

# Internalizing a Fiduciary Mindset to Put the Client First

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Every client needs to trust that his or her lawyer is dedicated to care for the client with all of the lawyer's ability. Deep care for the client is the principal foundation for client trust in the individual lawyer and the profession itself. <sup>1</sup> This is essentially a fiduciary disposition or fiduciary mindset, using "fiduciary" in the general meaning of founded on trustworthiness. <sup>2</sup> Each law student and new lawyer must learn to internalize a responsibility to put both the client's and the legal system's interests before the lawyer's self-interest. <sup>3</sup>

The law of lawyering (including the Rules of Professional Conduct) creates a floor of conduct below which the profession and the courts will discipline (and/or impose liability on) a lawyer, but good faith rule compliance in turn rests upon each lawyer's internalized fiduciary disposition that the lawyer's responsibilities to the client and the legal system must be put before the lawyer's self-interest. If the lawyer has no internalized fiduciary disposition, the lawyer looks for opportunities to "game" the system where he or she may not get caught.

The legal profession also holds out ideals and core principles of the profession that each lawyer should grow into over a career. For example, the Preamble of the Model Rules of Professional Conduct Paragraph 7 states "[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." <sup>4</sup> Paragraph 5 urges "[a] lawyer should demonstrate respect for the legal system and all who serve it, including judges, other lawyers, and public officials." <sup>5</sup>

Paragraph 6 explains that "a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of the service rendered by the legal profession," and gives special emphasis that "a lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore all lawyers should 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." <sup>6</sup>

It is also very important to note that the Model Rules leave vast areas for a lawyer's discretion and professional judgment regarding responsibilities to clients, to the legal system, to the quality of justice, to the lawyer's interest in being an ethical person, and the lawyer's own self-interest in making a satisfactory living. The Preamble's paragraph 9 recognizes that "difficult ethical issues" can arise from conflicts among these responsibilities. Paragraph 9 continues to say that "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."<sup>7</sup>

The Preamble's Paragraph 8 provides that "a lawyer is also guided by personal conscience and the approbation of professional peers."<sup>8</sup>

Note that the Model Rules do not specifically address a major goal of every student and lawyer to achieve self-sufficiency (and for some a goal of high income and wealth) except for Paragraph 9 of the Preamble. "Virtually all difficult ethical problems arise from a 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."<sup>9</sup>

The Model Rules recognize that clients also face many difficult ethical issues, and a lawyer should provide independent judgment and render candid advice to help the client think through decisions that affect others. The comments to Rule 2.1 note "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 .... It is proper for a lawyer to refer to the relevant moral and ethical considerations in giving advice."<sup>10</sup> The lawyer is not imposing the lawyer's morality on the client, rather the "relevant moral and ethical considerations" clearly include understanding the client's own tradition of responsibility to others and helping the client to think through the issues from the client's own tradition.

All of these paragraphs of the Preamble taken together implicitly define the elements of an ethical professional identity by calling on each lawyer to do the following:

- (1) to comply with the *ethics of duty*—the minimum standards of competency and ethical conduct set forth in the Rules of Professional Conduct;<sup>11</sup>
- (2) to foster in him or herself and other lawyers the *ethics of aspiration*—the core values and ideals of the profession, including internalizing the highest standards for the lawyer's professional skills and ethical conduct.<sup>12</sup>
- (3) to develop and be guided also by personal conscience including the development of "professional and moral judgment," and the meaning of being an "ethical person" in deciding all the "difficult issues of professional discretion" that arise in the practice of law; and
- (4) to do public service to improve justice, particularly to provide service to the disadvantaged.

It is clear that a student's and new lawyer's existing tradition regarding the question "what are my responsibilities to others?" is important in the educational process where each student and new lawyer grows out of self-interest toward a fiduciary disposition. Each student's and new lawyer's existing tradition on this question of responsibilities to others also will inform his or her development of personal conscience including the development of "professional and moral judgment," and the meaning of being an "ethical person" in deciding all the "difficult issues of professional discretion" that arise in the practice of law.

In my 2016 fall semester required professional responsibility course (required in the 2L years at the University of St. Thomas School of Law), I started the course by asking students to write a short essay on the following topic: "the general topic is to analyze your tradition and decision-making process with respect to discretionary decisions that involve both responsibilities to others and positive and negative impacts of your decisions on others. How can you help yourself develop further your tradition and decision-making process? Be specific on one or two ideas to help yourself develop your tradition and decision-making processes."

