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Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity

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ASSESSING PROFESSIONALISM: MEASURING PROGRESS IN THE FORMATION OF AN ETHICAL PROFESSIONAL IDENTITY

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I. INTRODUCTION

A. *The Social Contract of the Peer-Review Professions and Professionalism*

Over the past 125 years, the peer-review professions in the United States have gradually negotiated stable social contracts with the public in both custom and the law.[1] These social contracts are tacit agreements among society and members of each peer-review profession that regulate their relationship with each other—in particular, agreements regarding the profession's control over professional work.[2]

The public grants a profession autonomy to regulate itself through peer review, meaning that the profession's members: (1) substantially control entry into the profession (including qualifying credentials and the necessary university education that is influenced by the profession) as well as contin-

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1. WILLIAM M. SULLIVAN, WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA 3 (2d ed. 2004). The initial section of this essay first appeared in somewhat different form in the forthcoming series of papers "Academy in Transition" by the American Association of Colleges and Universities. Neil Hamilton, *The Future of the Professorate: Academic Freedom, Peer Review and Shared Governance*, AM. ASS'N C. & U. (Academy in Transition Series, forthcoming 2008).

2. MODEL RULES OF PROF'L CONDUCT, Preamble ¶¶ 10–12 (2007) (stating the social contract for the legal profession). Paragraph 10 provides that "[t]he legal profession is largely self-governing," with unique responsibilities, "because of the close relationship between the profession and the processes of government and law enforcement." *Id.* ¶ 10. The legal profession is the only peer-review profession whose members control one branch of government. Paragraph 11 states: "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." *Id.* ¶ 11. Paragraph 12 adds: "The legal profession's relative autonomy carries with it special responsibilities of self-government . . . . Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves." *Id.* ¶ 12.

ued membership and upward mobility in the profession, and (2) set standards for how individual professionals perform their work. In return, each member of the profession and the profession as a whole agree to meet certain correlative duties to the public including: (1) maintaining high standards of minimum competence and ethical conduct to serve the public purpose of the profession and disciplining those who fail to meet these standards, (2) promoting and fostering the core values and ideals of the profession, and (3) restraining self-interest to some degree to serve the public purpose of the profession.[3]

A peer-review profession's ability to regulate itself translates into substantial autonomy in, and control over, the work for individual professionals. Peers practicing in the profession understand the complexity of the practice and in their exercise of peer review over the work, protect a wide range of "judgment calls" as competent and ethical within the tradition of each profession.[4]

Eliot Freidson defines professionalism as an alternative ideology for the organization of work in contrast to the dominant market-competition ideology that assumes rational and fully informed consumers whose preferences are met by competition among producing firms resulting in low cost services. In the dominant market-competition ideology, consumer preferences direct what is produced, and the management of producers directs workers on how to meet consumer preferences. In the ideology of professionalism, the public grants members of an occupation control over their work because the particular tasks they perform are so different from those of most workers (and involve transcendent values like justice, spiritual and physical health, or the growth of reason) that occupational control of work is essential.[5]

Freidson defines an ideal institutional professionalism that includes a major precondition for, and three central elements of, the social contract of a peer-review profession. A major precondition for such a social contract is public acceptance of (1) the profession's contribution to a transcendent public good, (2) the grounding of the profession in a body of theoretically based specialized knowledge requiring a high degree of discretion, and (3) the profession's requirement of credentials conferred by institutions of higher education.[6] The three central elements of Freidson's ideal institu-

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3. *See* SULLIVAN, *supra* note 1, at 21; ELIOT FREIDSON, PROFESSIONALISM, THE THIRD LOGIC: ON THE PRACTICE OF KNOWLEDGE 127 (2001) [hereinafter FREIDSON, PROFESSIONALISM].

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

5. FREIDSON, PROFESSIONALISM, *supra* note 3, at 17, 122–23.

6. *Id.* at 1, 3, 127, 180, 213, 221.

tional professionalism are part of the social contract itself: (1) the public's grant of significant control over the work to the profession, including qualifying credentials for entry, continuing membership and career mobility; (2) the public's grant of exclusive jurisdiction over the division of labor[7] in employment to the profession (ideally incorporated into, and protected by, law); and (3) the reciprocal promise of the profession and each member to restrain self-interest to some degree to serve the public good in the area of the profession's responsibility.[8]

While Freidson uses "professionalism" to mean "a set of institutions which permit the members of an occupation to make a living while controlling their own work,"[9] this essay uses "social contract" to describe and analyze the same institutional elements examined by Freidson. The word "professionalism" is used here in its common meaning to describe the aspirations, conduct and qualities that mark a professional person. "Professionalism," as used herein, describes the important elements of an ethical professional identity into which each peer-review profession should socialize students and practicing professionals. These elements of an ethical professional identity capture the correlative duties of the profession's social contract for both the individual professional and the relevant professional peer-review groups.[10]

The Carnegie Foundation for the Advancement of Teaching's recent book, *Educating Lawyers: Preparation for the Practice of Law* (2007),[11] used "social contract" in the meaning adopted here and emphasized that:

> [T]his social contract shapes—and makes distinctive—professional education. Across the otherwise disparate-seeming educational experiences of seminary, medical school, nursing school, engineering school, and law school, [the Carnegie Foundation] identified a common goal: professional education aims to initiate

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7. The division of labor refers to "the separation of labor into components or into various distinct processes and their apportionment among different individuals and groups for the purposes of increasing productive efficiency." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002).

8. In addition to the reciprocal promise to restrain self-interest to serve the public good, there are other correlative duties a peer-review profession undertakes under the social contract (mentioned earlier in this essay) that Freidson does not discuss. In return for significant occupational control over work, the social contract requires each member of the profession and the relevant professional peer groups to maintain high standards of minimum competence and ethical conduct, discipline those who fail to meet these standards and promote and foster the core values and ideals of the profession.

9. FREIDSON, PROFESSIONALSIM, *supra* note 3, at 17.

10. Jordan Cohen, President of the Association of American Medical Colleges, commented that professionalism is the medium through which individual physicians fulfill the profession's social contract with society. Jordan Cohen, *Foreword* to DAVID THOMAS STERN, MEASURING MEDICAL PROFESSIONALISM, at vi (2006).

11. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PRACTICE OF LAW (2007) [hereinafter EDUCATING LAWYERS].

novice practitioners to think, to perform, and to conduct them-
selves (that is, to act morally and ethically) like professionals.[12]

In both *Educating Lawyers* and *Educating Clergy*,[13] the Carnegie
Foundation identified three apprenticeships necessary for entry and ad-
vancement in all of the peer-review professions: (1) the cognitive or intel-
lectual apprenticeship of the profession's unique analytical skills applied to
the profession's doctrinal knowledge; (2) the practical apprenticeship of the
other skills necessary for professional life; and (3) an apprenticeship of pro-
fessional identity formation.[14] The apprenticeship of formation into an ethi-
cal professional identity is professionalism in the meaning used here.

B.   *The Burden on the Peer-Review Professions to Justify Their Social Contracts in the Context of a Market Economy*

In a market economy, the strong presumption is that an optimal out-
come maximizing the public good is a competitive market wherein the man-
agement of each enterprise controls work to provide the services that
consumers prefer at the lowest cost. Exceptions granting the peer-review
professions occupational control of their work must be constantly justified
as in the public good. When the public does not understand how it benefits
because of (1) changing market conditions undermining the precondition
for the social contract for part or all of the profession, (2) failures of profes-
sionalism by the profession that undermine the public's trust in the social
contract, or (3) failures of the profession to educate the public regarding the
benefits of the social contract, then the public renegotiates the social con-
tract toward a typical market relationship of consumer/service providers or
employees/employers. The latter two reasons are failures of the profession
itself.

Over the course of more than a century, the major peer-review profes-
sions sought to convince the public that the social contract of these profes-
sions provides more benefits to the public than a purely market-competition
model.[15] However, these social contracts are premised on the public's trust
that a profession and its individual members are serious about professional-
ism. High degrees of professionalism build confidence in the social con-

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12. *Id.* at 22.

13. CHARLES FOSTER ET AL., EDUCATING CLERGY: TEACHING PRACTICES AND PASTORAL IM-
AGINATION 5–8 (2006).

14. EDUCATING LAWYERS, *supra* note 11, at 28; Foster, *supra* note 13, at 5–8.

15. For example, leaders in the professorate formed the American Association of University
Professors and issued the Declaration of Principles on Academic Freedom and Academic Tenure
in 1915 to convince boards of trustees and regents (who represent the public interest in non-profit
institutions of higher education) to rely on peer review in decisions regarding faculty status.
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACA-
DEMIC FREEDOM AND ACADEMIC TENURE, POLICY DOCUMENTS & REPORTS 291 (10th ed. 2006).

tract. Failures of professionalism undermine the social contract.[16] As the public's confidence in the social contract rises, the profession can negotiate more control over the work; as confidence falls, the public will reduce the profession's control over the work. These social contracts are always subject to renegotiation.

In recent corporate scandals after the failure of the accounting profession to fulfill its social contract as an effective gatekeeper exercising its independent judgment to protect the public—particularly Arthur Andersen in the Enron debacle—the public, acting through Congress in 2002 with the Sarbanes-Oxley Act,[17] redesigned the accounting profession's social contract to reduce significantly the profession's peer-review authority and autonomy.[18] The same legislation and subsequent Securities and Exchange Commission regulations sent a shot across the bow of the legal profession by substituting legislation and federal regulation requiring "up the ladder" reporting for what had been the profession's own standard in Model Rule 1.13.[19]

Similarly, many physicians have also experienced significant renegotiation of their social contract toward less control over their work, less autonomy and more reporting and oversight.[20] This is principally the result of fundamental market changes in third-party payment for health care, the rapid growth of managed care organizations, and a dramatic growth in advanced technology and specialized knowledge requiring large capital investment, combined with deep public concern over errors causing patient injury.

A significant proportion of the academic profession has also been experiencing a renegotiation of the social contract. The governing boards and administrative leadership at many colleges and universities, particularly those without a substantial research mission, have concluded that while changing market conditions call for more flexibility in the terms of faculty employment, failures of the faculty with respect to effective peer review and efficient shared governance undermine necessary market responses. These boards are fundamentally renegotiating the academic profession's so-

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16. Jordan Cohen makes the same argument for his profession: "Why is it important to maintain the medical profession's implicit social contract with society? For it is professionalism that is the medium through which individual physicians fulfill the lofty expectations that society has of medicine. If norms of physician behavior fall short of the responsibilities called for by medical professionalism, both presumed signatories to the social contract—the profession and the public— are destined to suffer irreparable harm." Cohen, *supra* note 10, at vi.

17. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 103–06, 2002 U.S.C.C.A.N. (116 Stat.) 745, 755–66.

18. *Id.*; *see generally* John C. Coffee Jr., Gatekeepers: The Role of the Professions in Corporate Governance (2006).

19. Sarbanes-Oxley Act § 307; 17 C.F.R. § 205.3(b) (2007).

20. Freidson, Professionalism, *supra* note 3, at 185, 190–91.

cial contract by moving dramatically toward a majority of contingent faculty (part-time and full-time non-tenure-track faculty).[21]

The peer-review professions' public defense of their respective social contracts tends to be anemic. As Freidson has observed, when the peer-review professions defend their social contracts, they typically rely on a rhetoric of rights, job security and "good intentions, which [are] belied by the patently self-interested character of many of their activities. What they almost never do is spell out the principles underlying the institutions that organize and support the way they do their work and take active responsibility for [the realization of the principles]."[22] They do not undertake responsibility for assuring the quality of their members' work.[23]

An effective defense of these social contracts has to rest on high degrees of professionalism among the members of the professions as well as constant education of the professions and the public about the benefits and duties of the social contract. The public must trust that the members of the professions, and the professions' peer communities, are fostering an ethical professional identity in each member of the professions. Otherwise, by default, the public should rely on the market and typical employer/employee relationships with respect to the control of work to provide optimal services at the lowest cost.

C. *Scope of This Paper*

While it is clear that professionalism is foundational for the social contract of each profession, there is little consensus both on how to define professionalism and how to measure the degree to which professional students or practicing professionals may have internalized an ethical professional identity. Indeed, the Carnegie Foundation authors have noted a common refrain throughout higher education for the professions: by the time students enter professional education, it is too late to affect their ethical commitments and professional responsibility.[24] Substantial evidence, however, suggests that while technically-oriented professional education may have little impact on the development of a student's ethical professional identity, appropriate pedagogy can have a positive impact.[25]

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21. Hamilton, *supra* note 1, at *18.

