Professional Identity Formation

Do the Rules of Professional Conduct provide a means to foster a more integrated conception of professional identity?

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Curricular Requirements for the Development of Professional Identity in Law Schools:

THE 2021-2022 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS

Revised 303: Curriculum Section (b)(3), which became effective in February 2022, states:

(b) A law school shall provide substantial opportunities to students for:
   (3) the development of a professional identity.
Curricular Requirements for the Development of Professional Identity in Law Schools: (Continued)

THE 2021-2022 ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS

Interpretation 303-5
Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice. Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.
Step 1: Where do lawyers locate their professional identity among the other roles in their lives? List the roles that you enact in your daily life. Include any roles that occur to you, just make sure that you include your identity as a lawyer.

Step 2: The circle represents your identity. Draw and label small circles representing each role you listed in Step 1 and place these roles close to center if they are particularly important to your sense of identity, and further from the center if they are less important.

THIN PROFESSIONAL IDENTITY
Professional role distancing has been a central concern in the normative literature on U.S. lawyers. The standard conception of lawyer identity is that it requires “thin professional identity,” whereby lawyers bifurcate between personal values and professional behavior in accordance with a client-centered principle of neutral partisanship.
THIN PROFESSIONAL IDENTITY (CONTINUED)

Defenders of the standard conception emphasize that it is necessary to avoid role confusion and paternalism in interactions with clients. Within this line of thinking, scholars often stress that thin professional identity need not be alienating, as lawyers can take pride in providing client-service without individual moral screening.

THIN PROFESSIONAL IDENTITY (CONTINUED)

Critics of thin professional identity worry that it encourages a “bleached out professionalism,” which is neither desirable nor realistic.
Some legal theorists have argued that the lawyer role is fundamentally morally flawed, as lawyers are required to engage in “moral prostitution” by selling their “words, thoughts, and convictions” to the client. These critics worry that the detachment implied by the standard thin conception leads to the atrophy of lawyers’ moral faculties.

Thick professional identity argues that lawyers should be public professionals, officers of the court, and lawyer-statesman—not amoral technicians.
On the far end of the thick professional identity continuum is the cause-lawyering perspective. Cause lawyers reject thin professional identity and explicitly invest the professional role with the lawyer's own political values and goals.

Sociological studies examining legal training, particularly focusing on the 1L classroom generally suggest that students are inculcated in the thin account of professional identity, much to their detriment. Through the Socratic exchange of the law school classroom, students are presented with a new legal epistemology—they learn to "think like a lawyer."
In this process, they learn to eschew their initial moral, emotional, and political reactions to cases in favor of doctrinal analysis, and to privilege legal context over social context. Students transition from a justice-oriented to a game-oriented consciousness and from a vocabulary emphasizing social justice to one that emphasizes zealous advocacy for one's client irrespective of the client's ends.

The Harvard study demonstrated that experiences of professional identity varied strongly by students' job-decision paths during law school. Students who pursued public-interest careers generally maintained a central conception of lawyer identity, which often overlapped with political, racial, religious, and gender roles. In contrast, students who pursued positions in large firms tended to describe substantial distancing from professional identity.
Formation of Professional Identity

Professional identity is more than simply ethics or professionalism - or even both together.

Although professional identity includes these two issues, it is a broader concept. Professional identity is the way lawyers understand their role relative to all the stakeholders in the legal system, including clients, courts, opposing parties and counsel, the firm, the legal system itself, and society as a whole.
Civility and respect for others are foundational to emerging lawyers’ understanding of professional conduct. However, professional identity engages lawyers at a deeper level by asking them to internalize principles and values such that their actions flow habitually from their moral compass.

A student’s professional identity (across the professions) means that the student understands, internalizes, and demonstrates:

1. an internalized deep responsibility and service orientation to others whom the student serves as a professional in widening circles as the student matures; and
2. pro-active continuous professional development toward excellence at all the competencies needed to serve others well in the profession’s work. *Educating in Ethics Across the Professions* (R. Jacobs ed., 2022).
A law student’s professional identity means that the student understands, internalizes, and demonstrates:
1. a deep responsibility and commitment to serving clients, the profession, and the rule of law; and
2. a commitment to pro-active continuous professional development toward excellence at all the competencies needed to serve others well in the profession’s work.

Empirical research strongly supports that internalizing and living into a profession’s values occurs in stages over time, principally through experience, feedback, and reflection, particularly guided reflection in a mentoring or coaching relationship.
The skill of reflection is an ongoing cycle of careful examination of specific thoughts, actions, and experiences from a student's own perspective and the perspective of others to inform and improve the student's insight and practice for future experiences. See Neil Hamilton, “The Foundational Skill of Reflection in the Formation of a Professional Identity,” 12 St Mary’s J Legal Malpractice & Ethics (2022).