All fifty-three students submitted an essay focusing on the following traditions to answer the essay question:

7—Catholic

18—Christianity generally

2—Christian/Aristotle synthesis

1—Christian/Buddhist synthesis

1—Jewish

1—Mahayana Buddhist

1—Village elder tradition in home village of Africa

1—Kant/Rawls

3—Golden Rule

1—Golden Rule plus mindfulness

4—Mindfulness. Two of these said they had not thought it through much until this paper.

10—Utilitarian, with six of these combined with a secular social justice theme. Six of the utilitarians said they had not thought it through much until this paper.

3—Not given this topic much previous thought. Three said up front that they had not given this thought, and two said that they were searching for a tradition. They thought I was sending a strong message that they needed a tradition. One student argued that the student should “wing it” on intuition each time a difficult discretionary decision had to be made.

In answering this question, 30 out of 53 looked to a faith tradition, and 23 out of 53 cited a secular tradition or no tradition. I explore all of these traditions in my earlier article, *Professional Formation/Professionalism’s Foundation: Engaging Each Student’s and Lawyer’s Tradition on “What Are My Responsibilities to Others?”*, 12 UNIV. ST. THOMAS L.J. 271-338 (2016), available at <http://ssrn.com/abstract=2566514>. Note that all the major faith traditions and nearly all of the secular traditions share extensive common ground that each person should grow from high self-interest toward increasing responsibilities to others.

The key goal is to help students/new lawyers (building on whatever tradition the student brings to the question of what are my responsibilities to others) continue to grow over a career both in his or her fiduciary disposition and in the ability to think through difficult issues of professional discretion.

It is always important to engage students and new lawyers where they are developmentally. Table 1 below outlines the developmental stages for a new entrant to the profession regarding an internalized responsibility to the client and the legal system. I show this table to students so they understand this growth process occurs over a career.

**Table 1—Developmental Stages of an Internalized Responsibility to Clients and the Legal System**<sup>13</sup>

Level 1

- a. Has self-awareness of own values/first principles regarding responsibilities and service to others.
- b. Has had previous experience in terms of responsibility to others on matters important to them, and has reflected on how the previous experience is relevant to the practice of law.

Level 2

- a. Demonstrates knowledge of basic legal ethics principles and is able to identify legal ethical issues in hypothetical situations.
- b. Demonstrates understanding of the profession’s core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness.

Level 3

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- a. Consistently recognizes legal ethical issues in the most common and frequent experiential situations and is able to discuss, analyze, and manage such issues.
- b. Demonstrates progress, in the most common and frequent experiential situations, with respect to integration into student's ethical identity of the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness (an ethical professional identity).

#### Level 4

- a. Is consistently able to effectively recognize, discuss, analyze and manage legal ethical issues in complicated and challenging experiential situations.
- b. Demonstrates consistent integration into student's ethical identity in complicated and challenging experiential situations of the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness.

#### Level 5

- a. Is exemplary in effectively recognizing, discussing, analyzing and managing legal ethical issues in complicated and challenging experiential situations.
- b. Demonstrates exemplary continuing growth, leadership, and mentorship in all situations in integrating the profession's core values and ideals including the importance and priority of responsibility to the client and the legal system, for example with respect to trustworthiness.

I also show students the data below from practicing lawyers and legal employers showing that trustworthiness and deep care for the client are foundational capacities that legal employers want. The students can see that it is in their own self-interest to keep growing toward a fiduciary disposition and prioritizing responsibilities to clients and the legal system.

**1. Competencies emphasized by Educating Tomorrow's Lawyer's Survey (24,000 lawyers in 2015) as "necessary in the short term."**<sup>14</sup> The numbers indicate how the respondents ranked each competency in terms of what is "necessary in the short term." I grouped the various necessary competencies into umbrella categories of Trustworthiness, Respect for Others and Relationship Skills, Strong Work Ethic/Conscientiousness, and Common Sense/Good Judgment.

