

INCORPORATING EMOTIONAL INTELLIGENCE CONCEPTS INTO LEGAL EDUCATION: STRENGTHENING THE PROFESSIONALISM OF LAW STUDENTS

*John E. Montgomery**

WE believe if legal education had as its focus forming legal professionals who are both competent and responsible to clients and the public, learning legal analysis and practical skills would be more fully significant to both the students and faculty. Much of law school's pedagogical activity presumes that issues of professionalism are somehow, somewhere, being handled. However, in a time when many raise questions about the legitimacy of the legal profession in both general and specific terms, professionalism needs to become more explicit and better diffused throughout legal preparation.¹

I. INTRODUCTION

Law schools are inadequately developing an ethos of professionalism in law students. Legal education focuses predominately on analytical reasoning, less so on professional skills,² and minimally on professionalism. An attention-getting survey of recent graduates of my law school indicates that their views on professionalism were mainly developed either before they entered law school or after they entered practice.³ If this survey were repeated at other law schools, the results would probably be similar.

* Professor of Law, Former Dean 1987-2003, University of South Carolina School of Law. BCh. E., 1964, University of Louisville; J.D. 1969, University of Louisville; LL.M. 1971, University of Michigan.

1. WILLIAM A. SULLIVAN ET AL., EDUCATING LAWYERS 14 (2007).

2. Skills instruction continues to expand, primarily through action-forcing changes in accreditation standards. In 2005, a new standard was promulgated requiring skills instruction to be generally available. See SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS § 302(a)(4) (2007-08), available at <http://www.abanet.org/legaled/standards/20072008StandardsWebContent/Chapter%203.pdf> [hereinafter STANDARDS FOR APPROVAL OF LAW SCHOOLS].

3. Robert M. Wilcox, Professional Character Development—An Empirical Study of the Current Role of Mentoring and Other Means by Which Lawyers Learn Appropriate Behavior after Law School 13-14 (Aug. 17, 2006) (unpublished manuscript, on file with the Nelson, Mullins, Riley & Scarborough Center on Professionalism, University of South Carolina School of Law).

This does not bode well for increasing lawyer professionalism, an important priority of the legal profession for almost two decades.⁴ In the 1980s, the ABA Stanley Commission on Professionalism documented a decline in professionalism among attorneys and proposed initiatives for law schools, firms, and the organized bar to address the problem.⁵ In 1992, improving professionalism was again an important concern of the ABA MacCrate Task Force.⁶ It proposed a professional education continuum, beginning in law school and continuing with the profession, to increase competency in important skills and to strengthen professional values.⁷ More recently, many state supreme courts, federal courts, and state bars have taken on the task of improving lawyer professionalism.⁸ State supreme court professionalism committees and commissions, professionalism oaths, and mentoring programs are among the initiatives addressing the problem.⁹

Law schools, while hardly ignoring professionalism, have done relatively little to embrace its development. Professionalism has been addressed primarily in orientation programs, ethics classes, and public interest and pro bono

4. See, e.g., "... In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, 112 F.R.D. 243 (1986), available at http://www.abanet.org/cpr/professionalism/Stanley_Commission_Report.pdf [hereinafter *Stanley Report*]; Conference of Chief Justices, A National Action Plan on Lawyer Conduct and Professionalism (1999) [hereinafter National Action Plan], available at <http://ccj.ncsc.dni.us/natlplan/NatlActionPlan.html>.

5. *Stanley Report*, *supra* note 4, at 248.

6. See generally SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AM. BAR ASS'N, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM: REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (1992) [hereinafter MACCRATE REPORT].

7. See *id.* at 223-323.

8. See, e.g., Final Report of the Comm. on Civility of the Seventh Fed. Judicial Circuit, 143 F.R.D. 441 (1992) (adopting professional conduct standards for the Seventh Circuit); N.Y. STATE UNIFIED COURT SYSTEM, STANDARDS OF CIVILITY (1997) (establishing guidelines for civility in the courtroom and in the practice of law); FLA. BAR CTR. FOR PROFESSIONALISM, 2004 ANNUAL REPORT FOR THE CENTER OF PROFESSIONALISM, available at [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/9FEAFCCBDF13039085256F96005630D8/\\$FILE/Professionalism%20Annual%20Report.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/9FEAFCCBDF13039085256F96005630D8/$FILE/Professionalism%20Annual%20Report.pdf?OpenElement) (describing the professionalism goals and activities of the Florida Bar).

9. Many state supreme courts have established commissions or committees on professionalism to address the issue. South Carolina's is representative. It is appointed by the South Carolina Supreme Court. Lawyers, judges and academic members make up the committee and it is charged with improving professionalism. See South Carolina Judicial Department, Rule 420: Chief Justice's Commission on the Profession, available at <http://www.judicial.state.sc.us/courtReg/displayRule.cfm?ruleID=420.0&subRuleID=&ruleType=APP> (last visited Jan. 13, 2008). In 1999, the Conference of Chief Justices recommended that "judicial leadership should promote mentoring programs for both new and established lawyers." See National Action Plan, *supra* note 4, at 14. A number of states have acted on that recommendation. In 2005, Georgia initiated mandatory mentoring with an emphasis on professionalism for all new lawyers. Ohio will soon start a comparable program. For details of the Georgia and Ohio mentoring programs, see State Bar of Ga., Comm. on Standards of the Profession, Implementation Plan for a Mandatory Transition into Law Practice Program (2004); Supreme Court of Ohio Lawyer to Lawyer Mentoring Program, available at <http://www.sconet.state.oh.us/mentoring/default.asp> (last visited Jan. 13, 2008).

programs.¹⁰ A few schools, including my own, have established centers and institutes to bring more sustained focus to the issue.¹¹ These efforts are by no means unimportant, but they remain peripheral to the long-held major focus of legal education, teaching legal analysis and reasoning.¹² The Carnegie Foundation for the Advancement of Teaching aptly labels this focus in its 2007 study, *Educating Lawyers*,¹³ as legal education's "signature pedagogy."¹⁴ Professionalism has been largely viewed as a problem the profession itself should address.

This can and should change. A promising opportunity to strengthen the professionalism of lawyers now exists in an unlikely vehicle: the concept of emotional intelligence.¹⁵ Without great cost or even restructuring the standard law school curriculum, it can be easily incorporated into legal education. Social science research on emotional intelligence has matured to the point that its usefulness is becoming clearer.¹⁶ Emotional intelligence has become broadly known through the work of Daniel Goleman¹⁷ and many researchers.¹⁸

10. My own informal survey of a large number of law school websites and discussions with colleagues, conducted in spring 2007, indicates that an overwhelming percentage of law schools deal with professionalism in orientation programs, that most have pro bono and public interest programs, and several administer professionalism oaths to entering students (this is the practice at my own school, the oath being administered by the Chief Justice of the South Carolina Supreme Court). For a discussion of professionalism initiatives in law schools, see Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 624-25 (2001). St. Thomas Law School is the exception, with a significant mentoring program focusing on professionalism. For a discussion of the program, see Neil Hamilton & Lisa Montpetit Brabbit, *Fostering Professionalism through Mentoring*, 57 J. LEGAL EDUC. 1 (2007).

11. Two such programs are the Nelson, Mullins, Riley & Scarborough Center on Professionalism at the University of South Carolina School of Law and the Keck Center on Legal Ethics and the Legal Profession at Stanford University School of Law.

12. The emphasis stems from Langdell's introduction of the case method at Harvard Law School in the 1870s. Langdell sought to wrest the education of lawyers from the apprenticeship system and embed it into a university setting. By characterizing law as a "science" whose principles could best be discerned and taught by highly educated academics, Langdell downplayed the role of practical experience, the core of the apprenticeship system. The modern case method, the direct descendant of Langdell's approach, retains its predecessor's focus on legal analysis and reasoning through the study of appellate opinions. Its use is virtually universal in legal education. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 170-71* (1993). This focus on legal analysis is supported by a law school and university tenure system which places great weight on analytical and theoretical scholarship and by a "cottage industry" of legal educators who author casebooks and teaching materials, available in virtually every legal subject area, which provide edited appellate opinions and notes designed to support instruction by the case method.

13. SULLIVAN ET AL., *supra* note 1.

14. *Id.* at 23-24.

15. The concept was introduced into the psychological main stream in DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE* 42-44 (1995). It was first proposed for use in legal education in Marjorie A. Silver, *Emotional Intelligence and Legal Education*, 5 PSYCHOL. PUB. POL'Y & L. 1173, 1198-1200 (1999), when its empirical research base was less developed.

16. A valuable survey of the application of emotional intelligence and other forms of multiple intelligences is *MULTIPLE INTELLIGENCES AND LEADERSHIP* (Ronald E. Reggio et al., eds., 2002)

Emotional intelligence is most usefully characterized as a set of emotional competencies involving self-awareness of emotions, empathetic awareness of the emotions of others, and the ability to use this awareness to influence the behavior of others.¹⁹ Considered an actual form of intelligence²⁰ and not merely a set of interpersonal skills,²¹ emotional intelligence, unlike IQ, can be taught and learned.²² Studies in the business context suggest that individuals with high emotional intelligence competencies, IQ being equal, have superior ability to persuade, influence, and communicate compared with individuals with less developed competencies.²³

This research has important implications for legal education. Persuading, communicating, and influencing are important skills not only for business managers, but also for lawyers.²⁴ Advocacy, negotiation, and counseling all rely heavily on these skills. Teaching these emotional competencies to law students offers a way to increase professionalism through increasing competency in these

[hereinafter MULTIPLE INTELLIGENCES]. See also DANIEL GOLEMAN ET AL., PRIMAL LEADERSHIP 249-51 (2002).

17. See generally GOLEMAN, *supra* note 15.

18. For representative studies, see generally Rebecca Abraham, *Emotional Competence As Antecedent to Performance: A Contingency Framework*, 130 GENETIC, SOC., & GEN. PSYCHOL. MONOGRAPHS 117 (2004); Julian Barling et al., *Transformational Leadership and Emotional Intelligence: An Exploratory Study*, 21 LEADERSHIP & ORG. DEV. J. 157 (2000); Chris Dulewicz et al., *The Relevance of Emotional Intelligence for Leadership Performance*, 30 J. GEN. MGMT. 71 (2005); Victor Dulewicz & Malcom Higgs, *Emotional Intelligence, A Review and Evaluation Study*, 15 J. MANAGERIAL PSYCHOL. 341 (2000); Elisabeth Englebert & Lennart Sj berg, *Emotional Intelligence, Affect Intensity, and Social Adjustment*, 37 PERSONALITY & INDIVIDUAL DIFFERENCES 533 (2004); Lisa Gardner & Con Stough, *Examining the Relationship between Leadership and Emotional Intelligence in Senior Level Managers*, 23 LEADERSHIP & ORG. DEV. J. 68 (2002); Jennifer M. George, *Emotions and Leadership: The Role of Emotional Intelligence*, 53 HUM. REL. 1027 (2000); Anna L. Green et al., *The Use of Multiple Intelligences to Enhance Team Productivity*, 43 MGMT. DECISION 349 (2005); Frank J. Landy, *Some Historical and Scientific Issues Related to Research on Emotional Intelligence*, 26 J. ORGANIZATIONAL BEHAV. 411 (2005); Paulo N. Lopes et al., *Emotional Intelligence and Social Interaction*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1018 (2004); Joseph B. Lyon & Tamera R. Schneider, *The Influence of Emotional Intelligence on Performance*, 39 PERSONALITY & INDIVIDUAL DIFFERENCES 693 (2005); John D. Mayer et al., *Emotional Intelligence Meets Traditional Standards for Intelligence*, 27 INTELLIGENCE 267 (2000); Benjamin Palmer et al., *Emotional Intelligence and Effective Leadership*, 22 LEADERSHIP & ORG. DEV. J. 5 (2001); David Rosete & Joseph Ciarrochi, *Emotional Intelligence and Its Relationship to Workplace Performance Outcomes of Leadership Effectiveness*, 26 LEADERSHIP & ORG. DEV. J. 388 (2005). For a more critical and cautious view, see Moshe Zeidener et al., *Emotional Intelligence in the Workplace: A Critical Review*, 53 APPLIED PSYCHOL. 371 (2004).

