two are neighbors, conflict is likely to continue, unsolved, without a more creative, relational, holistic approach to the "problem." Collaborative law or transformative mediation might be helpful as more effective, concrete processes for resolving their conflict.[27] A restorative justice perspective in the mediation might even afford them an opportunity for reconciliation, if appropriate.

Example 3. A business owner is contemplating filing for personal bankruptcy as well as the bankruptcy of his business. Perhaps his financial ruin was caused in part by the collapse of the economy and in part by poor business/personal budgeting, spending, incurring of debt, and financial planning. Perhaps he has an "Achilles heel" for going into business with friends and family members whose business acumen is poor. The transformative or TJ/preventive bankruptcy lawyer might view this legal representation as an opportunity to provide counseling for the client to change how he handles

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[27] The lawyer may also need excellent "relational lawyering skills" such as empathy, ability to read others, and negotiating skills, in order to solve this problem.

financial and business decisions, so that this situation does not recur in the future.[28]

d.   Conclusion

The comprehensive law approaches (or vectors) facilitate the work of lawyers seeking to positively impact, if not explicitly transform, disputes, clients, communities, and society. These vectors have grown substantially since 1990. Many are now so well known that a failure to advise a client of their availability may constitute malpractice; thus, they should be taught in law school courses. All practicing lawyers should be exposed to the wisdom of procedural justice, therapeutic jurisprudence, creative problem solving, and preventive law, in order to maximize client satisfaction with their legal services and optimize the outcomes of their clients' cases.

These approaches may or may not seem new to many lawyers and judges. However, what may be new is the identification of these approaches as distinct, identifiable, teachable, and learnable competencies that should be explicitly included in law school courses. While initially law school taught these disciplines only in separate elective courses, if at all, it now seems more appropriate to include each vector in the appropriate substantive course.[29] Family law courses should include a module on collaborative law; criminal law courses should include a module on restorative justice and problem solving courts; mediation courses should include a module on transformative mediation; and interviewing and counseling courses, clinics, and externships might include modules on therapeutic jurisprudence, preventive law, creative problem solving, and procedural justice.[29]

As practice evolves and new approaches arise, the law school curriculum should reflect the changes to prepare students both for the state of practice as it currently is, and for their role as future agents of on-going change.

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[28] As in the previous example, this lawyer might need good relational skills, such as careful listening skills, gentle and well-timed confrontive statements, excellent negotiation skills, and a good understanding of what nonlegal educational and coaching resources might be most helpful for this client.

[29] Arizona Summit Law School, Florida Coastal School of Law, the University of Miami, the University of Puerto Rico, and the University of Arizona were among the first to offer courses on the vectors of the movement.

[29] See Chapter 6, Section G, Subsection 2, *Teaching Students to Be Problem-Solvers and Dispute-Resolvers*, below.

2.   Teaching Students to be Problem-Solvers and Dispute-Resolvers

a.   Introduction

No matter what area of law students might end up practicing, dispute resolution and practical problem solving ("ADR" and PPS[1]) will play a central role. Litigators resolve far more cases through voluntary processes than through trial. Transactional lawyers negotiate the terms of a deal. Government lawyers often are called to resolve interagency disputes and claims against the government. Defense attorneys and prosecutors routinely negotiate plea arrangements. In-house counsel work both internally and externally to resolve conflicts on behalf of their company.

Reports on what lawyers should know, including the MACCRATE REPORT[2] and EDUCATING LAWYERS,[3] regularly list problem-solving, negotiation, and dispute resolution as skills that lawyers should have. BEST PRACTICES FOR LEGAL EDUCATION[4] called for law schools to educate students in problem-solving and in practical wisdom, in order to solve clients' problems effectively and responsibly.[5]

Law schools can, and many do, educate future lawyers in the knowledge, skills, and values inherent in the problem-solving approach in two ways. The first is to develop a specific and distinct Alternative Dispute Resolution curriculum. It is a best practice for every law school to make such courses available to every law student. The second is to incorporate the problem-solving orientation and skills throughout the curriculum. This is an emerging best practice. Both are addressed below.

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[1] Law schools vary in what they call dispute resolution classes. Some still refer to "Alternative Dispute Resolution" since these processes were considered alternatives to litigation. Other schools have moved to calling this field "Appropriate Dispute Resolution" highlighting the belief that effective lawyering includes the ability to choose among processes to best fit the client and the context. Still other law schools have dropped the precursor altogether and refer to Dispute Resolution. There is a movement in Canada to use the term "Consensual Dispute Resolution" for some of the processes. While this section uses ADR, "Dispute Resolution" on its own may prove to be the most modern of the choices.

[2] *See* LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK IFORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

[3] *See* WILLIAM M. SULLIVAN, ANN COLBY, JUDITH WELCH WEGNER, LLOYD BOND & LEE S. SHULMAN, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

[4] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

[5] *Id.*, text at notes 145-66 and 483-505.

b. TEACHING ALTERNATIVE DISPUTE RESOLUTION
By Andrea Kupfer Schneider[1]

i.   Introduction to Teaching ADR

Law schools have responded to the call for increased education in problem-solving, negotiation, and dispute resolution with a flurry of alternative dispute resolution classes, including both broader survey classes and more intensive upper-level skills classes in one or more of the primary dispute resolution skills. This section outlines three key aspects of teaching dispute resolution. First, the section provides a current overview of how law schools are teaching the subject either in stand-alone or specific skills classes. Second, it considers what law schools *should* be teaching as part of the dispute resolution curriculum. This includes a more careful look at the primary processes included in dispute resolution, what should be covered under each process, and how to balance the mix between awareness, skills-building, and theories of dispute resolution. Finally, the section ends with advice on best practices for assessment depending on the size, goals, and scope of the class.

ii.   Current Status of ADR in the Law School CurriculumIntroduction to Teaching ADR

Since the inception of dispute resolution as a field (usually dated back to the 1976 Pound Conference hosted by Chief Justice Warren Burger),[2] the number of courses has grown significantly with slightly more than half of all law schools offering at least a basic course in ADR (110 out of 203).[3] Even more schools offer a negotiation course (121) and impressive numbers also offer mediation (59) and arbitration courses (42). Similarly, 42 schools now offer some type of ADR certificate program and 21 schools require a course in ADR. For a subject that is still not required on the bar, these numbers demonstrate a significant commitment to the subject and an understanding that knowledge and awareness of ADR is a crucial part of a lawyer's education.[4] These

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[1] Readers for this section were Jill I. Gross and Michael Moffitt.

[2] The conference was officially called the National Conference on the Causes of Public Dissatisfaction with the Administration of Justice held in April 1976 in St. Paul, Minnesota. (Roscoe Pound had, in 1906, given a talk on the causes of popular dissatisfaction with the administration of justice and this later conference adopted that theme.) At the 1976 conference, Professor Frank Sander presented his paper, *The Pound Conference: Perspectives on Justice in the Future*, which introduced the concept of the multi-door courthouse. For more on this "Big Bang" of ADR, *see, e.g.*, Michael Moffitt, *Before the Big Bang: The Making of an ADR Pioneer*, 22 Neg. J. 437 (2006); Carrie Menkel-Meadow, *Mothers and Fathers of Invention: Intellectual Founders of ADR*, 16 Ohio St. J. on Disp. Resol. 1, 15-21 (2000); Carrie Menkel-Meadow et al., Dispute Resolution: Beyond the Adversarial Model 17 (2d ed. 2011) [hereinafter Menkel-Meadow, et al., Beyond the Adversarial Model].

[3] *See* ABA Directory at the University of Oregon Law School, Appropriate Dispute Resolution Center at http://adr.uoregon.edu/aba/search/?abamode=allclasses, *archived at* http://perma.cc/S7QX-Q35P, for a list of all schools that provide a course or program in dispute resolution. For an additional assessment of the current status and the future, see Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 Ohio St. J. on Disp. Resol. 25 (2010).

[4] *See* Julie Macfarlane & John Manwaring, *Reconciling Professional Legal Education with the Evolving*

trends are likely to continue given the increased focus on providing useful skills for law students.[5]

iii.   Goals of a Course in Alternative Dispute Resolution

The goals and learning outcomes of an ADR course can vary and are often determined by the number of students in the course, the rest of the curriculum in ADR, and the expertise and interest of the teacher. With smaller numbers of students, it is possible to engage in role-playing and other skills-building activities. If the ADR course is a survey or gateway course to upper-level workshops, skills-building is less necessary. (And if the class is too large, it might not be feasible.) Pedagogy is separately addressed below.

First, many courses focus on the importance of dispute resolution processes in the practice of the law. After the first year of law school in which courses generally use appellate cases to teach the law, ADR courses offer the opportunity to focus on a different aspect of legal practice. Few civil cases reach trial. Instead, they are completed through negotiation, mediation, or dismissed on motions.[6] Similarly, in criminal practice, the vast majority of cases are plea bargained.[7] One of the first goals of an ADR course is to make sure that students are aware of how cases are actually handled in the modern age. The importance of this awareness no doubt varies by school. Some civil procedure teachers are quite comprehensive in their coverage of ADR and do explain its role in the life of a case.[8] Others are more traditional and focus primarily on what happens when a case goes to trial only, leaving settlement to other courses.

Another purpose of the ADR course can be to introduce students to the view that lawyers are problem solvers — rather than just litigators — and teachers with that goal will spend time at the beginning of the course teaching about the theories of problem-solving and counseling clients. This focus should include the concept of client-centered counseling, interviewing clients, and ascertaining a client's interests or concerns with the client's particular problem or opportunity. Again, depending on the structure of the curriculum, the time devoted and depth needed for these introductory

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(Trial-less) Reality of Legal Practice, 2006 J. Disp. Resol. 253 (2006).

[5] *See, e.g.*, *Legal Education Reform*, N.Y. Times, Nov. 25, 2011, at 18.

[6] *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 Calif. L. Rev. 577, 579 (1997); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339 (1994); *see generally* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. Empirical Legal Stud. 111 (2009) (exploring the methods of calculating the settlement rate of cases and the percentage of cases that settle in different areas of the law).

[7] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics (Kathleen Maguire & Ann L. Pastore eds., 2002) (stating about 95 percent of all convictions in the US are secured by a guilty plea). Note that this number also includes "implicit" guilty pleas which are not explicitly negotiated in advance. *See also* Caroline Wolf Harlow, Bureau of Justice Statistics, Defense Counsel in Criminal Cases (2000).

[8] *See, e.g.*, Stephen N. Subrin et al., *Civil Procedure Doctrine, Practice, and Context* 651-58 (4th ed. 2012).

topics will vary by law school and coverage provided in other law school courses.