#### **a. Trustworthiness**

1. Keep Confidentiality
3. Honor Commitments

4. Trustworthiness/Integrity
15. Take Individual Responsibility
18. Strong Moral Compass

**b. Respect for Others and Relationship Skills**

2. Arrive on Time
5. Treat others with Respect
6. Listen Attentively and with Respect
7. Respond Promptly
17. Emotional Regulation and Self-control
20. Exhibit Tact and Diplomacy

**c. Strong Work Ethic/Conscientiousness**

8. Strong Work Ethic
9. Diligence
10. Attention to Detail
11. Conscientiousness

**d. Common Sense/Good Judgment (this was 12<sup>th</sup>).**

The report indicated that Research the Law was 13<sup>th</sup>, Intelligence was 14<sup>th</sup>, Speak Professionally was 16<sup>th</sup>, and Write Professionally was 19<sup>th</sup>.

**2. Competencies emphasized by National Conference of Bar Examiner's New Lawyer Survey (2013)<sup>15</sup> and Hamilton's surveys of MN lawyers (2013-14)<sup>16</sup>:**

- a. Trustworthiness/Integrity/Honesty
- b. Strong Work and Team Relationship Skills
- c. Dedication to Client/Responsiveness to Client

d. Good Judgment/Common Sense

e. Habit of Seeking Feedback

f. Initiative/Strong Work Ethic

**3. Note that there are very few empirical studies of what competencies clients want. The Shultz/Zedeck study discussed below is the best of these studies, but note that the survey population consists of lawyers imagining they were clients and then indicating what competencies they would most want.**

In 2003, Professors Marjorie M. Shultz and Sheldon Zedeck at the University of California at Berkeley identified 26 factors important for lawyer effectiveness by interviewing people from five stakeholder groups associated with Berkeley Law: alumni, students, faculty, clients, and judges. They asked questions such as “If you were looking for a lawyer for an important matter for yourself, who would you identify, and why?” and “What qualities and behavior would cause you to choose that attorney?”<sup>17</sup> The 26 factors important to lawyer effectiveness that emerged from the interviews are shown in Table 3.

The Shultz-Zedeck study did not list the 26 lawyer effectiveness factors in order of importance, so for comparative purposes, the table below lists the 26 lawyer effectiveness factors using the same umbrella categories as the table above on the Educating Tomorrow’s Lawyers’ competencies “necessary in the short term.”

**Table 2—Shultz-Zedeck List of 26 Lawyer Effectiveness Factors**

**Trustworthiness**

- Integrity/honesty
- Self-development

**Relationship Skills**

- Building relationships with clients and providing advice and counsel
- Developing relationships within the legal profession
- Networking and business development
- Listening
- Able to see the world through the eyes of others

- Community involvement and service
- Organizing and managing others
- Evaluation, development and mentoring of others

**Strong Work Ethic/Diligence**

- Passion/engagement
- Diligence
- Stress management

**Common Sense/Good Judgment**

- Problem solving
- Practical judgment
- Creativity and innovation

**Technical Competencies**

- Analysis and reasoning
- Researching the law
- Fact finding
- Questioning and interviewing
- Influencing and advocating
- Writing
- Speaking
- Strategic planning
- Organizing and managing one's own work
- Negotiation



We see convergence that legal employers want these ethical-professional-identity competencies:

1. trustworthiness<sup>18</sup>;
2. respect for others and relationship skills including client relationship skills and teamwork;
3. strong work ethic/initiative/conscientiousness;
4. commitment to self-development including the habit of self-evaluation; and
5. good judgment.

Finally, I discuss Table 3 below with students to give them another window on the importance of undertaking a growth process from rule compliance, through preventive law and reputational risk management, toward an internalized ethical tradition in order to develop good judgment, which is of great importance to legal employers. The lawyer can also help a client (individual or organizational) think through the same steps (from their tradition). I emphasize again that a lawyer with a clear tradition of her own that she applies to the difficult discretionary calls of lawyering is not substituting or imposing the lawyer's morality on the client.

**Table 3—Factors That Go Into Good Judgments on Decisions That Affect Other People by the Individual Lawyer, the Individual Client or the Organizational Client**

**LAWYER AND INDIVIDUAL CLIENT DECISION-MAKING**

The lawyer's or individual client's ethical tradition on responsibilities to others. See levels 3-5 of the developmental stages of an ethical professional identity in Table 1.

Other enlightened self-interest considerations that ethical business practices lead to long-term profitability.

Reputational Risk Management considerations including the lawyer's brand that leads others **to trust** the lawyer with their work or the individual client's brand in terms of trustworthiness.