19. GOLEMAN ET AL., *supra* note 16, at 39.

20. See generally Mayer et al., *supra* note 18.

21. Examples of interpersonal skills might include stress management, the ability to give effective feedback and listen carefully.

22. GOLEMAN ET AL., *supra* note 16, at 38.

23. See, e.g., Dulewicz et al., *supra* note 18, at 81-82. For a general discussion, see GOLEMAN ET AL., *supra* note 16, at 33-52.

24. Virtually every law school offers skills courses in advocacy, negotiation, and counseling. These are universal skills used in every type of practice.

basic skills. Emotional intelligence also encompasses empathetic awareness and the ability to understand and act on the basis of another's situation. As will be developed later,²⁵ this is important for one of the basic tenets of professionalism, acting in the public interest to improve the justice system.²⁶

Incorporating instruction about emotional intelligence competencies into the existing law school curriculum can strengthen an ethos of professionalism among law students and better support the profession's efforts to increase the professionalism of lawyers. Part II of this article discusses the concept of a profession and surveys the basic elements of professionalism. Part III argues that legal education's predominant focus on legal analysis and reasoning may, in some respects, actually weaken professionalism among law students. Part IV reviews the research on emotional intelligence and its applications to legal education. Part V discusses the potential applications of emotional intelligence competencies for legal education.

II. PROFESSIONAL WORK AND THE CONCEPT OF PROFESSIONALISM

A. *The Nature of Professional Work*

Professional work has several distinguishing characteristics.²⁷ Professionals, for example lawyers and doctors, engage in making complex judgments that integrate technical knowledge, skills, and informed judgment. This work is largely self-regulated through a system of controlled entry²⁸ and licensure.²⁹ Professional work is usually governed by ethical codes³⁰ which, with

25. See *infra* notes 39-45 and accompanying text.

26. *Stanley Report*, *supra* note 4, at 261.

27. For a general treatment of the nature of professional work, see generally WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* (2003).

28. Admission to practice law requires a degree from an accredited law school. While some states allow admission upon graduation from a state-accredited law school (California is the most prominent example), the norm is graduation from a school accredited by the American Bar Association through its Section on Legal Education and Admissions to the Bar. A degree from an ABA-accredited law school allows a graduate to take the bar examination in any state. Graduates of non-ABA accredited institutions usually can take only the bar of the state where the law school is located. ABA accreditation standards are rigorous and address faculty credentials, admission, the library and physical facilities, finances and curriculum. See generally STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 2.

29. All states require a license to practice law, which is granted after graduation from law school, successful passage of a bar examination, and a character and fitness assessment. Some states also impose additional requirements such as observation of several legal proceedings. See generally NAT'L CONFERENCE OF BAR EXAMINER'S & AM. BAR ASS'N SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS* (2006), available at http://www.ncbex.org/fileadmin/mediafiles/downloads/Comp_Guide/2006CompGuide.pdf.

30. Every state has its own standards of professional responsibility, usually patterned after ABA standards. See AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, *MODEL RULES OF PROFESSIONAL CONDUCT* (2003). For one state's professional responsibility rules, see S.C. RULES OF PROF'L CONDUCT R. 407 (2005).

licensure and continuing education,³¹ give assurance to clients and the public that professionals are held to high ethical and performance standards. Finally, professionals have public obligations.³² Lawyers are obligated to support and improve the justice system.³³ For physicians, the obligation is to improve the public's health.³⁴

An important consequence of the structure of professional work is its relative independence from forces that affect other types of work. Global market forces now dominate virtually all non-professional work. Globalization drives work, even knowledge work, which has become a commodity, to places of lowest cost.³⁵ Self-regulation and the exercise of complex judgment are the critical elements of professional work, which provide some immunity from these market forces. Exercising complex judgment to resolve a client's problem cannot easily be outsourced to another country even though the knowledge on which that judgment is based often can be.³⁶ When a client needs a "bet-the-company" lawyer, the ability to employ sound professional judgment in the client's interest remains a high priority in retaining counsel.

This independence from forces that affect other types of work is strengthened by the ability of professionals to self-regulate and control access to who can perform the profession's work. Controlled entry through accredited law schools, strict licensure requirements, and the ability to define and prevent unauthorized law practice provides protection for the work of lawyers.³⁷

This special privilege of self-regulation is customarily assumed to be one side of a social contract between the legal profession and the public.³⁸ Because

31. Continuing education is, if not mandatory, a professional expectation of every lawyer. *See, e.g.*, S.C. APP. CT. R. 408, available at <http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=408.0&subRuleID=&ruleType=APP> (last visited Jan. 13, 2008).

32. For a general discussion of the public obligations of professionals, see SULLIVAN, *supra* note 27, at 1-6. *See also* MACCRATE REPORT, *supra* note 6, at 138-41.

33. MACCRATE REPORT, *supra* note 6, at 141 (noting that lawyers should be committed to "contributing to the profession's fulfillment of its responsibility to enhance the capacity of law and legal institutions to do justice").

34. For a general discussion of the history of American medicine and its public obligations, see PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE (1982). *See also* SULLIVAN, *supra* note 27, at 43.

35. *See* THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY 103-09 (2005).

36. Complex engineering and design can be done virtually anywhere knowledgeable workers are located. Medical diagnostic procedures, such as reading MRIs, similarly can be done anywhere trained personnel are located. *See id.* Some insurance companies will now pay for medical procedures performed in other countries, usually at much reduced costs. Medical Discounts International, http://www.medicaldiscounts.com/employers_insurance.htm (last visited Jan. 13, 2008).

37. For general discussion, see AM. BAR ASS'N CTR FOR PRO'L RESPONSIBILITY, SURVEY OF UNAUTHORIZED PRACTICE OF LAW COMMITTEES (1999) (defining practice of law and unauthorized practice of law, enforcement, remedies, and guidelines of each state). *See also* Landise v. Mauro, 725 A.2d 445, 452-53 (D.C. 1998); Fla. Bar v. Hughes, 824 So. 2d 154, 159-60 (Fla. 2002); Unauthorized Practice Comm., State Bar of Tex. v. Cortez, 692 S.W.2d 47, 49-51 (Tex. 1985).

38. SULLIVAN, *supra* note 27, at 3-6. *See also* Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism,"* 41 EMORY L.J. 403, 409-13 (1992). Others view such professional

of the need for trust between the legal profession and the public, and the privilege of self-regulation to protect such trust, the profession assumes the obligation to serve the broader public good, in addition to furthering its own economic interest.³⁹ Lawyers are obligated to work for the improvement of the justice system, a critical institution that assures fair and equal treatment for all. For lawyers, that work can take many forms. Pro bono representation, mentoring new lawyers, and working through the organized bar to improve delivery of legal services are common examples.⁴⁰ Other non-professional work is not burdened by the notion of public altruism, or what Justice O'Connor referred to as the lawyer's "ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market."⁴¹

Roscoe Pound expressed the special nature of professional work in his description of the legal profession.⁴² Pound viewed a profession as a group of individuals "pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood."⁴³ Later, Professor Elliott Freidson, who served as a commissioner on the ABA Stanley Commission on Professionalism,⁴⁴ defined a profession, for the purposes of the Stanley Commission's work as:

[a]n occupation whose members have special privileges, such as exclusive licensing, that are justified by the following assumptions:

1. That its practice requires substantial intellectual training and the use of complex judgment.
2. That since clients cannot adequately evaluate the quality of service, they must trust those they consult.
3. That the 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, and

obligations not as public responsibilities, but as self-interested ways to further members' own interests. See generally James M. Buchanan, *An Economic Theory of Clubs*, 32 *ECONOMICA* 1 (1965); Mark V. Pauly, *Clubs, Commonality, and the Core: An Integration of Game Theory and the Theory of Public Goods*, 34 *ECONOMICA* 314 (1967); Mark V. Pauly, *Cores and Clubs*, 9 *PUB. CHOICE* 53 (1970).

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

40. These are all referred to in the MacCrate Task Force Report as part of the "fundamental values of the profession" which lawyers are obligated to uphold. See MACCRATE REPORT, *supra* note 6, at 140-41. Many law schools have pro bono programs, either mandatory or voluntary, to introduce students to the professional expectations of most bars that pro bono representation is an obligation of every lawyer. Many large firms encourage partners and associates to devote time to pro bono representation. Mentoring programs for new lawyers are now operating in Ohio and Georgia. See *supra* note 9. South Carolina is now in a pilot mentoring program for a portion of new bar admittees. See *id.*

41. *Shapiro v. Ky. Bar Ass'n*, 486 U.S. 466, 488-89 (1988) (O'Connor, J., dissenting).

42. POUND, *supra* note 39.

43. *Id.* at 5.

44. *Stanley Report*, *supra* note 4, at 335.

4. That the occupation is self-regulating—that is organized in such a way as to assure the public and the courts that its members are competent, to not violate the client’s trust and transcend their own self interest.⁴⁵

Exercising complex judgment, self-regulation, and a commitment to public responsibilities are defining elements of professional work.

B. The Concept of Professionalism

A standard definition of professionalism has not been agreed upon.⁴⁶ An attitude or approach to work, it has to do both with the way work is conducted and the underlying values and traditions associated with the profession that shape the professional’s approach to work.⁴⁷ For lawyers, professionalism has been defined as “the set of norms, traditions and practices that lawyers have constructed to establish and maintain their identities as professionals and their jurisdiction over legal work.”⁴⁸ This sociological definition can be contrasted with a descriptive approach that lists common elements of professionalism:

45. *Id.* at 261-62.