Finally, most ADR survey courses focus on introducing the three main processes under ADR — negotiation, mediation and arbitration.[9] Time allocation will likely vary among the processes, but in a typical 14-week three-credit course,[10] one would expect to allocate about four weeks to each process. With this assumption, each process could be introduced, primary theories and concepts covered, and perhaps a small amount of skill-building can be included. Other ADR courses tend to focus on one of the three main processes, treating each in greater depth, and with greater opportunity for practice.

iv.　　　　Scope and Coverage of a Dispute Resolution Course

Under the topic of negotiation, the majority of courses will cover at least six primary topics: (1) the idea of personal style or strategy or personality in a negotiation (including the concepts of competitive or adversarial vs. interest-based or principled or problem-solving); (2) the use of communication skills — both listening and talking — in negotiation; (3) the concept of integrative vs. distributive negotiations; (4) the concept of a "bargaining zone" between the parties as well as the concepts of BATNA[11] and reservation prices; (5) the use of brainstorming and option creation in a negotiation; and (6) the importance of preparation to negotiation.[12] ADR courses should also focus on the role of ethics and misrepresentation in negotiation, particularly if the likelihood is that most students will not be taking an upper-level course in negotiation. This is crucial given that studies have shown that many lawyers still fail to understand what behavior constitutes fraudulent conduct in settlement.[13] With additional time or depth, the ADR course often introduces common psychological obstacles to effective decision-making.[14]

For mediation, an ADR course should be sure to cover three main aspects — the process of mediation, the particular role of the mediator, and how the role of the

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[9] *See, e.g.*, MENKEL-MEADOW, ET AL., BEYOND THE ADVERSARIAL MODEL; LEONARD L. RISKIN ET AL., DISPUTE RESOLUTION AND LAWYERS (4th ed. 2009) [hereinafter DISPUTE RESOLUTION AND LAWYERS]; JAY FOLBERG ET AL., RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW (2d ed. 2010) [hereinafter RESOLVING DISPUTES]; STEPHEN GOLDBERG ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES (5th ed. 2007) [hereinafter NEGOTIATION, MEDIATION, AND OTHER PROCESSES]. Each of these books has typical coverage of the three processes.

[10] Some schools only offer two-credit courses in DR and, understandably, each of these processes must be condensed even further.

[11] ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 102 (3d ed. 2011) (BATNA stands for "Best Alternative to a Negotiated Agreement").

[12] Christopher Honeyman & Andrea Kupfer Schneider, *Catching Up with the Major-General: The Need for A "Canon of Negotiation,"* 87 MARQ. L. REV. 637, 643-44 (2004).

[13] Art Hinshaw & Jess K. Alberts, *Doing the Right Thing: An Empirical Study of Attorney Negotiation Ethics*, 16 HARV. NEGOT. L. REV. 95, 148-49 (2011); Art Hinshaw, Peter Reilly & Andrea Kupfer Schneider, *Attorneys and Negotiation Ethics: A Material Misunderstanding?* 29 NEG. J. 265 (2013).

[14] Not all, but many textbooks cover these barriers. *See, e.g.*, MENKEL-MEADOW, ET AL., BEYOND THE ADVERSARIAL MODEL at 636-640; NEGOTIATION, MEDIATION, AND OTHER PROCESSES at 342-49; DISPUTE RESOLUTION AND LAWYERS at 22-23.

lawyer differs in the mediation process from litigation. Under the process of mediation, courses should discuss the law of mediation, confidentiality, and the Uniform Mediation Act. For the role of the mediator, many courses use the "Riskin grid"[15] to explain the variety of approaches that a mediator can take and some will also introduce yet other styles of mediation.[16] The primary characteristics of mediation — neutrality, self-determination, informed consent, and confidentiality — are also covered.[17] An ADR course should also highlight, for students, that their role as a lawyer in mediation is different than their role in a courtroom and at least build awareness that the expectations of behavior as well as the client needs are different in this process.[18]

Finally, for arbitration,[19] ADR courses typically spend the most time on the extensive law of arbitration starting with the Federal Arbitration Act up through the most recent Supreme Court cases.[20] Along the way, discussion of arbitration often includes the changing interpretation of the Supreme Court from one suspicious of mandatory arbitration to one that highly favors it. And, whatever the teacher might think about mandatory employment or consumer arbitration, this segment should discuss the extensive adoption of arbitration in a large variety of contexts including sports, labor, commercial, and international law.[21] With time, an ADR course could also cover the role of the arbitrator and lawyer in the process, and offer opportunities for practice.[22]

Depending on time allocation, the ADR course might discuss hybrid processes like mediation-arbitration ("med-arb")[23] or summary jury trials.[24] Other ADR courses

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[15] Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 8 (1996). *See also* Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 Notre Dame L. Rev. 1 (2003).

[16] Menkel-Meadow, et al., Beyond the Adversarial Model at 258-264; Dispute Resolution and Lawyers at 311-16; Resolving Disputes at 274-78; *see also* Edward Brunet et al., Alternative Dispute Resolution: The Advocate's Perspective Cases and Materials 211 (4th ed. 2011) [hereinafter The Advocate's Perspective]; Alan Scott Rau et al., Process of Dispute Resolution: The Role of Lawyers 386-94 (4th ed. 2006) [hereinafter The Role of Lawyers].

[17] Michael Moffitt & Andrea Kupfer Schneider, Examples & Explanations: Dispute Resolution 91-96, 117-28 (3d ed. 2014).

[18] For example, "In the court room, lawyers are only focused on their parties' needs; however, in mediation, the mediator must be sensitive to the emotional needs of all parties." Menkel-Meadow, et al., Beyond the Adversarial Model at 297. "Lawyers in the court room are focused on advocating for their client and winning, while in mediation, it is more important to focus on problem solving." The Advocate's Perspective at 269.

[19] While not all courses cover arbitration last, that is the typical order in the most popular DR textbooks.

[20] Menkel-Meadow, et al., Beyond the Adversarial Model at 413-440; The Advocate's Perspective at 449-451, 546-56; Resolving Disputes at 611-87; Negotiation, Mediation, and Other Processes 215-95 (5th ed. 2007); Dispute Resolution and Lawyers at 563-79; The Role of Lawyers at 660-75.

[21] Menkel-Meadow, et al., Beyond the Adversarial Model at 387-412; The Advocate's Perspective at 435-49; Resolving Disputes at 558; Negotiation, Mediation, and Other Processes at 532; Dispute Resolution and Lawyers at 679-708; The Role of Lawyers at 621-58.

[22] Many teachers choose not to spend much time on arbitration skills because the roles are similar to litigation.

[23] Med-arb is a hybrid process in which the same neutral or neutrals conducts both the mediation and

might focus on multiparty disputes or dispute system design or international disputes once the core three processes have been discussed.**25**

v.   **Pedagogy**

As previewed above, the pedagogy of an ADR course will vary depending on goals. A survey course can be taught much like any other law school course with all the variations that teachers can provide. This includes traditional Socratic Method, problem method, regular use of small groups, team work, videos, or, likely, a mix of all of these ways of engaging students. The key question in figuring out the teaching method for a course in ADR processes is whether the students will spend any time actually engaging in these processes. With large numbers (some ADR survey courses can run to 75-80 students), multiple role-plays in which students get roles, prepare, carry out a role-play, and receive feedback from the instructor can be logistically challenging. With a larger class, it is less likely that students will gain much skills-building experience.

Is it worth the time and energy to engage in role-plays or other experiential education? Even in bigger classes where extensive teacher feedback on skills is unlikely to happen, engaging in these exercises can be useful for two reasons. First, role-playing in a process stimulates a different kind of learning than reading about the process.**26** Even when skill-building is not possible over the course of the semester, experiential education adds more nuance to the students' understanding of the processes.**27** This builds awareness of the motivations of clients and lawyers and how the process operates, and helps put the theories they have been reading about into context.**28** Second, experiencing the process and starting to see how lawyers act in

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ensuing arbitration. If the parties do not reach settlement in the mediation, the same neutral will make an arbitral decision. Parties could also choose to reverse the process, creating arb-med.

24 MENKEL-MEADOW, ET AL., BEYOND THE ADVERSARIAL MODEL at 526-29, 564-68; THE ADVOCATE'S PERSPECTIVE at 679-81, 686; RESOLVING DISPUTES at 737-43; NEGOTIATION, MEDIATION, AND OTHER PROCESSES at 307-09, 317-18; DISPUTE RESOLUTION AND LAWYERS at 776-79, 827-32; THE ROLE OF LAWYERS at 549-55, 941-51.

25 MENKEL-MEADOW, ET AL., BEYOND THE ADVERSARIAL MODEL at 582-620; RESOLVING DISPUTES at 747-68; NEGOTIATION, MEDIATION, AND OTHER PROCESSES at 321-36; DISPUTE RESOLUTION AND LAWYERS at 886-923.

26 *See* Bobbi McAdoo & Melissa Manwaring, *Teaching for Implementation: Designing Negotiation Curricula to Maximize Long-Term Learning*, 25 NEG. J. 195 (2009). *But see* Nadja Alexander & Michelle Le Baron, *Death of the Role-Play*, *in* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 179 (Christopher Honeyman et al. eds., 2009).

27 *See* BEST PRACTICES, text at notes 170-74 (explaining the importance of experiential learning in law school); *see* Andrea K. Schneider & Julie Macfarlane, *Having Students Take Responsibility for the Process of Learning*, 20 CONFLICT RESOL. Q. 455 (2003) (encouraging the use of the classroom itself as experiential learning).

28 *See* Rethinking Negotiation Teaching Series, available at http://law.hamline.edu/dri/projects/press. html, *archived at* http://perma.cc/2BGE-5XD9; *see also* Melissa Nelken, Bobbi McAdoo & Melissa Manwaring, *Negotiating Learning Environments*, *in* RETHINKING NEGOTIATION TEACHING: INNOVATIONS FOR CONTEXT AND CULTURE 199 (Christopher Honeyman et al. eds., 2009); Noam Ebner & Kimberlee K. Kovach, *Simulation 2.0: The Resurrection*, *in* VENTURING BEYOND THE CLASSROOM: VOLUME 2 IN RETHINKING NEGOTIATION TEACHING SERIES 245 (Christopher Honeyman et al. eds., 2010) [hereinafter VENTURING BEYOND THE CLASSROOM]; Daniel Druckman & Noam Ebner, *Enhancing Concept Learning: The Simulation Design Experience*, *in* VENTURING BEYOND THE CLASSROOM at 269; David Matz & Noam Ebner, *Using Role-Play in*

that process also flags the skills that will be necessary to engage in it. After taking the introductory ADR course, many students will then take upper-level skills courses, clinics, and externships that can deepen the focus on their skills. Of course, in smaller ADR classes, experiential education is easier to implement and, as a side note, more enjoyable for the students.

Assessment in ADR courses varies with the pedagogy. If the teacher has employed numerous experiential education opportunities, journals and reflective papers link well with this pedagogy.[29] More traditional classroom pedagogy, on the other hand, would result in more traditional assessment including quizzes, essay final exams, or final research papers.

vi.   Conclusion

Exposure to dispute resolution practice and skills is necessary for every law student. Many schools already recognize this necessity and have responded with a plethora of courses. Yet others lag, leaving a significant gap in their students' understandings of the practice of law. Without recognizing the role of dispute resolution in the modern court system — both civil and criminal — students can leave law school not knowing how cases are actually handled, or how to counsel clients about their choices. Without exposure to the skills of negotiation, problem-solving, listening, and communication, students miss out on skills long-identified as crucial by studies and practitioners. Best practices require us to ensure that students both understand and are equipped to perform in all aspects of today's legal practice.

Online Negotiation Teaching, VENTURING BEYOND THE CLASSROOM at 293; Nadja Alexander & Michelle LeBaron, *Embodied Negotiation: Resurrecting Roleplay-Based Curricula through Dance*, *in* EDUCATING NEGOTIATORS FOR A CONNECTED WORLD: VOLUME 4 IN RETHINKING NEGOTIATION TEACHING SERIES 22 (Christopher Honeyman et al. eds., 2013) [hereinafter HONEYMAN, EDUCATING NEGOTIATORS].