Risk Management considerations in terms of possible liability or regulatory investigations and sanctions.

Preventive Law considerations.

**ORGANIZATIONAL CLIENT DECISION-MAKING**

The organizational client's ethical tradition on responsibilities to others.

For organizational clients, the lawyer could refer both to the organizational mission and code of conduct (is it a living document?) and to aspirational business ethics statements like Caux or Minnesota Principles or industry best practices statements.

Other enlightened self-interest considerations that ethical business practices lead to long-term profitability.

Reputational Risk Management considerations including the organizational client's brand that leads others like customers or employees to trust the client with their business/livelihood.

Risk Management considerations in terms of possible liability or regulatory investigations and sanctions.

Preventive Law considerations.

Law Compliance.

Note that a lawyer must comply with the minimum floor of conduct set by the law of lawyering which includes the concept of service as a fiduciary for a client. A fiduciary relationship is based on **trust** where the fiduciary puts the client's best interests first.

Law Compliance.

Endnotes

<sup>1</sup> WILLIAM M. SULLIVAN, *Foreword* to TEACHING MEDICAL PROFESSIONALISM at xi, xv (Richard Creuss et al. eds., 2009).

<sup>2</sup> See *id.* at ix. See William Sullivan, *Align Preparation with Practice*, 85 N.Y. ST. B.A. J. No. 7 (Sept. 2013) at 41-43 (where he introduces the concept of fiduciary disposition).

<sup>3</sup> Standard 302(c): "A law school shall establish learning outcomes that shall, at a minimum, include competency in the following: (c) Exercise of proper professional and ethical responsibilities to clients and the legal system." ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS, *available at* [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_aba\\_standards\\_and\\_rules\\_of\\_procedure.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf).

<sup>4</sup> ABA MODEL RULES OF PROF'L CONDUCT Preamble para. 7 (2017).

<sup>5</sup> ABA MODEL RULES OF PROF'L CONDUCT Preamble para. 5 (2017).

<sup>6</sup> ABA MODEL RULES OF PROF'L CONDUCT Preamble para. 6 (2017).

<sup>7</sup> ABA MODEL RULES OF PROF'L CONDUCT Preamble para. 9 (2017).

<sup>8</sup> ABA MODEL RULES OF PROF'L CONDUCT Preamble para. 8 (2017).

<sup>9</sup> *Supra* note 7.

<sup>10</sup> ABA MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. (2017).

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11 LON L. FULLER, *THE MORALITY OF LAW* 3-9 (rev. ed., Yale U. Press 1969).

12 *Id.*

13 This table is adapted from “Table 1. Four Selected General Milestones in the Next Accreditation System,” in Thomas Nasca et al., *The Next GME Accreditation System—Rationale and Benefits*, *NEW ENG. J. MED.* 3 (Feb. 22, 2012), <https://www.acgme.org/acgmeweb/Portals/o/PDFs/NAS/NEJMfinal.pdf>. Note that the Milestones in the original table, which were developed by an ACGME expert panel, reflected the following expected levels of performance that the evaluator assesses: level 2, typical graduating medical student; levels 3 and 4, resident during the program; level 5, graduating resident; level 6, advanced, specialist resident or practicing physician.

14 Institute for the Study of the American Legal System, *Foundations for Practice: The Whole Lawyer and the Character Quotient* (2016), <http://iaals.du.edu/educating-tomorrows-lawyers/publications/foundations-practice-whole-lawyer-and-character-quotient>.

15 National Conference of Bar Examiners, *A Study of the Newly Licensed Lawyer*, <http://www.ncbex.org/publications/ncbe-job-analysis/> (2016).

16 Neil Hamilton, *Changing Markets Create Opportunities: Emphasizing the Competencies Legal Employers Use in Hiring New Lawyers (Including Professional Formation/Professionalism)*, 65 *S.C. L. REV.* 547, 557-58 (2014).

17 Marjorie Shultz & Sheldon Zedeck, *Predicting Lawyer Effectiveness: Broadening the Basis for Law School Admission Decisions*, 36 *LAW & SOC. INQUIRY* 620, 629 (2011).

18 David Maister defines a trustworthiness quotient with a numerator of Credibility + Reliability + EQ over a denominator of Self-Orientation. In other words, the greater a student’s or lawyer’s self-orientation, the smaller the person’s trustworthiness.