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"Teaching" Formation of Professional Identity

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“TEACHING” FORMATION OF PROFESSIONAL IDENTITY

*David I. C. Thomson**

INTRODUCTION

In its landmark 2007 report on legal education, the Carnegie Foundation for the Advancement of Teaching focused its strongest criticism on the conclusion that law schools were not paying sufficient attention to the formation of professional identity in their students.¹ This was a relatively new concept to legal educators, although one they may have addressed occasionally in some courses and clinical offerings.² But the *Carnegie Report* put a spotlight on the obligation as follows: “Because it always involves social relationships with consequences, [law] practice ultimately depends on serious engagement with the meaning of the activities—in other words, with their moral bearing. For professionals, the decisive dimension is responsibility for clients and for the values the public has entrusted to the profession.”³

It is instructive to remember that the *Carnegie Report* was part of a series of reports on education for the professions and included reports on the training of doctors, nurses, clergy, and engineers.⁴ In each report, Carnegie Foundation authors emphasized the professional formation of the student.⁵ However, perhaps because the legal profession already had a code of professional conduct⁶ and the ABA already required every law school to teach professional ethical rules,⁷ many legal educators did not understand what exactly was missing. As a result of the report encouraging the emphasis of professional identity formation in a

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¹ See WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 14 (2007) [hereinafter CARNEGIE REPORT].

² See *id.* at 12–14.

³ *Id.* at 11–12.

⁴ *Id.* at 15.

⁵ See Anne Colby & William M. Sullivan, *Formation of Professionalism and Purpose: Perspectives from the Preparation for the Professions Program*, 5 U. ST. THOMAS L.J. 404, 405, 410 (2008).

⁶ See MODEL RULES OF PROF'L CONDUCT pmb. para. 7 (2013).

⁷ See 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(1) (2014).

curriculum that already had a required course dedicated to ethics, there was confusion. It did not help that the report unintentionally blurred the distinction between the required course in ethics (and its emphasis on the ethical rules) that has long been a part of legal education and the new concept introduced in the report: the *formation of professional identity*.⁸ It took legal educators some time to realize that, buried in the report, was a concept that was almost completely new to them. Many had little idea what it was, reduced as it was in their minds to the concept of *professionalism*; and, having scant understanding that it was something different, had done very little to address it in legal education.

This Article is my attempt to provide a guide to what professional identity formation is—as distinct from more familiar concepts of professionalism and ethics—and what legal educators are doing, and could do in the future, to foster this sort of professional formation in their courses and curricula. In Part I, I offer some background and history of the topic, which supports a new definition provided in the Article for lawyer professional identity formation. I describe in Part II what some schools are doing to “teach” formation of professional identity and argue that those efforts have some significant limitations. I argue in Part III that teaching law through simulations can provide learning opportunities that foster professional identity formation and that these learning opportunities can be added to any course. Finally, in Part IV, I describe a particular course in civil discovery law that illustrates the concepts and arguments made in the Article.

I. DEFINING PROFESSIONAL IDENTITY FORMATION

A. *What a Profession Is*

The concept of a “profession” started with medicine and dates back to the fifth century B.C.⁹ The medical profession was the first to combine promises of scientific expertise with individual moral commitments.¹⁰ Interestingly (and appropriately, given how little about the human body was known), among those moral commitments were humility and a promise to learn from one’s and others’ mistakes.¹¹ Even to the present day, the core of medical professional identity is found in what is known as the Hippocratic Oath, and most students recite the oath upon graduation

⁸ See CARNEGIE REPORT, *supra* note 1, at 129.

⁹ See STEVEN H. MILES, THE HIPPOCRATIC OATH AND THE ETHICS OF MEDICINE 3, 178 (2004). The Hippocratic Oath is an early embodiment of the concept of a profession. *Id.* at 3.

¹⁰ See *id.* at 178.

¹¹ See *id.* at xiii–xiv (binding the physician to use his ability and judgment to keep patients from harm or injustice and guard life in a pure and holy way).

from medical school.¹² A common misunderstanding about this oath is that it contains the words "first do no harm,"¹³ but those words were added to medical professional formation by a nineteenth century surgeon, Thomas Inman.¹⁴ The oath that dates back to Hippocrates does include the words "I will use regimens for the benefit of the ill in accordance with my ability and my judgment, but from [what is] to their harm or injustice I will keep [them],"¹⁵ but also includes two key formulations that will sound familiar to any legal educator today: that what is learned by the professional will be shared with the professional's pupils, and that what is learned by the professional which is not proper to repeat will be kept confidential.¹⁶

These concepts in the oath became part of a legacy, a basis of identity for medical professionals, and that legacy remains much so to this day.¹⁷ The Hippocratic Oath created shared standards for moral behavior in the medical profession, even though it was not until 1847 that there was a published national code of ethics for doctors.¹⁸

The root word of professional is *profess*, or to declare something in public.¹⁹ The dictionary definition of that word is: "to declare or admit openly or freely: affirm."²⁰ A group of people who declare principles to which they will adhere constitutes a profession, and each professional thereby limits his options and behaves in conformance with the declared set of values. Lawyers, of course, declare openly that they will adhere to the Rules of Professional Conduct, the ethical standards of the legal profession.²¹ Roscoe Pound defined a profession as a group "pursuing a

¹² Raphael Hulkower, *The History of the Hippocratic Oath: Outdated, Inauthentic, and Yet Still Relevant*, 25/26 *EINSTEIN J. BIOLOGY & MED.* 41, 41 (2010).

¹³ Daniel K. Sokol, "First Do No Harm" Revisited, *BMJ* (Oct. 25, 2013), <http://www.bmj.com/content/347/bmj.f6426>; JACALYN DUFFIN, *HISTORY OF MEDICINE: A SCANDALOUSLY SHORT INTRODUCTION* 103 (2d ed. 2010) (noting that this is the translation of the commonly used Latin phrase "*primum non nocere*").

¹⁴ See Sokol, *supra* note 13.

¹⁵ MILES, *supra* note 9, at xiii (alteration in original).

¹⁶ See *id.* at xiii–xiv.

¹⁷ See Hippocratic Oath, Modern Version, GUIDES JOHNS HOPKINS U., <http://guides.library.jhu.edu/c.php?g=202502&p=1335759> (last visited Apr. 10, 2015).

¹⁸ *History of AMA Ethics*, AM. MED. ASS'N, <http://www.ama-assn.org/ama/pub/about-ama/our-history/history-ama-ethics.page> (last visited Apr. 10, 2015); see also COUNCIL ON ETHICAL & JUD. AFF., AM. MED. ASS'N, *CODE OF MEDICAL ETHICS* (2015), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.page>.

¹⁹ *MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY* 928 (10th ed. 2001).

²⁰ *Id.*

²¹ See MODEL RULES OF PROF'L CONDUCT pmb1. (2013). The ABA requires law schools to teach students these standards, and many lawyers swear an oath when admitted to the bar. See 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 303(a)(1) (2014);

learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood.”²² So lawyering is done as a “common calling”—we do it in common, and we are “called” to work in “the spirit of public service.” The question then becomes: What are the standards for moral behavior in service to the public for lawyers? Is it simply the ethical standards we have, or is it something more? And if it is something more, what does that mean for us as legal educators? Formal legal education has been criticized for being disconnected from the profession nearly since its inception, and a brief study of the more recent criticism might help to answer those questions.

B. The MacCrate Report

Legal education has been criticized for over 100 years,²³ but in the last twenty years or so, a series of reports has contained criticism and suggestions for improvement. The first report of the modern era was issued in 1992 by a panel of practicing lawyers and legal educators brought together in 1989 by the Council of the Section of Legal Education and Admissions to the Bar at the American Bar Association.²⁴ The colloquial name for this report comes from the chair of that panel, Robert MacCrate, a prominent attorney in New York.²⁵ The *MacCrate Report* offered a list of ten “Skills” and four “Values” that it concluded were fundamental to proper training for the practice of law.²⁶ This list became a guideline for curricular reform at many law schools in the 1990s, and in particular, was the genesis of significant growth in the clinical legal education movement.²⁷ However, much of that growth was focused on the ten lawyering skills that MacCrate listed, which included problem solving; legal research, analysis, and reasoning; written and oral communication; client counseling; negotiation; and recognizing and resolving ethical

MODEL RULES OF PROF'L CONDUCT pmbl. (2013); Carol Rice Andrews, *The Lawyer's Oath: Both Ancient and Modern*, 22 GEO. J. LEGAL ETHICS 3, 44–57 (2009).

²² ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953).

²³ See JOSEF REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* v (1914); ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* xiv–xv (1921).

²⁴ Task Force on Law Sch. & the Profession: Narrowing the Gap, *Legal Education & Professional Development—An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B., at xi–xiv (1992) [hereinafter *MacCrate Report*].

²⁵ See *A Survey of Law School Curricula: 2002–2010*, 2012 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 13 n.1 (2012) [hereinafter *2002–2010 A.B.A. Curricular Survey*].

²⁶ See *MacCrate Report*, *supra* note 24, at 138–41.

²⁷ See Wallace Loh, *Introduction: The MacCrate Report—Heuristic or Prescriptive?*, 69 WASH. L. REV. 505, 514–15 (1994); see also Bryant G. Garth, *From MacCrate to Carnegie: Very Different Movements for Curricular Reform*, 17 J. LEGAL WRITING INST. 261, 264 (2011).

dilemmas.²⁸ The *MacCrate Report* had significant impact on the development and expansion of clinical legal education, as well as the expansion of skills classes.²⁹ Less noticed, and less implemented, was the "Values" portion of the recommendations.

The *MacCrate Report* endorsed four "Fundamental Values of the Profession": 1) Provision of Competent Representation; 2) Striving to Promote Justice, Fairness, and Morality; 3) Striving to Improve the Profession; and 4) Professional Self-Development.³⁰

Much of law school is focused on the first value: competent representation.³¹ But there is much else of importance in this list. There is a reference to the morality of the profession, and the list includes such goals as promoting justice and fairness, a commitment to improvement of the profession, as well as one's own professional self-development.³² Because the primary focus of law school is on learning the law to represent the interests of a client,³³ what remains in this list of professional values are only occasionally or indirectly addressed.

C. *The Carnegie Report*

Starting in the late 1990s, the Carnegie Foundation for the Advancement of Teaching initiated a wide-ranging study of professional education in several fields.³⁴ The project, called Preparation for the Professions, included studies of medical, clergy, engineering, and legal education, and each project issued an extensive report.³⁵ The report on legal education, entitled *Educating Lawyers: Preparation for the Profession of Law*, was published in 2007.³⁶ After nearly 100 years of critical reports on the form and structure of legal education, just eight years after its publication, the *Carnegie Report's* influence has already been significant. Numerous conferences dedicated to the study and

²⁸ *MacCrate Report*, *supra* note 24, at 138–40.

