(Oxymoron?) Ethical Decision-Making By Attorneys: An Empirical Study

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(OXYMORON?) ETHICAL DECISIONMAKING 
BY ATTORNEYS: AN EMPIRICAL STUDY

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I. INTRODUCTION

Many commentators believe there is a professionalism "crisis" in the legal profession today which is evidenced by a perceived decline in ethical and civil behavior by attorneys.¹ Those commentators claim that there is a marked increase in discourteous, uncivil, "Rambo"-like behavior among lawyers.² The existence of this crisis is not entirely

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¹ See, e.g., Louis P. DiLorenzo, Civility and Professionalism, 68 N.Y. St. B.J. 8, 8 (1992).
uncontroverted. However, little empirical research has been conducted to determine whether attorneys are indeed behaving less ethically than they were in the past or whether they are actually exhibiting an inappropriate level of unethical conduct now. Instead, empirical research to date has focused on the moral and ethical decisionmaking styles of attorneys. Moreover, the results of these studies often have been inconsistent. Some studies find that the moral development of attorneys differs from that of the general population, while other studies find few significant differences.

This Article reviews existing research on the moral and ethical decisionmaking processes of attorneys and of mental health professionals.
and then presents the results of an original empirical study of the professional ethical decisionmaking processes of attorneys.\textsuperscript{8} The results will be compared to the results of similar studies on mental health professionals and then will be interpreted more generally.

In contrast to past research involving ethical decisionmaking by mental health professionals,\textsuperscript{9} the instant study found that attorneys appear to approach ethical decisionmaking on a case-by-case basis.\textsuperscript{10} What attorneys reported they should or would do when faced with a particular professional ethical dilemma, and the reasons for these decisions, varied according to the particular situation presented.\textsuperscript{11} Lawyers' ethical decisionmaking thus appears to differ somewhat from that of psychologists and other mental health professionals.\textsuperscript{12}

In contrast to some past research on the moral decisionmaking styles of attorneys,\textsuperscript{13} the instant study found that attorneys did not rely on laws, rules, and regulations as the reasons for their decisions more often than they relied on other rationales.\textsuperscript{14} Instead, the rationales chosen for their decisions also varied depending on the situation.\textsuperscript{15} This study suggests that lawyers' professional ethical decisionmaking may not be as homogeneous, conventional, or rule-based as some previous studies suggest.\textsuperscript{16}

Finally, in direct opposition to past research with mental health professionals,\textsuperscript{17} what attorneys reported they should do in each situation was not more conservative or ethical than what they reported they would do in that situation.\textsuperscript{18} They often reported they would do "more" than they believe they should.\textsuperscript{19} This may suggest that attorneys interpret should as determining the minimum standard of care in ethical dilemmas rather than the maximum standard or aspirational ideal.\textsuperscript{20} Indeed, overall the results of the instant study suggest that attorneys may view

\textsuperscript{8} This study was motivated in part by a desire to investigate whether empirical evidence could be gathered to support or controvert the perception of widespread unethical behavior among lawyers, and in part by a desire to determine whether attorneys reason differently than do non-lawyers.

\textsuperscript{9} See infra text accompanying notes 182-90.

\textsuperscript{10} See infra pt. IV.C.2.

\textsuperscript{11} Id.

\textsuperscript{12} See infra pt. IV.B.3.

\textsuperscript{13} See infra text accompanying notes 67-74, 131-42, 146-52.

\textsuperscript{14} See infra pt. III.D.3.

\textsuperscript{15} Id.

\textsuperscript{16} See infra pt. IV.C.

\textsuperscript{17} See infra text accompanying notes 191-96.

\textsuperscript{18} See infra pt. IV.D.

\textsuperscript{19} See infra pt. III.D.4.

\textsuperscript{20} See infra pt. IV.D.1.
the legal code of ethics as the minimum acceptable behavior, rather than as an ideal.\textsuperscript{21} This suggestion provides support for the argument that lawyers' ethics codes fail to promote professionalism adequately because they only outline what should not be done and fail to state what constitutes the most ethical, professional, or desirable behavior.\textsuperscript{22}

II. EXISTING RESEARCH

Existing empirical research on the moral and ethical development and decisionmaking processes of attorneys is somewhat inconsistent. Some studies suggest that attorneys make moral and ethical decisions differently than the general population.\textsuperscript{23} Other studies suggest that there are no great differences between attorneys and the general population with respect to moral development.\textsuperscript{24} Because the number of female law students has significantly increased in recent years,\textsuperscript{25} gender differences may be responsible in part for some of the inconsistency, as there is evidence that women's and men's moral reasoning styles may differ.\textsuperscript{26} Also, certain law school experiences appear to affect moral reasoning in different ways.\textsuperscript{27}