Reflection is defined as “the process of engaging the self in attentive, critical, exploratory, and iterative interactions with one’s thoughts and actions, and their underlying conceptual frame, with a view to changing them.” Quoc D. Nguyen et al., “What is Reflection? A Conceptual Analysis of Major Definitions and a Proposal for A Five-Component Model,” 48 Med Educ 1176 (2014).
Developing A Professional Identity: Reflection (Continued)

This conceptual model of reflection has two extrinsic elements and four core steps. The first extrinsic element is an experience that triggers a reflective thinking process. The second extrinsic element is the timing of the reflection. In the vast majority of definitions of reflection, the timing occurs after the experience, but the others believe reflection should occur before, during, and after the experience.

Developing A Professional Identity: Reflection (Continued)

The four steps of a reflective thinking process are:
1. to identify specific thoughts and actions the person is thinking about;
2. to think about the thoughts and actions attentively and critically, in an exploratory and iterative fashion;
3. to become aware of the conscious or unconscious conceptual framework(s) that underlie the person's thoughts and actions; and
4. to have a purpose of changing the self in terms of the person's conscious or unconscious conceptual framework.
Think about the 4-step process in this context:

Above the Law on November 8th reported about the challenge by three non-Native families to the Indian Child Welfare Act after seeking to adopt Native children. Two of the families have adopted the children in question and in the case of the one family who didn't, the child was placed with the child's grandmother.

Above the Law questioned why the case is still happening given these facts and quotes an article from Mother Jones.

“In all three lawsuits, non-Native foster parents wanted to adopt Native children; two of the three were ultimately successful in doing so. But the foster parents—along with the attorneys general for three states, with the backing of deep-pocketed right-wing groups like the Goldwater Institute and the Bradley Foundation—are suing the federal government and five tribes on the grounds that ICWA represents race-based discrimination and an overly intrusive federal government.”
“Then there’s Gibson Dunn, the law firm which has been representing pro bono the parents who adopted the child. The firm has represented plaintiffs in several cases that take issue with laws specific to Native communities; the lawyer representing the parents, also serves as counsel for a casino company in a federal case arguing that the Washington law limiting sports wagering to tribal entities is discriminatory. Gibson Dunn is known for representing Chevron in the decade-long lawsuit brought by indigenous communities in Ecuador, as well as representing the corporation behind the Dakota Access Pipeline.”

Above the Law concludes:

“Chevron and casino companies. Taking a financial loss litigating a family law case is a small investment toward advancing the interests of the rest of the firm’s clients in diminishing the last, tenuous pockets of tribal sovereignty. And that might be a business decision the firm likes but make no mistake that it is a business decision. All the “everyone deserves a lawyer” rhetoric doesn’t play here — the firm is taking on a pro bono case for a family with seemingly no injuries as part of a broad attack on tribal rights.”
Compare that with a synopsis of the four main issues at the heart of the dispute.

1. Whether ICWA goes beyond the powers that the Constitution gives to Congress in Article.
2. Whether ICWA violates the Constitution’s guarantee of equal protection, which generally bars the government from discriminating based on race, gender, or ethnicity.
3. Whether ICWA violates the 10th Amendment’s “anticommandeering doctrine,” which bars the federal government from requiring states and state officials to adopt or enforce federal law.
4. Whether provision of ICWA that allows tribes to adopt, for use in state courts, their own order of preferences for the placement of Native children unconstitutionally delegates legislative power to the tribes.

And where does the historical context of the treatment of Native children fit into the analysis?


Law schools’ great “triumph of formal knowledge” succeeds in raising law school above a mere trade school but comes at a significant price. The Carnegie Report cites studies suggesting, for instance, that law students’ moral development stops in law school and does not resume after graduation. The disappointing contrast is that other studies show that moral development in non-lawyer adults and through other professional programs either can or does continue. The most negative way of looking at these studies is that law school, equipping graduates with substantial analytical skill, actually stunts too many graduates’ natural analogical, interpersonal, and ethical growth.
Professors should not tell first-year students that their moral concerns are irrelevant to legal analysis, because law must be understood in the context of its social purpose. Sensitive teaching reminds students of that broader purpose. The goal “has to be holistic: to advance students toward genuine expertise as practitioners who can enact the profession’s highest levels of skill in the service of its defining purposes.”