²⁹ *See* Garth, *supra* note 27.

³⁰ *MacCrate Report*, *supra* note 24, at 140–41.

³¹ *See id.* at 210–12 (noting that the goal of competent representation is recognized in the ABA's Model Rules of Professional Conduct and the ABA's Code of Professional Conduct).

³² *MacCrate Report*, *supra* note 24, at 140–41.

³³ *See* 2014–2015 ABA STANDARDS FOR APPROVAL OF LAW SCH. Standard 302 (2014).

³⁴ *See* Neil Hamilton, *Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation's Five Studies on Educating Professionals*, 45 CREIGHTON L. REV. 763, 765 (2012).

³⁵ CARNEGIE REPORT, *supra* note 1, at 15. For a brief description of these reports, see Hamilton, *supra* note 34, at 769–71.

³⁶ *See generally* CARNEGIE REPORT, *supra* note 1.

discussion of the report have been held,³⁷ significant adjustments have been made throughout legal education that were obviously influenced by the report,³⁸ and at least three initiatives have been dedicated to promoting one or more of the principles described in the report.³⁹

The three principal contributions of the *Carnegie Report* were: first, that it identified the “three apprenticeships” of effective legal training;⁴⁰ second, that it argued persuasively in favor of the integration of all three apprenticeships throughout legal education;⁴¹ and third, that it brought attention to the importance of professional identity formation.⁴² The three apprenticeships it identified in the report were: (1) the cognitive, (2) the practical, and (3) the ethical-social.⁴³ The cognitive apprenticeship focuses on what has long been referred to as “thinking like a lawyer.”⁴⁴ The practical apprenticeship focuses on practical lawyering skills and harkens back to the list of skills in the *MacCrate Report*.⁴⁵ The ethical-social apprenticeship focuses on the formation of the student as a professional attorney.⁴⁶

The *Carnegie Report* found that law schools were generally effective, particularly in the first year, inculcating in students the principles of the first apprenticeship through the case method of study, which it called the “signature pedagog[y]” in law school.⁴⁷ Concerning the practical apprenticeship, the report expressed concern that there was not enough teaching of legal doctrine in the context of practice, noting that “[w]ith little or no direct exposure to the experience of practice, students have slight basis on which to distinguish between the demands of actual

³⁷ Comm. on the Prof'l Educ. Continuum, *Twenty Years After the MacCrate Report: A Review of the Current State of the Legal Education Continuum and the Challenges Facing the Academy, Bar, and Judiciary*, 2013 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO B. 18–19 (2013).

³⁸ See *id.* at 5.

³⁹ See generally EDUCATING TOMORROW'S LAW., <http://educatingtomorrowlawyers.du.edu> (last visited Apr. 10, 2015) (labeling itself an initiative of the Institute for the Advancement of the American Legal System (IAALS) at the University of Denver); HOLLORAN CENTER FOR ETHICAL LEADERSHIP PROFS., <https://www.stthomas.edu/hollorancenter/> (last visited Apr. 10, 2015) (labeling itself an initiative of St. Thomas Law School); PARRIS INST. FOR PROF. FORMATION, <http://law.pepperdine.edu/parris-institute/> (last visited Apr. 10, 2015) (labeling itself an initiative of Pepperdine School of Law).

⁴⁰ CARNEGIE REPORT, *supra* note 1, at 27.

⁴¹ See *id.* at 28–29.

⁴² See *id.* at 14.

⁴³ See *id.* at 28.

⁴⁴ *Id.*

⁴⁵ *Id.*; see *MacCrate Report*, *supra* note 24, at 135.

⁴⁶ CARNEGIE REPORT, *supra* note 1, at 28.

⁴⁷ See *id.* at 2, 23–28.

practice and the peculiar requirements of law school."⁴⁸ In this way, the *Carnegie Report* refocused attention on skills needed for practice, as the *MacCrate Report* did before it.⁴⁹

However, the *Carnegie Report* reserved its greatest criticism of legal education for the lack of intentional development of its students in the third apprenticeship, the ethical-social, which it also referred to as the students' formation of professional identity as a lawyer.⁵⁰ In recent years, conferences and commentators have begun to focus on this apprenticeship—what it means and what sorts of adjustments to legal education might be needed to address it.⁵¹ Bryant Garth, former Director of the American Bar Foundation and dean at two law schools, has suggested that this recommendation, and the changes it will bring if taken seriously, may have an even more profound impact on legal education than the *MacCrate Report* has.⁵²

Among the *Carnegie Report's* most important recommendations were that the three apprenticeships should be integrated throughout the law school course of study, and that paying greater attention to the third

⁴⁸ *Id.* at 95.

⁴⁹ Compare *id.* (noting that the key to becoming an effective legal problem-solver is practicing legal problem-solving in real or hypothetical situations), with *MacCrate Report*, *supra* note 24, at 138–40 (identifying ten fundamental lawyering skills).

⁵⁰ See CARNEGIE REPORT, *supra* note 1. The *Carnegie Report* likely used the word "identity" quite intentionally. The psychologist Erik Erikson developed the concept of identity in the middle of the twentieth century. HOWARD GARDNER ET AL., GOOD WORK: WHEN EXCELLENCE AND ETHICS MEET 11 (2001). Identity has been defined as a combination of "a person's deeply felt convictions about who she is, and what matters most to her existence as a worker, a citizen, and a human being." *Id.* Contemporaries summarized Erikson's theory of identity formation as follows: "Each person's identity is shaped by an amalgam of forces, including family history, religious and ideological beliefs, community membership, and idiosyncratic individual experiences." *Id.*

⁵¹ For example, the first annual conference of the Educating Tomorrow's Lawyers initiative of IAALS, which took place September 27–29, 2012, was thematically focused on the third apprenticeship. See *Event: The Development of Professional Identity*, EDUCATING TOMORROW'S LAW., <http://educatingtomorrowlawyers.du.edu/events/the-development-of-professional-identity-in-legal-education-rethinking-lear/program/> (last visited Apr. 10, 2015). This Article comes out of a presentation made by the author with Bill Sullivan on September 28, 2012, at that conference. Also, at the Southeast Association of Law Schools (SEALS) 2014 Conference, a three-hour discussion group of ten law faculty addressed itself to a detailed discussion of the third apprenticeship and prepared short papers on the subject in advance. See *Seals 2014 Conference Program*, SEALS, <http://sealslawschools.org/submissions/program/pastprograms.asp?confyear=2014> (last visited Apr. 10, 2015). In addition, I participated in this symposium entirely devoted to professional identity hosted by Regent University School of Law on October 5, 2014. See *Regent University Law Review Symposium Presenters*, REGENT U. SCH. L., http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/symposiumparticipants.cfm (last visited Apr. 10, 2015).

⁵² See Garth, *supra* note 27, at 267.

apprenticeship could help facilitate that integration.⁵³ Even the report itself mentions the potential power of law schools paying significant attention to the third apprenticeship: “The third element of the framework—professional identity—joins the first two elements and is, we believe, *the catalyst* for an integrated legal education.”⁵⁴ The report criticized the typical law school curriculum as being too separated between doctrine and skills and recommended that law schools make an effort to integrate all three apprenticeships into their curricula.⁵⁵

A more adequate and properly formative legal education requires a better balance among the cognitive, practical, and ethical-social apprenticeships. To achieve this balance, legal educators will have to do more than shuffle the existing pieces. The problem demands their careful rethinking of both the existing curriculum and the pedagogies that law schools employ to produce a more coherent and integrated initiation into a life in the law.⁵⁶

Unfortunately, as the *Carnegie Report* also notes, “in most law schools, the apprenticeship of professionalism and purpose is subordinated to the cognitive, academic apprenticeship.”⁵⁷

As we develop our thinking about professional identity formation, however, we should be explicit about what it means. Since the *Carnegie Report* was published, the terms “professionalism” and “professional identity” have been confused with each other, and yet, they are mostly different concepts.⁵⁸ While there is some overlap between them, each contains components that are distinct from the other. The *Carnegie Report* uses this language to describe professional identity formation: “Th[e] apprenticeship of professional identity . . . include[s] conceptions of the personal meaning that legal work has for practicing attorneys and their sense of responsibility toward the profession.”⁵⁹

So we know that the original idea included concepts of “personal meaning” and “responsibility.” Further, the report argued that learning how to balance the competing interests in legal representation was critical to our students’ formation:

⁵³ CARNEGIE REPORT, *supra* note 1, at 28.

⁵⁴ *Id.* at 14 (emphasis added).

⁵⁵ *See id.* at 27–29.

⁵⁶ *Id.* at 147.

⁵⁷ *Id.* at 132–33.

⁵⁸ Compare Martin J. Katz, *Teaching Professional Identity in Law School*, COLO. LAW., Oct. 2013, at 45, 45 (explaining that professional identity includes “more than simply ethics or professionalism—or even both together”), with Donald Burnett, *A Pathway of Professionalism—The First Day of Law School at the University of Idaho*, ADVOCATE, Feb. 2009, at 17, 18 (using the words “professional identity” and “professionalism” synonymously).

⁵⁹ CARNEGIE REPORT, *supra* note 1, at 132.

[L]egal education needs to attend very seriously to its apprenticeship of professional identity. . . . [S]tudents' great need is to begin to develop the knowledge and abilities that can enable them to understand and manage these tensions in ways that will sustain their professional commitment and personal integrity over the course of their careers.⁶⁰

As a way of underscoring this important subject, the report argued that it was one with far-reaching consequences:

Insofar as law schools choose not to place ethical-social values within the inner circle of their highest esteem and most central preoccupation, and insofar as they fail to make systematic efforts to educate toward a central moral tradition of lawyering, legal education may inadvertently contribute to the demoralization of the legal profession and its loss of a moral compass⁶¹

In a book about undergraduate business education that he co-authored, William Sullivan, lead author of the *Carnegie Report*, said this about ethical formation in that context:

[U]nless this rigorous thinking is directed toward some committed purpose, it can lead to relativism or cynicism—or at least to a narrowly instrumental orientation.