46. One observer, after reviewing some seven hundred articles and speeches of attorneys on professionalism from the 1920s through 1960, concluded that “professionalism has no commonly accepted definition.” Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS IDEALS/LAWYERS’ PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION* 144, 145 (Robert L. Nelson et al. eds., 1992). The Stanley Commission concluded the concept is “elastic” and “hard to pin down.” *Stanley Report*, *supra* note 4, at 261. A standard definition is also complicated by the fact that professionalism “varies as a function of the setting within which it is performed, that it is evolving, and that it is perceived differently by different segments of society.” EDGAR H. SCHEIN, *PROFESSIONAL EDUCATION: SOME NEW DIRECTIONS* 8 (1972). The uncertainty in professionalism’s definition is more extensively discussed in Peter A. Joy, *A Professionalism Creed for Judges: Leading by Example*, 52 *S.C. L. REV.* 667, 669 n.7 (2001). Professionalism, or its decline, has been associated with increased commercialism. Arlin M. Adams, *The Legal Profession: A Critical Evaluation*, 93 *DICK. L. REV.* 643, 652 (1989). Altruistically placing “the good of their clients and the good of society above their own self-interest” has been noted as an important element of professionalism. MICHAEL H. TROTTER, *PROFIT AND THE PRACTICE OF LAW: WHAT’S HAPPENED TO THE LEGAL PROFESSION 197-98* (1997). Professionalism has been characterized as a “social contract” with elements of self-interest balanced by public responsibilities. See SULLIVAN, *supra* note 27, at 60-65. Professionalism is thought to contain elements of technique (or competency), altruism, etiquette, aspiration, and social values. W. Bradley Wendel, *Morality, Motivation, and the Professionalism Movement*, 52 *S.C. L. REV.* 557, 557 (2001). Most commonly, professionalism is associated with competent representation, fairness in dealing with clients, civility, pro bono and public service work to improve the justice system and avoidance of overzealous representation. See Frank X. Neuner, Jr., *Professionalism: Charting a Different Course for the New Millennium*, 73 *TUL. L. REV.* 2041, 2042 (1999) (noting that ethics, competency, continuous learning, civility, duties to the judicial system and pro bono service are elements of professionalism); Jerome J. Shestack, *Taking Professionalism Seriously*, *A.B.A. J.* Aug. 1998, at 70, 72-73 (1998) (noting that ethics and integrity, competence combined with independence, meaningful continuing learning, and civility are elements of professionalism).

47. Terrell & Wildman, *supra* note 38, at 403-04.

48. Robert L. Nelson & David M. Trubeck, *New Problems and New Paradigms in Studies of the Legal Profession*, in *LAWYER’S IDEALS/LAWYERS’ PRACTICES*, *supra* note 46, at 5.

competency in knowledge and skills, a civil approach to others, and commitment to public service.⁴⁹ Others have pointed out that professionalism must surely involve something more than the relatively trivial obligations to be civil and perform pro bono work, as necessary as both are.⁵⁰ Professionalism must also include values essential to the public good,⁵¹ akin to a moral commitment.⁵² The MacCrate Task Force, in its “Statement of Fundamental Skills and Values”⁵³ provides guidance on this point. The Task Force defined “[f]undamental [v]alues of the [p]rofession” as “[s]triving to [p]romote [j]ustice, [f]airness and [m]orality”⁵⁴ and “[s]triving to [i]mprove the [p]rofession.”⁵⁵ Noted was every lawyer’s membership “in a profession that bears special responsibilities for the quality of justice....”⁵⁶ That special responsibility is to uphold and improve the justice system, an institution essential to any democratic society that values justice and equal treatment.

These views of professionalism encompass what can be called the “professionalism triad.” This triad includes high competency in the knowledge and skills necessary for professional work, respect for the justice system and its participants, and “civic trusteeship”⁵⁷ or an attitude of “public altruism”⁵⁸ by every lawyer toward the justice system. Concerns that the professionalism of lawyers is declining generally reflect the failure of lawyers to meet one or more of the elements of this professionalism triad.⁵⁹ Commonly cited examples include incivility in dealing with clients, other lawyers and even judges, overly aggressive and excessive tactics, and insufficient attention to the profession’s responsibility to the justice system.⁶⁰ Whether viewed as a crisis that blights the

49. See Neuner, Jr., *supra* note 46, at 2042; Shestack, *supra* note 46.

50. See Terrell & Wildman, *supra* note 38, at 419.

51. Terrell and Wildman suggest six fundamental values: (1) an ethic of excellence; (2) an ethic of integrity; (3) respect for the legal system and rule of law; (4) respect for other lawyers and their work; (5) a commitment to accountability; and (6) a responsibility for adequate distribution of legal services. *Id.* at 424. The MacCrate Task Force sets out four fundamental values: (1) competent representation; (2) striving to promote justice, fairness, and morality; (3) striving to improve the profession; and (4) professional self-development. MACCRATE REPORT, *supra* note 6, at 140-41.

52. Terrell & Wildman, *supra* note 38, at 422 (“Lawyering is a distinctive occupation with unique moral requirements ... the legal system embodies our last remaining vestige of a sense of ‘community’—of shared values and expectations.”).

53. MACCRATE REPORT, *supra* note 6, at 135-221.

54. *Id.* at 213.

55. *Id.* at 216.

56. *Id.* at 213.

57. For additional discussion on the public responsibilities of professionals, see SULLIVAN, *supra* note 27, at 5-15.

58. *Id.*

59. See, e.g., Shestack, *supra* note 46, at 72-73.

60. See generally Rob Atkinson, *A Dissenter’s Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 283 (1995); Joy, *supra* note 46 (discussing the unprofessionalism of judges). Though less frequent than attorney professionalism lapses, judges sometimes demonstrate less than professional demeanor. An ongoing controversy among the justices of the Michigan Supreme Court has drawn national attention. See Adam Liptak, *Unfettered Debate Takes Unflattering Turn*

entire profession, or a series of recurring deficiencies of individual lawyers, there is broad agreement that the public's respect for lawyers has declined and lawyers' unprofessional conduct contributes to the problem.⁶¹

The commercialization of law practice, with increased emphasis on billable hours⁶² and the breakdown of "relationship" lawyering,⁶³ is often associated with decreased professionalism. While causal connections are not easy to establish

in Michigan Supreme Court, N.Y. TIMES, Jan. 19, 2007, at A21. The controversy arose over a proposed rule forbidding justices from publicly disclosing any "correspondence, memoranda and discussions regarding cases or controversies." *Id.* The dispute became personal when Justice Elizabeth A. Weaver, an opponent of the rule, accused her colleagues of "bully tactics," "abuses of power and grossly unprofessional conduct and trying to censor her." *Id.* In a confidential draft opinion, Chief Justice Clifford Taylor "accused Justice Weaver of behaving 'like a child engaging in a tantrum' and 'suggested she continue her protest [in] a hunger strike [which offers the] 'potential for everyone to be a winner.'" *Id.* Richard D. Friedman, professor of law at the University of Michigan School of Law commented, "The justices of the Michigan Supreme Court are making spectacles of themselves. They really should start acting like grown-ups" *Id.* Justice Weaver's position on the controversy between the Justices of the Michigan Supreme Court is available from her website in the form of a letter to Michigan's state government leaders. Letter from Justice Elizabeth A. Weaver, Michigan Supreme Court, to Leaders of Michigan's State Government (Jan. 31, 2007), available at <http://www.justiceweaver.com/pdfs/EAW1-31.commission.pdf>. The website also includes Justice Weaver's 10 Principles For Living. Justice Elizabeth A. Weaver, Justice Weaver's 10 Principles For Living—Fundamental Tenets of Responsible Behavior (Feb. 15, 2007), available at <http://www.justiceweaver.com/principles/php>. Number 1 is, "Be a goodfinder, a person who seeks out the good in himself and herself and others." *Id.* Number 4 is, "You Catch More Bees With Honey Than Vinegar. Treat people as you would have them treat you." *Id.* Number 6 is, "Avoid Unnecessary Disputes and Confrontations. They cause friction, and friction wears things out." *Id.* For additional judicial professionalism examples, see Joy, *supra* note 46, at 680-82.

61. See generally sources cited *supra* note 46 for discussions.

62. The effects of commercialization were raised over twenty years ago as having a potentially adverse effect on professionalism. *Stanley Report*, *supra* note 4, at 261 ("While economic pressure cannot justify unprofessional behavior, it may help explain why some lawyers seem less selfless than before. Indeed, the economic pressure is likely to become even greater in the future..."). See also George P. Baker & Rachel Parkin, *The Changing Structure of the Legal Services Industry and the Careers of Lawyers*, 84 N.C. L. REV. 1635, 1635 (2006); Dennis Curtis, *Can Law Schools and Big Law Firms Be Friends?*, 74 S. CAL. L. REV. 65, 69 (2000). For more general treatment of the economics of law firms over the last twenty years, see Donald Gibson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989); Robert Gilson & Robert H. Mnookin, *Sharing among the Human Capitalists: An Economic Inquiry into the Corporate Law Firms and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985); S.S. Samuelson & L.J. Jaffee, *A Statistical Analysis of Law Firm Profitability*, 70 B.U. L. REV. 185 (1990). Billable hour expectations continue to rise, from about 1800 hours for associates in large New York City firms in 1990 to today's 2000-2400 hours, often with pro bono and firm development hours on top of that. Starting salaries have grown correspondingly and contribute to the pressure to increase billable hours. Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 891 (1999).

63. "One consequence of the increasing size and scope of in-house legal departments has been that corporate clients no longer hire a law firm to 'be their lawyer,' developing a multifaceted and lasting relationship and giving that firm nearly 100% of their legal work.... As old relationships become less important, law firms (and lawyers) now must compete against each other for clients in a way that would have been unimaginable in the past.... Rainmaking is now a necessary tool for a law firm's performance and survival." Baker & Parkin, *supra* note 62, at 1654-66.

here, increased billable hour demands do leave less time for the kinds of uncompensated activities commonly associated with lawyer professionalism: pro bono representation, mentoring new lawyers, and working through the organized bar to improve the justice system.⁶⁴ Billable hour pressures are often linked to the decline of “relationship” lawyering. Sophisticated clients are less inclined to refer business to a firm simply because the firm handles one specific matter. From those clients’ perspectives, legal service has elements of a commodity. If multiple firms can supply the same service with more or less equivalent quality, then cost effectiveness matters more than prior relationships as a deciding factor in who gets the business.⁶⁵ These pressures require more “rainmaking” by senior members of the firm, leveraging of associates, and increased billable hour expectations.⁶⁶ All of these business concerns leave less time for activities associated with professionalism.