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The Tension between Professional Identity and Zealous Advocacy

THE RULES OF PROFESSIONAL CONDUCT DO NOT REQUIRE THE LAWYER TO ZEALOUSLY REPRESENT THE CLIENT

- In television and movies, we often see the lawyer as a zealous and combative advocate. The Rules of Professional Conduct, however, do not require the lawyer to zealously represent the client. None of the Rules mention zeal or zealous.
- Although ABA Comment [1] to SCR 201.3 states that a lawyer “must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,” the Comment does not stop there.
- It cautions: “A lawyer is not bound, however, to press for every advantage that might be realized for a client... The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.”
The Tension between Professional Identity and Zealous Advocacy (Continued)

MANY CLIENTS EXPECT THAT BECAUSE THEY HIRED THE LAWYER, THEY HAVE THE POWER TO DICTATE THE LAWYER'S CONDUCT

○ The lawyer has an obligation to correct that expectation and to refuse a client's demand to act uncivilly or to engage in unethical practices. SCR 20:1.4(a)(5) requires a lawyer to “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.”

SCR 20 PREAMBLE [1]: A LAWYER’S RESPONSIBILITIES

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
A LAWYER’S RESPONSIBILITIES AS A PUBLIC CITIZEN

As 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. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts.
Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.
SCR 20 PREAMBLE [13]: A LAWYER’S RESPONSIBILITIES IN THE PRESERVATION OF SOCIETY

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

SCR 20 SCOPE [16]

[16] ... The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.
SCR 40.15 Attorney’s Oath

I will support the constitution of the United States and the constitution of the state of Wisconsin;
I will maintain the respect due to courts of justice and judicial officers;
I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, or any defense, except such as I believe to be honestly debatable under the law of the land;
I will employ, for the purpose of maintaining the causes confided to me, such means only as are consistent with truth and honor; and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;
I will maintain the confidence and preserve inviolate the secrets of my client and will accept no compensation in connection with my client's business except from my client or with my client's knowledge and approval;
I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;
I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice.
So help me God.
It is professional misconduct for a lawyer to:
(g) violate the attorney’s oath;

In representing a client, a lawyer shall exercise
independent professional judgment and render candid
advice. In rendering advice, a lawyer may refer not only to
law but to other considerations such as moral, economic,
social, and political factors that may be relevant to the
client’s situation.
Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
SCR 20:1.4(A)(5)

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

SCR 20:4.1 Truthfulness in Statements to Others

(a) In the course of representing a client a lawyer shall not knowingly:

   (1) make a false statement of a material fact or law to a 3rd person;
(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a 3rd person, or use methods of obtaining evidence that violate the legal rights of such a person.

An Example for Discussion

- In 1958, Justice John Harlan, speaking for the Supreme Court in *NAACP v. Alabama*, ruled that the state of Alabama had no right to demand the membership list of the NAACP: "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may ... expose these members to economic reprisal, loss of employment and threat of physical coercion."
- In 1993, the Texas Human Rights Commission has brought suit to get the names of any members of the Texas Knights of the Klan who lived in the town of Vidor -- or who may have been there -- between September 1 and December 15.
- The Texas Human Rights Commission wanted to find out if the subsequent threats and other forms of intimidation against black residents of the previously all white public housing in Vidor were the work of the Klan.
An Example for Discussion (Continued)

- The American Civil Liberties Union of Texas defended Michael Lowe -- grand dragon of the Klan -- who had pledged to go to jail rather than give up the names of those members. (“These people could lose their jobs or businesses.”)
- A volunteer attorney from Galveston, Anthony Griffin, handled the case for the ACLU. He was an experienced constitutional litigator and had won some notable First Amendment and voting rights cases. Griffin was also general counsel for the Texas NAACP. Griffin, a black lawyer, told the grand dragon that this case “wasn’t about race. It wasn’t about whether I liked him or he liked me. It’s about the basic principle of his right to speak and organize.”
- NAACP members harshly criticized Griffin and he was dismissed as general counsel for the Texas NAACP.
- While stressing that he wholeheartedly opposes the Klan, Griffin insisted that all organizations have a constitutional right to protect their membership lists.

Griffin stressed that if the NAACP advocated for the state’s right to membership lists, that decision could one day haunt them. (Texas had tried to get NAACP membership lists in the 1970s.)
- Griffin, who had marched in an anti-Klan rally in East Texas a few weeks before, said the case represents something more profound -- the supreme test of a lawyer’s commitment to the Bill of Rights.
- While upsetting many in the NAACP, Griffin’s case had also brought the ACLU under attack. Some NAACP officials, civil rights leaders, legal experts and educators have reopened the debate over whether the ACLU allows the 1st Amendment to supersede the other amendments in the Bill of Rights.
An Example for Discussion (Continued)

- In 1977, when the ACLU supported a neo-Nazi group’s right to march in Skokie, where numerous Holocaust survivors live, the liberal organization lost 10 percent of its membership.
- Other hotly debated 1st Amendment issues - hate speech on college campuses and in rap music, flag burning and sexual harassment - have forced the ACLU to consider its position on the 1st Amendment, especially when it appears to conflict with the civil rights of minorities and women.

Thank you!