[29] For more ideas, see Andrea K. Schneider & Julie Macfarlane, *Having Students Take Responsibility for the Process of Learning*, 20 CONFLICT RES. Q. 455 (2003); Noam Ebner & Yael Efron, *Pop Quiz: Do You Use This Evaluation Method?*, *in* ASSESSING OUR STUDENTS, ASSESSING OURSELVES: VOLUME 3 IN RETHINKING NEGOTIATION TEACHING SERIES 43 (Christopher Honeyman et al. eds., 2012); Bobbi McAdoo, *Reflective Journal Assignments in Teaching Negotiation*, *in* ASSESSING OUR STUDENTS, ASSESSING OURSELVES: VOLUME 3, RETHINKING NEGOTIATION TEACHING SERIES 65 (Christopher Honeyman et al. eds., 2012); Kenneth H. Fox & Sharon Press, *Venturing Home: Implementing Lessons from the Rethinking Negotiation Project*, *in* EDUCATING at 59; Christopher Honeyman et al., *A Game of Negotiation: The "Deliberation Engine,"* *in* HONEYMAN, EDUCATING NEGOTIATORS at 587; BEST PRACTICES, text at notes 571-604 (focusing on best practices in simulation-based courses).

c.   INTEGRATING ALTERNATIVE DISPUTE RESOLUTION AND PROBLEM-SOLVING ACROSS THE CURRICULUM
By Jill Gross & John Lande[1]

i.   Introduction to Practical Problem-Solving

BEST PRACTICES FOR LEGAL EDUCATION suggests that faculty should "use context-based education throughout the program of instruction" to teach "theory, doctrine and analytical skills," "how to produce law-related documents," and "how to resolve human problems and cultivate practical wisdom."[2] Most significantly, the book posits that context-based learning will help students "develop competence, which is the ability to resolve legal problems effectively and responsibly." Yet, as BEST PRACTICES notes, even if we agree that law schools should teach students problem-solving skills, "the challenge is to figure out how to accomplish this."[3] As described below, faculty may be reluctant to incorporate problem-solving in their teaching for many reasons. Problem-solving is already a major emphasis in clinical courses and in many skills simulation courses, particularly in the dispute resolution track.

Improving legal education to assure law students are more prepared for the profession as it exists today means facing the pervasive shift in law practice to a more problem-solving approach and including a problem-solving orientation across the curriculum. For schools that are considering improvements in their educational programs, conversations about the importance of problem-solving are necessarily part of this dialogue.

This part details how law schools can enhance the teaching of problem-solving to law students by integrating the teaching of problem-solving into existing non-clinical courses. Some techniques require little or no additional time of faculty or students. The chapter also identifies a wide range of methods for faculty who might be interested in increasing their problem-solving instruction, but are hesitant to do so for various reasons.

ii.   What Is Practical Problem-Solving?

Problem-solving involves the range of skills that lawyers use regularly in practice in addition to legal research, writing, and analysis. These skills include fact-gathering and research, client interviewing and counseling, claim assessment, communication, collaboration, negotiation, representation in dispute resolution processes, drafting legal documents, dealing with cultural differences, and professionalism. One group of legal educators has grouped these skills under the name of practical problem-solving ("PPS") and is gathering and developing teaching materials.[4] These educators believe

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[1] The reader for this section was Andrea Kupfer Schneider.

[2] BEST PRACTICES, Chapter 4, text at notes 299-536.

[3] *Id.*, text at notes 463-464.

[4] The Legal Education, ADR, and Problem Solving (LEAPS) Task Force of the ABA Section on Dispute Resolution aims to increase instruction of "practical problem-solving" skills (PPS) in a wide range of

it is important for students to be exposed to PPS in many courses to emphasize the importance of these skills and to teach students more about what lawyers actually do in practice. They raise concerns about the predominant "hidden curriculum," which teaches that lawyers' primary role is as a courtroom advocate in appellate litigation despite this being a relatively small part of what most lawyers do. Teaching students PPS in other contexts provides a more realistic and complete portrait of lawyers' work.

iii.   Teaching Practical Problem-Solving Skills

Many teachers already incorporate some PPS elements in their courses in ways that require virtually no additional time or preparation. This can be quite subtle, such as asking students to discuss cases in a casebook from the perspective of a lawyer advising a client or negotiating with the other side. To include more PPS instruction, faculty can use the following methods:[5]

- **Expanded Case Analysis.** Expand the use of traditionally-assigned appellate cases to include discussion of skills such as interviewing or counseling clients or negotiating with other lawyers. This may help students understand that lawyers' roles include advising clients and structuring transactions, as well as being advocates in court. It may also lead students to take a prospective view of the facts in contemplating client decisions, not only the retrospective perspective of the facts in appellate litigation, where the facts are essentially fixed by the findings at trial. For example, teachers can ask students to consider why the parties chose to litigate the case, what other procedures they might have used, and why they might prefer the various procedures. They can also ask students how lawyers might have advised clients to avoid the problems that ended up being litigated in the cases in the casebook.

- **Problem-Based Learning.** Use problem-based learning, where teachers give students hypothetical facts and ask them to apply the law to the facts. This is similar to what teachers ask students to do on exams. In class discussion of particular doctrinal issues, teachers can use prior exam questions, hypothetical facts in teaching manuals, or "notes" following the principal cases in casebooks.

- **Simulations.** Organize and conduct simulations based on fictional or real scenarios. Students (and possibly some faculty or staff) might play lawyers, clients, mediators, judges, arbitrators, or other roles. Exercises may be done during or outside of class (or both). Students learn from preparing, executing, and reflecting on the simulation experience. Teachers can prompt

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courses, including doctrinal, litigation, transactional, and skills courses. The LEAPS website explains why increased teaching of PPS benefits students, suggests teaching ideas for PPS teaching, and provides resources for faculty to increase teaching of PPS. *See* http://leaps.uoregon.edu/, *archived at* http://perma.cc/9DAV-WU6Y.

[5] To assist those who want to incorporate PPS into their courses and adopt some of these teaching methods, but do not know how to do it or cannot take the time to develop exercises, LEAPS convened small panels of highly-respected law teachers to provide consultations, advice, and materials for incorporating PPS into their courses. The LEAPS website lists panels of consultants for civil procedure, clinics, contracts, criminal law, family law, labor and employment law, professional responsibility, property, and torts.

reflections in various ways such as small group debriefings, class discussion, and written papers.

- **Videos and Media.** Show portrayals of lawyers' work in videos, film excerpts, YouTube clips, and other media. Teachers can do this in class and/or require students to view these materials outside of class. Visual learners will particularly benefit from these teaching materials.

- **Guest Speakers.** Invite guest speakers to address the topic of the class as seen through the eyes of experienced practitioners. This may be particularly useful for teachers with limited or no practice experience in the course subject.

- **Interaction between Students in Different Courses.** Foster interactions between students and teachers enrolled in different courses. For example, students in a pretrial litigation course could play lawyers in a mediation course when the students in the mediation course play the mediators.

- **Have Students Draft and Use Legal Documents.** Incorporate an assignment — either in or outside of class — where the students draft legal documents involving the doctrinal topic. Such documents might include briefs, discovery, office memos, letters to clients, internal preparation memos, contracts, and settlements.

- **Background Stories.** Provide rich accounts of significant cases using information from public records, books, or journalistic accounts. This could include information on the clients and lawyers, settlement attempts between the parties before the final outcome, or external events affecting the case. This helps the law "come to life" so that students associate the legal principles with their impact on actual people and entities.

- **Interactive Student Exercises.** Assign students to engage in activities such as group projects, breakout group discussions, online student discussion groups or labs, and even short exercises such as "quick-writes" of answers to questions and "pair-and-share" discussions. Research shows that students learn more effectively when they are engaged in an interactive exercise in class.

iv.   Overcoming Barriers

Some teachers might have doubts about the benefits or feasibility of integrating PPS into their courses or the curriculum generally. Teachers regularly struggle to overcome difficult barriers, including competing time commitments, which prevent them from developing or implementing new teaching techniques. In addition, the changes in students' learning may not be readily apparent, although they are potentially significant. Below are some commonly identified challenges to teaching problem-solving and suggestions on how to overcome those challenges:

- Perceived Separation Between Doctrine and Problem-Solving Skills Education.

  Given that outside constituencies, including the ABA, are calling for new graduates to have more familiarity with practice-based and problem-solving

orientations of law, law school teachers need to accept that some change is both inevitable and desirable. In fact, they can readily make adjustments without overhauling an entire course or curriculum. Teachers can incorporate PPS as "seeds" in courses, *e.g.*, discussing cases from the lawyer's perspective when interviewing or counseling clients or negotiating with opposing counsel.[6] Increasingly, casebooks include some PPS exercises at strategic points to underscore the doctrinal learning in a manner that is both easy to master and powerful.[7]

- Insecurity Due to Lack of Time and/or Practice Experience.

Teachers can use available texts that have suitable and current problems. They can also collaborate with practitioners or colleagues with practice experience, as guest speakers or in other ways. They can also seek advice from colleagues at other schools who teach the same subject.[8] Moreover, deans can support the development of problem-solving teaching materials in the same manner that they provide support for scholarship, and the teaching experiment can be a fruitful subject for scholarship.

- Coverage Concerns.

Teachers can assign students to do exercises outside of class as homework, or experiment with some flipping of the classroom.[9] Such developments are worth experimentation because some students learn both breadth and depth of doctrine better by applying the concepts practically in concrete problems.

- Concerns about Detracting from Bar Examination Coursework.

Most bar exams now require students to take the Multistate Performance Test, which covers PPS skills.[10] Some students learn legal doctrine better by practically applying the concepts in concrete problems.[11]

- Concerns about Student Engagement.

Teachers should explain to students why they are including exercises or other activities. They can use small-group activity to avoid student passivity; many students think these exercises are more engaging than other teaching

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[6] Michael Moffitt, *Islands, Vitamins, Salt, Germs: Four Visions of the Future of ADR in Law Schools (and a Data-Driven Snapshot of the Field Today)*, 25 Ohio St. J. on Disp. Resol. 26 (2010); John Lande & Jean R. Sternlight, *The Potential Contribution of ADR to an Integrated Curriculum: Preparing Law Students for Real World Lawyering*, 25 Ohio St. J. on Disp. Resol. 247 (2010).

[7] For a list of textbooks that incorporate PPS and professional skills development, see http://leaps. uoregon.edu/content/legal-texts-incorporate-practical-problem-solving-and-professional-skills-development, *archived at* http://perma.cc/78UW-AVHK.

[8] Panels of consultants for many law school subjects are listed on the LEAPS website. *See* http://leaps. uoregon.edu/content/consultants-and-resources-subject-area, *archived at* http://perma.cc/J7G7-KBTR.

[9] *See* Chapter 5, Section C, *Use of Technology in Teaching*, above.

[10] *See* National Conference of Bar Examiners, http://www.ncbex.org/about-ncbe-exams/mpt/mpt-faqs/, *archived at* https://perma.cc/3FVK-AMLT?type=image (33 states and District of Columbia require students to take the MPT).

[11] LEAPS consultants and others can give advice about practical methods of assessing students' performance.

modalities. Teachers can distribute assessment rubrics in advance to create confidence in assessment and student understanding of expectations.

- Logistical Concerns.

  As noted, faculty can use materials from teachers' manuals for specially created problem-oriented texts. They can use technology to create efficiencies in teaching, and certainly should limit the amount of PPS instruction to what is manageable. A variety of assessment techniques are available, including self-assessment and peer assessment. Some activities can be ungraded and faculty can provide group feedback instead of individual feedback.

- Concerns about Small Group Work and Accountability.

  Faculty can set clear and realistic expectations by establishing straightforward ground rules and by using grading rubrics. Students can report on group work, with advance notice, and with group assessment part of overall course assessment expectations. Faculty can instill a classroom culture that values group work by explaining learning benefits of group work in advance, and being strategic about group composition. Educating students about how lawyers work in groups in practice helps students embrace working effectively in groups. For instance, groups work more effectively if each individual has a specific task, because that heightens the sense of responsibility.

