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Empirical Professional Ethics: Ethical Development in the Learning and Practice of Law

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FOREWORD

EMPIRICAL PROFESSIONAL ETHICS: ETHICAL DEVELOPMENT IN THE LEARNING AND PRACTICE OF LAW

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The mission of the Holloran Center for Ethical Leadership in the Professions is research on the holistic formation of both students and practicing professionals into ethical leadership in their communities. A necessary foundation for ethical leadership in a peer-review profession like law is each student's and each practicing professional's moral core into which the professional has internalized the ideals and core principles of the profession. On September 22, 2012, the University of St. Thomas Law Journal and the Holloran Center hosted a symposium, with the eight papers published here, to analyze what we know empirically about ethical development in the learning and practice of law.

The Holloran Center appreciates both the contributions of the authors to this symposium and the funding support of the Medtronic Foundation for the conference. We also are grateful for the tireless efforts of the law journal editors for their work on the symposium.

The contribution of the papers in this symposium is best understood in the context of the education assessment framework already adopted by accrediting authorities for graduate education in the health professions and undergraduate education.¹ The ABA's late-stage drafts to change the accreditation standards for law schools also adopt this same framework.² This education assessment framework asks legal educators to:

1. identify student educational needs;
2. articulate student learning outcomes (educational objectives) that respond to student educational needs;
3. plan and implement an educational program and curriculum that help students achieve the learning outcomes;

1. See NELSON MILLER, *TEACHING LAW: A FRAMEWORK FOR INSTRUCTIONAL MASTERY* 13 (2010).

2. ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS Standard 303, 307, and 308 (2012) available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf.

4. create formative and summative assessment measures; and
5. evaluate the effectiveness of the educational program and curriculum.³

I. SYMPOSIUM PAPER ADDRESSING ALL FIVE ELEMENTS OF THE EDUCATION ASSESSMENT FRAMEWORK

Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation To Become An Effective Lawyer, by Neil Hamilton, Verna Monson, and Jerry Organ analyzes data on all five elements of the education assessment framework.⁴ We address the following questions:

1. Is professional formation important both for the professional effectiveness of each law student and practicing lawyer and for the legal profession's social contract, whereby society grants the profession autonomy to regulate itself? Part I of the article presents data strongly supporting an affirmative answer.
2. What are the specific learning outcomes/educational objectives that define the elements of professional formation that students need? Part I of the article also defines these elements.
3. What does empirical research tell us about the most effective curriculum, culture, and pedagogy to help each student internalize the capacities and skills of professional formation? Part II of the article summarizes and analyzes research indicating the most effective educational strategies.
4. With both the educational objective of professional formation and the empirical research on the most effective educational engagements in mind, how has the University of St. Thomas School of Law (UST Law) designed its curriculum, culture, and pedagogy to help each student develop in terms of professional formation? What are the formative and summative assessments that UST Law has found effective? Part III summarizes and analyzes UST Law's curriculum, culture, pedagogy, and assessments.
5. Do the University of St. Thomas School of Law's curriculum, culture, pedagogy, and assessments make any assessable difference in terms of student professional formation? Part IV analyzes the data, which indicates substantial student growth in moral reasoning and ethical professional identity.

3. See MILLER, *supra* note 1, at 15–25, 99–104; ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROAD MAP 7–9 (2007). Formative assessments are measurements at different points during a particular course or over the span of a student's education that provide meaningful feedback to improve student learning. Summative assessment methods are measurements at the culmination of a particular course or the culmination of any part of a student's legal education that measures the degree of student learning. See MILLER, *supra* note 1, at 99–104; STUCKEY, *supra* note 3, at 7–9.

4. Neil Hamilton, Verna Monson & Jerry Organ, *Empirical Evidence That Legal Education Can Foster Student Professionalism/Professional Formation To Become An Effective Lawyer*, 10 U. St. Thomas L.J. 11 (2012).

The empirical evidence presented in this article demonstrates that a well-designed law school curriculum and culture can help students grow toward internalization of a high degree of professionalism or what we now call professional formation. The paper argues that legal education should move toward much more effective curricula, culture, pedagogies, and assessments to foster each student's professionalism/professional formation.