22. *Id.* at *3 (citing Freidson, Professionalism, *supra* note 3, at 3).

23. Freidson, Professionalism, *supra* note 3, at 190.

24. Educating Lawyers, *supra* note 11, at 133.

25. *Id.* at 133–35; *see generally* George B. Forsythe et al., *Making Sense of Officership: Developing a Professional Identity for 21st Century Officers*, *in* The Future of the Army Profession 189, 205 (Lloyd J. Matthews ed., 2002); Michael G. Pratt, Kevin W. Rockman, & Jeffrey B. Kaufman, *Constructing Professional Identity: The Role of Work and Identity Learning Cycles in the Customization of Identity Among Medical Residents*, 49 Acad. Mgmt. J. 235 (2006); Muriel Bebeau, *Promoting Ethical Development and Professionalism: Insights from Educational Research in the Professions*, 5 U. St. Thomas L.J. 366 (2008).

Faculty also tend to resist the idea that it really is possible to assess students' disposition around issues of moral values and character, and many faculty and students are deeply skeptical of the notion of teaching moral values or character.[26] This essay addresses the issue of whether it is possible to undertake assessment of a student's or practicing professional's professionalism. Part II outlines why a clear definition of professionalism is important; Part III explores the lack of a clear definition of professionalism, focusing particularly on medicine and the law; Part IV proposes a clear definition for the legal profession; Part V explains how the major elements of professionalism for the legal profession apply also to the medical profession; Part VI explains the criteria by which measures to assess the professionalism of a student or practicing professional should be evaluated; and Part VII provides, in the context of the criteria above, an introductory analysis of the current tools available to assess the elements of professionalism.

II.   Why a Clear Definition of Professionalism is Important

The professions should clearly and succinctly define the major elements of an ethical professional identity for the following reasons:[27]

1. ithout the guidance of clear principles of professionalism, the professions and professional education tend to emphasize the minimum floor of competence, compliance with legal duties and avoidance of malpractice exposure. For example, the legal profession's current socialization of law students and practicing lawyers excessively emphasizes the law of lawyering, defined only by the professional rules and law of malpractice.

2. If the floor of minimum rule compliance to avoid discipline or liability is the dominant focus of the socialization of the profession, then members of the profession will tend to understand ethical professional identity as simply compliance with the rules and avoidance of malpractice. For example, a practicing lawyer not socialized into the core values and ideals of the profession may have very limited tools to deal with the vast spectrum of lawyer decisions involving ethical dimensions beyond simple rule compliance or malpractice avoidance. Extrinsic values relating to ranking systems of grades, income or prestige—rather than intrinsic values relating to the profession's core values and ideals—tend to dominate lawyer decision-making on these discretionary ethical judgments.[28]

3. Confusion about the meaning of professionalism undermines the public's trust that the profession and each individual professional

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26. Educating Lawyers, *supra* note 11, at 176–77.
27. The discussion regarding the importance of a clear definition of professionalism also appears in Neil Hamilton, *Professionalism Clearly Defined*, 18 Prof. Law. 4 (forthcoming 2008).
28. Hamilton, *supra* note 1, at *6.

are serious about meeting their obligations under the social contract. A clear and succinct definition will help the public understand what goals the profession is trying to achieve with the socialization of its members.

4. Confusion about the meaning of professionalism greatly reduces the possibility that the concept will actually influence the conduct of students in professional schools or practicing professionals. Students and practicing professionals will give more attention and energy to expectations that are clearly stated and rigorously evaluated.

5. With a clear definition of professionalism, professional education and the organized professions could implement the assessment loop described in Part VI and move toward assessment of which pedagogies are most effective to help students and practicing professionals internalize and live the elements of the definition.

6. Assessment of professionalism in general, whether directed at the effectiveness of instruction or whether individual members of the profession are internalizing and living the elements of the definition, will give the profession more credibility with the public.

III. The Definition of Professionalism in the Medical and Legal Professions

The medical and legal professions have given the most attention to a definition of professionalism. By contrast, the 2006 Carnegie Foundation study of the education of clergy finds that professionalism for that profession has emphasized competent skills for the various clergy roles.[29] Scholars in engineering define professionalism as attributes of knowledge, organization and service to others.[30]

A. *Medical Literature on Professionalism*

The medical profession's literature on professionalism, while offering definitions of professionalism "in all kinds of shapes and sizes,"[31] has tended to focus both on concepts of fiduciary duty and the core values and ideals of the profession. Two major medical organizations have defined the term. The American Board of Internal Medicine (ABIM) defines professionalism as "those attitudes and behaviors that serve to maintain patient interest above physician self-interest . . ." and ". . . aspire to altruism, accountability, excellence, duty, service, honor, integrity, and respect for

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29. Foster, *supra* note 13, at 254–55 (2006).

30. William D. Lawson, *Professionalism: The Golden Years*, J. Prof. Issues Eng'g Edu. & Prac. 26 (2004).

31. Frederic W. Hafferty, *Definitions of Professionalism: A Search for Meaning and Identity*, 449 Clinical Orthop. & Related Res. 193, 200 (2006).

others." The ABIM expands on its definition by providing guidelines for behavior that require faculty and residents to demonstrate qualities such as "integrity, respect, compassion, professional responsibility, courtesy, sensitivity to patient needs . . . , and professional attitudes and behavior toward colleagues." The ABIM also notes seven challenges of professionalism, including abuse of power, arrogance, greed, misrepresentation, impairment, lack of conscientiousness and conflict of interest.[32] The Board's "Physician's Charter,"[33] which highlights professionalism as the basis for the medical profession's social contract, is a statement of three fundamental principles—patient welfare, patient autonomy and social justice—followed by ten commitments: professional competence, honesty, patient confidentiality, appropriate relations with patients, improvement of the quality of care and access to care, just distribution of finite resources, scientific knowledge, conflicts of interest and a generic commitment to professional responsibilities.[34]

The Accreditation Council for Graduate Medical Education (ACGME) defines professionalism as:

> [A] commitment to carrying out professional responsibilities and an adherence to ethical principles. Residents are expected to demonstrate: (1) compassion, integrity, and respect for others; (2) responsiveness to patient needs that supersedes self-interest; (3) respect for patient privacy and autonomy; (4) accountability to patients, society and the profession, and (5) sensitivity and responsiveness to a diverse patient population . . . .[35]

Scholars have also offered definitions of professionalism for the medical profession. However, Fred Hafferty, a leading scholar on medial professionalism, after reviewing the ten most-cited articles on professionalism as of 2006, concluded they "do not offer us tremendous insight into professionalism."[36]

Based on surveys of medical schools and the schools' teaching of professionalism, a group of scholars discussed four commonly recognized attributes essential to professionalism: subordinating one's self-interest to the interest of patients, adhering to high ethical and moral standards, responding to societal needs and evincing core humanistic values.[37] One of the groups in a separate article, further provided a definition of professionalism

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32. *Id.* at 195; *see generally* American Board of Internal Medicine, *Medical Professionalism In the New Millennium: A Physician Charter*, 136(3) ANNALS INTERNAL MED. 243, 243–46 (2002) [hereinafter *Physician Charter*].

33. *Physician's Charter*, *supra* note 32.

34. Hafferty, *supra* note 31, at 195; *Physician Charter*, *supra* note 32, at 244–46.

35. AMERICAN COUNCIL FOR GRADUATE MEDICAL EDUCATION, GENERAL COMPETENCIES (2007).

36. Hafferty, *supra* note 31, at 197.

37. *Id.*; Swick et al., *Teaching Professionalism in Undergraduate Medical Education*, 282 J. OF THE AM. MED. ASS'N 830, 830–32 (1999).

consisting of nine behaviors: (1) subordinating self-interest to the interest of others, (2) adhering to high ethical and moral standards, (3) responding to societal needs, (4) evincing core humanistic values, (5) exercising accountability, (6) demonstrating continued commitment to excellence, (7) exhibiting a commitment to scholarship, (8) dealing with high levels of complexity and uncertainty, and (9) reflecting upon actions and decisions. When performed by physicians, these behaviors demonstrate that the professionals are worthy of the trust patients and the public give them.[38]

Louis Arnold and David Stern in *Measuring Medical Professionalism* provided a fairly recent definition for professionalism. "Professionalism is demonstrated through a foundation of clinical competence, communication skills, and ethical and legal understanding, upon which is built the aspiration to wise application of the principles of professionalism: excellence, humanism, accountability, and altruism."[39] They also noted that "[r]espect, compassion and empathy, plus honor and integrity, comprise humanism."[40]

Although one of the earlier definitions of professionalism mentions "reflections upon actions and decisions," Hafferty noted that Epstein is the most cited reference on the element of mindfulness in professionalism. Epstein described mindful practice as including "critical reflection on action, tacit personal knowledge, and values in all realms of clinical practice, teaching, and research."[41] Epstein argued that critical self-reflection is a necessary ingredient in the development of a professional identity, and that a continuing self-reflection "enables physicians to listen attentively to patients' distress, recognize their own errors, refine their technical skills, make evidence-based decisions, and clarify their values so they can act with compassion, technical competence, presence, and insight."[42] The habits and skills of continuing self-reflection and peer review of others are closely related.[43]

Hafferty, "[preferring] succinctness over inclusiveness (and thus a longer string of key qualities and characteristics)," built a definition of medical professionalism:

> . . . around a tripartite framework of (1) core knowledge and skills, (2) ethical principles, and (3) a selflessness and/or service orientation. The key here is to differentiate between ethics and service versus altruism. My preferred core sociological definition is grounded in Sullivan's tripartite of (1) expert knowledge, (2) self-regulation, and (3) a fiduciary responsibility to altruism.[44]

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38. Hafferty, *supra* note 31, at 198; H.M. Swick, *Toward a Normative Definition of Medical Professionalism*, 75 Acad. Med. 612, 612–16 (2000).

39. Measuring Medical Professionalism, *supra* note 10, at 19.

40. *Id.* at 21.

41. Ronald M. Epstein, *Mindful Practice*, 282 J. Am. Med. Ass'n 833, 838 (1999).

42. Hafferty, *supra* note 31, at 198 (quoting Epstein, *supra* note 41, at 833).

43. *Id.* at 201.

44. *Id.* at 200.

Hafferty also emphasized self-reflection as a critical component of professionalism. "It is the personal equivalent of peer review. In turn, self-review and peer review are necessary conditions for professionalism."[45] Finally, Hafferty included in his description of professionalism the importance of truthfully educating the public on an ongoing basis about how the profession is carrying out these responsibilities.[46]

B.   *Legal Scholarship on Professionalism*[47]

Although professionalism is a highly useful term to describe the important elements of an ethical professional identity, legal scholars have so far been unable to construct and agree on a widely-accepted, clear and succinct definition of "professionalism."[48] Legal scholarship regarding professionalism comes in three typical varieties. One brand discusses professionalism with no attempt to state a definition of the concept itself. In these articles, the definition of professionalism is either assumed to be self-evident or meant to be implicitly understood within the context of the article's main focus.[49] For example, this brand of legal scholarship often asserts that "professionalism" is in decline and provides evidence of growing incivility among lawyers, increased legal malpractice actions and greater focus on profit and personal gain in the practice of law.[50] The suggestion, then, is that professionalism itself is principally high competence and civility within the practicing bar, including also a commitment to serve the public rather than self-interest. Commonly, this type of article does not provide

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45.   *Id.* at 201.

46.   *Id.*

47.   The discussion summarizing legal scholarship on professionalism can also be found in Hamilton, *supra* note 27, at 2–3.

48.   Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm. & Mary L. Rev. 1303, 1307 (1995) (stating that professionalism is an abused term and is often defined merely as "to act the way we want lawyers to act"); Timothy Terrell & James Wildman, *Rethinking Professionalism*, 41 Emory L.J. 403, 406 (1992) (finding that professionalism is an elusive concept and a lofty goal); Burnele V. Powell, *Lawyer Professionalism as Ordinary Morality*, 35 S. Tex. L. Rev. 275, 277–78 (1994) (stating that the concept of professionalism is widely discussed, passionately supported and has generated innovative programs, codes and experiments, but it is little-defined); Deborah Rhode, *Opening Remarks: Professionalism*, 52 Santa Clara L. Rev. 458, 459 (2001) ("[A] central part of the 'professionalism problem' is lack of consensus about what exactly the problem is."); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 Val. U. L. Rev. 657, 657 n.2 (1994) (noting that there is a tendency to rely on metaphor in the use of the term professionalism, which may contribute to the absence of consensus as to the term's meaning).