- Assessment Challenges.

  Teachers have to become comfortable using assessments other than standard exam structures for this type of teaching. Teachers can use grading rubrics to explain learning goals in advance. Assessment options include self-evaluation, peer evaluation, using teaching assistants, online surveys or "clickers," group reports or debriefs of exercises, adjuncts helping assess performance, e-portfolios, pass/fail exercises, journals, and scored exercises.

- Questions about Including Intercultural Effectiveness.

  A wealth of experience is available to provide guidance for teaching cultural competence in problem-solving.[12] Teachers can ask students to discuss their own culture and values as a way to be more aware of others' cultures, assign videos or readings to expand students' awareness of cultural issues, or explore the "back stories" of cases to address intercultural issues in doctrinal courses.

v.   Conclusion

In today's world, most law faculty recognize the need to increase instruction in PPS. Teaching students PPS will benefit them, their future clients, and society generally. Some faculty members have understandable concerns about changing their teaching methods to focus more on PPS. This chapter suggests many ways that faculty can realistically do so, on their own or with assistance from colleagues, and it

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[12] *See* Chapter 6, Section E, *Intercultural Effectiveness*, above.

is an emerging best practice to integrate PPS throughout the curriculum.

H.   INTERPROFESSIONAL EDUCATION
By Lisa Radtke Bliss, Sylvia B. Caley, Patty Roberts, Emily F. Suski & Robert Pettignano, M.D., M.B.A.[1]

1.   Introduction

As legal educators consider how to improve the outcomes of legal education, maximizing the knowledge, skills, and values taught during the law school experience, consideration should be given to increasing interprofessional learning opportunities in the curricula. As Best Practices for Legal Education[2] suggested, the creative thinking necessary for effective problem-solving includes an understanding of interprofessional[3] dimensions of practice, but interprofessional opportunities are still the exception rather than the norm in legal education.[4] Interprofessional legal education intentionally asks law students to blend the knowledge, skills, and values of two or more professions in order to address complex legal problems. Placing students in an interprofessional context allows them the opportunity to consider problem solving outside of the framework imposed by their own professional lens and frees them to achieve more holistic, comprehensive solutions to legal problems. Law school curricula should include opportunities to expose law students to interprofessional collaborations in order to aid in developing the skills students will need in order to address the increasingly complex problems they will face in practice. This section identifies the benefits of interprofessional education in law schools and urges schools to implement interprofessional education opportunities.

2.   Interprofessional Legal Education

Interprofessional legal education can be incorporated into both doctrinal and clinical courses and can be as modest as utilizing another profession to inform the legal topic being explored, and as expansive as students of two or more professions intentionally learning together by exploring problems through various professional lenses. This process involves a mutuality of effort in which each member of an interprofessional team works collaboratively and synergistically to figure out the nature of a problem, its causes, and its potential solutions. This blending of effort produces both a "more comprehensive understanding of a particular problem"[5] and a solution that could not have been achieved through the work of a single disciplinary

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[1] Readers for this section were Lynn Barenberg, Lucy Johnston-Walsh, and Virgil Wiebe.

[2] Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map (2007) [hereinafter Best Practices].

[3] The authors have elected to use the term "interprofessional" in this chapter; while "interdisciplinary" historically has been used in the literature, current literature and exploration of this topic instead utilizes the term interprofessional to describe the teaching and learning across disciplines, particularly at the graduate level. The terms could be used interchangeably to discuss the best practice of incorporating the views of multiple disciplines in legal education.

[4] Best Practices, text at notes 162-163.

[5] Allen F. Repko, *Assessing Interdisciplinary Learning Outcomes*, 12 Acad. Exchange Q. 171 (2008) [hereinafter Repko, *Assessing*].

analysis.[6] This comprehensive problem-solving approach to the complexity of client problems is one often utilized in the practice of law.[7]

Interprofessional courses and programs have been noted by scholars as valuable to "the advancement of cognitive or higher order thinking skills such as problem-solving, critical thinking, the ability to engage multiple perspectives, tolerance for ambiguity, sensitivity to ethical issues, creative or independent thinking, listening skills, teamwork, self-reflection and humility."[8] Relying on other professions' "methodology, knowledge, skills, attitudes, and values provide[s] the context for analyzing the problem."[9] It is not enough to simply bring together a number of professionals from different disciplines to approach a problem, and expect that they will engage in teamwork that produces results. Instead, efforts should be made to prevent future lawyers from making "solitary and amateurish forays into fields that are not [their] area of expertise" and interpreting interdisciplinarity "as a call for lawyers single-handedly to incorporate the wisdom of other disciplines in solving problems."[10] "Collaborative work involves more, including communication skills; knowledge about other disciplines, including their range of coverage and limitations; understanding of group process and team-building; self- and other-awareness, including the effects of one's behaviors on others; and leadership skills."[11]

In addition to those benefits already noted, interprofessional training encourages students to consider an issue from a variety of viewpoints, which can also stimulate a "higher level of cognitive processing — what some psychologists define as 'wisdom.'"[12]

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[6] Veronica Boix Mansilla, *Assessing Student Work at Disciplinary Crossroads*, 37 CHANGE 14, 19 (2005).

[7] For instance, preparing a client's claim for disability benefits will require reliance on, and perhaps collaboration with, health care professionals; a fraud case or business acquisition might include the expertise of accounting professionals; representing a client with mental illness might require psychiatry, psychology, and social work professionals.

[8] Carolyn Haynes & Jeannie Brown Leonard, *From Surprise Parties to Mapmaking: Undergraduate Journeys toward Interdisciplinary Understanding*, 81 J. HIGHER EDUC. 645, 661 (2010) (*citing* J.T. KLEIN, INTERDISCIPLINARY EDUCATION IN K–12 AND COLLEGE: A FOUNDATION FOR K–16 DIALOGUE (J.T. Klein ed. 2002); LISA R. LATTUCA, CREATING INTERDISCIPLINARITY: INTERDISCIPLINARY RESEARCH AND TEACHING AMONG COLLEGE AND UNIVERSITY FACULTY (2001); S.B. Buchbinder, P.M. Alt, K. Eskow, W. Forbes, E. Hester & M. Struck, *Creating Learning Prisms with an Interdisciplinary Case Study Workshop*, 29 INNOVATIVE HIGHER EDUC. 257–74 (2005); M. Field, R. Lee & M.L. Field, *Assessing Interdisciplinary Learning*, in INTERDISCIPLINARY STUDIES TODAY 69-84 (J.T. Klein & W.G. Doty eds., 1994); B. Hursh, P. Haas & M. Moore, *An Interdisciplinary Model to Implement General Education*, 54 J. HIGHER EDUC. 42 (1983); V.C. Kavalovsky, *Interdisciplinary Education and Humanistic Aspiration*, in INTERDISCIPLINARITY AND HIGHER EDUCATION 224-43 (J.J. Kockelmans ed. 1979); W.H. Newell, *Interdisciplinary Curriculum Development*, in INTERDISCIPLINARITY: ESSAYS FROM THE LITERATURE 51-65 (W.H. NEWELL ed. 1998); W.H. Newell, *Integrating the College Curriculum*, in INTERDISCIPLINARY EDUCATION IN K–12 AND COLLEGE 119–37 (J.T. Klein ed. 2002); C.R. Wolfe & C.A. Haynes, *Interdisciplinary Writing Assessment Profiles*, 21 ISSUES INTEGRATIVE STUD. 126–69 (2003); J. Brown Leonard, Integrative Learning as a Developmental Process: A Grounded Theory of College Students' Experiences in Integrative Studies (2007) (unpublished Ph.D. dissertation, University of Maryland, College Park).

[9] Janet Weinstein, *Coming of Age: Recognizing the Importance of Interdisciplinary Education in Law Practice*, 74 WASH. L. REV. 319, 332 (1999) [hereinafter Weinstein, *Coming of Age*].

[10] *Id.*

[11] *Id.* at 327.

[12] Anita Weinberg & Carol Harding, *Interdisciplinary Teaching and Collaboration in Higher Educa-*

Such wisdom "cannot be confined to a specialized field, nor is it an academic discipline; it is the consciousness of wholeness and integrity that transcends both."[13] Interprofessional education recognizes that problems do not stop at the boundaries of disciplines, but often require thoughtful collaboration among professionals with varying viewpoints.

3. Knowledge, Skills, and Values of Interprofessional Legal Education

Interprofessional legal education incorporates specific knowledge, skills, and values that will help lawyers collaborate with other professionals.

a. Knowledge and Skills Outcomes of Interprofessional Legal Education

i. Understanding the Complex Causes of Problems

Most, perhaps all, legal problems are not purely legal problems. Instead, they involve multiple components and causes. An urban planning regulatory problem, for example, may include environmental, policy, and economic components, among others, in addition to the legal regulatory component. Conversely, problems that on their face do not seem legal in nature, for instance, an asthmatic child in an emergency room, may turn out to require legal assistance, such as enforcement of habitability regulations or insurance coverage.

The centuries-old parable about blind men examining an elephant individually and one part at a time, notes that no one man's individual impression leads to the conclusion that the animal is an elephant because the individuals only feel the parts of the animal and do not see the totality. Scholars citing the parable point out that interprofessional education helps reduce the prospect of failing to see the totality and complexity of a problem. Because interprofessional education embraces multiple viewpoints about the causes of problems, it helps students develop a better understanding of the whole problem.[14] By coming to an understanding that "legal" problems and their sources are complex, law students experience a "cognitive advancement" that allows "them to take into account all components of a problem."[15] This cognitive advancement enables a "profound understanding and deep insight" into a problem that would otherwise be unavailable by examining a problem through the lens of a single discipline.[16]

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tion: A Concept Whose Time Has Come, 14 Wash. U. J.L. & Pol'y 15, 23 (2004) (*citing* Joseph W. Meeker, *Wisdom and Wilderness*, 25 Landscape 15 (1981), *available at* http://www.wisdompage.com/meekart.html, *archived at* http://perma.cc/L5ZA-G4PV)[hereinafter Weinberg & Harding, *Whose Time*].

[13] *Id.*

[14] Kim Diana Connolly, *Elucidating the Elephant: Interdisciplinary Law School Classes*, 11 Wash. U. J.L. & Pol'y 11, 13 (2003) [hereinafter Connolly, *Elephant*].

[15] Veronica Boix Mansilla & Elizabeth Dawes Duraising, *Targeted Assessment of Students' Interdisciplinary Work: An Empirically Grounded Framework Proposed*, 78 J. Higher Educ. 215, 219 (2007).

[16] Weinberg & Harding, *Whose Time*, at 23.

ii.   Understanding the Analytic Gaps of Single-Discipline Analysis

When law students understand in a concrete way that problems and their causes are complex, they can also understand the corollary: analytic gaps are left by legal analysis alone.[17] Working in an interprofessional context, they not only understand that gaps exist, but they also can identify at least some of those specific gaps.[18] When students see the limits of and assumptions in legal analysis, they can also understand the limits of legal solutions and appreciate the need for an interprofessional approach to solving problems.

iii.   Understanding the Culture and Orthodoxy of Other Professions

Law students working with other disciplines in interprofessional education learn about the culture of other professions. The culture of individual professions, like that of any cultural group, is multi-faceted. Professional culture includes the language of the profession, and its unique ways of using that language to frame, write, and talk about problems.[19] The particular ethics, beliefs, assumptions, and rules (written and unwritten) of a profession also contribute to its culture.[20] By understanding that other professions have unique cultures, and understanding differences and similarities, students can start to learn the skills of how to work with other professionals, including how to communicate with them, access their knowledge, and work collaboratively. This interprofessional training will be instrumental in teaching future lawyers how to cooperatively solve problems with other professionals in practice.

iv.   Deeper Understanding of Professional Identity

By comparing the culture of legal education and legal problem solving to that of other professions, students gain a greater understanding of their own profession and professional identity. For example, by learning about social work, which focuses on relationships, systems, and context in its approach to problem solving instead of emphasizing more narrowly defined legal concepts and standards, law students might gain a fuller understanding of the uniqueness of their own professional perspective, and be inspired to broaden their own approach to problem solving and client interactions.