Addressing the decline in professionalism is a complex task. First, lack of professionalism does not necessarily equate with “bad lawyering.” Failure to devote time to improving the justice system, lack of civility, and overly aggressive tactics may not be ethical violations, professional malpractice, or detrimental to a client’s interests.⁶⁷ More typically these behaviors are viewed with distaste and engender harsh feelings about lack of professionalism.⁶⁸ Second, professionalism has elements of a public good.⁶⁹ All lawyers benefit from its presence but few have direct economic incentives to be “more professional.” Indeed, many attribute the problem to the structural changes in the economics of law practice that individual lawyers are powerless to change.⁷⁰

64. “These changes have caused lawyers to focus increasingly on the business aspects of their practice. For many firms, billable hours, partner profits, and market share in a practice area or in a city—in other words, the ‘bottom line’—have become the only way success is measured. Dropping out are other forms of what used to be the basis of lawyers’ prestige, such as peer recognition, participation in bar association activities and projects, especially those designed to provide access to justice ... and leadership of non-related civic groups” Curtis, *supra* note 62, at 70.

65. See Baker & Parkin, *supra* note 62, at 1655.

66. *Id.* at 1664-65. There is another side to this. While data is very hard to find, most large firms continue to support and even expect pro bono representation. A significant percentage of bar work, including service as committee members, chairs and officers, comes from members of large firms. One possible explanation is large firms can better support these activities. See Ruth Piller et al., *Large Firms Place Increasing Emphasis on Pro Bono*, HOUSTON LAW., Mar.-Apr. 2006, at 22, 23-25; Kimberly McKelvey, Comment, *Public Interest Lawyering in the United States and Montana: Past, Present, and Future*, 67 MONT. L. REV. 337, 349-50 (2006).

67. A particularly useful discussion of this general point and the argument that very zealous “conscientious” advocacy is a legitimate type of lawyering which should not be disfavored by efforts to increase professionalism is Atkinson, *supra* note 60, at 303-17.

68. *Id.*

69. SULLIVAN, *supra* note 27, at 5 (“From an economic viewpoint, such values as a functional legal system and a good health care system are public goods, meaning that they are values from which all benefit and that depend on everyone’s cooperation, but to which no particular market actor has a strong incentive to contribute.”).

70. This was one of the points of the Stanley Commission Report. It noted that lawyers would in the future face increased competition because of the rising number of new lawyers entering practice and rising overhead costs, neither which lawyers can control. *Stanley Report*, *supra* note 4, at 260.

Attempts to address the problem have mainly taken the form of aspirational initiatives. These include professionalism oaths and creeds,⁷¹ state supreme court professionalism commissions,⁷² and mentoring programs for newly admitted lawyers.⁷³ Mandatory, enforceable professional codes have been avoided. They are considered politically and constitutionally questionable.⁷⁴ This is a relatively quiet crusade, not generally visible to the public. The purpose of these programs is to raise every lawyer's awareness of the importance of professional conduct to the public's perception of the legal profession. They are designed to change the behavior of practicing lawyers by highlighting elements of professionalism.⁷⁵ These initiatives are in their early stages. Their effectiveness is as yet indeterminate.

Law schools have taken steps to address professionalism, but not with the sense of urgency of the rest of the profession.⁷⁶ Professionalism is most directly addressed in the orientation programs of many law schools.⁷⁷ Beyond that, and pro bono and public interest programs designed to encourage students to work to improve the delivery of legal services,⁷⁸ professionalism is left to the discretion of individual faculty members to address. Typically, it appears again in ethics courses and in some clinical and skills courses.⁷⁹ By no means is improving professionalism an important priority of legal education.⁸⁰ It is viewed as something best addressed by the rest of the profession.

71. See, e.g., The Texas Lawyers Creed: A Mandate for Professionalism (Nov. 7, 1989), available at <http://www.law.uh.edu/libraries/ethics/lcreed/index.html>.

72. Roy T. Stuckey, *Introduction to Professionalism Symposium*, 52 S.C. L. REV. 443, 443 (2001).

73. See *supra* note 9.

74. Atkinson, *supra* note 60, at 277-83.

75. For discussion of public, aspirational declarations of professionalism and some specific issues which such declarations might address, see generally Bruce Green, *Public Declarations of Professionalism*, 52 S.C. L. REV. 729 (2001).

76. Law faculties have been included in most major ABA professionalism initiatives. My colleague Roy Stuckey served as a member of the MacCrate Task Force. Quite commonly, law faculties are members of state bar and state supreme court professionalism committees and commissions. Even with this participation, relatively little has been done to implement recommendations beyond orientation programs and pro bono and public interest initiatives. The Stanley Commission recommendations for law schools, for example, were so general that they went virtually unnoticed. Law schools were charged with being "more creative" in teaching ethics, including "new methods" such as negotiation for dealing with legal disputes, encouraging law professors to be "role models for students," adopting "codes of conduct" and retaining "high admissions standards." *Stanley Report*, *supra* note 4, at 244.

77. See discussion *supra* note 10.

78. *Id.*

79. Information professionalism instruction in these courses comes predominately from the instructor and not from generally available teaching materials. My own informal survey of approximately twenty books on the teaching of trial skills, negotiation, and counseling found only one book with some attention and material devoted specifically to professionalism. See STEFAN H. KRIEGER & RICHARD K. NEUMANN, JR., *ESSENTIAL LAWYERING SKILLS* 7-17 (3d ed. 2007).

80. The broad issues which have been of prominent concern to legal education over the last two decades—accreditation, incorporating more skills instruction, increasing the number of clinicians and legal writing professionals, job security (tenure or long-term contracts) for non-

C. Professionalism Revisited

A vision of professionalism that emphasizes its central meaning, instead of the descriptive definitions so far addressed, may offer a useful alternative for structuring improvement initiatives, especially in law schools. The professionalism triad that I earlier put forth as a useful descriptive definition⁸¹ consists of professional competency, respect for participants in the justice system, and a commitment to improving the justice system. While professional competency is essential to professionalism, few view that as a major problem.⁸² The decline of concern is usually associated with the other two elements, insufficient respect for others and insufficient public interest commitment. So described, those two problem areas have little commonality. A more unifying, useful view of these problems characterizes them as lawyers placing their own interests above the interest of others and of the justice system itself. This failure to adequately consider other interests, or excessive self-interest, is inconsistent with recognized, common elements of professional work.⁸³ Those common elements require that professional self-interest be balanced with interests of the public.⁸⁴ This excessive self-interest appears as an element of both lack of respect for others (incivility) and insufficient commitment to the justice system. It can be described by a term uncommon to law, insufficient empathy.⁸⁵

traditional faculty, growing costs and relatively flat resources, incorporating information technology, globalization, law student wellness, placement, admissions, bar passage, and what to do about *U.S. News* rankings—have little to do with professionalism.

81. See *supra* notes 57-59 and accompanying text. Lists of specific elements of professionalism are what Rob Atkinson refers to as “professionalism as description.” His other ways of categorizing the concept include professionalism as “explanation,” as “focus of regulation” and as “focus of aspiration.” Atkinson, *supra* note 60, at 271-75.

82. While virtually every discussion of professionalism includes competence as a critical element, there is little to suggest that it is of the same level of concern as other elements, such as incivility and failure to work for the improvement of the profession. Both the MacCrate Task Force and the Stanley Commission, for example, viewed competence as of obvious importance, but did not perceive its lack as a problem. MacCrate was more concerned with broader education in skills. MACCRATE REPORT, *supra* note 6, at 138-40 (noting the fundamental skills essential for competent lawyering). Stanley simply asserted that competence is an important element of professionalism. *Stanley Report*, *supra* note 4, at 296.

83. See *supra* notes 42-45 and accompanying text.

84. “[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...” *Stanley Report*, *supra* note 4, at 262.

85. While empathy is not common in legal discussions, it is by no means unknown. See RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 123 (1981) (“[E]mpathy ... is also politically relevant because it facilitates the resolution of conflict.”); RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* 92 (1992) (noting that empathy and professional responsibilities can coexist); ROBIN WEST, *NARRATIVE, AUTHORITY, AND THE LAW* 6-7 (1993) (noting that empathy may facilitate a method for a moral criticism of law); Rob Atkinson, *Law as a Learned Profession: The Forgotten Mission Field of the Professionalism Movement*, 52 S.C. L. REV. 621, 634 (2001) (noting that law and humanities courses in law school can develop empathy which in turn links to professionalism); Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1576 (1987) (arguing that empathy can play an important role in law); Toni M. Massaro, *Legal Storytelling: Empathy, Legal Storytelling, and the Role of Law: New Words, Old*

I suggest that a useful conceptualization of professionalism should include empathetic understanding. Stated differently, professionalism requires empathetic understanding of the interests of others, in addition to competency. This focuses specifically on the areas most associated with professionalism's decline; lack of respect and failure to support the profession. Empathetic understanding touches all aspects of professionalism.⁸⁶ It increases competence in certain skills essential for good lawyering and increases both respect for others and commitment to the justice system.

Empathy is thought to be antithetical to the analytical rationality viewed as essential for effective lawyering. As the term is commonly used, connoting sympathy and benevolent understanding of another's situation,⁸⁷ this is true. This common linkage of empathy with sympathy is quite different from the reasoned, emotion-free discourse used in legal communication. Such "emotionless" exchanges serve an important purpose. They facilitate the exchange of legal arguments in a sufficiently depersonalized way to minimize interpersonal conflicts.⁸⁸ Accordingly, lawyers, judges, and juries can better focus on legal issues.

This view that empathy and emotion should properly play a minimal role in law has been criticized as "impoverished"⁸⁹ and arising from the commonly held belief that reason and emotion, at least in law, must be separated.⁹⁰ As a result of this effort to downplay the role of emotion in legal communication, "an entire mode of understanding and interpreting is seemingly foreclosed by legal discourse ... or, more likely, it rumbles underground, much like the Freudian unconscious, seldom explicitly breaking through."⁹¹

Empathy has broader meaning than its common association with sympathy.⁹² It is this broader meaning which has significance for law and, specifically, for professionalism. "[E]mpathy is a form of understanding, a

Wounds?, 87 MICH. L. REV. 2099, 2101-02 (1989) (discussing the role of empathy in law); Catherine Gage O'Grady, *Tribute: Empathy and Perspective in Judging—The Honorable William C. Canby*, 33 ARIZ. ST. L.J. 4, 16-24 (2001) (contrasting different empathetic understandings between Seventh and Ninth Circuit decisions); Ammon Reichman, *Law, Literature, and Empathy: Between Withholding and Reserving Judgment*, 56 J. LEG. EDUC. 296 (2006) (demonstrating the usefulness of incorporating non-legal materials into legal education to transform the way students, lawyers and judges think and argue). For different perspectives, see Jeremy Blumenthal, *Law and the Emotions: The Problems of Affective Forecasting*, 80 IND. L.J. 155, 162 (2005) (arguing that people are unable to predict the emotions of others); Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1, 40-78 (1997) (setting out "[r]easons to [l]imit the [r]ole of [s]ympathy in [l]egal [j]udgment").

86. See *infra* notes 196-198 and accompanying text

87. Henderson, *supra* note 85, at 1581-82.

88. That interpersonal conflict, injected into a legal proceeding, can interfere with the dispute resolution process is clear to all.

89. Henderson, *supra* note 85, at 1575.

90. *Id.* at 1575-76.

91. *Id.* at 1576.