49.   Powell, *supra* note 48, at 278. Powell further notes that professionalism is often treated as a "self-evident concept requiring no definition."

50.   Susan Daicoff, *Asking Leopards to Change their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 Geo. J. Legal Ethics 547, 549 (1998); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 Val. U. L. Rev. 563, 564–66 (1994) (describing the demise of professionalism as congruous with the decline of the legal profession generally, with such symptoms as prevalent lawyer-bashing, negative stereotypes and low scores on public opinion polls).

the legal community with a positive working definition of "professionalism;" rather, it describes problems in the profession and equates these problems with a *lack* of professionalism.[51]

The second variety of scholarship on professionalism attempts to define the term by focusing on one or more characteristics that are the "core" of professionalism. Examples include a focus on professionalism as a set of core values,[52] professional standards created by the ABA,[53] a commitment to public service,[54] client-oriented service,[55] or individual morality and respect for the human beings and communities lawyers serve.[56]

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51. Robert L. Nelson, *Professionalism from a Social Science Perspective*, 52 SANTA CLARA L. REV. 473, 479 (2001) (asserting that, in trying to define professionalism, "we mostly rely on post-hoc horror stories about what has gone wrong and use them to analyze the nature of the problem").

52. Terrell & Wildman, *supra* note 48, at 406, 424–31 (arguing that the heritage of the profession of law is the basis of a "professional tradition" defined by a set of essential, timeless principles). Terrell and Wildman attempt to isolate those principles of professionalism, which include (1) an ethic of excellence; (2) integrity, or saying no to client demands at the limits of law; (3) respect for the system and rule of law; (4) respect for other lawyers and others who serve legal systems; (5) commitment to accountability to clients; and (6) responsibility for adequate distribution of legal services; Buchanan, *supra* note 50, at 579 (suggesting that the six standards of the highly selective International Society of Primerus Law Firms are the best model of professionalism and can facilitate the return of legal professionalism, with the six standards including (1) integrity, (2) excellence of work product, (3) reasonable fees, (4) professional education, (5) civility, and (6) community service); Roger Cramton, *Delivery of Legal Service to Ordinary Americans,* 44 CASE W. RES. L. REV. 531, 605, 611 (1994) (arguing that a renewed vision of professionalism will include a lawyer who (1) cares about clients and engages in moral dialogue with them while protecting client interests, (2) cares about equal access to legal services and efficiency in the provision of services, and (3) considers moral conscience in daily practice); Philip S. Anderson, *Remarks of Philip S. Anderson*, DICK. J. INT'L L. 43, 44 (2000) (identifying four core principles of the legal profession as (1) specialized training and knowledge for the practice of law as a learned profession; (2) independent exercise and conflict-free practice; (3) compliance with, and enforcement of, ethical principles; and (4) obligating a lawyer to the public in addition to his or her client as well as to the rule of law).

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

54. Richard C. Baldwin, *Rethinking 'Professionalism'— and Then Living It!*, 41 EMORY L.J. 433, 436 (1992) (noting that though dialogue about professionalism cannot be limited to service to the poor, "the most important substantive value carried by our professional heritage" is access to justice for all members of society); Zacharias, *supra* note 44, at 1317–18 (describing the birth of the emphasis on pro bono activities that many commentators describe as the "core" of professionalism as the elite Bar's response to a declining public image of lawyers).

55. Zacharias, *supra* note 48, at 1315 (providing a history of the client-oriented theory of lawyering); *see id.* at 1319–20 n.54–57 (discussing the contributions of Monroe Freedman, a fundamental voice for a client-oriented model of lawyering, and the subsequent response and adoption of his ideas); Buchanan, *supra* note 50, at 574 (1994) (espousing a renewed "consumer-oriented" course for lawyers in their relationships to clients and the public in order to mend current dismal reputations and revitalize professionalism).

56. Robert E. Rodes, Jr., *Professionalism and Community: A Response to Terrell and Wildman*, 41 EMORY L.J. 485, 486 (1992) (critiquing Terrell and Wildman's six values because, as he asserts, they espouse a false theory of moral privatization and lack of shared values in the

Lastly, a third brand of scholarship simply dismisses "professionalism" as a misguided concept.[57] Freedman, for example, argues that professionalism's emphasis on civility and courtesy will undermine zealous advocacy,[58] and Atkinson believes that professionalism is a simplistic crusade based on an implicit assumption that there is one universal way to be a legal professional and categorically condemns certain conduct.[59]

IV. A Clear Definition of Professionalism From a Synthesis of American Bar Association (ABA) and Judicial Statements on Professionalism[60]

A. *Five Elements of Professionalism for Individual Professionals*

The 1986, 1992 and 1996 ABA reports on professionalism, a 1999 Conference of Chief Justices National Action Plan on professionalism, and the Preamble to the ABA Model Rules of Professional Conduct all state elements of professionalism, including the correlative duties of each lawyer under the social contract. A synthesis of these common elements appears below in a clear and succinct list, after which each listed element is then explained.

In my distillation of the major ABA reports, the Conference of Chief Justices National Action Plan and the Preamble to the Model Rules of Professional Conduct (the "Rules"), professionalism means that each lawyer:[61]

    1. Continues to grow in personal conscience over his or her career;[62]

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community); W. Bradley Wendel, *Morality, Motivation and the Professionalism Movement*, 52 Santa Clara L. Rev. 557, 599–601, 608 (2001) (The "essence of professionalism requires attending to the moral dimension of lawyering and seeking motivation in the intrinsic values that inform professional life."); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Hum. Rights 1, 8, 15 (1975) (arguing that the pervading view of "professionalism" is one in which the lawyer engages in role-differentiating behavior, inhabiting an amoral universe where he or she provides special competence to accomplish client objectives, but does not judge the character of the client, their objectives or the avenues through which they are pursued. Wasserstrom finds this view in some ways problematic, particularly in that amoral legal acculturation can begin to "dominate one's entire life.").

    57. Kenneth L. Penegar, *The Professional Project: A Response to Terrell and Wildman*, 41 Emory L.J. 473, 484 (1992) (critiquing the functional structuralism of Terrell and Wildman's "Professionalism Project" by noting that, "[w]ithout [a] more complicated picture of reality, efforts to conjure a single image, consciousness, or ideal justification for lawyers' roles and work are likely to remain unconvincing").

    58. Monroe Freedman & Abbe Smith, Understanding Lawyers' Ethics 23–25 (3d ed. 2004).

    59. *See* Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 Tex. L. Rev. 259, 263 (1995).

    60. This discussion also appears in Hamilton, *supra* note 27, at 5–10.

    61. Detailed support for each element is set forth in *id.* at 6–10.

    62. The Preamble to the Model Rules of Professional Conduct specifically provides that a lawyer is also guided by personal conscience and sensitive professional and moral judgment. Model Rules of Prof'l Conduct, Preamble ¶¶ 7, 9.

   2. Agrees to comply with the ethics of duty—the minimum standards
      for the lawyer's professional skills and ethical conduct set by the
      Rules;[63]

   3. Strives to realize, over a career, the ethics of aspiration—the core
      values and ideals of the profession, including internalization of the
      highest standards for the lawyer's professional skills and ethical
      conduct;[64]

   4. Agrees to both hold other lawyers accountable for meeting the min-
      imum standards set forth in the Rules and encourage them to realize
      core values and ideals of the profession;[65] and,

   5. Agrees to act as a fiduciary, where his or her self-interest is over-
      balanced by devotion to serving the client and the public good in
      the profession's area of responsibility: justice.[66] This includes:

      a. Devoting professional time to serving the public good, particu-
         larly by representing pro bono clients;[67] and,

      b. Undertaking a continuing reflective engagement, over the course
         of a career, on the relative importance of income and wealth in
         light of the other principles of professionalism.[68]

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   63. All the professionalism definitions stress that a minimum level of competence is neces-
sary. The Model Rules' Preamble specifically requires a lawyer to observe the Model Rules. *Id.* ¶¶
7, 12, 14. Rule 8.3 states that it is professional misconduct to violate the Rules, which include
Rule 1.1 on competence and Rule 1.3 on diligence. *Id.* at R. 8.3, 1.1, 1.3 (2007).

   64. The Preamble to the Model Rules of Professional Conduct states directly that "[a] lawyer
should strive to attain the highest level of skill, to improve the law and the legal profession, and to
exemplify the legal profession's ideals of public service." *Id.* ¶ 7.

   65. Self-regulation is another common theme of all of these definitions of professionalism.
The Model Rules' Preamble speaks at length of the self-regulation of the legal profession and the
profession's social contract with society. "A lawyer should also aid in securing their observance
[of the Rules] by other lawyers." *Id.* ¶¶ 10–12. The Preamble also stresses the responsibilities that
are implicated by self-regulation and notes that the profession risks loss of its autonomy if its
members fail in their duties. *Id.*

   66. Paragraph 1 of the Model Rules' Preamble calls on each lawyer to hold in tension three
major roles: (1) a representative of clients; (2) an officer of the legal system; and (3) a public
citizen having special responsibilities for the quality of justice. *Id.* ¶ 1. The Stanley Commission
Report states: "The client's trust presupposes that the practitioner's self-interest is overbalanced
by devotion to serving the client's interest and the public good."

   67. Public service is an important element in all of these professionalism definitions. The
Model Rules' Preamble notes: "As a public citizen, a lawyer should seek improvement of the law,
access to the legal system, the administration of justice and quality of service rendered by the legal
profession . . . . In addition, a lawyer should further the public's understanding of and confidence
in the rule of law and the justice system . . . . [A]ll lawyers should devote professional time . . . for
all those who . . . cannot afford or secure adequate legal counsel." MODEL RULES OF PROF'L
CONDUCT, Preamble ¶ 6.

   68. While some restraint on simple income and wealth maximization is implicit in the fifth
element of professionalism (acting as a fiduciary where self-interest is over-balanced by devotion
to serving the client and the public good), as well as in the first professionalism element (develop-
ment of personal conscience), and the professionalism theme in 5.a. (pro bono service), the in-
creasing emphasis on billable hours and net profit per lawyer means that every lawyer, but

B. *Further Analysis of the Principles*

1. *Personal Conscience*

Personal conscience, the first element of professionalism, is an awareness of the moral goodness or blameworthiness of one's own intentions and conduct together with a feeling of obligation to be and do what is morally good.[69] Personal conscience in this definition thus includes awareness that the person's conduct is having an effect on others, a reasoning process to determine the moral goodness or blameworthiness of the person's intentions or conduct, and a sense of obligation to be and to do what is morally good.

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

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

The MacCrate and the Haynsworth Reports and the CCJ National Action Plan note the importance of self-scrutiny along with feedback from, and moral dialogue with, others in order to contribute to a lawyer's professional growth.[70] The skills of self-reflection, feedback and moral dialogue help a lawyer to learn from mistakes and improve professional skills generally. These skills contribute particularly to growth in personal conscience in terms of awareness of the impact of conduct on others, the formation of first ethical principles, and a sense of obligation to live the law student's or lawyer's ethical principles.

b. *The Four Component Model and Personal Conscience*

Moral psychology also offers a useful analytical framework with which to explore and understand personal conscience. Personal conscience, as defined above, involves awareness of a moral issue, a reasoning process

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particularly those in private practice, should reflect regularly on the question "how much is a satisfactory living?" Otherwise, money will dominate as a measure of the value of the lawyer and the lawyer's work. The Model Rules' Preamble has a focus on balancing a lawyer's personal income and wealth goals with the other principles of professionalism. *Id.* ¶ 9.

69. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3d ed. 2002). A personal sense of morality and moral compass are sometimes used as synonyms for personal conscience, but they focus more specifically on a person's principles of right and wrong.