II. SYMPOSIUM PAPERS FOCUSING ON IDENTIFYING STUDENT AND PRACTICING PROFESSIONAL EDUCATIONAL NEEDS AND POSSIBLE LEARNING OUTCOMES IN THE CONTEXT OF CURRENT MARKETS FOR LEGAL SERVICES

Based on ongoing empirical research which thus far has involved 116 interviews with lawyers in 14 law firms, *Money and Meaning: the Moral Economy of Law Firm Compensation* by Milton Regan and Lisa Rohrer is an exceptional empirical study of law firm compensation systems in a time of market challenges.⁵ The article analyzes the significance of these compensation systems in signaling what it means to be a lawyer and which competencies are valued in these law firms.

Regan and Rohrer summarize

[a]s firms become subject to increasing competitive business pressures, they have tended to use their compensation systems as more deliberate instruments of business strategy to encourage behavior that furthers the firm's financial performance. Because most firms are dependent on the efforts of partners who have relationships with key clients, compensation systems increasingly provide substantial rewards for developing such relationships. In addition, firms have created systems that differentiate more finely how various types of partner activities contribute to revenues. These developments reflect the view that today's successful law firm partner must possess profitable business skills, not simply traditional legal talents. More generally, they signal that today's successful law firm must be run more explicitly as a business enterprise, not simply as an organization of lawyers guided by values internal to the legal profession.

Our research suggests that the compensation process provides an occasion for contesting the relative weight that a firm gives to modern business skills and traditional professional capabilities. A firm's decisions on this issue serve to allocate respect among its partners because it expresses a hierarchy of attributes that serves as a basis for assessing who are valuable members of the firm. This hierarchy reflects a firm's working conception of what con-

5. Milton Regan & Lisa Rohrer, *Money and Meaning: the Moral Economy of Law Firm Compensation*, 10 U. St. Thomas L.J. 74 (2012).

stitutes professionalism in a world in which law firm practice is subject of fierce market forces.”⁶

Regan and Rohrer conclude that firms face a choice in terms of their model of business organization.

It is possible for professionalism in the law firm setting to be assimilated to business logic, by conceptualizing firms as one particular type of business organization that is distinctive only in the type of service that it provides. It is also possible, although perhaps more difficult, to fashion a notion of professionalism that acknowledges business realities but also incorporates a conception of lawyers as distinctive because of the adherence to certain traditional values internal to the profession. Our research suggests that the partner compensation process is one arena in which modern law firms are attempting to work through a response to this challenge. As such it represents yet another chapter in the ongoing process of determining what it means to be a lawyer.⁷

An interesting question for future discussion is that scholarship about business corporations clearly identifies some corporations that foster cultures of responsibilities for others similar to the traditional values of the legal profession.

Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation, by Susan Fortney and Tahlia Gordon is another thought-provoking empirical study.⁸ The article focuses on how New South Wales’ new requirement of “proactive management based regulation” (in contrast to reactive discipline to rule violations already committed) is encouraging practicing lawyers to develop new competencies. Amendments to the Australian Legal Profession Act require that incorporated legal practices (ILPs) take steps to assure compliance with provisions of the Legal Profession Act of 2004. Specifically, the legislation provides that the ILP must appoint a legal practitioner director to be generally responsible for the management of the ILP. The ILP must also implement and maintain “appropriate management systems” (AMS) to enable the provision of legal services in accordance with the professional obligations of legal practitioners. Because the new law did not define “appropriate management systems,” the Office of Legal Services Commissioner for New South Wales worked with representatives of other organizations and practitioners to develop guidelines and an approach for evaluating compliance with the statutory requirements. “The collaboration resulted in an “education toward compliance” strategy in which a desig-

6. *Id.* at 150–51.

7. *Id.* at 151.

8. Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. St. Thomas L.J. 152 (2012).

nated legal practitioner director for an ILP completes a self-assessment process (SAP), evaluating the ILP's compliance with ten specific objectives of sound legal practice."⁹

To evaluate the new regulatory regime, the authors conducted a mixed method empirical study of incorporated law firms in New South Wales Australia. In Phase One of the study, they surveyed all incorporated law firms with two or more solicitors. In Phase Two, the authors interviewed legal practitioner directors responsible for the management of incorporated legal practices.