A strong education in Analytical Thinking and Multiple Framing without attention to meaning can teach students to formulate and critique arguments, but this very facility can make it hard for them to find any firm place to stand. For this reason, Analytical Thinking and Multiple Framing need to be grounded in and guided by the third mode of thought in liberal learning—the Reflective Exploration of Meaning, which engages students with questions such as “What do I really believe in, what kind of person do I want to be, what kind of world do I want to live in, and what kind of contribution can I make to that world?” Lack of attention to this third mode is a dangerous limitation, especially when students are preparing for work that has important implications for the welfare of society.⁶²

D. Lawyer Professional Identity Defined

Having examined the *Carnegie Report* closely, we know that the concepts behind the third apprenticeship include: personal meaning in the work, responsibility to the profession and society, and personal integrity.⁶³ Unfortunately, while introducing a potentially quite valuable concept into legal education, the *Carnegie Report* also adds some confusion to the

⁶⁰ *Id.* at 128.

⁶¹ *Id.* at 140.

⁶² ANNE COLBY ET AL., *RETHINKING UNDERGRADUATE BUSINESS EDUCATION* 79 (2011).

⁶³ *CARNEGIE REPORT*, *supra* note 1, at 132.

difference between this new concept and the traditional concept of professional ethics as studied in law school.⁶⁴

Part of this confusion comes simply through the various terms the report uses for the third apprenticeship. Chapter four of the report is focused on this subject, and there are references to the “[a]pprenticeship of [i]dentity and [p]urpose,” the “apprenticeship of professional identity,” the “apprenticeship of professionalism and purpose,” and the “ethical-social apprenticeship.”⁶⁵ Further, there is confusion between the terms “professionalism” and “professional identity.”⁶⁶ Is professional identity formation simply the same as professionalism? Or does it merely refer to the identity of being a professional attorney?

Professor W. Bradley Wendel believes there is no difference between the two concepts. In his critique of the *Carnegie Report*, he states that the professional identity of lawyers is described “simply [as] performing the complex task of representing clients effectively within the bounds of the law.”⁶⁷ He believes that law professors should just “continue teaching their students to be good lawyers.”⁶⁸

In his critique, he uses the example of John Yoo, an attorney for the Office of Legal Counsel in the U.S. Department of Justice during the early days after the September 11th terrorist attacks on the United States.⁶⁹ Mr. Yoo (now Professor Yoo at Berkeley Law School) was the primary author of what has since become known as the “Torture Memos,” which provided legal justification to the administration of President George W. Bush to torture prisoners of war.⁷⁰ Critiques of the memos have focused on the immorality of torture, and have suggested that a lawyer acting morally would not have written them.⁷¹ Professor Wendel believes that the law contains internal logic and that a significant part of what it means to be a lawyer is to be loyal to the law.⁷² Quite apart from the immorality of torture, the conclusion of the memos was “flawed *as legal advice*”

⁶⁴ See sources cited *supra* note 58.

⁶⁵ CARNEGIE REPORT, *supra* note 1, at 132.

⁶⁶ See sources cited *supra* note 58.

⁶⁷ W. Bradley Wendel, *Should Law Schools Teach Professional Duties, Professional Virtues, or Something Else? A Critique of the Carnegie Report on Educating Lawyers*, 9 U. ST. THOMAS L.J. 497, 498 (2011).

⁶⁸ *Id.* at 501.

⁶⁹ See *id.* at 503 n.27.

⁷⁰ Robert Bejesky, *An Albatross for the Government Legal Advisor Under MRPC Rule 8.4*, 57 HOW. L.J. 181, 182–85 (2013).

⁷¹ See, e.g., Milan Markovic, *Can Lawyers Be War Criminals?*, 20 GEO. J. LEGAL ETHICS 347, 355–56 (2007) (claiming that the Torture Memo authors were accomplices to torture).

⁷² See Wendel, *supra* note 67, at 498, 501.

because the law does not allow torture.⁷³ Yoo was therefore a poor lawyer and displayed disloyalty to the law in claiming otherwise.⁷⁴ In other words, all the professional identity in the world would not have helped; what was needed was a better adherence to the craft of lawyering.

The views of Professor Wendel about professional identity of lawyers are in opposition to those of Professor David Luban, and these two professors have had a back-and-forth scholarly discussion about the relationship between morality and the duties of a lawyer for over a decade.⁷⁵ Luban notes that Wendel takes the view that a lawyer should "recognize professional duties as obligations of political morality, not individual morality."⁷⁶ Luban's view is that, however difficult it might be at times, a lawyer must still consider matters of justice and individual morality.⁷⁷

Professor Eli Wald believes that the ABA Model Rules of Professional Conduct have what he calls a "hired gun bias" and that they should be refocused to emphasize the role of lawyers as officers of the legal system and public citizens, going so far as to suggest that the preamble to the Model Rules should be rewritten as follows: "A lawyer is a public citizen, an officer of the legal system and a representative of clients."⁷⁸ Further, Professor Wald argues that the Model Rules ought to be rewritten to reflect the commitment of the Model Rules to form lawyers whose professional identity is more complex than mere servants of client interests.⁷⁹

Professors Ben Madison and Natt Gantt offer the following definition of the professional identity of a lawyer:

[P]rofessionalism[s] . . . focus historically has been on the outward conduct the legal profession desires its members to exhibit. . . . Professional identity [, however,] encompasses the manner in which a lawyer internalizes values such that, for instance, she views herself as a civil person who treats others with civility and respect even in hotly disputed matters.⁸⁰

⁷³ *Id.* at 502.

⁷⁴ *See id.* at 503 n.27.

⁷⁵ *See, e.g.*, David Luban, *How Must a Lawyer Be? A Response to Woolley and Wendel*, 23 GEO. J. LEGAL ETHICS 1101 (2010); Alice Woolley & W. Bradley Wendel, *Legal Ethics and Moral Character*, 23 GEO. J. LEGAL ETHICS 1065 (2010).

⁷⁶ Luban, *supra* note 75, at 1102 (citing Woolley & Wendel, *supra* note 75, at 1098).

⁷⁷ *See id.* at 1116–17.

⁷⁸ Eli Wald, *Resizing the Rules of Professional Conduct*, 27 GEO. J. LEGAL ETHICS 227, 266 (2014).

⁷⁹ *See id.*

⁸⁰ Benjamin V. Madison, III & Larry O. Natt Gantt, II, *The Emperor Has No Clothes, but Does Anyone Really Care? How Law Schools Are Failing to Develop Students' Professional Identities and Practical Judgment*, 27 REGENT U. L. REV. 337, 344–45 (2015).

Professor Daisy Hurst Floyd has proposed another definition: “Professional identity refers to the way that a lawyer integrates the intellectual, practical, and ethical aspects of being a lawyer and also integrates personal and professional values. A lawyer with an ethical professional identity is able to exercise practical wisdom and to live a life of satisfaction and well-being.”⁸¹

Returning to the *Carnegie Report*, it offers a prescription that may be helpful in the context of this brief review of competing views of lawyer professional identity:

Law school graduates who enter legal practice also 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.⁸²

Some key terms in this prescription are worth highlighting: “ethical questions their cases raise,” “wise judgment when values conflict,” and “integrity to keep self-interest from clouding their judgment.”⁸³

It is possible for all these competing views and definitions to be reconciled. Doing so, however, will require that we separate the terms “professionalism” and “professional identity.” It is important that we do this because, while the ethical rules include value judgments,⁸⁴ they are rules, and as such, are amenable to bad lawyering.⁸⁵ The values of the profession, however, are not fully contained in the ethical rules, and where they are addressed, they often reflect historical values that may be antiquated or include some undesirable values the profession ought to rethink.⁸⁶ Those values may be difficult to achieve, but that does not mean it is impossible or unrealistic.⁸⁷ The *Carnegie Report* suggests that even though we have ethical rules that govern our behaviors, something is still missing, or at least sufficient focus on that something has been lost.⁸⁸

While there is some overlap existing between the two concepts, these concepts are separable, and there is value in articulating two separate

⁸¹ Daisy Hurst Floyd, *Practical Wisdom: Reimagining Legal Education*, 10 U. ST. THOMAS L.J. 195, 201–02 (2012).

⁸² CARNEGIE REPORT, *supra* note 1, at 146.

⁸³ *Id.*

⁸⁴ See Andrew B. Ayers, *What If Legal Ethics Can't Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1, 2 (2013).

⁸⁵ See Wendel, *supra* note 67, at 518 (describing the Holmesian bad man approach to legal ethics).

⁸⁶ See Wald, *supra* note 78, at 256 (explaining that the underlying assumptions of the Model Rules of Professional Conduct are inconsistent with the profession as a whole).

⁸⁷ See Luban, *supra* note 75, at 1102 (arguing that mere difficulty is an insufficient reason to reject the conception of “moral agency”).

⁸⁸ See CARNEGIE REPORT, *supra* note 1, at 127.

definitions and goals in this work and in our teaching. Therefore, this Article offers the following formulation of professionalism: "Professionalism relates to the ethical rules (the line below which we cannot stray) as well as behaviors, such as thoroughness, respect and consideration for one's clients and towards opposing counsel and judges, and responding to client needs in a timely fashion."

Remember that the *Carnegie Report* suggests that law schools are not giving sufficient attention to the formation of professional identity in law school.⁸⁹ But it *could not* have been referring to the concepts included in this definition of professionalism; we teach these concepts pretty well in law school, not only in the ethics course, but also across the curriculum. Arguably, we could be more intentional about how and when we do this, but throughout the curriculum, beyond the required ethics course, we expect certain behaviors from our students. Often we define them in our course policy documents, and certainly they are defined in our student handbooks and honor codes.⁹⁰ We expect certain behaviors, and for the most part we get them. We could doubtless do a better job of engendering consideration for diverse clients and diverse client perspectives, but this is becoming a more intentional part of clinical pedagogy, as well as all forms of experiential learning.⁹¹

If that is an acceptable definition of professionalism—at least for the purpose of defining the goals for legal education—what is the Carnegie Report referring to when it argues in favor of law schools being more intentional about the work they do with their students in helping them to form a professional identity? This Article offers the following definition of professional identity for lawyers: "Professional identity relates to one's own decisions about professional behaviors 'above the line,' as well as a sense of duty as an officer of the legal system and responsibility as part of a system in our society that is engaged in preserving, maintaining, and upholding the rule of law."

The reason for the "above the line" distinction in this definition is this: no one goes to law school to learn how to violate the ethical rules.⁹²

⁸⁹ See *id.*

⁹⁰ See generally, e.g., Academic Honor Code, BERKELEY L., <http://www.law.berkeley.edu/819.htm> (last visited Apr. 10, 2015); Honor Code, STANFORD U., <https://studentaffairs.stanford.edu/communitystandards/policy/honor-code> (last visited Apr. 10, 2015).