70. A.B.A. LEGAL EDUC. AND PROF. DEV., *An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, 137, 205, 215, 218 (1992) [hereinafter *MacCrate Report*]; A.B.A. REPORT OF PROF. COMM., *Teaching and Learning Professionalism*, 7 (1996) [hereinafter *Haynsworth Report*]; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION 66 (2007) ("The key skill set of lifelong learners is reflection skills."); CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM 205, 218 (1999) [hereinafter *Action Plan*].

to determine the moral goodness or blameworthiness of alternative courses of conduct and a sense of obligation to do what is morally good. Similarly, the moral psychology literature starts with the question, "What must we suppose happens psychologically in order for moral behavior to take place?" Morality in this meaning focuses on the social condition that humans live in groups and what one person does can affect others.[71] In light of this understanding, morality asks, "What do we owe others? What are our duties to them? What rights can they claim?" Scholars posit that four distinct capacities, called the Four Component Model,[72] are necessary in order for moral behavior to occur:

i.   *Moral Sensitivity*

Moral sensitivity requires the understanding of one's own intuitions and emotional reactions.[73]

> Moral sensitivity is the awareness of how an individual's actions affect other people. It involves being aware of different possible lines of action and how each line of action could affect the parties concerned. It involves imaginatively constructing possible scenarios and knowing cause-consequence chains of events in the real world; it involves empathy and role-taking skills.[74]

ii.   *Moral Reasoning and Judgment*

"Once the person is aware of possible lines of action and how people would be affected by each line of action (Component [One]), then Component [Two] judges which line of action is more morally justifiable—which alternative is just, or right."[75] It involves deliberation regarding the various considerations relevant to different courses of action and making a judgment regarding which of the available actions would be most morally justi-

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

72. The first reference to the Four Component Model was in James Rest, *Morality*, *in* 3 HANDBOOK OF CHILD PSYCHOLOGY: COGNITIVE DEVELOPMENT 556–28 (Paul Mussen et al. eds., 4th ed. 1983).

73. MORAL DEVELOPMENT IN THE PROFESSIONS 23 (James Rest & Darcia Narvaez eds., 1994).

74. *Id.*

75. *Id.* at 23–24. More recent scholarship on moral judgment is de-emphasizing any implication that there is a linear sequence of psychological processes leading to moral behavior. Recent articles frame the four component process as an interactive, dynamic process model. Muriel Bebeau & Verna Monson, *Guided by Theory, Grounded in Evidence: A Way Forward For Professional Ethics Education*, *in* HANDBOOK ON MORAL AND CHARACTER EDUCATION (Darcia Narvaez & L. Nucci eds., forthcoming 2008).

fiable. It entails integrating both shared moral norms and individual moral principles.[76]

Shared moral norms and an individual's moral principles—what philosophy calls normative ethics[77]—flow from one of two general sources. A rational approach uses analysis and logic in any situation to determine right conduct from a set of first ethical principles. This "ethics of principle" approach can be derived from faith or religious teachings, cultural norms or moral philosophy, such as Kant's categorical imperative or Mills' utilitarianism. A second general source emphasizes the virtues and good habits of character in any situation and is more intuitive about the right conduct that a virtue or habit of character demands in the situation. Some people using this "ethics of character" approach find the relevant virtues or habits of character in faith or religious teachings. Others look to moral philosophy or cultural norms.[78]

Recent advances in moral theory have found evidence that moral judgments may vary depending upon the set of internalized beliefs and rationales about moral problems that the individual possesses—called moral schemas in this scholarship.[79] Moral schemas are useful in understanding moral reasoning in general and, later in this essay, professional moral reasoning. Neo-Kohlbergian theory proposes that there are three moral schemas, as opposed to six stages of moral reasoning in Kohlberg's original model:

> [T]he *personal interest* schema, characterized by decisions motivated by self-interest, fear of authority, and lack of autonomy or personal responsibility; *maintaining norms* schema, focused on enforcement of existing norms, rules, codes, and laws; and the *postconventional* schema, centered on concepts of justice, fairness, duty, and the evolutionary nature of morality in society . . . .[80]

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76. Over a lifetime, the two most important factors influencing growth in moral judgment as measured by the moral reasoning tests developed in this body of scholarship are education and age, with education being a far more powerful predictor of moral judgment development. Rest & Narvaez, *supra* note 69, at 15. Bebeau, *supra* note 25, at X (young people are naturally more self- rather than other-centered, and learning to serve others is a mark of moral maturity).

77. Normative ethics is aimed at judgments of right and wrong, virtue and vice. It provides criteria to support or refute claims of rightness or wrongness, or virtue or vice. Descriptive ethics is a social science aimed at empirically neutral description of the values of individuals and groups. Meta-ethics (sometimes called analytical ethics) examines "the meaning and objectivity of ethical judgments. Meta-ethics is therefore at a level removed from normative ethics. At this remove, one might [for example] explore the differences among scientific, religious and ethical perspectives; the relation of legality to morality; the implications of cultural differences for ethical judgments, and so forth." KENNETH E. GOODPASTER & LAURA L. NASH, POLICIES AND PERSONS: A CASEBOOK IN BUSINESS ETHICS 523 (3d ed. 1998).

78. SULLIVAN, *supra* note 1, at 262–67.

79. James Rest et al., *A Neo-Kohlbergian Approach: The DIT and Schema Theory*, 11 EDUC. PSYCHOL. REV. 291, 297 (1999).

80. Bebeau & Monson, *supra* note 75.

Empirical evidence supports the validity of this schema approach.[81]

iii.   *Moral Identity and Motivation*

Moral identity and motivation involve "the importance given to moral values in competition with other values. Deficiencies in Component [Three] occur when a person is not sufficiently motivated to put moral values higher than other values—when other values such as self-actualization or protecting one's organization replace concern for doing what is right."[82]

Competing drives and emotional states can also halt moral action. For example, if someone must choose between having a steady paycheck to ensure her family has food on the table and acting in accordance with her moral values, the drive to care for basic needs may override all else.

iv.   *Moral Implementation.*

This component involves ego strength, perseverance, backbone, toughness, strength of conviction, and courage. A person may be morally sensitive, may make good moral judgments, and may place a high priority on moral values, but if the person wilts under pressure, [or] is easily distracted or discouraged, . . . then moral failure occurs because of deficiency in Component [Four] (weak character).[83]

Problem-solving skills—including figuring out the necessary sequence of concrete actions, working around impediments and unexpected difficulties, and interpersonal skills—are important. Component [Four] includes the knowledge, skills and abilities to manage conflicts, communicate effectively[84] and minimize polarization.[85]

The Four Component Model offers both an explanation of how moral failure occurs as well as a vision of human potential in terms of the transformation of individuals towards excellence in any or all of the four components. Lawrence Walker noted that, "[m]oral failure can be a consequence of a deficiency in any component: being blind to the moral issues in a situation, being unable to formulate a morally defensible position, failing to accord priority to moral concerns, or being unable or unwilling to implement action."[86] It is important, therefore, to attend to the development of all four components.

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81.   *Id.*; *see* Bebeau, *supra* note 25.

82.   MORAL DEVELOPMENT IN THE PROFESSIONS, *supra* note 73, at 24.

83.   *Id.*

84.   Effective communication includes active listening, persuasion, negotiation and conflict resolution.

85.   Verna E. Monson & Muriel J. Bebeau, *Defining Issues, Defining Realities: The Role of Moral Psychology in Advancing Business Ethics Education* (Jan. 23, 2007) (unpublished working paper, on file with the University of St. Thomas Law Journal).

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

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

C.   *The Relationship Between Personal Conscience and the Other Four Elements of Professionalism*

The relationship between the first element of professionalism—growth in personal conscience over a career—and the other four elements is synergistic. For example, personal growth in either the skill of self-scrutiny and encouragement of feedback from others or any of the capacities in the Four Component Model should help a law student or practicing lawyer grow in capability on any of the other four elements of professionalism. In addition, as a lawyer grows in these dimensions of personal conscience, the lawyer becomes a better counselor to his or her client.[87] A fully developed lawyer can help a client think through a situation from the client's perspective, wherever that client is in terms of the skills and capacities of moral decision making.[88]

Similarly, as a law student or lawyer internalizes professionalism elements two through five, he or she is also forming new dimensions and capacities of personal conscience. A lawyer fully integrated into an ethical professional identity has one conscience, but that conscience now includes capacities of awareness, reasoning, motivation and moral implementation regarding the moral goodness or blameworthiness of actions in both personal and professional contexts. When the lawyer is acting in a professional context, the personal conscience of the professional is embedded in an appropriate ethical professional framework. This essay refers to this integration of personal conscience with the other four elements of professionalism as personal conscience in a professional context.

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87. For example, a lawyer whose own moral reasoning is at an early stage of development will be limited in his or her ability to counsel a client who is at a more developed stage of moral reasoning. The lawyer simply will not understand the client well. If the reverse is true, the lawyer will understand the moral reasoning of the client and can help the client think through the client's best interests from the client's shoes.

88. In addition, clarity on a lawyer's own personal conscience enables the lawyer to explain the lawyer's moral perspective to the client. Robert Vischer points out that an attorney's moral perspective often determines the advice she gives, and clients will be better off if that perspective is articulated openly and deliberately instead of being left to operate beneath the surface of the attorney-client dialogue. "The attorney's moral experiences and perspectives invariably shape her understanding of the client and the object of the representation, not as a result of her irresponsible exercise of professional discretion, but as a consequence of human function." Robert Vischer, *Legal Advice as Moral Perspective*, 19 Geo. J. Legal Ethics 225, 266 (2006).

1. The Ethics of Duty

The Scope Note for the Model Rules of Professional Conduct states:

Some of the Rules are imperatives, cast in the terms of "shall" and "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. . . . The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.[89]

The ethics of duty—the obligatory and disciplinary elements of the Rules—state the minimum floor of competence and ethical conduct below which the profession will impose discipline. An ethical professional identity requires each law student and practicing lawyer to understand and internalize the ethics of duty.

2. The Ethics of Aspiration—The Core Values and Ideals of the Profession

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

a. The Core Values of the Profession

The core values of the profession are apparent in the Model Rules of Professional Conduct, the ABA Reports and CCJ Action Plan on professionalism. They include:

- Competent representation, including reasonable diligence and reasonable communication with the client;[90]
- Loyalty to the client;[91]
- Confidentiality of client information;[92]
- Zealous advocacy on behalf of the client, constrained by the officer of the legal system role;[93]

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89. MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 14.

90. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.4; *MacCrate Report*, *supra* note 70, at 205, 207; STUCKEY ET AL., *supra* note 70, at 26–27.

91. MODEL RULES OF PROF'L CONDUCT R. 1.7–1.12; *MacCrate Report*, *supra* note 70, at 205. Loyalty includes recognition that that the lawyer's self-interest in fees is in conflict with the client's interest, therefore the lawyer's fees should be reasonable and fair. MODEL RULES OF PROF'L CONDUCT R. 1.5.

92. MODEL RULES OF PROF'L CONDUCT R. 1.6; *MacCrate Report*, *supra* note 70, at 205.

93. MODEL RULES OF PROF'L CONDUCT, Preamble ¶¶ 2, 8, 9 ("As advocates, a lawyer zealously asserts the client's position under the rules of the adversary system." Further, "when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done." Finally, "[t]hese principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in

- Independent professional judgment;[94]
- Public service to improve the quality of justice, particularly to maintain and improve the quality of the legal profession, ensure equal access to the justice system and educate the public about the justice system;[95] and,
- Respect for the legal system and all persons involved in the legal system.[96]

b. Ideals of the Profession

The ideals of the profession are apparent in the Model Rules, the ABA reports, and the CCJ National Action Plan. They include:

- The commitment to seek and realize excellence at both the skills of the profession and the other core values and ideals of the profession;[97]
- Integrity;[98]

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the legal system." Paragraph 1 of the Model Rules' Preamble makes clear that the lawyer is to hold in tension the roles of "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." *Id.* ¶ 1; *see MacCrate Report, supra* note 70, at 205. Zealous advocacy focuses on maximizing client autonomy to achieve any lawful client objective through legally permissible means. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1969).

94. MODEL RULES OF PROF'L CONDUCT R. 2.1; *MacCrate Report, supra* note 70, at 151; A.B.A. COMM'N ON PROF., *". . . In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism*, 1986 A.B.A. COMM'N ON PROF. 28 (1986) [hereinafter *Stanley Commission* Report]; STUCKEY ET AL., *supra* note 70, at 82.