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[17] Connolly, *Elephant*, at 37.

[18] *Id.*

[19] Linda Morton, J.D., Howard Taras, M.D., & Vivian Reznik, M.D., M.P.H., *Teaching Interdisciplinary Collaboration: Theory, Practice, and Assessment*, 13 QUINNIPIAC HEALTH L.J. 175, 198 (2010).

[20] Weinberg & Harding, *Whose Time*, at 22.

v.   Perspective Taking Skills

Perspective taking is a particular analytic skill that allows students to consider problems from the perspective of a discipline or profession other than their own.[21] Students develop the ability to use perspective taking in two interrelated ways. First they learn perspective taking simply by working with other professionals and thereby gaining exposure to another profession's perspective. They also learn perspective taking by openly listening to the ideas about a problem offered by members of another profession when they are exposed to them.[22]

Developing perspective taking skills helps students to uncover their own assumptions rooted in legal analysis.[23] Once students begin to understand the perspectives of other professions, they can start to identify and question their own assumptions, for instance, the assumption that multi-faceted problems are primarily legal problems. By learning and using perspective taking skills, law students are more likely to recognize non-legal issues that need to be addressed as part of any problem solving for the client. Perspective taking can broaden a student's skill set to include approaches to problem-solving that are applied in other professional contexts. A student might, for example, learn to use the medical perspective in approaching a problem. Doctors take in information about a patient's problem by analyzing it from both the patient's subjective complaints and by making objective assessments.[24] A law student may learn from that medical perspective to intentionally analyze a client's legal complaint both in subjective and objective terms.

vi.   Holistic Analytic and Integration Skills

Once law students are able to take the perspective of another profession, they can approach problems more flexibly, creatively, and holistically.[25] They develop the ability to identify what forms of non-legal analysis help solve the totality of a problem.[26] They also learn how to access the analytic tools, information, and research of other professions, and how to begin to apply those tools, information, and research to address problems.[27] This requires that law students learn how to integrate their

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[21] *See* Repko, *Assessing.*

[22] *Id.* at 3.

[23] *See id.*

[24] STEDMAN'S MEDICAL DICTIONARY 1782 (28th Ed. 2006) (Defining the "SOAP" method, Stedman's Medical Dictionary states "Acronym for subjective, objective, assessment, and plan; used in problem-oriented records for organizing follow-up data, evaluation, and planning.").

[25] Sara R. Benson, *Beyond Protective Orders: Interdisciplinary Domestic Violence Clinics Facilitate Social Change*, 14 CARDOZO J. L. & GENDER 1, 6-7 (2007).

[26] An example of this holistic problem solving through interprofessional education is evident at William & Mary Law School's Lewis B. Puller, Jr. Veterans Benefits Clinic, where law and psychology students and teachers work together to identify the mental health needs of veterans seeking legal assistance in their benefit claims. This interprofessional collaboration helps to address both the medical and legal needs facing veteran clients.

[27] Interprofessional legal education does not aim to make law students experts in other disciplines; it aims to teach law students how to begin to apply the analytic skills of other professions and collaborate with those professionals.

legal knowledge and skills with the knowledge and skills of other professions, which has been called the "hallmark of interprofessional learning."[28] These integrated, holistic skills allow students to "solve a problem in ways that would have been unlikely through single disciplinary means."[29] As one student put it, interprofessional collaboration creates a "body of competence" out of individual professional contributions from which greater solutions can be developed than would be possible without multiple contributions.[30]

vii.   Communication Skills

When law students work with other professions, they learn to speak a shared language of integrated interprofessional collaboration.[31] They learn to better recognize the language and terminology unique to the legal field and to develop a new way of communicating that incorporates the language of two or more professions. This more integrated approach to communication is likely to include communication skills that are often not part of the persuasive and adversarial communication learned in law school, and may lead to an increased awareness of the importance of their choice of language, tone, body language, and attentiveness.[32] In some situations, they may simply need to learn another profession's "language" in order to communicate effectively with interprofessional partners.

viii.   Group Collaboration and Leadership Skills

Working in an interprofessional context requires law students to develop the skills to contribute their own expertise to a group process and to accept and use the knowledge of other professions. Students learn how to leverage individual resources — from individual personalities and talents or from the individual professions — to better achieve the end goal of solving a problem. In addition, students have to rely on team members in their work. To do that, they must develop the ability to trust other members of their interprofessional team. Working in a group provides law students with the opportunity to develop leadership skills. They learn how to distribute and delegate work.[33] A more difficult skill perhaps for lawyers is that of following — in some teams, it may be appropriate for lawyers to take the role of receiving and executing instructions from other professionals. Law students learn how to engage in long-range planning and to schedule deadlines and other events in order to move work forward.[34] They learn how to motivate others effectively and "convey respect to group members that will encourage high standards of performance and effective

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[28] Repko, *Assessing*, at 4.

[29] *Id.* (quoting Mansilla & Duraising, at 215).

[30] Class discussion with Tamara Garcia, student, HeLP Legal Services Clinic seminar, Georgia State University College of Law (April 12, 2012).

[31] Weinstein, *Coming of Age*, at 335.

[32] *Id.* at 336.

[33] *Id.* at 340.

[34] *Id.*

collaboration."**35**

b.   Values Outcomes of Interprofessional Legal Education

Interprofessional legal education expands upon the values generally taught in law school: professionalism and ethical practice. Working with other professionals requires students to understand and explore legal ethics as they relate to the ethics of other professions. For instance, lawyers must be mindful of attorney-client privilege and keeping client confidences, and must balance their duties to clients as well as duties to the court, while other professions have mandatory reporting obligations with respect to suspected child abuse and neglect that lawyers do not have. Another example of differing professional obligations includes accountants, who owe duties to their individual clients, but must also perform a public watchdog role.**36** Students need to be sensitive to the values underlying these differing ethical obligations in navigating them on an interprofessional team, and need to develop ways to meet sometimes competing professional ethical obligations while addressing the needs of clients.

Interprofessional legal education teaches law students to value intentionality, creativity, and collaboration in their professional efforts. They learn to value intentionality because they must be thoughtful and intentional in how they exercise the skills required for interprofessional collaboration, including how they communicate, distribute work, and listen and learn from other's perspectives. In doing so, they learn to value creativity and be open to new ways of thinking about problems by seeing and appreciating how other professionals can contribute to solving clients' problems.

4.   Teaching Strategies

Bringing together students from different professions to learn and work together presents challenges. "[S]uccessful [interprofessional teaching] collaborations cannot be forced, nor do they develop overnight."**37** Ultimately, "[s]uccessful [interprofessional] teaching depends primarily on the motivation of the students, faculty, and institutions involved."**38** Creating an interprofessional course requires legal educators to cross both structural and professional barriers. One commentator notes that "those designing and teaching interdisciplinary courses may encounter the following barriers and challenges: physical and psychological isolation; faculty marginalization; overly simplistic instruction in a discipline; potential overreaching; views that dual degree or specialized programs offer sufficient interdisciplinary opportunities; different ethical norms between disciplines; bar passage pressure; different student expectations; parochialism; cost; and logistics."**39**

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35 *Id.*

36 Dina Schlossberg, *An Examination of Transactional Law Clinics and Interdisciplinary Education*, 11 Wash. U. J. L. & Pol'y 195, 223 (2003).

37 Andrea M. Seielstad, *Community Building as a Means of Teaching Creative, Cooperative, and Complex Problem Solving in Clinical Education*, 8 Clinical L. Rev. 445, 497 (2002) (discussing formation of collaborations between legal institutions and community organizations).

38 Morton et al., at 201.

39 Connolly, *Elephant*, at 31.

To maximize the opportunity for success, and to facilitate enrollment, educators should consider which requirements from different professions may overlap, or identify aspects of an existing course that may also satisfy the requirements from another profession. Creating "win/win" opportunities can help overcome logistical and institutional impediments.[40] Packaging an interprofessional course in a way that incorporates or satisfies the educational requirements for different professions can be a challenge.[41] By considering the requirements of each profession when creating joint interprofessional classes, the goals of students from multiple professions seeking to satisfy academic program requirements can be met.

a.   Teaching Collaboratively with Other Professionals

A successful joint interprofessional class depends upon careful planning and collaboration among faculty to ensure that they share the same goals for the class and similar expectations of their students.[42] This collaboration is only the beginning of a process by which faculty teaching interprofessional collaboration model interprofessionalism themselves.[43] The faculty's ability to work together as a team, negotiate, and understand one another's roles and capabilities has an impact on their ability to impart collaborative skills to their students.[44] When planning an interprofessional course, faculty should collaborate on determining the course's pedagogical goals. Those goals should be crafted with intentionality, explicitly noting the reasons for incorporating multiple and particular professions.

In designing an interprofessional course, the extent to which other professions will be incorporated into the course must be determined. In examining interdisciplinarity[45] in practice, Lisa Lattuca developed a model that included four types of interdisciplinarity. The first, *informed disciplinarity*, focuses on a single discipline, with other disciplines informing the course but not substantially altering the learning of course content. *Synthetic interdisciplinarity* utilizes theories, concepts and methods from other disciplines, linking disciplines but keeping them distinctive. *Transdiciplinarity* avoids a focus on the disciplines themselves, instead testing concepts, theories and methods across disciplines. The fourth type of interdisciplinarity is *conceptual*, where the course adopts no compelling disciplinary focus and instead considers and critiques

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[40] E.g., Jonathan Kahn, *The Two (Institutional) Cultures: A Consideration of Structural Barriers to Interdisciplinarity*, 54 PERSP. BIOLOGY & MED. 399 (2011).

[41] Elizabeth Tobin Tyler, *Allies Not Adversaries: Teaching Collaboration to the Next Generation of Doctors and Lawyers to Address Social Inequality*, 11 J. HEALTH CARE L. & POL'Y 249, 290-91 (2008) (discussing reasons for limiting medical student enrollment to second- and third-year students and acknowledging different student investment based on credit hours awarded by the respective schools).

[42] *Id.* at 292.

[43] Morton et al., at 186.

[44] *Id.*

[45] Lisa R. Lattuca, Lois J. Voigt & Kimberly Q. Fath, *Does Interdisciplinarity Promote Learning? Theoretical Support and Researchable Questions*, 28 REV. HIGHER EDUC. 23 (2004). The authors have maintained the term "interdisciplinarity" as used by Lisa Lattuca in her original model; for purposes of this chapter, interprofessionalism could have been used interchangeably.

multiple disciplinary perspectives[46] Any of the foregoing methods of teaching inter-disciplinarity can aid students in understanding that "[p]roblems come in 'layers' that need to be separated and analyzed, but solutions usually need to be comprehensive, addressing the problem as a system, not as pieces."[47] Students must "be able to see, evaluate, and select from among differing perspectives that bear on a problem."[48] The degree to which students are able to do that can be impacted by the type of interdisciplinarity the educators choose to utilize in teaching the course, and the collaborating educators must be able to agree on which type they intend to use in order to craft clear course goals, methodologies, and roles.