⁹¹ See Mary Lynch, *The Importance of Experiential Learning for Development of Essential Skills in Cross-Cultural and Intercultural Effectiveness*, 1 J. EXPERIENTIAL LEARNING 129, 131–32 (2015).

⁹² No rational student would spend the tuition and attendant costs to attend law school just to run the risk of being disbarred and losing all of that investment.

Students want to know what is expected of them as professionals.⁹³ And not all situations—indeed precious few of them in day-to-day practice—require that the attorney takes a position that is *right on the ethical line*.⁹⁴ So professional identity must involve personal decisions of where the attorney will apply his judgment to decide how to resolve particular ethical matters that reside “above the line.”⁹⁵ Such decisions obviously involve both matters of morality and matters of identity.

And so then the concept of *teaching* professional identity means we want our students to experience making these sorts of decisions while they are still in law school so they have some idea of how they would resolve them when they arise in practice. When we say we “teach” professional identity, it means we ask our students to finish this sentence: “I am a *lawyer*, and that means for *me* that *I* will resolve this *above the line* ethical dilemma as follows” The *Carnegie Report* is probably correct when it says most law schools do not *teach* that—or when they do, not intentionally or very well—across the curriculum.⁹⁶

II. “TEACHING” PROFESSIONAL IDENTITY

A. *Is This Something We Can Teach?*

With the emerging consensus that these are things we should teach our students comes the companion view that this is something we *can* teach. Indeed, “[t]he predominant view among legal educators is no longer that students can learn professional values by osmosis or on the job training. We have to teach it in law school.”⁹⁷ A recent panel at the annual conference of the Association of American Law Schools (AALS) was entitled “Incorporating Teaching Professional Identity into the Legal

⁹³ See Helia Garrido Hull, *Legal Ethics for the Millennials: Avoiding the Compromise of Integrity*, 80 UMKC L. REV. 271, 272–73 (2011) (noting stories of lawyers facing discipline or disbarment for lack of professionalism); Sabrina C. Narain, *A Failure to Instill Realistic Ethical Values in New Lawyers: The ABA and Law School’s Duty to Better Prepare Lawyers for Real Life Practice*, 41 W. ST. U. L. REV. 411, 415–16 (2014) (noting that most professional responsibility courses focus on the “basic framework to avoid malpractice liability and disciplinary actions by the state bar”).

⁹⁴ See Luban, *supra* note 75, at 1116 (“By and large, lawyers do not go frantically through life encountering one moral dilemma after another like challenges in a video game.”).

⁹⁵ Because this part of the definition incorporates the ethical rules, it is the place of overlap between the two concepts of “Professionalism” and “Professional Identity.”

⁹⁶ CARNEGIE REPORT, *supra* note 1, at 14, 146–47.

⁹⁷ Alison Donahue Kehner & Mary Ann Robinson, *Mission: Impossible, Mission: Accomplished or Mission: Underway? A Survey and Analysis of Current Trends in Professionalism Education in American Law Schools*, 38 U. DAYTON L. REV. 57, 99 (2012).

Education Curriculum."⁹⁸ Law professors are a confident and hard-working bunch, and there is a broad assumption that this is something we can teach.

The problem for us as teachers is that formation of a student's identity is not directly "teachable," at least not in the didactic sense. As we have seen, professional formation in law happens in the context of work that is important for the welfare of society, and it involves judgment and concepts of one's personal identity as a human being and as a citizen and member of that society.⁹⁹ Because the subject is so personal to each student, the answers to such questions as "What do I really believe in?" and "What kind of a person do I want to be?" and, gradually, "What kind of a lawyer do I want to be?" are not something we can "teach," at least not through the methods common to law school classrooms.¹⁰⁰ We cannot effectively teach someone to answer such questions in the abstract. When we try to do that, we usually receive tentative answers disconnected from the legal context that animates them. The context and the value judgments students make are the bases from which they will form their professional identity as lawyers.¹⁰¹

We must also remember that all students come to law school with different backgrounds and educational experiences, all of which have formed them as human beings. Instead of thinking that ethical formation is something we can do for our students didactically—*teaching* in the standing-behind-the-podium sense—law faculty need to do something else. We need a pedagogical method by which we might address the third apprenticeship throughout the curriculum.¹⁰² It is likely this will be something different than the familiar one-to-many classroom framework in which we are most comfortable.

⁹⁸ Final Program at Association of American Law Schools 2015 Annual Meeting: Legal Education at the Crossroads 10 (Jan. 2–5, 2015), available at https://www.aals.org/wp-content/uploads/2014/12/Program_Final.pdf.

⁹⁹ Nelson P. Miller, *An Apprenticeship of Professional Identity: A Paradigm for Educating Lawyers*, MICH. B.J., Jan. 2008, at 20, 23 (noting that part of professionalism training must include the concept of a lawyer as a citizen of the United States).

¹⁰⁰ See Kathleen Clark, *The Legacy of Watergate for Legal Ethics Instruction*, 51 HASTINGS L.J. 673, 676 (2000) ("[A] student needs to engage not just her intellect, as she might in puzzling out the intricacies of federal jurisdiction, but she must also engage her heart, to determine how she will feel in a professional situation she may face.").

¹⁰¹ It should be noted, of course, that clinical and externship faculty have often worked on these matters more intentionally than other parts of the typical law school faculty. However, the goal of this Article is also to be helpful in clinic and externship programs, since the framework provided here could also be helpful in those contexts.

¹⁰² Denise Platfoot Lacey, *Embedding Professionalism into Legal Education*, 18 J.L. BUS. & ETHICS 41, 46 (2012).

B. Attempts to “Teach” Formation of Professional Identity

One methodology we have seen in recent years is a proliferation of additional programs that address attorney behavior and professionalism.¹⁰³ Many schools have added programs—outside of the ethics course—in which practitioners and judges have mostly talked at students about how important professional behavior is.¹⁰⁴ Until the fall of 2014, my own school was no exception; we developed a program that took most of the day on a Saturday in the fall semester.¹⁰⁵ It mostly involved local practitioners for whom this is an important topic or judges who are sick of resolving disputes between overly-litigious attorneys, lecturing about how awful badly-behaved attorneys are and how these students should not be like that when they graduate.¹⁰⁶ There is scant evidence that such programs have value. Indeed, when they are asked, students often say they perceived them as having little impact.¹⁰⁷ This may be because such programs do not engage the student in the personal contextual thinking process necessary for ethical formation.¹⁰⁸

Better than these one-day programs is the emergence of professionalism and ethical formation courses in a handful of innovative schools across the country. These fall into two main categories—first-year required courses and upper-level electives.

Some schools now require in the first year of law school a specialized course designed to introduce new students to what lawyers do and the obligations they have. An example of this is the course at the University of St. Thomas School of Law that explores the legal system and the values of lawyers, including the moral and ethical dimensions—which requires

¹⁰³ For a recent study of professionalism education in American law schools, see generally Kehner & Robinson, *supra* note 97.

¹⁰⁴ See Lacey, *supra* note 102, at 45–46 (noting examples of schools adding professionalism events into law school programs).

¹⁰⁵ See Event Agenda at For This We Stand, Joint 1L Professionalism Orientation Event (Sept. 15, 2012) (on file with the Regent University Law Review) (outlining the schedule for a one-day professionalism program at the University of Denver Sturm College of Law).

¹⁰⁶ See *id.*

¹⁰⁷ *E.g.*, E-mail from Student 1 to author (Feb. 23, 2015, 04:06 PM) (on file with the Regent University Law Review) (used with permission) (likening a professionalism event to a glorified legal rumor mill); E-mail from Student 2 to author (Feb. 23, 2015, 11:48 AM) (on file with the Regent University Law Review) (used with permission) (considering a professionalism event a waste of time).

¹⁰⁸ See Dwane L. Tinsley, President’s Page, *Ethical Is the Best Policy*, W. VA. LAW., Jan.–Mar. 2009, at 4, 5 (“Legal ethics require lawyers to make contextual, discretionary, ethical judgments.”).

students to begin reflecting on these issues.¹⁰⁹ Another example is the required first-year course taught at the University of North Dakota School of Law called Professional Foundations, or "ProfFound" for short. This course

explicitly asks students to engage in studied self-reflection about twelve core professional qualities of a "good lawyer," including attributes such as adaptability, diligence, courage, honesty, humility, integrity, loyalty, and patience. The course explores these qualities through life-like lawyering scenarios that implicate their meaning and application, and ask students to confront the questions "What would *I* do or how would *I* feel as a lawyer dealing with those issues in these particular situations?"¹¹⁰

These are both good examples of first-year required courses that attempt to foster the Carnegie third apprenticeship. But many schools will not want to dedicate the time and effort to offering a course like this in the first year. Instead, some schools have chosen to allow interested faculty to offer an upper-level elective with similar educational goals.

An example of an innovative upper-level course that immerses students in opportunities for professional formation is the course entitled Advanced Legal Ethics: Finding Joy and Satisfaction in the Legal Life, which was developed over a decade ago and taught by Professor Daisy Hurst Floyd at Mercer School of Law.¹¹¹ In this course, Professor Floyd asks her upper-level students to reflect in writing on what they think will make them better lawyers (beyond the assumption of competence) and how those qualities relate to their notions of the profession of law.¹¹² Second, Professor Floyd's students write a reflection on times in their lives when they have felt most alive and whether they expect they will ever be able to feel like that when they are practicing law.¹¹³ These assignments are atypical compared to what most students are asked to do in most law school classes.¹¹⁴

¹⁰⁹ Neil W. Hamilton et al., *Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation to Become an Effective Lawyer*, 10 U. ST. THOMAS L.J. 11, 31 (2012) (describing the first-year course entitled Foundations of Justice at the University of St. Thomas School of Law).

¹¹⁰ *Professors Alleva & McGinniss Present on Professional Foundations at the AALS 2015 Annual Meeting*, U. N.D. SCH. L., <http://law.und.edu/faculty/news/2015/alleva-mcginniss-aals.cfm> (last visited Apr. 11, 2015).

¹¹¹ Daisy Hurst Floyd, Dean and Univ. Professor of Law & Ethical Formation, Walter F. George Sch. of Law, Curriculum Vitae 4, *available at* http://law.mercer.edu/mulaw/faculty/directory/hurst-floyd/upload/Floyd_Daisy_CV.pdf (showing that Dean Floyd taught Advanced Legal Ethics with Steven J. Keeva in the fall of 2001).

¹¹² WILLIAM M. SULLIVAN & MATTHEW S. ROSIN, A NEW AGENDA FOR HIGHER EDUCATION 56 (2008).