95. MODEL RULES OF PROF'L CONDUCT, Preamble ¶¶ 1, 6, 7 (A lawyer is "a public citizen having special responsibility for the quality of justice." Further, "[a]s a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession . . . . In addition a lawyer should further the public's understanding of and confidence in the rule of law and the justice system." Finally, "[a] lawyer should strive to . . . exemplify the legal profession's ideals of public service."); *see Haynsworth Report*, *supra* note 70, at 7; *MacCrate Report, supra* note 70, at 213; STUCKEY ET AL., *supra* note 70, at 84–88. The core value of public service focused on the maintaining and improving the quality of service provided by colleagues in the legal profession is developed in more detail in the fourth principle of professionalism. The core value of public service particularly focused on equal access to justice for the disadvantaged is developed in detail in professionalism principle 5.a.

96. MODEL RULES OF PROF'L CONDUCT, Preamble ¶¶ 5, 9, R. 1.3 cmt. 1, R. 3.5 cmt. 4, R. 4.4(a); *MacCrate Report, supra* note 70, at 204, 213; *Haynsworth Report*, *supra* note 70, at 7; *Action Plan*, *supra* note 70, at 37; STUCKEY ET AL., *supra* note 70, at 82.

97. The major ideal of the profession is to seek continuing growth toward excellence in both lawyering skills and ethical conduct over a career. MODEL RULES OF PROF'L CONDUCT, Preamble ¶ 7 ("A lawyer should strive to attain the highest level of skill, to improve the law and legal profession and to exemplify the legal profession's ideals of public service."); *MacCrate Report, supra* note 70, at 136, 200, 219 (Lawyers should "seek to achieve excellence in [their] chosen field."); *Stanley Commission Report*, *supra* note 94, at 15, 17; STUCKEY ET AL., *supra* note 70, at 66.

98. The word "integrity" comes from the Latin *integritas*, which means wholeness or oneness. A lawyer of integrity acts consistently with the lawyer's first ethical principles even when there is some cost involved. *Stanley Commission Report*, *supra* note 94, at 15, 47; *MacCrate*

- Honesty;[99] and,
- Fairness.[100]

3.   *The Duty of Peer-Review*

In the initial 1908 ABA Canons of Professional Ethics,[101] peer review was a central theme. Canon 29 spoke forcefully on the duty of lawyers to "expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession."[102] The 1969 Model Code of Professional Responsibility[103] and the 1983 Model Rules of Professional Conduct also emphasize the critical importance of effective peer review.[104]

Peers in the legal profession can also bring to bear informal pressure on unethical conduct. As Charles Wolfram noted, "[a] lawyer who seriously offends against widely held professional norms faces unofficial but nonetheless powerful interdictions. Those include sanctions such as negative publicity and other expressions of peer disapproval, the cutting off of valuable practice opportunities, denial of access to centers of power and prestige . . .and preclusion from judicial posts."[105] There are many occasions in the legal profession where peers observe a lawyer's work. Parties almost always choose to be represented by lawyers when in litigation with anything significant at risk. Lawyers carry out this work subject to observation by both judges and the peers who oppose them, both of whom can speak informally to a lawyer or make a formal complaint to disciplinary authori-

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Report, supra note 70, at 204; *Haynsworth Report*, *supra* note 70, at 7; STUCKEY ET AL., *supra* note 70, at 7, 84–88.

99.   The Model Rules of Professional Conduct Rule 8.4(c) prohibits conduct involving dishonesty, and Rule 8.3 requires reporting of another lawyer's violation of a Rule that raises a substantial question as to that lawyer's honesty. MODEL RULES OF PROF'L CONDUCT R. 8.4(c), 8.3. Paragraph 2 of the Preamble asks lawyers to negotiate "consistent with requirements of honest dealings with others." *Id*. ¶ 2; *MacCrate Report, supra* note 70, at 204; STUCKEY ET AL., *supra* note 70, at 80–82, 84–88. The focus of "honesty" in the advocacy context is that affirmative statements of fact by a lawyer are to be truthful. "Honesty" in this context does not require revelation of material confidential facts unless there is either a legal duty to do so or the client consents.

100.   The Model Rules of Professional Conduct Rule 3.4 focuses on fairness to the opposing party and opposing counsel. MODEL RULES OF PROF'L CONDUCT R. 3.4 (2007). The ABA and CCJ reports on professionalism also emphasize fairness as a virtue for a lawyer. *Stanley Commission Report*, *supra* note 94, at 15, 47; *MacCrate Report, supra* note 70, at 136, 213; *Action Plan*, *supra* note 70, at 37; STUCKEY ET AL., *supra* note 70, at 84–88. The thrust of these references to fairness is that a lawyer in adversary contexts should conform to established and commonly accepted formal and informal rules and customs in dealing with adversaries. They create trust and efficiency which reduce transaction costs and benefit both the justice system and the clients overall. The lawyer should not "game" these rules and customs with either interpretations outside the spirit of the rules and customs or conduct that may escape the adversary's reasonable ability to monitor compliance. If the lawyer challenges existing understandings regarding these rules and customs, notice and transparency would be important.

101.   ABA CANONS OF PROF'L ETHICS Canon 29 (1908).

102.   *Id.*

103.   MODEL CODE OF PROF'L RESPONSIBILITY Canon 8 (1969).

104.   MODEL RULES OF PROF'L CONDUCT R. 8.3 (2007).

105.   CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 22 (1986).

ties regarding a violation of the code of ethics.[106] Adversaries in a transaction can do the same. Lawyers in the same firm or law department or lawyers from different firms working as a team can speak to each other about conduct.

The Model Rules and the ABA Reports tend to focus on the requirement that peers report misconduct that falls below the floor of the Rules. This is important, but the creation of strong ethical cultures emphasizing excellence at the skills, core values and ideals of the profession is even more important.[107] Unethical culture will trump rules, as demonstrated by the recent scandals in corporations with well-drafted ethics codes but corrupt cultures. Recent research on cheating in graduate schools finds that cheating is positively correlated with students' perceptions of the level of cheating among peers.[108] Ethical peer culture matters.

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

The social contract of the professions with the public requires that each member of the profession restrain self-interest to some degree to serve the client and the public purpose of the profession. If members of a peer-review profession seek self-advantage to the same degree as individuals in other occupations, then society has no reason to grant the profession authority to regulate itself,[109] and society would rely on the competitive market's control of work by management.

For the legal profession, in the words of the Stanley Commission, "[T]he client's trust presupposes that the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good."[110] The public good served by the legal profession is justice.[111] The peer-review professions have always been about making a satisfactory liv-

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106. Judges, who are lawyers, observe and review lawyers' work in litigation and also have the power to impose sanctions through fee awards, contempt of court powers, and disqualification motions.

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

108. Donald L. McCabe et al., *Academic Dishonesty in Graduate Business Programs: Prevalence, Causes, and Proposed Action*, 5 ACAD. MGMT. LEARNING & EDUC. 294, 299 (2006).

109. Peer-review in turn translates into substantial autonomy and discretion for individual professionals.

110. *Stanley Commission Report*, *supra* note 94, at 10. The common law of fiduciary duty regarding a lawyer's duties to clients developed prior to the drafting of the 1969 ABA Model Code of Professional Responsibility and the 1983 Model Rules of Professional Conduct. A lawyer owes a client the fiduciary duties of safeguarding confidences and property, avoiding impermissible conflicts of interest, dealing honestly with the client, adequately informing the client, following the instructions of the client, and not employing the power given the attorney in the attorney-

ing in addition to serving the client's interest and the public good. For lawyers, the degree of "overbalancing" the client's interest and the public good of justice against the lawyer's own self-interest in terms of income and wealth is a difficult question explored further in the discussion of Element 5(b), below.

Element 5(a), below, explores further this concept of a fiduciary duty to over-balance the lawyer's self-interest with devotion to the public good of justice as an officer of the legal system and a public citizen having special responsibility for the quality of justice.

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

One of the core values of the profession is the duty to contribute public service in order to improve the quality of justice, maintain and improve the quality of the legal profession, educate the public about the justice system, and ensure equal access to justice.[112] Professionalism Element Four—the duty of peer review—assumes that each lawyer gives uncompensated time necessary to assist in assuring that peers meet minimum professional standards and fostering ethical peer cultures of high ideals.

The tradition of the peer-review professions also includes a "to whom much has been given, much will be required"[113] duty to provide pro bono or low-fee assistance to the disadvantaged.[114] This duty is uniquely compelling for the legal profession in comparison with the other peer-review professions. The moral justification for the work of the other peer-review professions depends to a much lesser degree on the proper functioning of the system within which the work is done. A physician, for example, can serve the major public purpose of the profession—the health of individual

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client relationship adversely to the client. This body of law calls on the lawyer to restrain self-interest similar to what the law of fiduciary duty requires of other agents in fiduciary relationships.

111.   A fair analogy is that a lawyer is an agent and fiduciary not just for the client, but also for the legal system, the purpose of which is justice. The first sentence of the Preamble to the Model Rules in effect states this concept by providing that a lawyer is "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." In this meaning an officer holds a position of duty, trust or authority, and a lawyer does in fact both hold a position of trust conferred by the court and exercise authority on behalf of the court whose purpose is justice. "Both the client and the court are sources of the lawyer's authority to act as lawyer, the former being the source of the specific authority to act in a particular case and the latter the source of general authority to act in any case." L. Ray Patterson, Lawyer's Law: Procedural, Malpractice & Disciplinary Issues 11–12 (4th ed. 1999).
The agent lawyer owes fiduciary duties to both the client and the court.

112.   *See supra* text accompanying notes 66-67.

113.   *Luke* 12:48.

114.   Measuring Medical Professionalism, *supra* note 10, at vii; *MacCrate Report, supra* note 70, at 214–15; Stuckey et al., *supra* note 70, at 24–26. Included in the calculus of what has been given is the autonomy of the profession to self-regulate, which in turn creates autonomy for each lawyer's professional judgment.

patients—without significant concern that others will be negatively affected, except to the degree that costly procedures may reduce the amount of resources available to others. However, a lawyer in litigation will serve the major public purpose of the profession—justice—only when the adversary system is working properly. The adversary system is the society's best approximation of justice only when there exists both a competent neutral decision maker and competent representation for all affected persons. Paragraph Eight of the Model Rules' Preamble recognizes this: "Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done."[115]

Therefore, to claim that the lawyer's work serves justice, each lawyer should seek to ensure that all affected persons are competently represented. Paragraph Six of the Preamble urges each lawyer to "devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel."[116] Model Rule 6.1 specifically states, "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay," with an aspirational standard of at least fifty pro bono hours a year.[117]

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

All the definitions of professionalism fail to address adequately the business aspects of the profession that may create tension between a lawyer's personal goals of income and wealth and the correlative duties, core values and ideals of the profession. Lawyers properly celebrate the virtue of self-sufficiency—making a living and supporting others; however, law is a peer review profession whose tradition and social contract call for some meaningful restraint on self interest to serve the client's interest and the profession's public purpose. This is the essence of the social contract that the legal profession and each lawyer have with society.[118]

There is no number that defines a satisfactory living for each lawyer. As with all aspirational ideals, the best the profession can do is to ask and encourage each professional to give serious and continuing reflective

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115. MODEL RULES OF PROF'L CONDUCT , Preamble ¶ 7.

116. *Id.* ¶ 6.

117. *Id.* at R. 6.1.

118. If the legal profession is indistinguishable from other occupations in terms of restraint on self-interest, then the profession should be regulated as other occupations are regulated. This is what the falling public perception on the ethics and standing of the legal profession is telling us. Over the past twenty-five years, while the opinion polls continue to indicate the public understands that the other peer-review professions have a unique morality, the public no longer believes that to be true of the legal profession and now is unable to distinguish the legal profession from other business occupations. *Firefighters, Scientists and Teachers Top List as "Most Prestigious Occupations" According to Latest Harris Poll*, HARRIS INTERACTIVE, Aug. 1, 2007, http://www.harrisinteractive.com/harris_poll/index.asp?PID=793.

thought to the issue of how much is enough. Professionalism requires each lawyer to undertake a continuing engagement, over a career, on the relative importance of income and wealth in light of the four other elements of professionalism.