92. Empathy can be viewed as a reaction to something, usually to the emotional state of another through perceiving those emotions. It can also include both perceiving an emotional state and understanding it. See *id.* at 1579-81.

phenomenon that encompasses affect as well as cognition in determining meanings.”⁹³ It can facilitate appreciation of what a given legal situation means to affected individuals. Empathy encompasses several related phenomena: (1) feeling the emotions of another; (2) understanding another’s situation or experience; and (3) taking actions based on another’s situation. Empathy involves ways of knowing and understanding and can serve as a catalyst for either action or restraint. In this broader view, empathy is an essential element of the concept of emotional intelligence.⁹⁴

Empathy, when it primarily involves sympathy, leads to helping behaviors and even altruism. It supports putting other interests ahead of self-interest. So viewed, that aspect of empathy has little role in actual adversarial proceedings. Empathy, however, also includes the ability to understand and act in a neutral or even self-interested manner, not necessarily in a compassionate manner.⁹⁵ In this form, empathy can lead to self-interested conduct that arises from empathetic understanding of another’s situation. Such self-interested action can include persuading, communicating, and influencing behaviors that are typical in many legal proceedings.⁹⁶ “Empathetic narratives”⁹⁷ are useful as litigation strategies and can produce good and, in some cases, extraordinary results.⁹⁸

Empathy in this broad sense has important, but so far little explored implications for professionalism. First, empathy in its neutral or self-interested meaning may correlate with more effective persuasion and advocacy skills. It can improve lawyer competency; an essential element of professionalism. Second, in its sympathetic or altruistic sense, empathy can be an impetus for helping action. It can counterbalance excessive self-interest. This can mitigate uncivil conduct and promote altruistic behaviors, such as working for the benefit of others through pro bono representation or other efforts to improve the justice system.

Focusing on empathy offers a potentially promising mechanism to improve professionalism since it touches each element of the professionalism triad. Part III will discuss how legal education underemphasizes and even discourages empathetic behavior in law students and does little to promote an ethos of professionalism.

93. *Id.* at 1576.

94. *Id.* at 1579. See also GOLEMAN ET AL., *supra* note 16.

95. See Henderson, *supra* note 85, at 1583 (“[E]mpathetic responses do not inevitably elicit helping behavior.”).

96. The MacCrate Task Force includes them in its list of fundamental lawyering skills. MACCRATE REPORT, *supra* note 6, at 138-40.

97. Henderson, *supra* note 85, at 1593.

98. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). For a discussion of the case and the significance of the tactics, narratives, and arguments employed, see RICHARD KLUGER, *SIMPLE JUSTICE* (1975).

III. LEGAL EDUCATION AND PROFESSIONALISM: AN INADEQUATE PARTNERSHIP

A. *The Overemphasis of Legal Analysis*

Legal education does not adequately support the development of an ethos of professionalism among law students. In substance and pedagogy, law school's predominant emphasis⁹⁹—some would argue its over-emphasis¹⁰⁰—is on teaching analytical skills and reasoning through broad exposure to numerous areas of law. Unquestionably, this produces substantive competency, an important element of professionalism. But it neglects other important skills and values essential to an ethos of professionalism. In effect, legal education's "signature pedagogy,"¹⁰¹ the teaching of analytical reasoning, tends to promote self-interest over altruism¹⁰² and focuses on external rewards over working for the interests of others.¹⁰³ These negative externalities of the case method of instruction undermine and offset efforts to encourage professionalism.

Legal education has a dramatically different philosophy than medical education.¹⁰⁴ Physicians are educated through teaching hospitals and have broad exposure to clinical faculty.¹⁰⁵ Scientific knowledge and analysis are central, but not emphasized to the detriment of essential professional skills. By graduation, every medical student has spent considerable time in a teaching hospital acquiring professional skills and a sense of the professional identity of the medical profession. This clinical education experience is an apprenticeship in professional skills and identity which compliments instruction in scientific knowledge and analysis. In sharp contrast, most law students at most law

99. For the most useful and best discussion of legal education, see SULLIVAN ET AL., *supra* note 1.

100. For a general discussion of this point, see Ann. L. Ijima, *Lesson Learned: Legal Education and Law Student Dysfunction*, 48 J. LEGAL EDUC. 524, 528-30 (1998); Bridget A. Maloney, Note, *Distress among the Legal Profession: What Law Schools Can Do about It*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 315-16 (2001); Stephen B. Shanfield & G. Andrew Benjamin, *Psychiatric Distress in Law Students*, 35 J. LEGAL EDUC. 65, 68-70 (1985); Morrison Torrey, *You Call that Education?*, 19 WIS. WOMEN'S L.J. 93, 103-09 (2004).

101. SULLIVAN ET AL., *supra* note 1, at 3-6.

102. SUSAN S. DAICOFF, *LAWYER, KNOW THYSELF* 122-23 (2004). See also Lawrence S. Krieger & Kannon M. Sheldon, *Does Law School Change Law Students? Values, Motives and Well Being in a First Year Class* (2001) (unpublished manuscript, on file with Florida State University School of Law) (comparing entering Florida State law students to University of Missouri undergraduates).

103. DAICOFF, *supra* note 102, at 122-23.

104. The histories of legal education and medical education are quite different. Legal education was pulled away from the apprenticeship system and into the academy in the 1870s by Langdell at Harvard. Medical education in its modern form, based around a teaching hospital and the teaching of rigorous science, came from the influential Flexner Report in the early twentieth century. For general discussion, see KRONMAN, *supra* note 12, at 165-85; SULLIVAN, *supra* note 27, at 202-07.

105. While law schools have relatively few clinical faculty, clinical faculty in medical schools usually outnumber faculty teaching basic medical sciences. Law schools utilize significant numbers of adjunct faculty, usually to teach specialized courses. See Hisashi Yamagata, *Trends in Faculty Attrition at U.S. Medical Schools, 1980-1999*, ASS'N AM. MED. COLLEGES, Mar. 2002, http://www.aamc.org/data/aib/aibissues/aibvol2_no2.pdf.

schools graduate with insufficient exposure to the skills necessary for competent practice and little exposure to the professional identity of lawyers.¹⁰⁶ In-house clinics, externships, pro bono programs, and other skills-oriented courses still reach only a minority of law students.¹⁰⁷ Many law students likely develop their professional identity from summer clerkships more than they do from their formal legal education. Law schools have effectively “outsourced” to the profession many things important to the professional competency of practicing lawyers.

These criticisms are hardly new. Most recently, the Carnegie Foundation for the Advancement of Teaching in its 2007 monograph, *Educating Lawyers* argues that legal education needs a more integrated, holistic approach toward the education of lawyers.¹⁰⁸ Such an approach would elevate education for practice and professional identity to the same level as education for legal analysis. A greater sense of professionalism would be one beneficial result.¹⁰⁹ This can best be accomplished by utilizing a series of three integrated “apprenticeships.”¹¹⁰ This metaphor of apprenticeship¹¹¹ is useful in pointing out that “[p]rofessional schools are not only where expert knowledge and judgment are communicated from advanced practitioner to beginner; they are also the place where the profession puts its defining values and exemplars on display.”¹¹² Integrated apprenticeships of knowledge,¹¹³ practice,¹¹⁴ and professional identity,¹¹⁵ if combined in the law school curriculum, would more effectively educate students for a competent professional approach to practice than the current analytically focused approach.

A 2007 report of the Clinical Legal Education Association, *Best Practices for Legal Education*,¹¹⁶ drafted by my colleague Roy Stuckey at the University of South Carolina School of Law, reinforces the central points of *Educating*

106. My own informal survey, based on visits to a representative group of law school websites in spring 2007, and discussions with faculty colleagues, suggests that less than one-third of law students take more than one skills course (that course most likely being in trial skills).

107. My informal survey referenced *supra* note 106, also suggests that fewer than 20% of law students take a clinics course that involves live client contact. While most law schools have pro bono and public interest programs, participation in programs that are voluntary probably averages less than 30%.

108. SULLIVAN ET AL., *supra* note 1, at 191.

109. *See id.* at 200 (citing a recent paper by Peggy Cooper Davis of NYU’s law school which describes Davis’s conception as where “the cognitive, practical, and ethical-social apprenticeships become intertwined as students’ understanding of fundamental concepts is deepened through experience”).

110. *Id.* at 27-29.

111. The apprenticeship system, prior to the growth of legal education in universities, was the original method for educating lawyers. KRONMAN, *supra* note 12, at 170.

112. SULLIVAN ET AL., *supra* note 1, at 4.

113. *Id.* at 147. Sullivan also refers to this apprenticeship as a “cognitive apprenticeship.” *Id.*

114. *Id.*

115. *Id.* This is also referred to as an ethical-social apprenticeship. *Id.*

116. ROY T. STUCKEY, BEST PRACTICES FOR LEGAL EDUCATION: A PROJECT OF THE CLINICAL LEGAL EDUCATION ASSOCIATION (2007).

Lawyers.¹¹⁷ *Best Practices* advocates that the teaching of practice and professionalism must be at the center of legal education if that education is to be effective.¹¹⁸

It is not clear to what extent law schools have contributed to the public's loss of trust in lawyers, but we certainly should be trying to be part of the cure by educating students about the traditions and values of the legal profession, by serving as role models, and by striving to infuse in every student a commitment to professionalism.¹¹⁹

This obviously means greater attention to what *Educating Lawyers* refers to as apprenticeships of practice and professional identity.¹²⁰ These two comprehensive, persuasive, and hopefully influential, reports come some fifteen years after the MacCrate Task Force on Law Schools and the Profession issued its report, *Legal Education and Professional Development—An Educational Continuum*.¹²¹ The MacCrate Task Force Report raised many of the same criticisms voiced in *Educating Lawyers*¹²² and *Best Practices*.¹²³ In the words of the MacCrate Report:

While practicing lawyers undoubtedly appreciate the value of the law school experience to their own careers, surveys understandably indicate that practicing lawyers believe that their law school training left them deficient in skills that they were forced to acquire after graduation. . . . It is, of course, in the area of curriculum that the practicing bar has traditionally been most critical of law schools.¹²⁴

The MacCrate Task Force, to address this skills "gap" that hinders lawyer professionalism, proposed a "Statement of Fundamental . . . Skills and . . . Values,"¹²⁵ which it viewed as essential for professional competence. The Task Force noted that while legal analysis and problem solving are the most fundamental building blocks of professional competence,¹²⁶ those abilities alone will not assure adequate competence and professionalism.¹²⁷ Other skills and values must be part of every lawyer's professional development. The values deemed essential are central pillars of professionalism: "Striving to Promote Justice, Fairness and Morality"¹²⁸ and "Striving to Improve the Profession."¹²⁹

117. SULLIVAN ET AL., *supra* note 1.

118. STUCKEY, *supra* note 116, at vii.

119. *Id.* at 28.

120. SULLIVAN ET AL., *supra* note 1, at 3-4.

121. MACCRATE REPORT, *supra* note 6.

122. SULLIVAN ET AL., *supra* note 1.

123. STUCKEY, *supra* note 116.

124. MACCRATE REPORT, *supra* note 6, at 5-6.

125. *Id.* at 135-41.