Another model to consider for interprofessional education, besides creating a stand-alone interprofessional course, is to create an interprofessional environment in a clinic setting in which case work happens with live clients, with a seminar supporting the case work. For instance, social workers and psychologists might work alongside law students, where the law clinic seminar is taught jointly by law, psychology, and social work professionals with students from those disciplines assisting on cases when appropriate.

b.   Teaching Students to Recognize Differences in the Cultural Context of Other Professions and to Surface Assumptions

Bringing students from different professions together in the same classroom can result in a clash of cultures due to differing expectations about the learning process. One approach for the different educational professionals teaching in these settings is to purposely attempt to balance the types of learning methods and activities expected by each profession, thus allowing each group some refuge in their "comfort zone," while at the same time forcing students to move beyond their previous expectations for their own learning.[49] Multiple teaching strategies should be employed so that all students, regardless of professions and skill sets, remain encgaged.

c.   Teaching Teamwork in an Interprofessional Environment

We cannot assume that effective teamwork will occur naturally; rather it is a professional skill that must be taught intentionally and fostered over time. Interpro-fessional education is one way of teaching the skills associated with teamwork. In creating two interprofessional problem-solving courses, two scholars explicitly identi-fied the goal of "working with others," as a skill for students to develop.[50] They viewed the experience of working along with other professions as providing the opportunity to

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[46] Lattuca et al., at 25-26, *citing* LISA R. LATTUCA, CREATING INTERDISCIPLINARITY: INTERDISCIPLINARY RESEARCH AND TEACHING AMONG COLLEGE AND UNIVERSITY FACULTY (2001).

[47] JAMES R. DAVIS, INTERDISCIPLINARY COURSES AND TEAM TEACHING: NEW ARRANGEMENTS FOR LEARNING 39 (Oryx Press 1995).

[48] Lattuca et al., at 34.

[49] Tyler, at 292.

[50] Janet Weinstein & Linda Morton, *Interdisciplinary Problem Solving Courses as a Context for Nurturing Intrinsic Values*, 13 CLINICAL L. REV. 839 (2007).

develop skills such as "consensus building, collaboration, teamwork, respect for others, respect for differences, and communication skills."[51] Teaching students collaboration skills can take many forms. A key focus is communication skills, "including listening, learning to adapt to others' styles of communication, writing skills, [and] identifying and expressing interests. . . . "[52]

A goal for the interprofessional classroom environment is to foster a culture of cooperation and collaboration that law students and other professionals can transfer to their careers as professionals.[53] "[D]isciplines are akin to cultures and . . . cultural ignorance and misunderstandings abound between disciplines, much as they do between cultural groups."[54] In interprofessional classrooms, the idea of collaboration moves from the theoretical to the real.[55] By exploring different professional roles and differing obligations among professions, students can better understand their own profession, its effectiveness and its limitations, and where it may overlap with other professions.[56]

5. Assessment of Interprofessional Legal Educational Experiences

Scholars in education have suggested that purpose, effectiveness, common language, and development of new culture may be an appropriate continuum of development for assessing the level of integration achieved in an interprofessional program.[57] "Interdisciplinarity is increasingly the hallmark of contemporary knowledge production and professional life."[58] Accordingly, educators of all stripes should recognize the need to nurture skills development in interprofessional problem-solving and collaboration. This obligation, of course, requires that appropriate tools

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[51] *Id.* The four goals were: (1) Expanding Approaches to Problem Solving: broad vision, considerations of justice, systems thinking, and creative thinking; (2) Working with Others: consensus building, collaboration, teamwork, respect for others, respect for differences, and communication skills; (3) Focusing on Community: a sense of compassion, serving others, and unselfishness; and (4) Developing Sense of Self: building self-esteem and self-confidence, self-governance, and autonomy.

[52] *Id.* at 854.

[53] Benjamin J. Naitove, *Medicolegal Education and the Crisis in Interprofessional Relations*, 8 Am. J.L. & Med. 293, 307 (1982) ("The mixed student body will force the early exposure of young, developing professionals to each other. As noted previously, such exposure should begin early so that young professionals can begin to accommodate their differences.").

[54] Weinstein, *Coming of Age*, at 328.

[55] Connolly, *Elephant*, at 14; *see also id.* at 17 ("Law, by its very nature, is almost always interdisciplinary: the job of most lawyers is to assist others with the portion of the legal system that addresses a particular issue in that person's life. In fact, most law classes are theoretically interdisciplinary, given that they provide instruction in that 'of' something.").

[56] Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. Mich. J.L. Reform 121, 144 (2007-2008).

[57] Mansilla & Duraising, at 215.

[58] *Id.*

for determining program and student success are developed and utilized.[59]

Scholars have identified 21 cognitive skills associated with integrated experiences ranging from the development of critical thinking and recognition of bias to enhanced awareness of ethical issues.[60] Fundamentally, the common objectives of interprofessional education are to improve the students' foundation in their chosen professions, to advance their overall ability to integrate problem-solving skills from other professions, and to arrive at a heightened level of critical awareness at the conclusion of the experience.[61]

Law schools that offer interprofessional learning opportunities need to design an assessment tool that adequately measures the knowledge, skills, and values outcomes achieved by the participating students, as well as by the teaching professionals. In addition, when interprofessional education includes clinic representation of clients, the participating educators should create evaluative measures to demonstrate the impact that such interprofessional problem solving has on client problems.

6.   Conclusion

The overarching goal of interprofessional collaboration is to create a climate in which participants are able to develop understanding of and embrace differences in order to develop common understanding.[62] Achievement of these goals in interprofessional law school classes results in graduates who are better prepared to address client needs and issues.

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[59] *See* Morton et al. Professor Linda Morton has contributed significantly to the area of assessment in interprofessional clinical education.

[60] *Id.* at 217.

[61] *Id.* at 222. The HeLP Legal Services Clinic at Georgia State University College of Law is developing a qualitative survey in-house to evaluate attainment of key values associated with interprofessional clinical legal education. In developing the instrument, faculty interviewed students, met with educational testing experts, held numerous working sessions, and tested the instrument on classes of students in the clinic. Ultimately, the goal is to finalize and implement a useful instrument as a first step in developing a longitudinal study that not only would include students, but also program graduates. The Interprofessional Center for Counseling and Legal Services at the University of St. Thomas is utilizing the competency domains included in "A Framework for the Development of Interprofessional Education Values and Core Competencies," to measure competencies through formative and summative assessment, from exposure to immersion to competence. As part of their measurement, the Interprofessional Center includes in a scaled self-evaluation form, a number of questions addressing consideration of multidisciplinary options, role definition and maintenance, and interprofessional respect. This framework allows educators to measure the practice based skill development in areas such as teamwork, role identification, and communication across professions.

[62] Gunilla Oberg, *Facilitating Interdisciplinary Work: Using Quality Assessment to Create Common Ground*, 57 Higher Educ. 405, 407 (2009).

I. TECHNOLOGY IN THE PROFESSION
   ### By Conrad Johnson[1]

1. Introduction

Time flies, but the legal profession crawls, at least when it comes to effectively integrating technology into law practice. While overwhelming evidence confirms that technology has changed most aspects of everyday life, the legal profession has been somewhat slower to adapt. Even as the profession struggles to more completely integrate technology, legal education has lagged behind in providing students with the structure and perspective they need to practice competently using technology, much less thrive in contemporary practice. BEST PRACTICES FOR LEGAL EDUCATION[2] did not specifically address teaching law students about technology. Given the rapid developments in technology, and the impact that those changes have had on the practice of law, this section suggests that teaching students about the intersections of technology, practice, and the profession is an emerging best practice. While it is impossible to name and properly discuss all the aspects of technology that might profitably be addressed in law school, the section aims to provide some useful starting points.

2. Legal Education and Technological Competence as an Ethical Imperative

Law schools routinely recognize the importance of including offerings about the skills and values of traditional practice.[3] Typically, teaching in these areas occurs in clinics, externships, practicum courses and the like, as well as courses and seminars related to trial advocacy or ethics. Similarly, it is increasingly common to find curricular coverage of "cyberlaw," *i.e.*, substantive law issues that flow from or are affected by technology, such as intellectual property, privacy, internet policy, speech, licensing, and jurisdiction.

In contrast, exploration of the impact of technology on law *practice* has received very little curricular attention. Scant data are available on law school offerings that seek to provide students with an understanding of or experience with the use of technology in lawyering. That, in itself is telling. In a 2014 article, the co-chairs of the ABA's eLawyering Task Force concluded that,

> [F]ew schools have made substantial and sustained efforts. . . . Some peri-odically offer practical courses on the technology of practice and they are

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[1] The reader for this section was Warren Binford.

[2] ROY STUCKEY AND OTHERS, BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP (2007) [hereinafter BEST PRACTICES].

[3] The extent to which experiential education and practice-oriented subjects are properly integrated into the overall curriculum of U.S. law schools is quite another matter. The point here is that there has been general acceptance that schools should offer at least some outlets to students who wish to learn about the practice of law. Further, in this context, "traditional practice" should be read as including instruction in traditional lawyering skills such as interviewing, counseling, drafting, etc.

largely taught by adjuncts. Few have offerings that explore the impact that technology is having on the practice of law and how it can enhance the client experience and increase lawyer effectiveness. No schools that we know of require students to take these courses.[4]

The lack of training in this area is alarming given the recognition that competent lawyering requires an understanding of technology. Model Rule 1.1 of the ABA Model Rules of Professional Conduct regarding the "Duty of Competence" was amended in August 2012 to include a revised "Comment 8 — Maintaining Competence." Comment 8 now states:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.[5] (Emphasis added.)

The linking by the ABA of competence with an understanding of technology is a significant early step towards more closely aligning professional norms with the reality of contemporary practice. The disconnect between that reality and the education provided by law schools regarding technology points to the need for curricular reform.

The widespread use of technology in law practice is here to stay. That said, having computers, mobile devices, and ubiquitous access to the Internet can be no more important than merely possessing paper and pen. It is what lawyers do with these tools that matters. Lawyers who primarily use computers merely as digital typewriters and paperless file cabinets, or consider mobile devices portable phones with a mailbox and calendar or are satisfied with the results of a Google, Lexis, or Westlaw search underutilize technology for lawyering in important ways. Giving students opportunities to structure their learning so that they can use technology in a more thoughtful innovative, professionally sustaining manner is essential.

3.   Technological Change and the Legal Profession

Law is a profession that runs on information. Every lawyering task has an information component.[6] In the digital age, where information technologies have reshaped our lives, understanding technology is central to the work of lawyers.

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[4] Richard Granat & Marc Lauritsen, *Teaching the Technology of Practice: The Top Schools*, Law Practice Magazine, July/August 2014, Vol. 40 No. 4, The Big Ideas Issue, a publication of the ABA Law Practice Division. The article reports that in 2013, the ABA's eLawyering Task Force, with the assistance of the ABA Standing Committee on the Delivery of Legal Services, conducted a survey of law school deans at the then-203 ABA-accredited law schools. Only 32 schools responded. Of the respondents, only eight schools maintain a center devoted to the study of "technology of law" and approximately 6-7 schools offer more than two courses in that area.

[5] Model Rules of Prof'l Responsibility R. 1.1, available at http://www.americanbar.org/groups/ professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ comment_on_rule_1_1.html, *archived at* http://perma.cc/KBY9-2RT5.

[6] M. Ethan Katsh, The Electronic Media and the Transformation of Law (1989); Ethan Katsh, *Digital Lawyers: Orienting the Legal Profession to Cyberspace*, 55 U. Pitt. L. Rev. 1141 (1994); M. Ethan Katsh, Law in a Digital World (1995); Peter W. Martin, *Pre-Digital Law: How Prior Information Technologies Have*

Lawyers essentially engage in three basic tasks: they gather, manage, and present information.[7] Technology can assist lawyers in performing *traditional* skills such as gathering information through interviewing, managing information in counseling, or presenting information through drafting or oral advocacy.