D.   *Personal Conscience in a Professional Context*

A "gold standard" professional would be highly developed in both personal conscience, as defined by the Four Component Model, and the internalization of the other four elements of professionalism. This professional would have a highly developed personal conscience in a professional context. Again, the Four Component Model is useful to analyze what has to happen for a professional to engage in a moral action. A professional who has both grown in personal conscience and internalized the other four elements of professionalism would have high degrees of professional ethical sensitivity, professional moral reasoning, ethical professional identity and professional moral implementation.

a.   *Professional Ethical Sensitivity*

Professional ethical sensitivity for individuals being socialized into professional practice involves the ability to see things from the perspective of other stakeholders in any professional context and, more abstractly, from legal and institutional perspectives that define the professional role—such as the regulations, codes, and norms of one's profession.[119] It also involves the awareness of the moral issues that may not be explicit in a situation.[120] The interaction in any professional context between the professional's cognitive capacity to view multiple perspectives and the emotional capacity for empathy, or to vicariously experience the emotions of another person, fuels the development of professional ethical sensitivity.[121]

b.   *Professional Moral Reasoning*

Moral reasoning in the professions has three dimensions. On one level, the professional must reason through the application of explicit codes, rules and norms specific to the profession in the situation presented. At a second level, professional moral reasoning requires the professional to reason through the application of the profession's core values and ideals—intermediate concepts relevant to each profession like "confidentiality," "conflicts of interest" and "fiduciary duty." At a third level, it encompasses the over-arching neo-Kohlbergian idea of post-conventional thinking or reasoning about the broad, societal dimensions of an ethical problem in the context of

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119. Bebeau, *supra* note 25.
120. Bebeau & Monson, *supra* note 75.
121. Martin L. Hoffman, Empathy and Moral Development: Implications for Caring and Justice (2002).

the profession's responsibilities—concepts like justice, spiritual and physical health, or the growth of reason.[122]

c. Ethical Professional Identity

Professional identity development is particularly useful in explaining how a professional's conception of the self in relation to other people changes as the individual matures and internalizes the four elements of professionalism. Bebeau and Monson noted:

> Our recent explorations into the development of the moral self illustrate how a young professional makes meaning of professional values and expectations. Entering professional school student conception of a professional identity is distinctly different from how moral exemplars understand professional identity and is profoundly influenced by his or her stage of identity development. Development evidence indicates that individuals move from self-centered conceptions of identity through a number of transitions, to a moral identity characterized by the expectations of a profession—to put the interests of others before the self, or to subordinate one's own ambitions to the service of society or the nation.[123]

d. Professional Moral Implementation

Professional moral implementation builds on the same ego strength, perseverance, toughness, strength of character, courage, and interpersonal and problem-solving skills discussed earlier, but applied in the context of the role demands of the profession. A professional also adds his or her skills and capacities as (1) a counselor/teacher to build a full understanding of the problems presented and empower decisions by the persons or organizations served; (2) an active professional agent using the problem-solving and other skills unique to each profession to carry out the decision of the persons served; and (3) a member of the profession carrying the credibility and standing of the profession.

V. APPLICABILITY OF THE FIVE ELEMENTS OF PROFESSIONALISM TO THE MEDICAL PROFESSION

The social contract of each of the peer-review professions requires a member of the profession to internalize the correlative duties of the relevant profession's social contract into an ethical professional identity. The important elements of this ethical professional identity are similar across the peer

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122. Muriel J. Bebeau & Stephen J. Thoma, *"Intermediate Concepts" and the Connection to Moral Education*, 11 EDUC. PSYCHOL. REV. 343, 347–48 (1999).

123. Bebeau & Monson, *supra* note 75; *see* Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism Through Mentoring*, 57 J. LEGAL EDUC. 102, 115–19 (2007) (explaining Kegan's most common stages of professional identity formation).

review professions. For example, each member of a peer review profession must internalize the ethics of duty—the rules defining the floor below which peers will impose discipline. The specific rules will be profession-specific, although there will be some common themes. For example, prohibitions against conflicts of interest will be common among the professions.[124] Similarly, each member of a peer review profession should internalize the ethics of aspiration for that profession, which again will be different for each profession but with some common themes. For example, many professions celebrate the ideals of honesty, integrity and respect for others.

The five elements of professionalism set forth above for the legal profession include all of the components of existing definitions of medical professionalism. For example, the core values, ideals and virtues listed in many definitions of medical professionalism fit under the ethics of aspiration element of professionalism. However, the five elements offer a clearer and more comprehensive understanding of the correlative duties of the social contract than the existing definitions of medical professionalism.

The definitions of medical professionalism discussed earlier in Section III. A. emphasize the three related concepts of fiduciary duty in terms of patient interest elevated above physician self-interest, altruism, and service to others plus lengthy lists of professional core values and ideals. Fiduciary duty, including service to others, is the fifth element of professionalism, and professional core values and ideals are included in the third element of professionalism—the ethics of aspiration. While there is some discussion in the medical professionalism literature about the importance of self-reflection,[125] there is no explicit recognition in these definitions of the importance of personal conscience as the foundation upon which an ethical professional identity is built. "Competence" or "legal understanding" are mentioned in several of the medical professionalism definitions, and these are included in the second element of professionalism—the ethics of duty.[126] Some definitions mention accountability but do not spell out the central importance of effective peer review (the fourth element of professionalism) to the social contract of a peer review profession. None of the definitions of medical professionalism deal with the tension goals of high income and wealth create with respect to fiduciary duty, except that ABIM mentions "greed" as a challenge to professionalism.

Hafferty stated, more directly than the five elements of professionalism, that medical professionalism includes a duty to justify the profession's

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124. For example, prohibition of conflicts of interest is central to theModel Rules of Professional Conduct in Rules 1.7 through 1.10, and are increasingly important in medical ethics. Fred Hafferty, *Measuring Professionalism: A Commentary in* MEASURING MEDIAL PROFESSIONALISM, *supra* note 10, at 281, 297–98.

125. *See supra* notes 36–38.

126. *See supra* notes 27–35.

social contract by constantly educating the public about the benefits of the profession's control over work and the social contract. This is critically important to maintain the public's trust in the benefit the profession's social contract provides to the public above the customary market arrangements of employer control over work. This duty is weakly stated as a core value of the legal profession. In balance, however, the five elements of professionalism capture more clearly and more completely what each profession's social contract requires of individual professionals and the relevant peer community of professionals.

VI. ASSESSMENT OF PROFESSIONALISM GENERALLY

A. *The Assessment Loop*

Assessment of a student's or practicing professional's knowledge, skills and aptitudes can be used for several different purposes: (1) to screen candidates for admission, grades, rank or employment (i.e., high stakes testing); (2) to determine awards and honors; (3) to determine the most effective educational pedagogies; and (4) to foster self-knowledge and development. Assessment may determine the most effective educational engagements to foster one or more elements of professionalism, which includes fostering student self-knowledge and development.

To determine the most effective pedagogies, George Forsythe, a leading scholar in professional identity formation, described an assessment loop for educational programs that involves determining needs, setting goals, articulating learning models, designing programs and implementing the programs while constantly assessing the program results.[127] This essay focuses on both the goal of fostering the five elements of professionalism and the tools available to assess student progress toward any of the elements.[128] Using the clear definition of professionalism described above, professional schools could implement learning models and programs, such as mentoring or the presentation of moral exemplars, that seek to develop one or more of the elements of professionalism. After students have participated in the learning models and programs, the students would be assessed on their progress on any of the elements of professionalism. The changes in the students' results would aid the profession in evaluating the learning models and programs and their effectiveness in fostering professionalism. Students would receive individualized and confidential feedback on their progress.

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127. George B. Forsythe, United States Military Academy, Presentation at the Annual Meeting of the American Educational Research Association: Institutional Use of Assessment in Support of Educational Research (Apr. 16, 2004), *available at* http://www.nae.edu/nae/caseecomnew. nsf/65ca52e9d8eefef485256e010080ee03/85256d9f006047a985256e7c004080f8/$FILE/Barney%20Forsythe.doc.

128. A future essay will explore the most effective learning models and teaching programs to foster professionalism.

B.   Assessment Criteria

In order to provide useful feedback in the assessment loop toward the goal of professionalism, assessment tools must meet specific criteria. First, an assessment tool must be both valid and reliable in order to be a solid tool for the assessment loop. Second, an assessment tool must account for specific variables that may affect results in the specific profession. Third, an assessment tool must be practical for administration to groups of students and professionals.[129]

Oxford Dictionary of Sociology defines validity as whether the assessment measures what it claims to measure.[130] There are two types of validity used in evaluating assessments: criterion and construct validity. Criterion validity is "the closeness of fit between a measure . . . and the reality that it is supposed to reflect."[131] For example, to test the criterion validity of a measure of professionalism, it should be compared against other measures of professionalism as a whole as well as the individual elements of professionalism. Construct validity is "whether or not a particular measure . . . relates to other variables in ways that would be predicted by the theory behind the concept."[132] For example, lawyers who have been practicing reflectively for a number of years should score higher on an assessment of professionalism than law students. A highly valid measure of professionalism would distinguish between these groups. Construct validity also means that a highly valid assessment tool should correlate with other assessment tools measuring similar concepts.

Psychological and educational measurement takes into account the limitations of any single measurement tool or assessor. The use of multiple measures of the construct and multiple raters has been found to improve validity. A practical example of this approach would be the use of a 360-degree feedback tool administered to a student's professors, internship supervisors, mentors and advisors, in addition to self-reports from the student. The degree of agreement between ratings would then be a key indicator of the validity of the assessment.

Oxford's Dictionary of Statistics defines the reliability as "a measure of the confidence that we can have" in the results of an assessment.[133] Reliability refers to "whether the same results would be produced if the research

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129. In the evaluation literature, one often sees some additional criteria: (1) organizational support for the assessment approach, top-down; and (2) the assessment effort must minimize unintended consequences of the assessment (e.g., misuse of the results, assurance of confidentiality).

130. John Scott & Gordon Marshall, *Validity*, in A DICTIONARY OF SOCIOLOGY (2005), *available at* http://www.oxfordreference.com.

131. *Id.*

132. *Id.*

133. Graham Upton & Ian Cook, *Reliability*, in A DICTIONARY OF STATISTICS (2006), *available at* http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t106.e1387.

procedure were to be repeated."[134] Reliability considers differences in whether the assessment was repeated at a different time (temporal reliability) or with different researchers, a different population or different forms (comparative reliability).[135] It is also an important contributor to the overall validity of a test or assessment tool.

In addition to these criteria, several other criteria play a role in the usefulness of a professionalism assessment tool. One major concern with measures that rely on self reports is bias. Participants may give biased and false information based on what they believe the researcher wants to gather in the assessment. For example, participants may be more likely to exaggerate answers on assessment tools that evaluate concern for the public good because they feel they should be more concerned with this topic.

Professionalism assessment should also be longitudinal. To find evidence for the development of professionalism, an assessment tool must show development and change over time. Plausible, alternative explanations for the change and growth (e.g., other events that occur in the school setting or simply growing older) must be addressed, and analysis must show that the change was the result of the educational process. The professionalism assessment should be equally valid for various populations and take into account gender and cultural biases. Finally, in my experience using a moral reasoning test (the Defining Issues Test), journals and reflective essays in some of my classes, participants evaluated on professionalism will be concerned about confidentiality. They will fear that such data could be used later in life to cause public embarrassment.

A professionalism assessment effort should have broad buy-in from all constituents of the organization, especially from the students who are being assessed.[136] Feedback should be coupled with ample opportunities for developmental coaching and educational enrichment programs and activities. Assessment feedback should adhere to the principles of psychological and educational measurement, guarding against unintended consequences that may result from an overemphasis on single number indices of a complex construct without adequate narrative or dialog about the underlying meaning of the construct.

Lastly, professionalism assessment should be practical. A practical professionalism assessment will consider the convenience of administra-

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134. John Scott & Gordon Marshall, *Reliability*, in A DICTIONARY OF SOCIOLOGY (2005), *available at* http://www.oxfordreference.com/views/ENTRY.html?subview=Main&entry=t88.e1915.