126. *Id.* at 135.

127. *Id.*

128. *Id.* at 140.

129. *Id.* at 141.

B. Legal Education: Negative Externalities

These criticisms and calls for change in legal education's substance and pedagogy should be viewed in the context of studies documenting the effect of continuous exposure to instruction in legal analysis on students.¹³⁰ Some thirty years of empirical research on the effect of law study on law students¹³¹ indicates that law study has significant negative externalities, most likely associated with its "signature pedagogy,"¹³² instruction in legal analysis and reasoning. While students entering law school are similar to the general population in their overall wellness,¹³³ their law school experience leads to reduced interest in reflective thought and introspection,¹³⁴ as well as increased depression, aggression, anxiety,¹³⁵ and alienation.¹³⁶ Law students report that they become more motivated by external values.¹³⁷ Students also become less altruistic and less satisfied by working for the benefit of others rather than furthering their own interests.¹³⁸

The point here is not that law students as a group are intrinsically motivated by self-interest or overly aggressive. Any faculty member at any law school can attest that law students who are given the opportunity through pro bono, public interest programs, or clinics representing the disadvantaged will devote their time and considerable talents in furthering the interests of others. The point is, however, that repeated focus on legal analysis as the primary foundation of legal education and the relatively limited opportunities for instruction in skills and professional identity overpromotes self-interest and diminishes altruism and the desire to work for the interests of others. Things that counterbalance those effects, such as pro bono and public interest programs and clinical experiences,

130. See *supra* note 100 and accompanying text.

131. This body of research is exhaustively reviewed and discussed in DAICOFF, *supra* note 102. For a recent study of students at the University of Connecticut Law School, see generally Nancy J. Soonpaa, *Stress in Law Students: A Comparative Study of First-Year, Second-Year, and Third-Year Students*, 36 CONN. L. REV. 353 (2004). Much of the research on this topic was stimulated by the work of Shanfield and Benjamin in the 1980s. See Shanfield & Benjamin, *supra* note 100. At its 2006 annual meeting, the Association of American Law Schools conducted a day-long workshop on the topic of student wellness. See Association of American Law Schools, AALS Workshop on a Search for Balance in the Whirlwind of Law School, Jan. 2006, available at <http://www.aals.org/am2006/program/balance>.

132. SULLIVAN ET AL., *supra* note 1, at 2-3.

133. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 246; Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1354 (1997).

134. See DAICOFF, *supra* note 102, at 122.

135. *Id.* at 117.

136. *Id.* at 118-19. See generally Paul D. Carrington & James J. Conley, *The Alienation of Law Students*, 75 MICH. L. REV. 887 (1977) (discussing alienation as the single most important factor in the emotional and intellectual withdrawal of students from the University of Michigan Law School).

137. DAICOFF, *supra* note 102, at 122.

138. *Id.*

may be insufficiently available to make a difference.¹³⁹ This, of course, reinforces the central themes in *Educating Lawyers*,¹⁴⁰ *Best Practices for Legal Education*,¹⁴¹ and the MacCrate Task Force Report.¹⁴² Legal education, as currently structured, insufficiently attends to the skills and professional identity essential for lawyer competency and professionalism. It reinforces behaviors and attitudes that actually weaken professionalism.

The changes and reforms proposed by these reports, if adopted, could have a profoundly beneficial effect on the professionalism of law students at the macro level. It is also useful to explore initiatives short of major curricular reform, always a slow process, which can offset the negative effects of excessive self-interest. The concept of empathy, discussed earlier,¹⁴³ offers promise here. A more formal approach to the usefulness and application of this trait has taken form in the context of extensive work on emotional intelligence.¹⁴⁴

The next part of this article explores the usefulness and applications of emotional intelligence competencies in addressing some of the problems associated with the effects of legal education and in supporting an ethos of professionalism.

IV. EMOTIONAL INTELLIGENCE AND ITS APPLICATION TO PROFESSIONALISM

A. *The Concept of Emotional Intelligence*

Emotional intelligence is most usefully characterized as a series of competencies or abilities involving emotions.¹⁴⁵ They include self-awareness of emotions, awareness of the emotions of others, empathetic understanding of those emotions, and the ability to use this awareness to self-regulate the actor's own behavior and influence the behavior of others.¹⁴⁶ Self-awareness involves the ability to "[read] one's own emotions and [recognize] their impact" and to use that self-awareness to guide decisions.¹⁴⁷ Self-regulation involves "keeping disruptive emotions and impulses under control ... displaying honesty and ... trustworthiness," and the ability to take initiatives and be flexible in adapting to

139. See *supra* notes 106-107.

140. SULLIVAN ET AL., *supra* note 1.

141. STUCKEY, *supra* note 116.

142. MACCRATE REPORT, *supra* note 6.

143. See *supra* notes 85-96 and accompanying text.

144. See *supra* notes 15-23 and accompanying text.

145. See GOLEMAN ET AL., *supra* note 16, at 39. Emotional intelligence also is viewed as one element of various leadership models. See generally Martin M. Chemers, *Integrating Models of Leadership and Intelligence: Efficacy and Effectiveness*, in MULTIPLE INTELLIGENCES, *supra* note 16, at 139 (discussing contemporary intelligence theories used in effective approaches to leadership). For influential early work characterizing emotional intelligence competencies, see generally John D. Mayer & Peter Salovey, *The Intelligence of Emotional Intelligence*, 17 INTELLIGENCE 433 (1993); Peter Salovey & John D. Mayer, *Emotional Intelligence*, 9 IMAGINATION, COGNITION & PERSONALITY 185 (1990).

146. GOLEMAN ET AL., *supra* note 16, at 39.

147. *Id.*

situations involving others.¹⁴⁸ The awareness of others' emotions includes empathy or understanding another's perspective and a service orientation, which motivates actions to meet the needs of other individuals or organizations.¹⁴⁹ Influencing the behavior of others, or relationship management, involves the ability to communicate to and motivate or lead others with a persuasive vision, influencing through use of persuasive tactics, resolving conflict, cultivating relationships, and motivating change.¹⁵⁰

Emotional intelligence is an actual form of intelligence, not a series of interpersonal skills.¹⁵¹ Emotional intelligence, unlike IQ which varies little through life, can be learned.¹⁵²

B. The Application of Emotional Intelligence in the Business Context

Emotional intelligence traces its origin to the early twentieth century work of Thorndike.¹⁵³ Based in substantial part on the research of multiple intelligences,¹⁵⁴ it achieved broad recognition through a series of studies in educational and business contexts in the 1980s and 1990s.¹⁵⁵ Daniel Goleman brought emotional intelligence into the psychological mainstream in the mid-1990s.¹⁵⁶ Empirical research in the area continues at a rapid pace, especially with regard to its use in developing superior abilities to persuade, influence, and communicate, all important leadership characteristics.¹⁵⁷ Emotional intelligence is increasingly used as a tool in developing business leaders. The idea that there are multiple forms of intelligence, in addition to the generally accepted notion of academic intelligence, has special appeal in the business world. “[L]eaders of today are still being chosen for their functional expertise. If leaders do lack emotional intelligence, they may be unmoved by calls for greater understanding

148. *Id.*

149. *Id.* at 255.

150. *Id.* at 255-56.

151. Mayer et al., *supra* note 18.

152. See GOLEMAN, *supra* note 15, at 37. See also HOWARD GARDNER, MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE 29 (1993); HOWARD GARDNER, FRAMES OF MIND (1983) (providing an influential discussion of a broad spectrum of intelligences necessary for life success beyond IQ alone). For specific discussion of the fixed nature of IQ, see Ronald E. Rizzio & Francis J. Pirozzolo, Commentary, *Multiple Intelligences and Leadership: Implications for Leadership Research and Training*, in MULTIPLE INTELLIGENCES, *supra* note 16, at 241.

153. Thorndike, an eminent psychologist, popularized his view that “social intelligence” is a third component of intelligence (in addition to verbal and performing), defining it as “the ability to understand ... men, women, boys and girls, to act noisily in human relations.” E.L. Thorndike, *Intelligences and Its Uses*, 140 HARPER’S MAGAZINE 227, 228 (1920). For general discussion of the progression of work on various intelligences, see Mayer et al., *supra* note 18, at 267-72.

154. See generally MULTIPLE INTELLIGENCES, *supra* note 16 (providing various perspectives on the topic).

155. See *supra* note 18 for representative studies.

156. GOLEMAN, *supra* note 15.

157. As of the time of this writing, there are several hundred published research studies on the concept and application of emotional intelligence. For representative studies see *supra* note 18 and MULTIPLE INTELLIGENCES, *supra* note 16.

of emotion in the workplace.”¹⁵⁸ As useful as IQ is, it alone does not explain a significant amount of the variance in why people with comparable IQs perform so differently in work situations. Some are highly successful, even transformative leaders; others are not. IQ alone does not account for the performance difference. Emotional intelligence competencies, together with IQ are better predictors of this type of leadership ability than IQ alone.¹⁵⁹

Emotional intelligence has become a familiar concept in business organizations. There are now a wide variety of leadership development programs and several measurement instruments in use to help develop more effective managers.¹⁶⁰ Executive coaches frequently employ the concept. The potential applications of emotional intelligence to other professions, such as nursing, has been suggested,¹⁶¹ but little research beyond business and early childhood education¹⁶² has been conducted.

C. *Models and Their Applications*

Two broad, significantly overlapping models of emotional intelligence have gained currency. The ability or competency model views emotional intelligence as a series of competencies in perceiving, controlling, and affecting emotions.¹⁶³ Central to these competencies is empathetic ability, which facilitates understanding and influencing the actions of others. The second model, the mixed model,¹⁶⁴ includes the same competencies in addition to a series of psychological traits, such as stress management and motivation.¹⁶⁵ Research has

158. David R. Caruso et al., *Emotional Intelligence and Emotional Leadership*, in MULTIPLE INTELLIGENCES, *supra* note 16, at 55, 72.

159. For an early, influential study involving the success of teams, see R. Kelly & J. Caplan, *How Bell Labs Creates Star Performers*, HARV. BUS. REV., July-Aug. 1993, at 128, 129-38. See also Dulewicz et al., *supra* note 18, at 80; Gardner & Stough, *supra* note 18, at 76-77. For a more general discussion, see GOLEMAN ET AL., *supra* note 16, at 33-52.

160. Any internet search for leadership programs and executive coaching in emotional competencies yields numerous offerings. A typical example is the Center for Creative Leadership, Greensborough, N.C., which provides extensive leadership training for businesses and organizations. See Center for Creative Leadership, <http://www.ccl.org> (last visited Jan. 13, 2008).

161. See Dawn Freshwater & Theodore Stickley, *The Heart of the Art: Emotional Intelligence in Nurse Education*, 11 NURSING INQUIRY 91, 91 (2001).