¹¹³ *Id.*

¹¹⁴ *See id.* at 57.

Professor Cliff Zimmerman teaches another example of an upper-level course addressing these issues at Northwestern University School of Law.¹¹⁵ In that course, Professor Zimmerman asks his students to write their own personal narrative, believing that the process of connecting with their stories will help them to reconnect with their personal identity.¹¹⁶ After that foundational step, he asks his students to read and talk about personal moral codes, the ethics of storytelling, the ethics of counseling and interviewing, and multiple ethics-based challenging situations to learn more about how they will react when the situations are real.¹¹⁷ All of the course assignments are reflective in nature, and they culminate in a final paper containing a student's interview of an attorney about her professional development and identity as well as the student's reflection on his own law school experience and the development of his professional identity.¹¹⁸

Both Professors Floyd and Zimmerman have noted that, early on in their courses, it is sometimes difficult to get law students to "open up" to these different sorts of learning experiences.¹¹⁹ So much of law school is about very different sorts of subjects and in very different learning environments.¹²⁰ As a result, students are sometimes taken aback that professors care about these matters and want to help them develop in these areas. Generally, students warm up to the approach and value it over the course of the semester, but this may be because they have self-selected into the course. It may also be because the professors have highly developed skills for teaching in this way.

Other pedagogical methods are being used and tested in other courses. In an Interviewing and Counseling course, Professor Lisa Bliss puts cards in a jar from which students pick one card.¹²¹ On the cards are

¹¹⁵ Cliff Zimmerman, Legal Professionalism and Narrative Syllabus (Spring 2013), available at <http://www.lawschool2.org/files/syllabus-4-1-13.docx>.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *id.* (indicating that students' assignments require exploring a formative moment in life, building lists of traits identifiable in good professionals, and discussing material with guest speakers).

¹¹⁹ See SULLIVAN & ROSIN, *supra* note 112, at 59; David Thomson, *Presentation at the Applied Storytelling Conference*, L. SCH. 2.0 (Aug. 1, 2013, 12:40 PM), <http://www.lawschool2.org/lis2/2013/08/presentation-at-the-applied-storytelling-conference.html> (outlining a presentation in which Professor Zimmerman described his students' coursework in his Legal Professionalism and Narrative class).

¹²⁰ Jess M. Krannich et. al., *Beyond "Thinking Like a Lawyer" and the Traditional Legal Paradigm: Toward a Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 386 (2009) (noting that within the first year of law school students are "initiated into a distinctive method of thinking that will forever alter the way they analyze disputes").

¹²¹ Lisa Bliss, Dir. of Experiential Educ., Co-Dir. of Health Law P'ship Legal Servs. Clinic, Ga. State Univ. Coll. of Law, Helping Students Cultivate Awareness and Sensitivity

descriptions of particular clients, their emotions, and their attitudes; students get to role-play both a client and the lawyer working with that client.¹²² This supports that aspect of professional formation that values the building of empathy for different client backgrounds and needs.

Some of this sort of professional formation has been happening in the first year of law school, although perhaps not intentionally.¹²³ The first-year lawyering class entered the curriculum approximately thirty years ago.¹²⁴ Since then, the pedagogy of the course has grown and matured, and a great deal of significant scholarship has been published about how to teach it well, develop its learning outcomes, and conduct effective assessment.¹²⁵

While the course is still titled "Legal Research and Writing" in some schools, most faculty members who teach in this area consider this to no longer be a representative term for what is now addressed by this course (although it does include both of those subjects).¹²⁶ Some schools have changed the name of the course; at the University of Denver, it is known as "Lawyering Process."¹²⁷ This title, given to the course in a pioneering step by the law faculty in 1990, is intentionally descriptive of what the

to Client Emotions and Attitudes and the Role that Client Emotions and Attitudes Play in Client Decision-Making, Discussion at Southeastern Association of Law Schools 2014 Annual Conference 12, 14 (Aug. 7, 2014) (on file with the Regent University Law Review) (including a description of Professor Bliss's course).

¹²² *Id.* at 14.

¹²³ See Kehner & Robinson, *supra* note 97, at 85–87.

¹²⁴ See, e.g., Paul Brest, *A First-Year Course in the "Lawyering Process,"* 32 J. LEGAL EDUC. 344, 344 (1982).

¹²⁵ See, e.g., Daniel L. Barnett, *Triage in the Trenches of the Legal Writing Course: The Theory and Methodology of Analytical Critique*, 38 U. TOL. L. REV. 651, 653–54 (2007); Kristen K. Davis, *Designing and Using Peer Review in a First-Year Legal Research and Writing Course*, 9 LEGAL WRITING 1, 2 (2003); Susan J. Hankin, *Bridging Gaps and Blurring Lines: Integrating Analysis, Writing, Doctrine, and Theory*, 17 LEGAL WRITING 325, 326 (2011); Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 149–50 (2010); Ellie Margolis & Susan L. DeJarnatt, *Moving Beyond Product to Process: Building a Better LRW Program*, 46 SANTA CLARA L. REV. 93, 93–94 (2005); David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 107 (2003); Lucia Ann Silecchia, *Legal Skills Training in the First Year of Law School: Research? Writing? Analysis? Or More?*, 100 DICK. L. REV. 245, 250–52 (1996).

¹²⁶ See, e.g., *Legal Research and Writing*, STANFORD L. SCH., <https://www.law.stanford.edu/courses/legal-research-and-writing> (last visited Apr. 10, 2015); *Legal Research and Writing Program Overview*, GEORGE WASHINGTON U., <http://www.law.gwu.edu/Academics/EL/LRW/Pages/Overview.aspx> (last visited Apr. 10, 2015); *Oregon's LRW Curriculum*, U. OR., <http://law.uoregon.edu/lrw/overview/#overview> (last visited Apr. 10, 2015).

¹²⁷ *Academics: Experiential Learning*, U. DENVER STURM C. L., <http://www.law.du.edu/index.php/academics/experiential-learning> (last visited Apr. 10, 2015).

course addresses and how it does so.¹²⁸ It is taught almost entirely with simulated client problems, and is designed to introduce first-year students broadly to the *process* that *lawyers* go through to do their jobs.¹²⁹ This process includes client interviewing, statute and case reading, legal analysis, legal research, and several forms of legal expression, including legal writing, contract drafting, and oral advocacy.¹³⁰ Despite being focused on developing these fundamental professional skills, many lawyering faculty may have been caught up short by the *Carnegie Report's* focus on the third apprenticeship. While lawyering faculty members regularly address issues of professionalism in their classes, they have not traditionally offered *intentional* opportunities for their students to form their professional identities. This is changing, and increasingly an additional item on the already long list of learning outcomes for the lawyering class is to offer intentional opportunities for professional formation.¹³¹

C. What Remains Unaddressed

Despite these encouraging courses and teaching methods, not many schools are engaged in this sort of intentional professional identity formation, and those that do are still not addressing all of our students. A recent ABA Curricular Survey indicates that where such opportunities have been made available, they are mostly in upper-level electives.¹³² In another study of the professionalism-related course offerings in American law schools, the authors found that professionalism instruction exists (however that might be defined by the survey respondent) in only sixteen percent of doctrinal courses.¹³³

But perhaps more importantly, there are significant limitations to the current attempts to teach formation of professional identity however well-designed and intentioned they are. Because the nature of professional formation is interwoven with personal formation, these specialized courses by nature must be small. The first-year courses are difficult to implement across the first-year class, and where they have been implemented (University of St. Thomas, Mercer), they required a

¹²⁸ PHILIP E. GAUTHIER, *LAWYERS FROM DENVER* 199–200 (1995).

¹²⁹ *See id.*

¹³⁰ *See, e.g.*, David Thomson, Contract Drafting Exercise in Lawyering Process (Spring 2015) (on file with the Regent University Law Review); David Thomson, Oral Argument Assignments in Lawyering Process (Spring 2014) (on file with the Regent University Law Review).

¹³¹ *See* Kehner & Robinson, *supra* note 97, at 71 & n.62, 72 (giving examples of learning outcome goals that embrace professional identity).

¹³² *See 2002–2010 A.B.A. Curricular Survey*, *supra* note 25, at 16.

¹³³ Kehner & Robinson, *supra* note 97, at 85–86.

broad institutional commitment to the work; indeed, it became integrated into the school's culture—no easy task to achieve.¹³⁴ First-year students are also being pushed and pulled in many different directions in their other courses, and that makes it a difficult time to devote so much time to these concepts. Further, because the nature of professional formation requires the ethical rules as a reference point, it is at least not ideal for students to grapple with these issues without having taken the required course in ethics.

More concerning, however, is that even though these courses use problems set in the context of practice, they are non-contextual for all students. So much of professional formation is localized in the area of practice of the graduate. Criminal defense attorneys have a different professional identity than corporate law attorneys in a large law firm.¹³⁵ If a student who wants to be a prosecutor takes one of these courses and all the contextual problems are not in criminal law, then he is still without the tools he needs for ethical formation *in his area of practice*. So while the first-year work endeavors to be contextual, it cannot cover all areas of practice and is not likely to be highly transferrable, or at least not as transferrable as we would like. What is needed is the taking up of such matters in the courses where students are taking their concentration and ensuring that they are taken up in the context of ethical issues that arise in that area of law practice. However, none of these limitations is meant as an argument against such first-year courses. They are just not enough.

Another worry is that such courses could allow the remainder of the faculty—those who are not engaged in these forms of education—to think that it is being taken care of elsewhere. But of course, the *Carnegie Report's* most fundamental recommendation was that the third apprenticeship be integrated throughout the curriculum.¹³⁶

Indeed, perhaps the greatest concern about these efforts is that they are piecemeal—they do not ultimately achieve the goal of integration of the three apprenticeships across the curriculum. Professional formation not only needs to be contextual, but it also needs to be regular and repeated. As William Sullivan has written, "[m]ost importantly, when ethical professional practices and standards are enacted over and over in

¹³⁴ See, e.g., Hamilton et al., *supra* note 109, at 29 ("[F]aculty members . . . create[d] a curriculum and a culture in which each student can develop the knowledge and skills essential to becoming an excellent lawyer while also forming an ethical professional identity integrated with the student's faith and moral compass.")

¹³⁵ See Robert Rubinson, *Professional Identity as Advocacy*, 31 MISS. C. L. REV. 7, 9 (2012). Typically, large law firms have a professional identity with "no moral or political spin," just opposition to another large organization. *Id.* By contrast, "criminal defense attorneys and prosecutors assume mythical roles of good against evil, both seeking to bear the mantle of truth and justice." *Id.* at 26–27.