135. *Id.*

136. A key barrier to both student and faculty "buy-in" is the view that such assessment is an "add-on" to an already heavy or difficult workload. Different learning styles and the inability of some students to see the relevance of reflection to the practice of the profession are also potential barriers. Cecelia M. Plaza et al., *Use of Reflective Portfolios in Health Sciences Education*, 71 AM. J. PHARM. EDUC. 34 (2007), *available at* http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1858617.

tion, ease of analysis and cost, especially if the assessment will be used to assess large populations of students and professionals. Practicality of assessment will include the time required to administer the assessment, the method of evaluating the participants' responses (including whether multiple evaluations are needed), the amount of training required of evaluators, and the cost of the materials and evaluators' time.

C.   Types of Assessment

Assessment literature proposes several types of assessment tools, each with their own advantages and disadvantages. The most practical assessment tool is the survey. Surveys are easy to administer, particularly to large groups of people. They are also easy to analyze, as most involve a limited number of possibilities for scoring. Finally, surveys are an affordable option, both in the costs of the materials and the costs of training evaluators to administer and analyze the assessments.

Interviews offer researchers the ability to probe more deeply into participants' answers by asking questions drawing off of their previous answers. If the interviewer is skilled at setting the participant at ease, an interviewer can more easily determine the participant's thought processes and observe the participant's non-verbal reactions to certain questions. Interviews can provide a plethora of valuable information. However, interviews are far less practical than survey options. Interviewers need extensive training on how to ask questions in the interview and how to treat all subjects equally. The interviewers would either need to take detailed notes during the interview, or all interviews would need to be taped and transcribed. To ensure accuracy in the results, more than one interviewer may be necessary. Issues of inter-rater reliability may arise if more than one interviewer is used. Each interviewer may classify responses differently. All of these factors increase the cost and time needed to assess participants. While the data gathered may be more in-depth, far fewer participants can be analyzed with interviews.

Journals and portfolios provide similar benefits as interviews, such as the ability to gather information on thought processes and in-depth responses. However, they also involve the same difficulties in evaluation. Evaluators need to be extensively trained in how to analyze the journals and portfolios. The participants' responses will need to be analyzed by different evaluators to ensure the accuracy of evaluation. Participants may also be less likely to divulge information in written responses when they know that their results will be analyzed.

Surveys present the most benefits for assessing professionalism. Many of the concepts used to define professionalism have already been assessed in other contexts, so some survey assessment tools are available. Surveys

are practical, so that large amounts of data can be gathered quickly, and the assessment can be administered to various populations longitudinally.

VII.   ASSESSMENT OF THE ELEMENTS OF PROFESSIONALISM

A.   *Comprehensive Assessment of Professionalism*

Stephen Swailes identified several scholars who have sought to develop comprehensive assessment tools to measure professionalism as each scholar has defined it.[137] For example, Howell and Dorfman developed a seven-item scale that assesses the subjects' years in education, degree of expertise, reliance on others in the same occupational specialty for guidance and feedback, and personal need to act autonomously.[138] Haywood-Farmer and Stuart created a twenty-three item scale measuring job autonomy, societal importance and impact, knowledge base and self-confidence.[139] Engel's assessment measured various aspects of the subjects' autonomy over work tasks.[140] Miner developed a forty-item scale measuring the acquisition of knowledge, acceptance of status, independent action, provision of help, and demonstration of professional commitment.[141] Lastly, Hall developed a fifty-item scale to assess five factors of professionalism, including the use of the professional organization as a major reference, a belief in self-regulation, a belief in service to the public, a sense of calling to the field and a feeling of autonomy.[142]

Despite their appeal, comprehensive assessment tools have provided limited insight for the professions. None of the professions have widely accepted these tools. Several of the comprehensive scales struggle with reliability.[143] For example, the scale from Hayward-Farmer and Stuart struggles with internal consistency, and Swailes theorizes that indistinct wording may have contributed to the reliability issues.[144]

Swailes notes that many of the comprehensive assessment tools simply distinguish between those who are professional and those who are not.[145] Most importantly, these comprehensive tools do not begin with a complete

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137. Stephen Swailes, *Professionalism: Evolution and Measurement*, 23 SERV. INDUS. J. 130 (2003).

138. *Id.* at 139.

139. *Id.* at 139; John Haywood-Farmer & F. Ian Stuart, *An Instrument to Measure the 'Degree of Professionalism' in a Professional Service*, 10 SERV. INDUS. J. 336 (1990).

140. Swailes, *supra* note 137, at 139; Gloria V. Engel, *Professional Autonomy and Bureacratic Organzation*, 15 ADMIN. SCI. Q. 12 (1970).

141. Swailes, *supra* note 137, at 139; John B. Miner, *The Role of Managerial and Professional Motivation in the Career Success of Management Professors*, 23 ACAD. MGMT. J. 487 (1980).

142. Swailes, *supra* note 137, at 132; Richard H. Hall, *Professionalization and Bureaucratization*, 33 AM. SOC. REV. 92 (1968).

143. Swailes, *supra* note 137, at 139.

144. Bebeau, *supra* note 25.

145. Swailes, *supra* note 137, at 139.

definition of the elements of an ethical professional identity. They capture at most one or two of the elements of professionalism (e.g., service to the public or the concept of peer-review and accountability).

To date, no adequate comprehensive assessment tool is available to assess a professional's progress on internalizing the elements of professionalism. It is necessary to rely on assessment tools aimed at individual elements of professionalism.

B. Assessment of Personal Conscience and Personal Conscience in a Professional Context

1. Assessment Tools for Development of Personal Conscience for All Persons Including Members of a Peer Review Profession

a. Moral Sensitivity

James Rest, one of the founding scholars in this field, viewed empathy as central to moral sensitivity.[146] Drawing on this theoretical linkage, measures of empathy can be used as a proxy for ethical sensitivity measures. Davis developed and validated the "Interpersonal Reactivity Index (IRI)," a multidimensional scale of empathy that has integrated cognitive and affective operational definitions of empathy and is well validated. The four dimensions of the IRI include: (1) perspective-taking scale (PT), the extent to which the individual adopts the viewpoint of the other; (2) fantasy scale (FS), or the process of imagining the feelings or perspectives of others; (3) empathic concern scale (EC), which taps into feelings of sympathy or concern for others; and (4) the personal distress scale (PD), or "self-oriented" empathy. The IRI has sound psychometric properties and is recommended for empathy research and assessment by experts in moral emotion research.[147]

b. Moral Reasoning

Two assessment tools are available to assess moral reasoning: the moral judgment interview and the "defining issues" test.[148] The Moral

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146. Rest, *supra* note 72, at 559–61.

147. Mark H. Davis, *Measuring Individual Differences in Empathy: Evidence for a Multidimensional Approach*, 44 J. PERSONALITY & SOC. PSYCH. 113, 113–26 (1983); JUNE PRICE TANGNEY & RONDA L. DEARING, SHAME AND GUILT (2002).

148. A third assessment tool, the Sociomoral Reflection Objective Measure, was developed to study moral reasoning with children, and to a much lesser extent, college students. The Measure is a paper-pencil survey based on Kohlberg's stages of moral development. The survey presents two moral dilemmas. Participants are given a list of responses to the dilemma, each corresponding to a Kohlberg stage and socio-moral norms (affiliation, life, law, legal justice, conscience, family affiliation, contract and property). ROBERT G. BRINGLE, MINDY A. PHILLIPS & MICHAEL HUDSON, THE MEASURE OF SERVICE LEARNING: RESEARCH SCALES TO ASSESS STUDENT EXPERIENCES 67–72 (2004). The scenarios and questions are simplistic and even omit Kohlberg's stage 5 reasoning

Judgment Interview (MJI) uses Kohlberg's six stages of moral development. It uses an extensive interview process to determine the stage into which each participant fits. The scoring protocol for the MJI is exacting and complex, and acceptable inter-rater reliability is difficult to achieve without extensive training. Thus, the MJI is impractical for educational assessment in comparison with the Defining Issues Test.[149]

Modeled after the Moral Judgment Interview (MJI), the Defining Issues Test (DIT) simplifies the MJI to a paper-pencil survey in order to assess the development of moral reasoning and judgment. The DIT is the most researched and validated measure of moral reasoning. It is highly reliable, both on internal consistency and test-retest reliability. The tool also stands up to measures of validity and actual prediction of behavior.[150]

The DIT has been cited in research articles involving hundreds of thousands of participants over three decades and has been used in over forty countries around the world.[151] Although the common belief prevails that one's moral orientation does not change beyond childhood years, research provides evidence to the contrary.[152] DIT studies have also found no support that moral development theory was biased against women; in fact, when there was a difference, it most commonly favored women.[153]

The DIT provides a measure of the three moral schemas discussed above. A baseline profile of moral reasoning within professional education has been developed using the three schemas.[154] Moral schema profiles, in which the percentage of preferred arguments for each schema are graphed, provide a means of conveying the individual's moral reasoning tendencies in a manner that is more neutral than a single score (typically for the post-conventional schema, which can be perceived as too reductive or diagnostic).[155] Schema profiles can be used for formative assessment, as an educational tool and to foster dilemma discussion and critical thinking. The DIT is not intended as a tool for selection or exclusion for job candidate selection or promotion.

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justifications. John C. Gibbs et al., *Construction and Validation of a Multiple-Choice Measure of Moral Reasoning*, 55 CHILD DEV. 527, 529 (1984).

149. *See* Georg Lind & Roland Wakenhut, *Testing for Moral Judgment Competence*, in MORAL DEVELOPMENT AND THE SOCIAL ENVIRONMENT: STUDIES IN THE PHILOSOPHY AND PSYCHOLOGY OF MORAL JUDGMENT AND EDUCATION 79 (Georg Lind et al. eds., 1985).

150. JAMES REST ET. AL., POSTCONVENTIONAL MORAL THINKING: A NEO-KOHLBERGIAN APPROACH 80-81 (1999).

151. Rest et al., *supra* note 79, at 291–324.

152. ERNEST T. PASCARELLA & PATRICK T. TERENZINI, 2 HOW COLLEGE AFFECTS STUDENTS: A THIRD DECADE OF RESEARCH 345–71 (2005); Rest et al., *supra* note 79, at 291–24; Duckett & Ryden, *Education for Ethical Nursing Practice*, in MORAL DEVELOPMENT IN THE PROFESSIONS, *supra* note 73, at 51–69.

153. Walker, *supra* note 86, at 67–92.

154. Bebeau, *supra* note 25, at 271–95.

155. M.J. Bebeau, Michael Rodrigues & Yukiko Maeda, Presentation at the Annual Meeting of the Association for Practical and Professional Ethics: Using Moral Schema Profiles to Evaluate Educational Interventions (Feb. 28, 2002).

c.   *Moral Identity and Motivation*

Measures of moral identity and motivation typically draw on interview data. Based on Loevinger's theory of ego development, Blasi proposed that, at the highest stage of moral identity development, the self would strive to act in ways consistent with one's identity as a moral agent. To act otherwise would result in considerable internal conflict—shame, guilt or remorse.[156]

Kegan, building on Blasi's work, defined a cognitive developmental model of moral identity development.[157] The individual in this model moves toward internalizing ever-increasing levels of moral responsibility to others. Kegan proposed that individuals at lower stages of identity development may not understand that they have the ability to resist pressure to conform to unethical norms of their employers, and thus subordinate values that are important to the self. Relying on interview research, Kegan found that one-third to one-half of adults have not reached a stage of identity development that would allow them to view their work (including work in a profession) as possessing a larger moral responsibility to others.[158]

d.   *Moral Implementation*

Moral Implementation presents significant assessment challenges. One approach is to present participants with a realistic case or role play and ask the subjects to assume the role of the person responsible for an action. Participants respond by drafting an action and implementation plan, including a constructed dialog with the other stakeholders, necessary for the implementation plan to work. The action and implementation plan and dialogs are then rated on several criteria based on expert judgment and interpersonal and communication skills. The importance of interpersonal and communication skills in moral implementation provides the theoretical linkage to a wide range of assessment possibilities. Depending on the venue of the assessment (e.g., written cases, videotaped performances or live simulations), rating criteria can include dimensions such as eye contact, body language or vocal inflection in addition to appropriate language, active listening or empowerment of the person served.[159]

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156. Augusto Blasi, *Moral Identity: Its Role in Moral Functioning*, in Morality, Moral Behavior, and Moral Development 129–39 (William M. Kurtines & Jacob L. Gewirtz eds., 1984).