162. John D. Mayer & Paul Salovey, *What Is Emotional Intelligence*, in EMOTIONAL DEVELOPMENT AND EMOTIONAL INTELLIGENCE 3, 3-31 (Paul Salovey & David J. Sluyter eds., 1997). For examples of the application of emotional intelligence in K-12 education, see GOLEMAN, *supra* note 15, at 301-09.

163. GOLEMAN ET AL., *supra* note 16, at 39.

164. See Caruso et al., *supra* note 158, at 59-60.

165. *Id.* at 59-63. The mixed model may include numerous other elements, in an attempt to develop a more complete theory of leadership. See, e.g., REUVEN BAR-ON, BAR-ON EMOTIONAL QUOTIENT INVENTORY: A MEASURE OF EMOTIONAL INTELLIGENCE (1997) [hereinafter BAR-ON] (adding intrapersonal skills, interpersonal skills, adaptability, stress management and general mood). Both the abilities model and the mixed model have limitations. The abilities model is not a complete theory of leadership. It attempts only to identify a specific type of intelligence which supplements and clarifies existing leadership models. The abilities model is newer and has less empirical research in support of its validity. The mixed model may not add significantly to existing

established that the abilities or competencies common to both models meet the accepted test for “intelligence.”¹⁶⁶ These abilities involve something more than interpersonal skills. Both models focus essentially “on how emotions ... facilitate thinking and adaptive behavior.”¹⁶⁷ These abilities “influence managerial performance.”¹⁶⁸ The competencies described by these models are either cognitive capacities or related to cognitive traits.¹⁶⁹ The personality traits described in the mixed model are thought of as resulting from these basic emotional competencies. These abilities can be measured either by self-reporting or by objective, performance-based instruments.¹⁷⁰

The appeal of emotional intelligence lies in its correlation with superior performance in certain areas critical to leadership,¹⁷¹ and the relative ease with which it can be incorporated into professional training and education.¹⁷² Research suggests that bringing these competencies to the attention of individuals through simple feedback has a measurable effect.¹⁷³ Short-term training produces more lasting results.¹⁷⁴ Most effective are longer courses that involve personnel techniques such as 360° evaluations¹⁷⁵ and in-depth exploration of the concept.¹⁷⁶ When learned, these competencies empirically correlate with increased levels of performance and leadership.¹⁷⁷ As a result of this research,

models of personality and leadership. For a discussion of the model theories of leadership, see generally John M. Digman, *Personality Structure: Emergence of the Five-Factor Model*, 41 ANN. REV. OF PSYCHOL. 417 (1990); Robert Hogan et al., *What We Know about Leadership*, 49 AM. PSYCHOLOGIST 493 (1994).

166. Mayer et al., *supra* note 18, at 291.

167. Caruso et al., *supra* note 158, at 61.

168. *Id.* at 63.

169. *Id.* at 56.

170. For general discussion of instruments to measure emotional intelligence, see BAR-ON, *supra* note 165; John D. Mayer et al., *Emotional Intelligence Test* CD-ROM (1997).

171. There are numerous “leadership” models which attempt to identify factors such as abilities to persuade, communicate, motivate and challenge others to perform. For discussions of leadership, see generally MULTIPLE INTELLIGENCES, *supra* note 16. For discussion of a specific leadership model attempting to identify characteristics of “transformational” leaders, see BERNARD M. BASS, *LEADERSHIP AND PERFORMANCE BEYOND EXPECTATIONS* (1985). See also Bernard M. Bass, *Does the Transactional-Transformational Leadership Paradigm Transcend Organizational and National Boundaries?*, 52 AM. PSYCHOLOGIST 130, 130 (1997).

172. Caruso et al., *supra* note 158, at 70.

173. For general discussion of the effectiveness of various training vehicles, see GOLEMAN ET AL., *supra* note 16, at 91-112. For specific discussion of problems with feedback, see *id.* at 91-96.

174. *Id.* at 99.

175. *Id.* at 135. This is an evaluation and feedback process commonly used in business where all people both reporting to and supervising an individual provide feedback on performance and abilities.

176. *Id.* at 5-12. See also CARY CHERNISS & MITCHELL ADLER, *PROMOTING EMOTIONAL INTELLIGENCE IN ORGANIZATIONS: MAKE TRAINING IN EMOTIONAL INTELLIGENCE EFFECTIVE* 111-28 (2000) (training, which involves learning the concepts and integrating and applying them, can yield changes of around 50% over multiyear periods).

177. Dulewicz et al., *supra* note 18, at 80; Dulewicz & Higgs, *supra* note 18, at 349; Gardner & Stough, *supra* note 18, at 76; John D. Mayer et al., *Emotional Intelligence: Theory, Findings and Implications*, 15 PSYCHOL. INQUIRY 197, 209 (2004).

many theorists have incorporated multiple intelligences, including emotional intelligence, into their leadership models.¹⁷⁸ Emotional intelligence apparently increases an individual's ability to motivate change in others and in organizations.¹⁷⁹

Much of the early research on those emotional competencies was conducted with children in educational settings.¹⁸⁰ This early work concludes that successful learning and performance are attributable to both rational and emotional capability development.¹⁸¹ These studies suggest that long-held organizational emphasis on rationality alone as the best way to achieve superior performance is an incomplete model.¹⁸²

Studies in business and organizational contexts have confirmed this.¹⁸³ Superior leadership in organizations correlates with superior emotional competencies.¹⁸⁴ IQ being equal, the most successful business managers exhibit higher levels of emotional competencies. Emotional competency differences apparently can differentiate between superior and average performance.¹⁸⁵ Similar correlations have been found for teams.¹⁸⁶

The business "leadership abilities"¹⁸⁷ that these studies refer to as being associated with emotional intelligence competencies are the abilities to persuade, advocate, influence, and communicate.¹⁸⁸ Apparently these are associated with empathetic understanding and its crucial role in understanding and influencing others.¹⁸⁹ These same abilities are essential for lawyers.¹⁹⁰ Negotiation, counseling and advocacy, for example, make use of these same skills. The obvious question is whether, if business executives with high emotional competencies are more successful, attorneys with the same high levels of emotional competencies would similarly demonstrate more effectiveness in

178. See sources cited *supra* note 173.

179. See sources cited *supra* note 177.

180. For general discussion of this work and emotional literacy programs in K-12 education, see GOLEMAN, *supra* note 15, at 261-87.

181. Dulewicz & Higgs, *supra* note 18, at 346.

182. See *id.* at 346-47.

183. See generally sources cited *supra* note 18 (citing representative studies for emotional intelligence).

184. See sources cited *supra* note 177.

185. Dulewicz et al., *supra* note 18, at 84. See generally MULTIPLE INTELLIGENCES, *supra* note 16.

186. See Kelly & Caplan, *supra* note 159, at 137-38.

187. See generally MULTIPLE INTELLIGENCES, *supra* note 16 (providing a series of discussions on multiple intelligences and leadership).

188. GOLEMAN ET AL., *supra* note 16, at 39. See also Dulewicz & Higgs, *supra* note 18, at 349; Mayer et al., *supra* note 177, at 209.

189. See generally GOLEMAN, *supra* note 15, at 96-110. For the role of empathetic understanding in law, see *supra* notes 85-99 and accompanying text.

190. See MACCRATE REPORT, *supra* note 6, at 138-41 (specifically mentioning advocacy and communication).

practicing law. Even with the obvious differences between law and business, no reasons are apparent to suggest a different result.¹⁹¹

There is already some recognition of the importance of emotional competencies in legal literature.¹⁹² Trial advocacy scholarship has noted the obvious connections between the ability of successful business managers to influence others and the ability of successful trial advocates to influence jurors.¹⁹³ Also noted is the importance of understanding and making personal connections with jurors in order to influence and persuade them to the advocate's position.¹⁹⁴ The techniques for accomplishing this are essentially emotional intelligence competencies: the ability to understand others, self-regulate, and use that understanding and control to influence others.¹⁹⁵ This is a promising area for additional research.

D. Emotional Intelligence and Professionalism

There are clear links between emotional intelligence and the concept of professionalism. The professionalism triad discussed earlier¹⁹⁶ sets out three fundamental aspects of professionalism: competency, respect for others, and a commitment to improve the justice system. Emotional intelligence competencies can strengthen each area. Substantial research supports the proposition that individuals with high levels of emotional competencies are more successful persuaders, communicators, and influencers.¹⁹⁷ In the legal context, improving the emotional competence of lawyers should lead to higher competence in professional skills that are essential to good lawyering.¹⁹⁸ At the same time, the empathetic understanding central to emotional intelligence tends to support understanding of others and taking actions to promote their interests.¹⁹⁹ This, too, can increase professionalism. Lawyers with higher levels of emotional competencies should be less likely to engage in uncivil behavior and more likely to give high priority to other interests, such as improving the justice system.

191. Lawyers are often involved in formal adversarial proceedings and managers are not. Nevertheless, persuading, communicating and advocating, regardless of the context, all have the same purpose of influencing others.

192. H. Mitchell Caldwell et al., *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 1068 (2002); Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion in the Courtroom*, 65 N.C. L. REV. 481, 482 (1987); Latour Lafferty, *Leadership in Trial Advocacy: Credibility Is a Cornerstone of Effective Trial Advocacy*, 28 AM. J. TRIAL ADVOC. 517, 522 (2000); James H. Roberts, Jr., *The SEC of Closing Arguments*, 23 AM. J. TRIAL ADVOC. 203, 206 (1999).

193. Lafferty, *supra* note 192, at 517-22.

194. Roberts, *supra* note 192, at 206-09.

195. GOLEMAN ET AL., *supra* note 16, at 39.

196. *See supra* text accompanying notes 46-59.

197. *See sources cited supra* note 18.

198. More effective persuasion, advocacy and communication skills directly relate to one aspect of professionalism, professional competency.

199. *See supra* notes 86-93 and accompanying text.

The next part of this article discusses incorporating emotional intelligence competencies into legal education and how that can support an ethos of professionalism in law students.

V. INCORPORATING EMOTIONAL INTELLIGENCE COMPETENCIES INTO LEGAL EDUCATION: STRENGTHENING AN ETHOS OF PROFESSIONALISM

A. *Revisoning Legal Education to Encompass Professionalism*

This section argues that instructing law students in emotional intelligence competencies will increase their professionalism and professional identity and can be accomplished with little change in the traditional curriculum.

A good starting point is the analytical framework in *Educating Lawyers*,²⁰⁰ which characterizes legal education as consisting of three integrated “apprenticeships:”²⁰¹ knowledge, skills, and professional identity.²⁰² This characterization is especially valuable. It facilitates comparison of any law school’s curriculum and teaching pedagogy with the integrated model proposed in *Educating Lawyers*.²⁰³ Virtually all law schools would receive high marks on knowledge. Even though much more is needed, there is significant, ongoing improvement in the skills area.²⁰⁴ Most law schools are likely deficient in the third. Little is being done to develop a sense of professional identity.