¹³⁶ See *supra* text accompanying note 54.

the course of training, students develop habits of heart and mind that shape their approach to their work for years to come.”¹³⁷

The nature of identity itself requires regular and repeated formation opportunities. Carrie Yang Costello is a sociologist who had prior training and practice experience as a lawyer, and she has written a book about professional identity formation in training for two professions (one of which is law). In her book, Professor Costello notes that “our identities are like icebergs. The large bulk of them lies invisible to us below the surface of consciousness, while only a small part of them are [sic] perceptible to our conscious minds.”¹³⁸ The non-conscious bulk of identity is referred to by sociologists as “habitus.”¹³⁹ This includes taste, body language, and emotional identity.¹⁴⁰ When one’s habitus is in dissonance with the professional identity of one’s chosen profession, this leads in most cases to difficulty having success in the profession or added physical stress—and often both.¹⁴¹ Only through repeated efforts to reconcile the two—or through finding a sub-specialty in the law that fits one’s personal identity better than most others and working to reconcile that—is one likely to reduce the dissonance between one’s identity and one’s profession. For these reasons, it is important to “consistently emphasize the development of professional identity and purpose throughout.”¹⁴²

It is worth noting that law schools with a religious affiliation may have a head start in efforts to promote the formation of professional identity.¹⁴³ The University of St. Thomas School of Law is the home of the Holloran Center for Ethical Leadership in the Professions.¹⁴⁴ The school and Center, within a Catholic university, have been leaders in developing courses and teaching methodologies for professional formation.¹⁴⁵ And Regent University School of Law, host of this symposium on professional

¹³⁷ Colby & Sullivan, *supra* note 5, at 421; *see also* CARNEGIE REPORT, *supra* note 1, at 191–92 (noting that the three apprenticeships—the cognitive, the practical, and the ethical-social—should be consistently integrated in law school curricula).

¹³⁸ CARRIE YANG COSTELLO, PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS 20 (2005). For a brief discussion of the psychological concept of personal identity, *see supra* note 50.

¹³⁹ COSTELLO, *supra* note 138.

¹⁴⁰ *Id.* at 20–22.

¹⁴¹ *See id.* at 23.

¹⁴² Colby & Sullivan, *supra* note 5, at 423.

¹⁴³ Jeffrey A. Brauch, *Faith-Based Law Schools and an Apprenticeship in Professional Identity*, 42 U. TOL. L. REV. 593, 598 (2011) (“Faith-based law schools are well-positioned to provide the professional identity training that Carnegie finds generally lacking in legal education today.”).

¹⁴⁴ *See* HOLLORAN CENTER FOR ETHICAL LEADERSHIP PROFS., <http://www.stthomas.edu/hollorancenter/> (last visited Apr. 10, 2015).

¹⁴⁵ *Id.*; *The Vision of a Catholic College in the Midwest*, U. ST. THOMAS, <http://www.stthomas.edu/aboutust/mission/> (last visited Apr. 10, 2015).

identity, is part of a faith-based university that provides an education "rooted in a Christian perspective."¹⁴⁶ At these schools, discussions around faith and morality are connected to their missions and are a part of their cultures.¹⁴⁷ To a large extent, their students self-select to these institutions because they already have a personal identity that is formed, at least in part, by the belief system that is consonant with the school's mission.¹⁴⁸ At law schools without such a foundation or culture, professional formation discussions are more likely to be met with skepticism.¹⁴⁹ In the Carnegie Foundation's study of clergy education, it was noted that "[m]any theological schools are more self-conscious about their reliance on the formative influences of the school's cultural practices [F]ormative communities of practice [are] a central mechanism of the third apprenticeship in theological education."¹⁵⁰ "Unfortunately," William Sullivan has noted, "the kind of intentionality with regard to campus culture as a formative mechanism that we see in clergy education is rare in most other professional schools."¹⁵¹

III. TEACHING METHODOLOGIES FOR THE THIRD APPRENTICESHIP

A. *The Value of Simulations for the Third Apprenticeship*

What is becoming clear is that we need to not simply lecture about professional formation, but instead create realistic "situations" in which our students can be confronted with ethical questions, reflect on the decisions they make, and be guided by us as they form their own

¹⁴⁶ *Regent Univeristy Law Review Symposium Schedule*, REGENT U. SCH. L., http://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/symposiumschedule.cfm (listing the events for a legal symposium titled "Raising the Bar: How Developing a Professional Identity Can Help You Break the Negative Lawyer Stereotype") (last visited Apr. 10, 2015); *Why Regent*, REGENT U., <http://success.regent.edu/index.php> (last visited Apr. 10, 2015).

¹⁴⁷ Brauch, *supra* note 143, at 602 (noting that, at Regent University School of Law, professional identity is a focus both inside and outside the classroom).

¹⁴⁸ *E.g.*, *Testimonials*, CENTER FOR ETHICAL FORMATION AND LEGAL EDUC. REFORM, <http://www.regent.edu/acad/schlaw/programs/cef/testimonials.cfm> (last visited Apr. 10, 2015) ("I knew that Regent was going to not only equip me academically and professionally, but it is also supportive of my values, viewing law as a means [of] glorifying God with our talents and knowledge."); *see also The Regent Law Difference*, REGENT U. SCH. L., <http://www.regent.edu/acad/schlaw/whyregentlaw/whyregentlaw.cfm> (last visited Apr. 10, 2015) (recruiting students interested in legal education based on "eternal principles of truth and justice [that] inform the way we should teach, study, and practice law").

¹⁴⁹ *See* LAW SCH. SURVEY OF STUDENT ENGAGEMENT, LSSSE LAW SCHOOL REPORT 2014: REGENT UNIVERSITY SCHOOL OF LAW 120 (2014) (identifying that 84.5% of Regent 3L's claim their law school experience "quite a bit" or "very much" helped them to develop a personal code of values and ethics, compared to only 54.3% of 3L's nationwide).

¹⁵⁰ Colby & Sullivan, *supra* note 5, at 417.

¹⁵¹ *Id.*

professional identities. Seminars dedicated to creating space for professional reflection and formation serve an important role, but formation clearly needs to be repeated and regular throughout the curriculum.¹⁵² What is needed is a methodology where this can take place in any subject-matter focused “doctrinal” course.

Fortunately, we already have that methodology—we just need to use it more. Teaching legal doctrine through simulations is a powerful and effective way of enabling professional formation because it is done in the context of the area of practice.¹⁵³ The *Carnegie Report* noted:

While simulated practice can be an important site for developing skills and understandings essential for practice, it can also provide the setting for teaching the ethical demands of practice. Lawyering courses that use simulation of client interviewing and counseling, for example, permit the introduction of ethical as well as technical problems in a setting that mimics for the student the unpredictable challenges of actual practice.¹⁵⁴

Indeed, teaching through simulations is becoming more common in other forms of professional education, particularly medical education: “It is instructive to note that . . . medical education has been moving heavily into the use of simulation.”¹⁵⁵ Of course, medical education is different from legal education in many important ways, but the trend in medical education is “suggestive that increased use of the pedagogy of simulation is likely to prove a boon to teaching both practical skills and ethical-social development. Ethical engagement has practical dimensions that are more fully evident and can be examined and taught in conditions that simulate practice rather than in conventional classrooms.”¹⁵⁶

As has been noted, the *Carnegie Report* recommends that more courses be designed to provide the learning of doctrine *in the context of practice* and to present the legal principles in such a way that students are exposed to situations that allow them to begin to form their identities as legal professionals.¹⁵⁷ Simulated practice experiences delivered through doctrinal simulations are ideal for this.

The question then becomes what those “situations” might look like. This Article offers a framework for contextual formation that should be applicable across the curriculum, from doctrinal classes to clinics. It involves a combination of guided steps that ideally take place in a particular order, called a Guidance Sequence for Formation of Professional Identity (GSFPI).

¹⁵² See sources cited *supra* note 137.

¹⁵³ CARNEGIE REPORT, *supra* note 1, at 158–59.

¹⁵⁴ *Id.* at 158.

¹⁵⁵ *Id.* at 159.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 195–97.

The sequence has four essential components: (1) a client representation, an exercise, or a writing assignment that presents an ethical dilemma as it appears in practice; (2) an identification by the student of the ethical quandary raised in completing the work; (3) a written expression by the student of the ethical issue as well as his reflection on his own decisions about how he resolved the dilemma; and (4) some form of written or oral feedback from the professor about the decisions and choices the student made and the quality and depth of the identification and reflection offered.¹⁵⁸

This could be accomplished fairly easily in any clinic, externship, or simulation-based course, but there is no reason it could not also be accomplished in a traditional doctrinal course as well. It could be a separate assignment in the course, with a portion of the grade assigned to it. The feedback from the professor is more time-consuming in a large class, but not impossible with a well-designed rubric. Offering such situations for students to engage with regularly throughout the course is ideal, and a whole-course simulation is the best form of this teaching. Still, if such methodologies were employed even once in every (or even most) doctrinal courses, it would go a long way to achieve the goals of the *Carnegie Report's* intended integration.

In the Discovery Law class that I teach (a simulation-based class that is discussed in greater detail below), every discovery document the students prepare—and serve on their assigned opposing counsel—offers opportunities for *identification* of ethical issues, and the memos that accompany each assignment specifically ask the students to explain the choices they made and *reflect* on how and why they made those decisions.¹⁵⁹ In the final step of the sequence, I provide margin *feedback* on their memos, and one of the criteria in the grading rubric on each assignment addresses the accuracy and quality of the identification of the ethical issue as well as the depth and clarity of the reflection.¹⁶⁰

Legal research and writing (LRW) professors should be working on how to introduce such GSFPI opportunities in the first-year course for three reasons. First, the *Carnegie Report* suggests that the formation of professional identity should be infused throughout the curriculum,¹⁶¹ and

¹⁵⁸ This discussion of a GSFPI has been adapted from my blog; for more, see David Thomson, "*Teaching*" *Formation of Professional Identity*, L. SCH. 2.0 (July 24, 2012, 1:46 PM), <http://www.lawschool2.org/lis2/2012/07/formation-of-professional-identity.html>.

¹⁵⁹ See David Thomson, Discovery Practicum Syllabus 1 (Spring 2015) (on file with the Regent University Law Review).

¹⁶⁰ See David Thomson, Discovery Practice Grading Rubric: Deposition (on file with the Regent University Law Review); David Thomson, Discovery Practice Grading Rubric: Requesting Document (on file with the Regent University Law Review); David Thomson, Discovery Practice Grading Rubric: Responsive Document [hereinafter Thomson, Responsive Document Rubric] (on file with the Regent University Law Review).