However, technology also prompts today's attorneys to learn *contemporary* skills that have emerged with the use of technology. For example, today, competent information gathering requires proficiency in skills such as electronic fact gathering, ediscovery and the effective use of search engines so that lawyers can plumb with efficient, yet comprehensive precision, the deep data reserves. Today, lawyers manage information through thoughtful knowledge management. This, in turn, may require attorneys to utilize intranets/extranets or become comfortable with expert systems, predictive coding and data assembly tools, to promote best practices, increase access to justice, or simply make optimal use of the information they gather. Today, in addition to learning oral advocacy and drafting, contemporary practice demands that lawyers gain facility with digital presentation tools, courtroom technology and presentations on the Web.

4.   Teaching Students about the Use of Technology in the Legal Profession

Specific technologies, hardware, and software come and go. To the extent that students are taught to use a particular program or device beyond the foundational tools — computers and the Internet — it is only a means to an end. The overarching goal is to provide a safe, structured environment for students to explore the variety of ways that technology can assist lawyers in performing the basic tasks of gathering, managing and presenting information.

Values, both professional and practical, are also implicated by the movement towards widespread use of technology in practice. The rising tide of technology brings both positive and negative repercussions that are worthy of study and critical for those entering practice to understand. What are the ethical ramifications of working in "the cloud"? What should lawyers know about communicating with clients electronically, engaging in limited-scope/unbundled services, using metadata, encryption or social media? What questions of professional responsibility should attorneys consider when, inevitably, collaborating with in-house IT departments or third-party service providers? These questions and many more go to the heart of lawyers' ethical duties. Law school is an ideal setting for thinking and learning about these issues.

Beyond skills and values, students benefit from exposure to concepts, habits of mind and trends that are shaping practice and the profession in the digital age. A partial list of examples includes:

- **Access to Information:** Prior to the digital age, print was the dominant

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Shaped Access to and the Nature of Law, 30 Revue Juridique Themis 153 (1996).

[7] *See* Conrad Johnson, *Lawyering in the Digital Age*, *in* Susan Bryant, Elliot Milstein & Ann C. Shalleck, Transforming the Education of Lawyers: The Theory and Practice of Clinical Pedagogy 308 (2014).

mode of broad information transfer. As a result, access to information was often confined to the places where the information was housed or the people who could afford to purchase printed materials. Libraries and offices were among the prime access points for information. These physical restrictions supported the monopoly of specialized information by those within a particular field.[8] Lawyers were among the groups that profited by the access limitations of print. With the advent of the Internet, information of all types is more freely available. This has incalculable ramifications for lawyers and non-lawyers alike. Non-lawyers have access to legal information that they can use for self-help or to inform the services they need or receive from attorneys. Unbundled legal services have expanded, as has limited-scope representation. The "commoditization" of the law has gained a foothold. A broader array of services, increased affordability, access to justice, and alternative fee arrangements are a few of the many manifestations of this transition. In addition, now that nearly every aspect of both professional and private lives can be digitally traced, aggregated, and accessed, an understanding of "big data" is important to client and counsel, as is attention to the consequences of using social media.

- **Client Relationships:** Attorney-client relationships are significantly altered with the advent of digital technologies. Increased access to legal information has reshaped the traditional balance of power between the profession and the consumer. Possibilities often lead to expectations. Clients expect attorneys to communicate with them promptly, in part, because technology makes that possible through the use of cell phones, emails, and text messaging. Clients expect greater transparency regarding the work performed by attorneys. Client portals, email, and extranets make this possible. The marketplace for legal assistance has expanded and is no longer limited by geography with the availability of online services. Document assembly tools and expert systems allow clients a greater variety of services tailored to their legal needs and budget. Time frames of production have been reduced. Attorneys are increasingly subject to public evaluation, making client satisfaction all the more important. While some suggest that technology has created distance between attorney and client, quite the opposite is true. Now, more than ever, because clients can exercise greater choice in hiring, a lawyer's ability to cultivate a good working relationship with the client and engage in efficient, effective project management is at a premium. Finally, lawyers can no longer charge high legal fees for legal documents that can be easily generated in other settings. Less complex legal matters such as rental agreements, uncontested divorces, small estate work, name changes, etc., can often be performed at low cost online.

- **Mechanics:** As mentioned earlier, in order to practice competently pursuant to the Model Rules of Professional Conduct, a lawyer, "should keep abreast

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[8] Elizabeth L. Eisenstein, The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early Modern Europe (1979); Walter J. Ong, Orality and Literacy (1991). *See also* Peter Martin, Pre-Digital Law: How Prior Information Technologies Have Shaped Access to and the Nature of Law (1996).

of changes in the law and its practice, *including the benefits and risks associated with relevant technology. . . .*[9] To fulfill this requirement, law students should have at least a rudimentary understanding of the basic transactions that occur in computing and the Internet. This does not mean that lawyers need to become programmers. However, they should know, among other things: what "digital" means; how the Internet operates (the underlying architecture of a basic internet transaction); the differences between how free search engines like Google and proprietary search engines used in Lexis/Westlaw function; the implications of the persistence of digital data (why "delete" does not mean erased); the risks and benefits of working in the "cloud"; why metadata may reveal more than one intends; the lawyering resources presented by "open source" technologies; or how "convergence" broadens the palette of communication and persuasion.

- **Sharing vs. Hoarding:** In the traditional model of lawyering, attorneys create value in themselves by hoarding information. The client comes to the lawyer, in large part, because the client does not have access to legal information or the facility to transform that information into legally effective action. Similarly, a lawyer's value within a legal organization or marketplace often turns on unique expertise that is not shared so as to increase demand for the lawyer's services. Of course, this paradigm remains prevalent in the profession. However, a new model is beginning to emerge. In this model, a lawyer creates value by sharing information either within a legal organization via the organization's intranet/internal content management system or with a broader client community online. This more open demonstration of expertise helps to attract clients or colleagues because the lawyer's expertise is more visible and can be easily evaluated for its quality and usefulness. Which model would a prospective client or individual in charge of a legal organization prefer?

- **Repurposing:** Law practice is typically reactive. Clients come to lawyers when they need help, often when they are in crisis. As lawyers work to forge solutions, they frequently learn quite a bit about a specific type of problem. When the problem is resolved, the lawyer moves on. Sometimes lawyers retain what they learned and apply it for use in similar situations. Other times, however lawyers move on to clients whose difficulties require the lawyer to develop new expertise. It is likely that lawyers retain at least some of the knowledge they gained in prior cases. It is also likely that some of that expertise fades from memory. Of course, much of that information could be put to use in preventing future problems. Innovative lawyers are beginning to repurpose the knowledge gained by dint of hard-earned experience to create resources and products that better serve existing clients and create new markets for their expertise. Preventive lawyering — the notion that it is better to have a fence at the top of the cliff than an ambulance below — is gradually gaining traction in the profession both in private practice and in

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[9] MODEL RULES OF PROF'L RESPONSIBILITY R. 1.1, available at http://www.americanbar.org/groups/ professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/ comment_on_rule_1_1.html, *archived at* http://perma.cc/KBY9-2RT5.

the public interest bar. Examples include the creation of the fee-based, online training modules that use learning management systems to meet "GRC" (governance, risk management and compliance) goals. Public interest attorneys use online systems to promote activities such as "know your rights" campaigns, engage in theme-based 24/7 outreach, and embed knowledge in expert systems for use by non-lawyers or novices to generate pleadings or information letters, or facilitate proper administrative protocols.

- **Government Use:** Most courts and administrative adjudicative bodies now rely heavily on technology for both administrative processes and decisional support. Maintaining a focus on the use of technology by the judiciary is important because where courts go, lawyers follow. One need only look to the impact of E-filing, ediscovery, and courtroom technology as evidence. Government is also using technology to alter its relationship with the public for better and worse. Use of the Internet has fostered greater accessibility to government information and services. The flipside is also true, as privacy and surveillance concerns abound. The costs and benefits of government's use of "big data" are ripe for study.

- **Access to Justice:** It is no secret that the demand for free legal services far outstrips the supply. The "justice gap" is deep and wide, affecting millions of those in need. This is a problem that has bedeviled advocates since the early days of the profession. Great work is being done by courts and public interest attorneys to expand access to justice with the aid of technology. Lay-focused legal websites provide information on demand to those who cannot afford to hire an attorney. Online intake and referral systems maximize scarce free legal services. The ability to use technology to work remotely makes it possible to bring legal assistance to the people and places where help is needed most, whether it be at public benefit hearing centers, in schools, or at disaster relief outposts. Online expert systems combine with document assembly tools to allow unrepresented litigants to create legally sufficient answers in eviction and debt collection proceedings, apply for benefits, and insure that school suspension hearings follow due process safeguards. Databases make it possible for lawyers to track the needs of their clients, more quickly identify systemic problems, and pursue relief. All of these innovations constitute a step towards making the rights and protections of the law more accessible. The above illustrations demonstrate that technology permits lawyers to address problems that appeared insoluble prior to the digital age. Anyone interested in client-centered lawyering through individual representation or systemic change has a vested interest in learning to use technology effectively.

- **Employability:** In a time of job scarcity and concerns about whether law school is worth the enormous cost, it behooves legal educators to do whatever possible to create value in their graduates. Employers, public and private, are all too aware of the financial investment they have made in technology. Graduates who have been trained to leverage that substantial investment in technology have an employment advantage. Moreover, it seems clear that graduates will experience greater mobility in their careers. Accordingly, it is

all the more imperative that they acquire transferrable skills that allow them to be effective in multiple work settings. Facility with technology promotes that goal.

By creating opportunities for students to learn the essential knowledge, skills, and values that accompany the use of technology, teachers promote transferrable education. Learning to use technology is valuable to students wherever their careers may lead, regardless of whether they engage in litigation or transactional work, private practice, academia, or public service.

Issues related to technology can be profitably pursued in many types of offerings. E-filing and ediscovery can, for example, be covered in civil procedure. Evidence and trial advocacy courses could be places where students learn to effectively use digital presentation tools to present and persuade. Similarly, it is hard to imagine a comprehensive professional responsibility syllabus that did not address the ethical issues presented by digital age practice. Courses or seminars devoted to an examination of judicial processes, court systems, administrative law, or constitutional subjects can all be updated to include consideration of at least some of the issues outlined in this section. Courses and seminars specifically focused on technology are increasingly common as well.

Clinics, with their dual missions of facilitating quality education and public service, are particularly well suited to providing the hands-on experience with technology that promotes vivid, deep learning. Regardless of where it occurs, meaningful instruction about technology is a responsibility that law schools must not avoid.

5.   Conclusion

Wherever issues related to technology in practice occurs in the curriculum, it is important to understand that students typically bring interest, experience, and expertise to these topics. That connection is one that can be leveraged to promote the heightened engagement and fuller collaboration that most students and educators crave. In addition, law schools can stay current with how the profession is transformed through technology just as they keep current in every other aspect of the law — by devoting teaching resources to that area of study. Doing so makes sense as it is certain that the impact of technology will only expand with time to the point where basic lawyering cannot be taught without a thoughtful focus on the use of technology in contemporary practice. Truth be told, legal education has already reached that point. It is a best practice for law schools to offer training in technology in a variety of contexts and settings.