Fortney and Gordon conclude

[r]egardless of the size of the firm, the self-assessment process helped shape the attitudes of many directors. The majority of respondents agreed that the SAP was a learning exercise that enabled their firms to improve client service. The degree of the impact on ethical norms, systems, conduct, and culture in firms largely turns on the extent to which directors seriously examine firm practices and invest in making improvements. Even for those directors who see the self-assessment process as a ministerial exercise of checking boxes or a recipe for implementing systems, the self-assessment process has successfully introduced directors to principles of good management by effectively forcing directors to complete assessment forms, noting compliance with the ten objectives for management systems. Beyond taking the minimum steps for compliance purposes, directors are increasingly recognizing the business imperative for improving management systems to attract and retain clients. In this sense, firms are implementing systems as an aspect of good management and business development.¹⁰

Practical Wisdom: Reimagining Legal Education, by Daisy Hurst Floyd surveys and synthesizes historical sources including Aristotle and a number of interdisciplinary studies to suggest that "practical wisdom" is the best framework for understanding student educational needs and possible learning outcomes in terms of the elements of professional identity. The article provides a rich review of research from the humanities and the social sciences on our understanding of practical wisdom.

Floyd notes "[p]ractical wisdom is derived from Aristotle, who considered it the master virtue. Practical wisdom encompasses all the other virtues, including loyalty, self-control, courage, fairness, generosity, gentleness, friendliness, and truthfulness. Aristotle believed that a person who knows how to use the virtues "practically," to apply them in concrete situations, is wise."¹¹ Floyd adds

9. *Id.* at 153.

10. *Id.* at 155.

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

[l]awyers are required to not only develop the multiple capacities for practical wisdom, but they must do so while taking into account particularized professional norms and requirements and acting in conditions of inherent uncertainty. Moreover lawyers act on behalf of someone else, a client. At the heart of a lawyer's actions is the fiduciary obligation owed to the client. Therefore, ethical lawyers must not only have developed the multiple capacities that allow them to exercise practical wisdom, they also have to integrate those capacities with the special responsibilities of a lawyer. This challenge brings with it another: while we expect the lawyer to act ethically, she is also in a position to help another act ethically through the client's exercise of practical wisdom. Therefore, the lawyer must understand enough about what it takes to act ethically to help her client act ethically.¹²

III. SYMPOSIUM PAPERS FOCUSING ON AN EDUCATIONAL PROGRAM, CURRICULUM, AND ASSESSMENTS THAT HELP STUDENTS ACHIEVE THE LEARNING OUTCOMES (EDUCATIONAL OBJECTIVES) RELATING TO ETHICAL DEVELOPMENT

Leadership Education: Who Enrolls and How it Helps by Heather Bock, Lori Berman, and Juliet Aiken analyzes data from an AmLaw 100 law firm to investigate two important issues central to competency training and development for associates (and thus also for law students).¹³ First, the authors assessed the extent to which a training program on leadership skills actually enhanced competency development. Second, they assessed the extent to which two personality traits – locus of control (the extent to which an individual feels she has personal control over her environment) and self-efficacy (an individual's belief in her ability to perform across contexts) – influenced self-selection into elective leadership training in this law firm. They found that “associates who attended the leadership academy improved significantly in their behavioral competency ratings of Teamwork & Leadership and Drive for Excellence over time relative to associates who did not attend the academy.”¹⁴ This finding supports the conclusion that legal education can foster student growth in terms of competencies related to professional formation. They also found that “associates who have a high internal locus of control and associates who have high self-efficacy are more likely to self-select into leadership training opportunities. Therefore, to the extent that elective training is effective, it may only be reaching individuals motivated to pursue it.”¹⁵

The authors continue

12. *Id.* at 218.

13. Heather Bock, Lori Berman & Juliet Aiken, *Leadership Education: Who Enrolls and How it Helps*, 10 U. St. Thomas L.J. 227 (2012).

14. *Id.* at 237.

15. *Id.* at 241.