Emotional intelligence competencies are significant here because they apply to all three apprenticeships.²⁰⁵ Substantial research indicates these competencies improve the abilities to persuade, communicate, and influence.²⁰⁶ These abilities are all of central importance for the professional competency of lawyers.²⁰⁷ Increasing the emotional intelligence competencies of lawyers should improve their skills and make them better advocates, negotiators, counselors, and communicators. Translating this research into the legal environment, students receive basic instruction in negotiation, counseling, and advocacy plus instruction in emotional intelligence competencies, should have superior abilities in those skills compared with students who receive only basic skills

200. SULLIVAN ET AL., *supra* note 1.

201. The apprenticeship concept developed in *Educating Lawyers* comes from Sullivan’s earlier work on professions. See SULLIVAN, *supra* note 27.

202. SULLIVAN ET AL., *supra* note 1, at 13-14.

203. *Id.*

204. Beginning in the early 1970s, the law school accreditation process, administered through the ABA Section on Legal Education and Admissions to the Bar, has required additional instruction in skills courses. Virtually all law schools now offer clinical courses and numerous offerings in other skills areas. Students, at least now, have the opportunity to take skills courses, even though many still do not. See STANDARDS FOR APPROVAL OF LAW SCHOOLS, *supra* note 2, at § 302(b)(1).

205. See *supra* notes 197-199 and accompanying text.

206. Dulewicz & Higgs, *supra* note 18, at 349; Mayer et al., *supra* note 177, at 209.

207. See *supra* notes 197-199 and accompanying text.

instruction.²⁰⁸ If professional competency in essential skills improves, so will professionalism.

There has long been broad recognition among text book authors in these skills areas that the types of interpersonal competencies encompassed by emotional intelligence are important in achieving good results.²⁰⁹ As yet, no research base has been available to support such assertions.²¹⁰ Specific instruction in these emotional competencies remains rare in law schools.²¹¹ Research has developed to the point that such instruction can be profitably included in skills courses. As this happens, research can be conducted in legal education settings to assess results.

A critical component of emotional intelligence competencies, empathetic understanding, has significance for strengthening the other components of professionalism²¹² and, in so doing, strengthening the apprenticeship of professional identity. Empathy and the ability to understand others are already viewed by many teachers of law and literature as important abilities for lawyers.²¹³ Increased awareness and understanding of others can counter-balance the self-interest stemming from repeated exposure to legal analysis and can foster increased respect for others.²¹⁴ Some scholars have already linked the notion of empathy directly to professionalism.²¹⁵

This connection between the emotional intelligence competency of empathetic understanding and professionalism, though largely unrecognized, holds significant promise. One of the tenets of professionalism is civic trusteeship or public altruism.²¹⁶ The professional identity, which *Educating Lawyers*²¹⁷ advocates strengthening, involves instilling in law students greater

208. There has been no research conducted on whether the same skills improvements found in business managers would also occur in lawyers. No reasons why they should not occur are apparent, since the skills are identical.

209. See DAVID A BINDER ET AL., *LAWYERS AS COUNSELORS, A CLIENT-CENTERED APPROACH* 35-44 (1990); ROBERT F. COCHRAN, JR. ET AL., *THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING* 3, 217 (2d ed. 2006); KRIEGER ET AL., *supra* note 79; THOMAS A MAUET, *TRIALS* 1, 2, 8 (2005); THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LEGAL INTERVIEWING AND COUNSELING* 1-8 (1980).

210. See *supra* note 208.

211. I have been able to find no specific courses (based on internet searches) specifically dealing with emotional intelligence in law schools. Elon Law School has an emphasis on leadership development and uses executive coaches to teach leadership skills. Those individuals would obviously be knowledgeable in emotional intelligence competencies. See Elon University School of Law, <http://www.elon.edu/e-web/academics/law/characteristics.xhtml> (last visited Jan. 13, 2008).

212. See *supra* notes 86-98 and accompanying text.

213. See *supra* note 85.

214. See generally DAICOFF, *supra* note 102.

215. See generally Atkinson, *supra* note 85.

216. See generally SULLIVAN, *supra* note 27, at 5-15 (discussing the public responsibilities of professionals).

217. SULLIVAN, *supra* note 1.

awareness of these public obligations of lawyers.²¹⁸ Introducing emotional intelligence competencies to law students should make students more receptive to the importance of understanding other interests, including the obligations of the profession generally. Empathetic understanding can strengthen that recognition and, as in the business context, serve as a catalyst for action.²¹⁹

The research to support this particular application of emotional intelligence has not been conducted and it needs to be done. At a minimum, increasing empathetic understanding of law students should offset the self-interest resulting from repetitive instruction in legal analysis. At best, if coupled with greater focus on the profession's public obligations and opportunities, such as pro bono representation and public interest externships, it should foster an increased sense of public responsibility.

B. The Application of Emotional Intelligence in Legal Education

Incorporating emotional intelligence competencies into legal education can be accomplished in a variety of ways, none involving either significant problems of pedagogy or resources. Instruction can be incorporated into substantive courses that have a skills component or into skills courses, which are a better fit. I have successfully used a self-reporting instrument in a negotiation exercise that is part of my family law course. The instrument is designed to force students to become aware of their own emotions and to understand both the legal and emotional situations of their negotiation opponents. In the exercise, students report better understanding of the impact of their own behavior and of the attitudes and behaviors of other parties in achieving results. Students reporting such understanding on both sides of the negotiation report greater success in reaching agreements satisfactory to both sides and fewer issues that cannot be resolved.²²⁰ Legal education literature already offers numerous examples of incorporating notions of self-awareness, reflection, and focused understanding of the positions of others into courses.²²¹ All these efforts, though methodologies

218. *Id.* at 88. The bar has "an official, public role" and lawyers have obligations for the proper administration of legal institutions; this needs explicit attention in law schools. *Id.*

219. Emotional intelligence competencies encompass motivation and taking action as a result of empathetic understanding. This suggests that a person who understands another's interest may be more likely to take action to affect that interest. See GOLEMAN ET AL., *supra* note 16, at 39.

220. Survey results and survey instrument are on file with the author at the University of South Carolina School of Law.

221. There are many initiatives. For representative examples, see R. Lisle Baker, *Using Insights about Perception and Judgment from the Myers-Briggs Type Indicator Instrument As an Aid to Mediation*, 9 HARV. NEGOT. L. REV. 115 (2004); Melissa L. Berger et al., *Teaching Professionalism in Context: Insight from Students, Clients, Adversaries and Judges*, 55 S.C. L. REV. 303 (2004); Angela Olivia Burton, *Cultivating Ethical Socially Responsible Lawyer Judgment: Introducing the Multiple Lawyering Intelligences Paradigm into the Clinical Setting*, 11 CLINICAL L. REV. 15 (2004); Russell Engler, *From the Margins to the Core: Integrating Public Service Work into the Mainstream of Legal Education*, 40 NEW ENG. L. REV. 479 (2006); Steven H. Goldberg, *Bringing the Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414 (2000); Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLINICAL L. REV. 413 (2005); Therese Maynard,

and pedagogies differ, attempt to get beyond the norm that law is best taught through analytical reasoning. Recognizing the relevance and applicability of emotional intelligence could add additional focus to these initiatives.

Law schools should take the additional step of more broadly incorporating instruction in emotional intelligence competencies generally into legal education. There are already many legal academics, especially skills teachers, who are capable of this kind of instruction. Further, most law schools in urban areas have access to other professionals, such as psychologists and executive coaches who could serve as lecturers, adjunct faculty, or resources for law faculty who want to learn these concepts.

There are other vehicles besides incorporation into existing courses for achieving the same result. My own school is looking at a separate course on professionalism in which emotional intelligence competencies could be easily incorporated. These concepts can be integrated into pro bono programs, programs on leadership within law schools, in orientation programs, or as part of academic support programs. If research in business organizations is a predictor, instruction in emotional intelligence would be most effective if included in skills and clinical courses that teach skills in the context of real or simulated situations.²²²

Emotional intelligence competencies hold promise for increasing the professional ethos and professional identity of law students. Instruction in these competencies should improve performance in important professional skills and raise awareness of basic professional obligations, such as respect for others and improving the profession. Such instruction will not necessarily be transformative, nor by itself change the way law students view the profession and their obligation to it. Such instruction, however, would be a positive step toward

Teaching Professionalism: The Lawyer as a Professional, 34 GA. L. REV. 895 (2000); Carrie J. Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as a Problem Solver*, 28 HOFSTRA L. REV. 905 (2000); Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLINICAL L. REV. 623 (2003); Leonard L. Riskin, *Mindfulness: Foundational Training for Dispute Resolution*, 54 J. LEGAL EDUC. 79 (2004); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Their Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Joshua D. Rosenberg, *Interpersonal Dynamics: Helping Lawyers Learn the Skills, and the Importance, of Human Relationships in the Practice of Law*, 58 U. MIAMI L. REV. 1225 (2004); Erin Ryan, *The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, 10 HARV. NEGOT. L. REV. 231 (2005); Roger E. Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1997); Kandis Scott, *Non-Analytical Thinking in Law Practice: Blinking in the Forest*, 12 CLINICAL L. REV. 687 (2006); Marjorie A. Silver, *Emotional Competence, Multicultural Lawyering and Race*, 3 FLA. COASTAL L.J. 219 (2002); Barry Sullivan & Ellen S. Podgor, *Respect, Responsibility, and the Virtue of Introspection: An Essay on Professionalism in the Law School Environment*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 117 (2001); Ian Weinstein, *Testing Multiple Intelligences Comparing Evaluation by Simulation and Written Exam*, 8 CLINICAL L. REV. 247 (2001); Bruce J. Winick, *Using Therapeutic Jurisprudence in Teaching Lawyering Skills: Meeting the Challenge of the New ABA Standards*, 17 ST. THOMAS L. REV. 429 (2005); Clifford S. Zimmerman, *Thinking Beyond My Own Interpretation: Reflections on Collaborative and Cooperative Learning Theory in the Law School Curriculum*, 31 ARIZ. ST. L.J. 957 (1999).

222. See *supra* notes 172-174 and accompanying text.

the laudable goal of educating lawyers with a heightened sense of professionalism and professional identity.

VI. CONCLUSION

Professionalism, despite its importance to the rest of the legal profession, has not been emphasized in the academy. It should be. Law students need a greater sense of professional identity than they now receive. Incorporating emotional intelligence competencies into legal education can help develop that professional identity. It can increase competency in important skills, strengthen respect for others, and facilitate awareness of the profession's public obligations. Emotional intelligence, coupled with increased opportunities for skills instruction, pro bono, and public interest programs, should strengthen an ethos of professionalism in law students.

There is now sufficient empirical research to support the usefulness and application of emotional intelligence in the practice of law. Its incorporation into legal education is both feasible and not economically prohibitive. Many lawyers already have corporate clients who are both familiar with emotional intelligence and have even been trained in its application to business. Lawyers should have the same training, if for no other reason than to be on equal footing with the clients they represent. This education should start in the nation's law schools.