J.   BUSINESS AND FINANCIAL LITERACY
By Dwight Drake[1]

1.   Introduction

Law practice continues to become more complex and demand a broader range of specialized knowledge. Business and financial literacy skills, once viewed as only important in business school or for law students who intend to become lawyers representing business owners or entities, are being viewed differently by legal educators who desire to ensure that law students are prepared for practice. The world is driven by business, and core business and financial issues routinely surface in various types of legal disputes, transactions, and planning challenges. At a minimum, knowledge of basic business and financial concepts will help a lawyer deal with personal consumer, credit, financial, investment, and business challenges and enhance the lawyer's ability to serve others, even when retained for a non-business matter. The importance of understanding core business and financial concepts is heightened for the lawyer who wants to serve business owners or executives at any level.

Best Practices for Legal Education did not address the need for business and financial literacy.[2] Given the growing recognition of this as a potential area for curricular development, it is a best practice for schools to identify whether students have opportunities in the curriculum to learn the knowledge, skills, and values of this subject. This section explores why such knowledge, skills, and values are important and aims to identify the core elements of business and financial literacy for educators exploring this topic.[3]

2.   Why Financial and Business Literacy?

Many law students graduate today with little to no understanding or appreciation for what they do not know about the world of business and how that deficiency in their education might hamper their professional development, their effectiveness in servicing others, and their ability to manage their own financial affairs. Such students may not have received business-related training before entering law school or received any in law school. Student understanding of basic business and financial concepts is a prerequisite to developing the capacity to meaningfully assist future clients in the processes of identifying and prioritizing specific business objectives. Many business owners and executives, even some of the brightest, find it challenging

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[1] Readers for this section were Nathalie Martin, Alexander Meiklejohn, Alex Ritchie, Toni Robinson, and Robert White.

[2] Roy Stuckey and Others, Best Practices for Legal Education: A Vision and a Road Map (2007) [hereinafter Best Practices]. In giving examples of how to articulate outcomes, Best Practices used examples taken from the Diploma in Legal Practice Program from the Glasgow Graduate School of Law in Scotland. Some of the relevant examples were Accountancy for Lawyers, Financial Services and Tax, and Practice Management.

[3] For a discussion of such elements, see Dwight Drake, Business and Financial Literacy for Law Students (2014). See also Robert W. Hamilton & Richard A. Booth, Business Basics for Law Students: Essential Concepts and Applications (4th ed. 2006).

to identify and articulate specific objectives without the aid of a knowledgeable advisor. They need help to understand the legal significance of an issue and identify facts and considerations that have consequences to their specific objectives relative to the issue. Because of conflicts and inconsistencies triggered by competing business objectives, clients may need assistance in identifying and ranking priorities. Lawyers can more effectively advise clients if they can collaboratively engage in a balancing analysis of business factors, strategic options, and trade-offs. Thus, a solid grounding in business and financial matters is needed.

Law schools can meet this need by offering students training in basic business and financial concepts that will advance their professional development. Such training helps students achieve a deeper understanding of the business world and an enhanced ability to interface with business owners, executives and those who serve the business community.

3.   Which Students?

All students who study business organizations should be exposed to the business and financial literacy concepts identified as "core" in the following section. The emphasis should be on breadth and real-world relevance and promoting awareness and a basic understanding of foundational issues. Although the objectives, priorities, teaching styles, and time constraints of teachers who teach business organizations vary widely, this exposure can often be accomplished by restructuring a traditional business organizations course to incorporate supplementary materials and related student problems.[4] Of course, such a restructuring many not be possible or desirable in many situations. As an alternative or addition, a school may offer the equivalent of a two-credit, one-semester course that covers core concepts as well as the broader business and financial literacy topics described in the following section. Such a course would be suitable for any student, but would be particularly helpful to those students who anticipate a career in the private practice of law.

4.   Scope of Subject Matter

The core elements of business and financial literacy include foundational topics that often fall outside the scope of a traditional course on business organizations or corporations. Incorporating such topics will expand a course's relevance, broaden the business literacy of the students, and complement the entity and doctrinal concepts covered in the course. Teachers or institutions seeking to incorporate core concepts might choose to teach all or a portion of the following suggested topics, which identify important knowledge and skills for lawyers:

- **Basic Business Differences, Classifications, and Characteristics.** Business is never a "one-size-fits-all" game. Businesses differ based on the type, mix, and number of their owners, and each business has specific characteristics that define the nature and role of the business and reveal its

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[4] For an example of such supplementary materials, see DWIGHT DRAKE, BUSINESS FUNDAMENTALS: ESSENTIAL CONCEPTS ALL LAWYERS SHOULD KNOW (2014), a short book that is designed as a supplement, covers the ten core topics described herein, and includes eighteen student problems.

uniqueness, strengths, weaknesses, market position, vulnerabilities, and a host of other important factors. These characteristics are key indicators of the business' growth potential, most significant risk factors, and long-term survival prospects. An understanding and appreciation of such differences and characteristics is the key to comprehending business developments and challenges. Lawyers should understand that it is a mistake for a legal advisor to assume that businesses are essentially the same and that all owners and executives share the same basic objectives and require the same essential structural plans.

- **Core Accounting Concepts and Financial Statements.** Lawyers should know core concepts that underlie financial statements, the components of each of the key financial statements, how to read financial statements, how the statements relate to one another, how key transactions impact financial statements, and the role and limits of the audit process and standard safeguards. Knowledge of sophisticated financial and accounting principles is not necessary. However, students should begin to develop a working knowledge of the basic concepts that drive all businesses. Accounting is the language of business, and financial statements, the scorecards of business, routinely surface in numerous types of legal disputes and challenges.

- **Basic Business Concepts and Performance Measures.** A lawyer should understand basic business concepts and performance measures: income, EBITDA ("Earnings Before Interest, Taxes, Depreciation and Amortization"), cash flow, opportunity costs, fixed and variable expense structures, economies of scale, depreciation, capitalization rates, return on equity, going concern value, etc. These concepts help explain and illustrate how well a business is performing. Without an understanding of these concepts, a student going into practice will struggle to comprehend business objectives and participate in intelligent, business-focused conversations.

- **Leverage and Debt Basics.** Lawyers should understand the basic concepts and vocabulary of common creditor-debtor transactions that are important to consumers and businesses: simple vs. compound interest, installment obligations, notes and amortization schedules, security interests, covenants, mortgages vs. deeds of trust, recourse vs. non-recourse obligations, the role of the FDIC and the Federal Reserve, LIBOR vs. prime rate vs. Wall Street Journal Rate vs. Federal Funds Rate, lines of credit, letters of credit, bonds, etc. Ongoing debt leverage is a challenge for most consumers and the norm for nearly all successful businesses. Creditor-debtor relationships are created regularly to fund enterprises, finance specific transactions, and generate yields on investable assets.

- **Time-Value-of-Money Concept.** Business executives often have to make decisions that require a comparison of dollar values at different points in time. These decisions require an application of basic concepts related to the time value of money. The key for most lawyers is to focus on the relevant concepts, the variables necessary to apply select concepts, and how to effectively use a calculator (handheld or online). Simple technology has

stripped away the mathematical challenges of decisions that incorporate time-value-of-money concepts.

- **Basic Business Valuation Techniques.** Lawyers should have an understanding of the vocabulary and basic techniques of business valuations. The issue of value is an essential factor in most important planning situations, and business valuation issues often arise in a broad range of litigation contexts, including marital dissolutions, bankruptcies, breach of contract battles, dissenting shareholder and minority owner oppression disputes, economic damage computations, and many other situations. At the most basic level, such an understanding makes intelligent conversation possible with business owners, executives, and managers. Knowledge of valuation factors and techniques also will make a lawyer a better negotiator.

- **Elementary Microeconomics Concepts.** For those who study antitrust law, an understanding of elementary neoclassical microeconomics concepts is a must. But the need to know extends to any lawyer who wants a basic understanding of how certain market forces work and how many business owners approach decisions to maximize profitability. Lawyers should have at least a rudimentary understanding of supply and demand concepts that are so often used to justify or explain a specific event, decision, or course of action.

- **Business Funding Challenges.** Law students should be introduced to the challenges of funding a business enterprise: going public realities and processes, how stock markets work and the related lingo and common trading strategies, start-up capital funding sources, and the importance of securities law registration exemptions and related dangerous misconceptions. Capital formation is a key prerequisite for success in nearly all businesses. A lawyer should have a basic understanding of the practical and legal challenges of capital formation and how markets function.

- **Business Entity Taxation.** The importance of business and corporate taxes throughout the world cannot be overstated. They directly affect the stability and strength of nations and communities, the scope and quality of governmental services, and the growth and development of economies that provide jobs and markets for goods and services. Lawyers should have a basic understanding of the role of business taxes throughout the world, the challenges of transfer pricing, and rudimentary concepts of C corporations, S corporations, partnership-taxed entities, and self-employment and payroll taxes. A study of business organizations is incomplete without an introduction to the general concepts of business entity taxation.

- **Choice-of-Entity Concepts.** Students should be introduced to the key business factors and collateral consequences that often impact the all-important choice-of-entity decision for a business. A threshold challenge for all businesses is to select the best form of business organization. The challenge is not limited to new ventures. A mature business sometimes needs to re-evaluate its business structure to maximize the benefits of the enterprise for its owners.

Beyond these core concepts, a course on business and financial literacy could be expanded to include three additional categories of important topics. The first category includes the numerous business factors that directly impact core legally-related challenges faced by businesses. Often a law student is introduced to a technical concept of business law without ever being exposed to the important business factors that must be considered in applying the concept. The student, for example, is taught how to form a corporation with no mention of the numerous business operational factors that co-owners of the new business should consider in the design of their organizational documents. Common legally-related business challenges are driven by key business factors. A grasp of these business factors and challenges defines business literacy and is the key to bridging the gap between legal concepts and business objectives. The best lawyers instinctively bridge that gap with their core business knowledge.

The second category includes foundational knowledge about business-related areas of the law that regularly impact businesses and their owners and executives. The goal is to promote awareness and an appreciation of why the business challenges associated with these areas of the law are so important. Key topics included in this category are the role and limits of antitrust, employee benefits (including healthcare reform), executive compensation, securities law risks (including insider trading), intellectual property protections, employment practices and rights of employees, and the role and evolution of multi-entity planning.

The third category includes business-related ethical challenges, including the importance of identifying and clarifying the client relationship, representing multiple parties, serving as an officer or director, investing with a client, and handling attorney-client privilege issues.

5. Best Approaches for Teaching Business and Financial Literacy Topics

Naturally, the teaching practices articulated in Best Practices and throughout this book apply to teaching business and financial literacy topics. These topics should be presented in a straightforward, understandable manner designed for students who are not trained in business. The discussions should focus on core concepts and eliminate extraneous materials and nonessential complexities. The reading materials should be concise, explain the practical relevance of each topic, and include numerous examples.

Ideally, reading materials on business and financial topics should include problems that test student comprehension by challenging students to analyze and apply the substance of what they are reading to specific fact situations. Such student problems can be used to efficiently broaden the scope of the subject matter and help students deepen their understanding of the concepts they are learning. This area is also ripe for law teachers to incorporate teaching of teamwork, ethics and professionalism, writing, and presentation skills.

6.   Conclusion

In the increasingly complex and expanding range of skills needed to practice law effectively, law schools must teach students the substantive knowledge and practical skills they need for contemporary practice environments. Regardless of whether a student intends to specialize in business or finance law, a basic understanding of business competency and financial literacy is essential to the modern practice of law. By offering courses that focus on the core concepts of business and finance and how those concepts influence a lawyer's decision making, law schools can further the primary goal set out in Best Practices: to develop more practice-ready attorneys.