[d]ue to the apparent importance of personality in the pursuit of elective training, educators should consider the outcomes of their programs relative to their aims. For example, training that only reaches high performers may not be a problem if the goal of training is to target and improve high performers. However, if the goal is to provide equal training to all, optional training that reaches only one portion of the population may not be satisfactory. To avoid this issue, educators may consider making certain early training programs mandatory, and building individuals' internal locus of control and self-efficacy in these programs.¹⁶

These findings point toward the need for legal education to consider required courses to foster student development of these important competencies.

Rich, Smart, Honest? Does Success Lead to Unethical Lawyering? by Jeremy Kidd and Michael Krauss creatively takes on the challenging question of the causes of unethical behavior in society and among lawyers in particular.¹⁷ One hypothesized cause of unethical behavior is class distinction. The authors' empirical study of students at George Mason University School of Law "offers a preliminary inquiry into whether the structure of law school education leads to greater unethical behavior because it imposes an additional level of class distinction among lawyers through class rankings and coveted spots on law review and other 'elite' organizations."¹⁸

The survey was comprised of nineteen scenarios in which the participants were presented with an ethical dilemma and required to choose from four potential responses One of the four responses was intended to represent an ideal ethical response and another was intended to represent a largely unethical response. Two additional responses were provided for each scenario, representing options that contained at least one ethical flaw but did not fall as far as the lowest ethical response.¹⁹

An additional benefit of this study in addition to its findings is the creation of this strong new assessment of student ethical development.

The authors' data analysis suggests "[The measure of class ranking] that proved most important in explaining the variance in ethical responses between the survey participants was academic class ranking It is also telling that students with higher class ranking were more likely to give *less* ethical responses."²⁰ "Also disappointing was the fact that those who took a legal ethics course did not score significantly higher on the survey."²¹ "One

16. *Id.*

17. Jeremy Kidd & Michael Krauss, *Rich, Smart, Honest? Does Success Lead to Unethical Lawyering?*, 10 U. St. Thomas L.J. 243 (2012).

18. *Id.*

19. *Id.* at 262.

20. *Id.* at 267.

21. *Id.*

more interesting finding: incoming 1Ls actually scored higher than any 2L, 3L, or 4L students.”²² The authors conclude that these empirical results suggest a possible inverse correlation between ethical standards and various indications of law school ‘class’ status. The authors caution that the results are not statistically significant to a high confidence level, and the small number of observations may have led to the lack of statistical significance, indicating a need for further research to verify the results.

Gaining from the System: Lessons from the Law School Survey of Student Engagement About Student Development in Law School by Carole Silver, Louis Rocconi, Heather Haeger, and Lindsay Watkins considers the factors that influence law students’ assessment of their development professionally and academically during law school.²³ It creatively uses responses of 5,612 third- and fourth-year law students to the Law School Survey of Student Engagement to identify student activities and behaviors that influence student professional development and academic gains. Professional development is defined as “more than a tangible skill set; it extends even beyond a sense of ethics and values. Professional identity is an important part of the individual’s identity more broadly, and includes integrity, consideration, and civility.”²⁴ The authors’ “aggregate measure, which includes understanding people of diverse backgrounds, self-understanding, developing a code of values and ethics, and contributing to the welfare of the community, speaks directly to this notion of professional identity.”²⁵

Four aspects of the law school experience emerge as common influences of students’ professional and academic development. The authors note “[t]here is some overlap between the factors that influence professional and academic gains. Four factors that positively influence professional gains also are positively related to increased academic gains: coursework emphasizing higher-order learning, student interaction with both faculty and peers, and more time spent preparing for class.”²⁶ “When students indicate[d] that their courses emphasize[d] analysis, synthesis, and higher-order learning approaches, they report both academic and professional development gains.”²⁷ This is an important finding. Legal education has a great strength in helping students develop analysis, synthesis, and higher-order learning approaches. The challenge is to help each student connect the dots to see the relationship of those competencies to the professional development.

A second key finding of the analysis is the

22. *Id.* at 269.

23. Carol Silver, Louis Rocconi, Heather Haeger & Lindsay Watkins, *Gaining from the System: Lessons from the Law School Survey of Student Engagement About Student Development in Law School*, 10 U. St. Thomas L.J. 286 (2012).