¹⁶¹ See CARNEGIE REPORT, *supra* note 1, at 191–92.

obviously that would include LRW. Second, because LRW professors already do some of this (just not necessarily intentionally) and their class is the first one that law students take which simulates legal practice, it is important for the LRW class to introduce concepts of formation of professional identity. Third, it would give LRW professors opportunities for more connections with other parts of the curriculum working on formation of professional identity, most particularly the clinic and the externship program.

Fortunately, it should not be difficult to do. Perhaps one way might be to have an ethical dilemma arise about whether to include a borderline negative case in a brief. That is a writing assignment that already exists in the LRW course, and sometimes this does happen.¹⁶² But LRW professors do not necessarily ask the students to identify and reflect on the choice they made about that case, and as a result, they might miss an opportunity for response and guidance to the students, which would complete each of the steps in a GSFPI. With a modicum of intention and planning, this sort of exercise could be accomplished in many courses currently in the law school curriculum.

At the University of Denver, we developed a model for upper class simulations that are designed to achieve the *Carnegie Report's* call for integration of the three apprenticeships.¹⁶³ This model, known as Carnegie Integrated Courses, is designed to integrate doctrine, skills, and professional identity formation in any law school course.¹⁶⁴ Typically taught in a simulation format, it can be applied to any legal doctrinal subject.¹⁶⁵ These courses can often provide necessary skills in a safe environment, and they can serve to prepare students to take a clinical course next, perhaps followed by an externship experience.

It is likely that these sorts of whole-course simulations—courses that intentionally integrate the three apprenticeships and use a systematic approach such as the GSFPI—may be the best pedagogy for the development of the third apprenticeship in our students. This is so because students learn the doctrine in the context that they apply it, so

¹⁶² See ASS'N OF LEGAL WRITING DIRS., LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY iv (2010), available at <http://www.alwd.org/wp-content/uploads/2013/02/2010-survey-results.pdf>.

¹⁶³ *Compare Course Simulations: Carnegie Integrated Courses*, U. DENVER STURM C. L., <http://www.law.du.edu/index.php/experiential-advantage/course-simulations> (last visited Apr. 10, 2015) [hereinafter *Carnegie Integrated Courses*] (describing the Carnegie Integrated Courses, which are mostly simulation-based and practice-oriented), with CARNEGIE REPORT, *supra* note 1, at 12 (suggesting law schools adopt curricula that integrate the three apprenticeships throughout). The *Carnegie Report* also suggested that models for integration of the apprenticeships already existed in the legal writing programs of many law schools. CARNEGIE REPORT, *supra* note 1, at 104.

¹⁶⁴ *Carnegie Integrated Courses*, *supra* note 163.

¹⁶⁵ *Id.*

they are confronted with ethical issues as they arise in practice, and they must resolve them to complete the assignment and reflect on their formation. While clinical and externship opportunities do this as well, it is impossible in those live-client representations to expose students to as many of the ethical issues that arise as can be done in the safer environment of a simulation.

Further, a simulation that places students in role relationships to each other—such as opposing counsel—creates a built-in normative benefit. Generally speaking, students are not willing to submit documents to each other that would be so sloppy or late as to inhibit the learning experience for their classmates. This might create a normative behavioral benefit: if their first experience (and then repeated experience) is in the mode and expectation of professional behavior, perhaps that will inculcate such behaviors and values as they enter practice.

B. The Value of Experiential Learning for the Third Apprenticeship

There has been much discussion in legal education recently about the benefits of experiential learning as a pedagogical design. Schools across the country have been expanding their experiential offerings, and the ABA has recently required that law schools increase these offerings.¹⁶⁶ But there remains some confusion about what experiential learning actually entails and why it can be so beneficial for student learning and formation.¹⁶⁷

My recent article offered a history and background for experiential learning and provided a new definition of experiential learning which intentionally includes opportunities for professional formation.¹⁶⁸

The term "Experiential Learning" refers to methods of instruction that regularly or primarily place students in the role of attorneys, whether through simulations, clinics, or externships. Such forms of instruction integrate theory and practice by providing numerous opportunities for students to learn and apply lawyering skills as they are used in legal practice (or similar professional settings). These learning opportunities are also designed to encourage students to begin to form their professional identities as lawyers, through experience or role-playing with guided self-reflection, so that they can become skilled, ethical, and professional life-long learners of the law.¹⁶⁹

There are several essential attributes of this definition that deserve highlighting. Experiential learning must focus on the students'

¹⁶⁶ See David I. C. Thomson, *Defining Experiential Legal Education*, 1 J. EXPERIENTIAL LEARNING 1, 5 (2014).

¹⁶⁷ See *id.*

¹⁶⁸ *Id.* at 19–20.

¹⁶⁹ *Id.* at 20.

experience, place students *in the role of attorneys*, intentionally emphasize the *formation of professional identity*, and effectively communicate to students that the concepts learned in law school are merely the foundation to their ever-expanding knowledge of the legal practice.¹⁷⁰

This definition can be made to apply to many different contexts, but one must ask several questions to pinpoint its application to a particular course.¹⁷¹ One of these questions is focused on the third apprenticeship: “Do you include opportunities for student self-reflection (in writing) about the experience of being ‘in role’ so as to help them form their professional identities as lawyers?”¹⁷² By asking this question, a professor can determine whether he has adequately planned for the formation of professional identity in his students through opportunities of student reflection. Although self-reflection is not *required* by the definition, a course that plans these opportunities meets at least one of the goals of experiential education. Obviously, courses without opportunities for students to reflect, but with other structures in place for students to form their professional identities, can still be classified as “experiential.”¹⁷³ This could also be true of virtually any course in the law school curriculum. Any course could incorporate one or more GSFPI designed modules that fit the substantive area of law being taught. It is also possible to do this throughout a course, and what follows is an example of that sort of course design.

IV. AN EXAMPLE COURSE IN DISCOVERY LAW

For over twenty years (on and off), I have taught a Civil Discovery Litigation course that is a whole-course simulation and which uses the GSFPI method for the intentional formation of professional identity. A typical pre-trial course might be thought of as just a skills course, leaving to some other course the teaching of the applicable doctrine. Most schools do not have a course focused just on civil discovery law, in part because it is believed that the subject is sufficiently covered in the first-year Civil

¹⁷⁰ *See id.* John Dewey emphasized teaching students how to learn, saying, Collateral learning in the way of formation of enduring attitudes . . . may be and often is much more important than the spelling lesson or lesson in geography or history that is learned. For these attitudes are fundamentally what count in the future. The most important attitude that can be formed is that of desire to go on learning.

JOHN DEWEY, *EXPERIENCE AND EDUCATION* 48 (1938).

¹⁷¹ *See* Thomson, *supra* note 166, at 21–22.

¹⁷² *Id.* at 22.

¹⁷³ Trial Practice is an example. *See id.* at 23. Practice-heavy courses like this would require only a bit of planning to transform them into explicitly formative courses. *Id.*

Procedure course.¹⁷⁴ Unfortunately, while all students take that course in the first year, they rarely learn much of the detail of the discovery phase in a civil litigation during that course. A typical Civil Procedure casebook contains 1200 pages and allocates but eighty pages to the discovery rules.¹⁷⁵ While some courses might direct some effort at those rules, the overwhelming focus of the first-year course is on such mainstream topics as jurisdiction, venue, pleading, and the *Erie* doctrine.¹⁷⁶ This is done for two primary reasons. First, those are subjects that can be tested on a final exam more substantively than the discovery rules can be tested, and second, because those are topics tested on the bar exam.¹⁷⁷ This is all understandable (and perhaps even appropriate), but it creates a problem: a law school graduate going into a litigation practice will have a good grounding in those subjects that can be tested on a summative exam but will rarely have any idea how to actually draft a set of interrogatories or understand why one would want to.

The Discovery Practice course is focused on the doctrine of the twelve Federal Rules of Civil Procedure that govern discovery.¹⁷⁸ While one could teach such a course in a "traditional" format, with lectures and a final exam, such a structure would not address the *Carnegie Report's* concerns about proper use of the upper-level years in law school and the integration of doctrine, skills, and professional identity formation.¹⁷⁹ Therefore, the structure of this course is set fully around a simulated litigation that takes place during the course, led by the students in teams of two.¹⁸⁰ Each team of two students is simulating the same litigation, so there are eight to ten versions of the case going on in each administration of the course.¹⁸¹ In such a course design, students learn about Rule 33,¹⁸² for example, by studying the Interrogatories to Parties rule itself, discussing key cases that interpret it, and learning various strategies for how and when to use interrogatories in litigation. Then the students *prepare* a set of

¹⁷⁴ See Arin Greenwood, *School of E-Discovery: Online Course Aims to Help Lawyers Bone Up*, A.B.A. J., Apr. 2011, at 30, 30 (noting that lawyers and law students have limited access to courses on e-discovery).

¹⁷⁵ See, e.g., RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH, at ix–xi (5th ed. 2009).

¹⁷⁶ See, e.g., *id.* at ix–x.

¹⁷⁷ See NAT'L CONFERENCE OF BAR EXAM'RS, MBE SUBJECT MATTER OUTLINE 1 (2014), available at http://www.ncbex.org/assets/media_files/MBE/MBE-Subject-Matter-Outline.pdf (including jurisdiction, venue, pleading, and law applied by federal courts as Civil Procedure topics tested on the MBE).

¹⁷⁸ Thomson, *supra* note 159.

¹⁷⁹ See CARNEGIE REPORT, *supra* note 1, at 12.

¹⁸⁰ See Thomson, *supra* note 159.

¹⁸¹ See *id.* at 7.

¹⁸² FED. R. CIV. P. 33.

interrogatories, and at the next class they *serve* their assigned opposing counsel the set that they have drafted.¹⁸³ This continues throughout the course, and the students draft a dozen discovery documents, one per week.¹⁸⁴ In this simulation course design there is still class time, of course, and there is doctrine to cover, but there are many more active learning methods of teaching that can be implemented.

The problem set the students work on during the course is a product liability prescription drug case.¹⁸⁵ It is an “ill-structured problem”¹⁸⁶ in the sense that the case has a range of reasonable outcomes, although it is not entirely unpredictable how it is likely to turn out. At the beginning of the course, students are given a précis about the problem, a complaint and answer, and a portion of the case file.¹⁸⁷ They spend the rest of the course learning about the rules, cases, and strategy in class, and then they *use* the discovery tools they have learned to find out the rest of the information that is available—just as in a real litigation.¹⁸⁸ In this way, the students are producers of knowledge about the case, but there are also ways in which they produce the knowledge about the discovery rules they learn during the course. One of those ways is working in collaborative groups to research one of the lesser important rules of discovery law (such as Rule 28—Persons Before Whom Depositions May Be Taken¹⁸⁹) and present to the class what they have learned.¹⁹⁰ There are five of these groups, and they each prepare a wiki-based research site and present in class from the site they have prepared. This way, other students have access to the sites on these rules to reference throughout the rest of the course.