157. Robert Kegan, The Evolving Self: Problem and Process in Human Development 4-5 (1982).

158. Robert Kegan, In Over Our Heads: The Mental Demands of Modern Life 188-91 (1998).

159. Adina Kalet et al., *Teaching Communication in Clinical Clerkships: Models from the Macy Initiative in Health Communications*, 79 Acad. Med. 511, 511–20 (2004); Lind & Wakenhut, *supra* note 149, at 97.

2. *Assessment Tools for Personal Conscience in the Professional Context of Peer Review Professions*

a. *Professional Ethical Sensitivity*

Bebeau and Rest designed the Dental Ethical Sensitivity Test (DEST) to evaluate students' ability to recognize ethical issues in the real-life situations of dentists.[160] The test consists of audiotapes to which the student tape-records an "on-the-spot" response. Criteria have been developed to judge the student's sensitivity to special characteristics of the patient and awareness of the needs and interests of others.[161] "Measures of moral sensitivity, based on the DEST, have been developed in business, counseling, medicine, and teacher education and have been found to have good psychometric properties for use as assessment tools."[162] The DEST has also informed the development of a Racial Ethical Sensitivity Test (REST) for teachers.[163]

b. *Professional Moral Reasoning*

Bebeau also developed the Dental Ethical Reasoning and Judgment Test (DERJT) to assess moral reasoning involving "intermediate" concepts like conflict of interest, informed consent or confidentiality in dental professionals.[164] A similar test is being developed for medicine.[165] The DERJT consists of five dental dilemmas that assess profession-specific "intermediate concepts." A respondent rates action choices and justifications and then selects the two best and two worst action choices and three best and two worst justifications. Scores are determined by calculating the proportion of times that a respondent selects actions and justifications consistent with expert judgment.[166] Researchers have also used the DIT to evaluate professional moral reasoning in law, medicine, dentistry, counseling, physical

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160. Muriel J. Bebeau et al., *Measuring Dental Students' Ethical Sensitivity*, 49 J. DENTAL EDUC. 225, 225–35 (1985).

161. *See* Muriel Bebeau, *Influencing the Moral Dimensions of Dental Practice*, *in* MORAL DEVELOPMENT IN THE PROFESSIONS, *supra* note 73, at 121–46.

162. Di You & Muriel J. Bebeau, Presentation at the Annual Meeting of the Association for Practical and Professional Ethics: Moral Sensitivity—A Review (Nov. 2005).

163. Mary M. Brabeck & Selcuk R. Sirin, *The Racial Ethical Sensitivity Test: Computer Disk Version* (REST-CD, 2001); Selcuk R. Sirin et al., *Validation of a Measure of Ethical Sensitivity and Examination of the Effects of Previous Multicultural and Ethics Courses on Ethical Sensitivity*, 13 ETHICS & BEHAV. 221, 221–35 (2003); Davis, *supra* note 147; TANGNEY & DEARING, *supra* note 147; Verna E. Monson, Empathic Response as Moral Action in Health Communication: A Predictive Validation Study (Feb. 28, 2008) (unpublished manuscript, on file with author).

164. Stephen J. Thoma & Muriel J. Bebeau, Presentation at the Annual Meeting of the American Educational Research Association: The Relationship Between Moral Judgment Development, Developmental Phase and Intermediate Concepts (Apr. 2007).

165. *Id.*

166. Bebeau, *supra* note 25, at 285.

therapy, teacher education and veterinary medicine.[167] There is a correlation between the DIT and the DERJT supporting construct validity.[168]

c. Ethical Professional Identity

Ethical professional identity can be assessed specifically to each profession. A participant can write an essay about what it means to be a professional, which is compared to the norms of the instructor and moral exemplars in the profession to determine how the participant has internalized the ethics of the profession.[169]

Forsythe used Kegan's concept of moral identity formation in interviewing military officers about their internalization of professional values.[170] Forsythe's methodology involves an interview with each subject. As discussed earlier, multiple observers highly trained both in the interview process and in evaluating the interviews should be used to estimate reliability of the evaluation.[171]

Bebeau also developed the Professional Role Orientation Inventory which assesses commitment to professional values over personal values.[172] This questionnaire and scoring guide enables dental professionals to conduct a self-assessment of role concept.[173] This is far more practical due to its ease of administration and evaluation. The Professional Role Orientation Inventory has also been adapted to analyze ethical professional identity of physical therapists.[174]

d. Professional Moral Implementation

Professional Moral Implementation is even more difficult to measure than moral implementation discussed above. We have very similar tools. Implementation in a professional context can be assessed by presenting a professional with a realistic ethical dilemma relevant to the field or specialization.[175] This could be in a role play or a case delivered in an audio or video format. The participant then responds with an action and implementa-

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167. Assessment based on the DIT may not be as persuasive to educators in the professions who will argue that general moral reasoning is not the goal of professional education.

168. Thoma & Bebeau, *supra* note 122, at 343.

169. *See* Muriel Bebeau, *Influencing the Moral Dimensions of Dental Practice*, *in* MORAL DEVELOPMENT IN THE PROFESSIONS, *supra* note 73, at 121–46.

170. Forsythe et al., *supra* note 25, at 357–78; Hamilton & Brabbit, *supra* note 123, at 116–19 (discussing Forsythe's data of professional internalization).

171. Forsythe et al., *supra* note 25, at 357–78.

172. Bebeau, *supra* note 25, at 286.

173. *See* Muriel Bebeau, David O. Born & David T. Ozar, *The Development of a Professional Role Orientation Inventory*, J. AM. C. DENTISTS. 27, 27–33 (1993).

174. Robert W. Sandstrom, *The Meanings of Autonomy for Physical Therapy*, 87 PHYSICAL THERAPY 98 (2007).

175. COMMITTEE ON ASSESSING INTEGRITY IN RESEARCH ENVIRONMENTS, NATIONAL RESEARCH COUNCIL, INSTITUTE OF MEDICINE, INTEGRITY IN SCIENTIFIC RESEARCH: CREATING AN ENVIRONMENT THAT PROMOTES RESPONSIBLE CONDUCT 97 (2002).

tion plan necessary to resolve the dilemma. The implementation plan and constructed dialog can be evaluated against responses from "gold standard" experts in the field. For each profession, participants can be presented with a scenario specific to the profession.

3. Recommendations to Assess Personal Conscience in a Professional Context

The most practical alternative to assessing *professional ethical sensitivity* is to develop a modification of the Dental Ethical Sensitivity Test specific to each profession. The use of audio-files or podcasts would permit it to be administered to large groups of people either in a classroom or through a website.[176]

The most practical alternative to assessing *professional moral reasoning* is the development of a version of the Dental Ethical Reasoning and Judgment Test. In the meantime, the DIT, with established reliability and validity, is the most practical tool for assessing moral reasoning. The DIT can be administered in thirty to forty minutes. The Center for the Study of Ethical Development at the University of Minnesota provides services for scoring DIT tests and maintains norms for educational groups. The cost of the surveys is affordable for administration to large groups. Unlike the other measures of moral reasoning, the DIT does not require trained evaluators with additional cost.

The Professional Role Orientation Inventory (PROI) is the most practical for assessing *ethical professional identity*. Sandstrom's research showed that the tool can be used in professional contexts other than dentistry and could, for example, be adapted to the legal profession.[177] Unlike Forsythe's interview process, the PROI can be administered in a paper-pencil format, thereby easing administration and reducing cost.

Lastly, *moral implementation* can be assessed by presenting participants with a dilemma where implementation of a course of action is necessary. The participant outlines a course of action and dialogue plan to discuss the dilemma with affected parties. Researchers can compare the subject to the course of action and dialogue plan of exemplars in the profession reacting to the same dilemma.

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176. It may be even more practical—due to the amount of time necessary both to train evaluators scoring a DEST type test and to score each participant—to develop a short form survey the participant could fill out after viewing an audio-file or podcast.

177. Sandstrom, *supra* note 174, at 100–01.

C. *Assessment of Understanding and Internalizing the Ethics of Duty,*
    the Ethics of Aspiration, the Duty of Peer Review, and
    Fiduciary Duties

The legal profession has developed the Multi-State Professional Responsibility Exam (MPRE) required for bar admission in nearly all states, which assesses whether a candidate knows the black letter ethical rules that define the floor of competence and ethics for the profession. Similar multiple choice examinations should be possible for each profession.

The internalization of the ethics of aspiration does not have a specific assessment tool. However, the concept closely relates to ethical professional identity assessed in personal conscience in a professional context. The PROI could also serve to assess the ethics of aspiration in professionalism. Again, it makes sense to create a PROI for each profession.

There is no specific assessment tool to assess understanding and internalization of the duty of peer review. The PROI could serve this purpose.

There is also no specific assessment tool to assess understanding and internalization of fiduciary duty. The PROI could serve this purpose.

A number of assessment tools are available for measuring commitment to public service. Each tool uses a slightly different measure of a person's beliefs to determine how committed the participants are to service. Many of the scales are very short and easy to administer. For example, the Civic Action scale looks at the participant's intentions and has eight items that measure whether the subject intends to engage in community service in the future.[178] The Community Service Self-Efficacy Scale assesses how much an individual feels they make a difference when they participate in community service. This scale presents a unique view of service in that it does not just measure participation, but rather measures an internal thought process regarding service.[179]

The Emotional Empathic Tendency Scale measures the degree to which a person vicariously has emotional responses due to the emotional experiences of others.[180] While several of these scales assess a person's desire to participate in community service, they may not all produce the results necessary for professionalism assessment. Scales measuring community service must take self-reporting bias into account. Community service is an area where participants may tend to exaggerate their interest or involvement in service to please the evaluator. The Community Service Self-Efficacy Scale offers the best alternative to mitigate these biases as it provides data of an internal thought process rather than the outward expression of a desire to serve.

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178. BRINGLE, *supra* note 148, at 169–72.

179. *Id.* at 100–03.

180. *Id.* at 111.

There are no existing scales that assess how reflective an individual professional is with regard to his or her income. In fact, very few scales exist that measure attitudes toward satisfactory wealth in any manner. Several scales assess attitudes toward money. While these scales are not directly on point to assess this sub-element of fiduciary duty, the scales may show an insightful relationship to a satisfactory living. The Money Ethics scale evaluates several factors related to money, including positive attitudes, negative attitudes, achievement, power, management of money and self-esteem.[181] The results of this tool indicated that people who related money with achievement had a low level of work and life satisfaction. On the other hand, the scale showed that those who had high work satisfaction did not relate money with achievement.[182] While this scale does not directly address reflection on a satisfactory living, it does show levels of satisfaction with money.

Ideally, a scale should be developed to assess the challenge of restraining self-interest in terms of income and wealth to some degree in order to serve both the other person for whom the work is done and the public good of the profession.

VIII.   CONCLUSION

The social contracts of the peer review professions must be constantly renewed in each generation. Students, practicing professionals and the public must be educated about the duties of the social contract, how those duties are being met and the benefits of the social contract to the public and the profession. Without this ongoing renewal, the members of the profession will fail to internalize and live the elements of professionalism, and eventually, the public will renegotiate the social contract away from occupational control over work toward the default model of the market.

The five elements of professionalism outlined earlier capture the correlative duties under the social contract for each member of a peer-review profession. Each member must internalize these elements. Essentially, professional schools and professional organizations must help each new entrant continue the development of the moral self by building on earlier life experiences, including undergraduate education, and internalizing into that moral self an understanding of the duties of the professional role.

Graduate schools in the professions and professional organizations need assessment tools to measure students' and practicing professionals' progress in internalizing the elements of professionalism. The professions could then experiment with learning models and educational programs to

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181. Thomas Li-Ping Tang, *The Meaning of Money Revisted*, 13 J. ORG. BEHAV. 197, 197 (1992).

182. *Id.* at 201.

assess which educational engagements are most effective at fostering development.

The peer review professions need to move beyond descriptive and anecdotal data of what works in terms of professionalism education. Section VII of this essay makes clear that at this stage of scholarship in this area, we will need to use multiple measures to assess the internalization of the five elements of professionalism. The assessment tools should move beyond self-reports toward more valid and reliable approaches. Assessment of overall programs is much less useful than assessment of specific engagements, since other graduate schools may not have the resources to replicate entire programs but could implement defined educational engagements where students show progress on any one of the five elements.

If the peer review professions identify the educational learning models and programs that are most effective at fostering professionalism, the future of the social contracts of the professions will be ensured. The public, each individual professional and each profession will benefit.