24. *Id.* at 304.

25. *Id.*

26. *Id.* at 307.

27. *Id.* at 311.

crucial role of student-faculty interaction. This finding is consistent with research in other areas of higher education. Law schools can exert an influence over certain aspects of student-faculty interaction simply by identifying it as a priority. But we can also imagine schools focusing attention on facilitating relationships and communication through policy (for example, by encouraging holding and use of regular office hours), programming (by creating advising or mentorship programs), and even through intentional architectural design that facilitates informal interaction, for example. These may lead to opportunities for learning that are as likely to occur outside of the classroom as within it.²⁸

The authors note “[A] third factor identified as a significant influence on professional and academic development is the relationships among law students. Again, this is good news for law schools because it is possible to shape and encourage interaction.”²⁹

The authors also find a fourth factor that influences both student professional development and academic gains. “Finally, the supportiveness of the law school environment exerts a positive influence on the student gains that are a focus of [the] research. This was the most salient of all of the law school characteristics that [was] analyzed . . . [O]ur research indicates that students feel they thrive when they feel supported by their school.”³⁰ These findings on the second, third, and fourth factors that influence student professional development are similar to the empirical findings of the earlier article by Neil Hamilton, Verna Monson, and Jerry Organ.

Cooperation–Competition and Constructive Controversy in Developing Professional Ethics in Law School Classes by David Johnson, Roger Johnson, and Verna Monson helpfully reviews all the empirical evidence concerning the impact of the pedagogy of cooperative and competitive learning and the impact of the pedagogy of constructive controversy on the development of students’ professional ethics.³¹ Cooperative learning is “the instructional use of small groups so that students work together to maximize their own and each other’s learning.”³² Formal cooperative learning consists of students working together for longer periods to complete specific tasks and assignments jointly. Informal cooperative learning consists in having students working together to achieve a joint learning goal in temporary, ad hoc groups.³³

28. *Id.* at 311.

29. *Id.* at 312.

30. *Id.*

31. David W. Johnson, Roger T. Johnson & Verna Monson, *Cooperation–Competition and Constructive Controversy in Developing Professional Ethics in Law School Classes*, 10 U. St. Thomas L.J. 317 (2012).

32. *Id.* at 342.

33. *Id.*

Constructive controversy is a pedagogy where groups of four students are given a challenging issue and then divided into pairs with one pair given the “pro” position and the other pair given a “con” position. Each pair researches the assigned position and presents the best case for the assigned position. The pairs engage in an open discussion of the evidence and argument. The pairs then reverse perspectives and argue the best case for the opposing perspective. The students then drop their roles as advocates and seek a synthesis on which all four members can agree. They finally discuss how well the group functioned.³⁴

The article reviews many empirical studies finding that cooperative learning contributes to higher student achievement, higher positive student interpersonal relationships, and better student psychological health. The article also reviews research indicating that constructive controversy contributes to higher student achievement (in particular in cognitive reasoning) and more positive student social support and interpersonal relationships. The authors recommend that legal education use more cooperative learning and constructive controversy pedagogies to achieve these learning outcomes.

IV. CONCLUSION

Educating Lawyers: Preparation for the Profession of Law, The Carnegie Foundation for the Advancement of Teaching’s study of legal education, noted in 2007 that “[a]s far as we know there is no research on the extent to which [a law school’s] influence results in greater incorporation of the ethical-social values of the profession into students’ personal and professional identities.”³⁵ The papers in this symposium contribute substantially to filling this research need by addressing a number of the elements of the education assessment model as applied to ethical development in the learning and practice of law. The papers identify student educational needs, articulate learning outcomes, outline educational programs and curriculum, suggest formative and summative assessment measures, and provide some strategies and data on evaluating the effectiveness of the educational program and curriculum.

The ultimate goal going forward is to provide both research including teaching materials and education through workshops to encourage more law professors to adopt the ethical development of each law student as an important educational objective. The University of St. Thomas Law Journal and the Holloran Center want to contribute to that goal both with this issue and going forward.

34. *Id.* at 345.

35. WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 135 (2007).