In the Discovery course, as with many other law school courses, students come into the class with well-formed notions of how the litigation system works or does not work, drawn mostly from popular media such as TV shows and movies. Typically, attorneys are depicted in the popular media as unethical sharks who use the litigation system for combat, often

¹⁸³ See Thomson, *supra* note 159, at 3.

¹⁸⁴ See *id.* at 3–5.

¹⁸⁵ David I. C. Thomson, *About S&V: Discovery Practice*, DISCOVERY SKILLS, <http://www.discoveryskills.com/aboutdp.htm> (last visited Apr. 10, 2015) [hereinafter Thomson, *About Discovery Practice*]; see also Thomson, *supra* note 159, at 2.

¹⁸⁶ See David H. Jonassen, *Instructional Design Models for Well-Structured and Ill-Structured Problem-Solving Learning Outcomes*, 45 EDUC. TECH. RES. & DEV. 65, 68 (1997); see also DAVID H. JONASSEN, *LEARNING TO SOLVE PROBLEMS: AN INSTRUCTIONAL DESIGN GUIDE 4* (2004).

¹⁸⁷ These documents are provided in the assigned textbook. See Thomson, *About Discovery Practice*, *supra* note 185.

¹⁸⁸ See Thomson, *supra* note 159, at 1–5.

¹⁸⁹ FED. R. CIV. P. 28.

¹⁹⁰ See Thomson, *supra* note 159, at 4.

using it to unfairly overwhelm their opponents.¹⁹¹ The design of the Discovery course is to put students into nearly "real" situations wherein they must represent a client, work with an opposing counsel, conduct a deposition, and ultimately reach a settlement. Through these stages of the course, the students can see for themselves that—at least most of the time—it is not about "winning" the case for a client, but it is more about managing a process according to the governing rules and reaching an acceptable result for the client.¹⁹²

Because over ninety-eight percent of cases settle (at least in federal court), the course ends with a settlement negotiation, which the students conduct themselves with the professor only acting as a facilitator where needed.¹⁹³ In some cases, the professor acts as a student attorney's client (depending on which side the student is representing). Almost every time, students successfully settle the case within a fairly broad, but still reasonable, range of settlement terms.

In a traditional course, the professor can lecture, explain, or tell war stories about the subject matter of the course. But when students learn on a metacognitive level through exercises such as a mock deposition or a settlement conference, they learn the subject of the course much more deeply, and often in a personal way.¹⁹⁴ Further, the simulation puts them in situations where they have to begin to form their own professional identity and consider difficult questions such as "How will I behave in this situation as an attorney?" and "What kind of attorney do I want to be: an obstreperous one or a cooperative one?" or more simply: "What is my style of lawyering going to be?"

Further, with each discovery document the students prepare through the course of the semester, they also prepare a "strategy and reflection" memo to the professor detailing their planned and attempted strategies in the particular document they drafted.¹⁹⁵ In that memo, they also address the ethical issues they faced and how they resolved them.¹⁹⁶ This feature of the course also provides an opportunity for metacognitive learning and further development of the students' professional identity.

As we learn more about assessment in law school, we have come to know that the more explicit we can be with our students about our

¹⁹¹ See Carrie Menkel-Meadow, *The Sense and Sensibilities of Lawyers: Lawyering in Literature, Narratives, Film and Television, and Ethical Choices Regarding Career and Craft*, 31 MCGEORGE L. REV. 1, 2–3 (1999).

¹⁹² Any of these individual discovery modules could also be conducted in the first-year Civil Procedure course.

¹⁹³ See Thomson, *supra* note 159, at 1, 5.

¹⁹⁴ See CARNEGIE REPORT, *supra* note 1; see, e.g., Thomson, *supra* note 159.

¹⁹⁵ Thomson, *supra* note 159, at 7.

¹⁹⁶ *Id.*

learning outcomes for the course, the better their learning will be.¹⁹⁷ Therefore, because the formation of professional identity is a learning outcome I have for the course, I am explicit about that on the first page of the syllabus:

[T]he learning objectives for this course are that, by the end of the course, you will be able to:

- Recognize and apply the twelve Federal Rules of Civil Procedure that pertain to discovery
- Recognize how and when to use the most common litigation documents
- Prepare such documents in a simulated litigation
-
- Identify and evaluate ethical dilemmas that arise in the discovery context
-
- Take and defend a deposition
- Compare options and negotiate a settlement with opposing counsel
-
- Use these opportunities to reflect intentionally on the formation of your professional identity.¹⁹⁸

Because a good discovery document does not necessarily reveal its strategy and goals to opposing counsel, I have students write a memo to me each week about each document they prepare.¹⁹⁹ Those memos fit a model that I describe for the students as follows:

The memos should address at least these three topics: 1) *methods and approaches*, 2) *strategy*, and 3) *formation of professional identity*. For the first topic, *methods and approaches*, please provide information about how you developed and prepared the document, such as your starting point and adjustments you made. For the second topic, please describe your *strategy* in preparing the document—what are you trying to learn from the opposing party, and why did you take the approach you did? For the third topic, *formation of professional identity*, please a) identify any ethical issues you encountered in preparing the document, b) describe how you resolved those ethical issues, c) reflect on how the

¹⁹⁷ Ciara O'Farrell, *Enhancing Student Learning Through Assessment: A Toolkit Approach*, DUBLIN INST. OF TECH. 8, available at http://www.tcd.ie/teaching-learning/academic-development/assets/pdf/250309_assessment_toolkit.pdf (last visited Apr. 10, 2015).

¹⁹⁸ Thomson, *supra* note 159 (including a slightly abbreviated set of the learning outcomes for the course).

¹⁹⁹ *Id.* at 8.

decision you made contributes to or is consistent with your own formation of professional identity as a lawyer.²⁰⁰

Finally, the fourth step is to provide some feedback. As assessment professionals say, "[w]e should measure what we value,"²⁰¹ so if we value this learning outcome, we must measure how the students are doing in their formation. Thus, twenty percent of the grade for each week's assignment includes the following one-to-five scale:

ETHICS / REFLECTION (20%)

- 1 Identification of ethical issues is poor or lacking (such as objecting to answer a legitimately focused question). Document and memo seems mechanical and lacks reflection.
- 2 A few ethical identification errors made. Document and memo show some thoughtful reflection.
- 3 Only one or two ethical identification concerns in the document and memo. Some thoughtful reflection and clarity of purpose is shown in the document.
- 4 No ethical identification concerns, and the document and accompanying memo show significant thoughtful reflection in preparing the document.
- 5 This is a student who is becoming confident with discovery, identifies all ethical grey areas, and uses the simulation to reflect with depth and clarity on decisions made while balancing the various competing concerns.²⁰²

It would be easy to think that students would not take this part of the assignments seriously. But quite the reverse is true. Here are a few examples of what students have said about their work on the discovery documents using this methodology:

"The central ethical dilemma of discovery came into sharp focus during this exercise. I felt torn on several questions . . . For each, I tried to imagine standing in front of a judge and explaining the choice I had made."²⁰³

"[W]hile I certainly could have phrased my interrogatories in a more aggressive manner . . . I chose not to. I felt it was more necessary to establish a generally amicable relationship with opposing counsel so that

²⁰⁰ These directions exemplify cultivating both technical skills and professional identity formation. David Thomson, Discovery Practicum Memo Instructions (on file with author).

²⁰¹ Robert Coe & Carol Taylor Fitz-Gibbon, *School Effectiveness Research: Criticisms and Recommendations*, 24 OXFORD REV. EDUC. 421, 433 (1998).

²⁰² Thomson, Responsive Document Rubric, *supra* note 160.

²⁰³ Student 3, Memorandum of Strategy for Answers to Interrogatories (on file with the Regent University Law Review) (used with permission).

future discussions relate specifically to the main points of contention”²⁰⁴

“I do not want lawyers, clients, or judges to perceive me as an attorney who walks too close to the unethical line, occasionally crossing it. However, I also want to protect my clients’ interests.”²⁰⁵

These student reflections are quite typical, and they indicate that the regular *guided sequences* provided in this simulation course give students the opportunity to explore the *personal meaning* of the legal work they are planning to do and to begin to feel the weight of *responsibility* that comes with being a lawyer.

CONCLUSION

The *Carnegie Report* argues that the professionalism problem starts in law school and that it is not about mundane things like timeliness and respect for judges, but rather is founded in the professional identity of lawyers.²⁰⁶ Further, it suggests that professional identity is governed only at its base by the Model Rules but is mostly about notions of duty and responsibility to society and the rule of law upon which that society is based.²⁰⁷ The *Carnegie Report* called on law schools to give this third apprenticeship greater attention, focus, and intentionality, and to do so in a curriculum that integrates professional identity with the essential doctrinal knowledge and skills required to function as an attorney.²⁰⁸

Some schools are working hard to address this call for reform in legal education.²⁰⁹ Innovative courses have been developed and taught to students in both the first year and upper-class years.²¹⁰ Legal educators who have always addressed themselves to such matters (such as clinicians and legal writing professors) have become more intentional about what they are doing.

However, this Article argues that there is much more to be done, and the call for integration has not yet been met. The barriers to achieving integration seem high, but they are not. Experiential learning opportunities are already expanding, and these learning environments are ideally suited to facilitate the professional formation of students. Even outside of experiential learning courses, modules that implement a guided

²⁰⁴ Student 4, Memorandum on Defendant’s Interrogatories (on file with the Regent University Law Review) (used with permission).

²⁰⁵ Student 5, Plaintiff’s Response to Interrogatories (on file with the Regent University Law Review) (used with permission).

²⁰⁶ See CARNEGIE REPORT, *supra* note 1.

²⁰⁷ *Id.* at 129.

²⁰⁸ *Id.* at 196.

²⁰⁹ See sources cited *supra* note 39; see also text accompanying notes 143–51.

²¹⁰ See *supra* Part II.B.

sequence for professional identity formation can be fit into any course. This Article provides a methodology for doing so.

When legal education achieves apprenticeship integration throughout the curriculum, it will have moved itself substantially forward in the direction of addressing its limitations. When this is achieved, the impact on the legal profession will likely be profound in ways that have long been desired.