A. Moral and Ethical Decisionmaking by Attorneys

Perhaps in response to the perceived professionalism crisis, much of the empirical research on lawyers and law students since 1980 has investigated their moral development and moral reasoning styles.\textsuperscript{28}

\textsuperscript{21} Id.
\textsuperscript{22} Id.
\textsuperscript{23} See, e.g., Landwehr, supra note 6, at 50-51. If this is the case, then there may be a wide gap in understanding and a lack of shared morality between attorneys and the general public. This would explain in part why the public has such low confidence in lawyers and the legal profession and tends to view their actions at times as immoral and unethical.
\textsuperscript{24} See, e.g., Willging & Dunn, supra note 7, at 357-58.
\textsuperscript{25} See infra note 115 and accompanying text.
\textsuperscript{27} See infra text accompanying notes 98-145; see also Robert Stevens, Law Schools and Law Students, 59 VA. L. REV. 551, 593-97 (1973) (discussing the differences in focus at various law schools and how those focuses have changed over time).
\textsuperscript{28} Research prior to the 1980s typically focused on their demographic makeup or personality characteristics. See generally Susan Daicoff, Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism, 46 AM. U. L. REV. ___ (1997); Stevens, supra note 27 (reviewing the empirical research on attorneys and law students).
Several of these studies have relied primarily on Lawrence Kohlberg’s stage theory of moral development.29

1. Kohlberg’s Theory of Moral Development

Lawrence Kohlberg developed a theory which posits that individuals’ moral development progresses through stages, as the individual matures.30 Based on Jean Piaget’s stage theory of general development, Kohlberg proposed six stages of moral reasoning, through which individuals are theorized to progress in a relatively invariant sequence from birth to maturity.31 Kohlberg suggested that progression through these stages normally occurs throughout life, moving from relatively immature to increasingly more complex and sophisticated levels of moral reasoning.32 However, not all individuals reach the same level of moral development.33 Most individuals do not reach Stage 6 but stop developing at Stage 3 or 4. Finally, moral development ends at various ages for different individuals.34

Kohlberg’s six-stage theory has been extensively studied and verified among children, adolescents, and adults in the United States as well as other countries.35 Kohlberg’s method for assessing a particular individual’s present stage of moral development involves presenting the individual with a hypothetical ethical dilemma, asking what he or she would do in the situation, and asking him or her to justify the choice of action.36 Under this method, an individual’s collective responses often reflect moral reasoning at more than one stage.37 However, the responses do generally cluster at one stage or another; thus, Kohlberg believes it is proper to characterize an individual as generally operating at one of the six stages of moral development.38

29. See infra text accompanying notes 29-66.
31. Id. at 14-15, 621-24.
32. Id. at 16-18.
33. See id. (stating that Stages 4, 5, and 6 are alternative types of mature response).
34. See id. at 55-59 (stating that Stage 4 is the dominant stage for most adults).
35. Id. at 387-94.
36. See id. 186-95 (discussing the methodology in assessing moral judgment developments).
37. See id. at 186-89 (discussing how to score a mixed stage response).
38. See id. at 172-80 (describing the moral stages).

Other researchers have developed more efficient, paper-and-pencil methods to assess an individual’s “Kohlbergian” stage of moral development. For example, James Rest has developed a multiple choice test, called the “Defining Issues Test” (DIT). See CENTER FOR THE STUDY OF ETHICAL DEVELOPMENT, GUIDE FOR THE DEFINING ISSUES TEST (Jan. 1993) (on file with James Rest at the Univ. of Minnesota) (citing numerous publications by James Rest regarding the DIT).
Kohlberg suggests that, before understanding the six stages, one should first understand the three moral levels. These are the preconventional, conventional, and postconventional. Preconventional is the “level of most children under 9, some adolescents, and many adolescent and adult criminal offenders.”\(^9\) This level includes Stages 1 and 2.\(^40\) Kohlberg refers to Stage 2 as “con-man ideology.”\(^41\) The conventional level is “the level of most adolescents and adults in our society and in other societies.”\(^42\) This level refers to “conforming to and upholding the rules and expectations and conventions of society or authority just because they are society’s rules, expectations, or conventions.”\(^43\) However, the rules have become internalized at the conventional level, while at the preconventional level, the rules are followed only because they are externally imposed and enforced.\(^44\) Conventional reasoning includes Stages 3 and 4.\(^45\) The postconventional level is “reached by a minority of adults” and then usually only after age 20.\(^46\) The postconventional individual “understands and basically accepts society’s rules, but acceptance of society’s rules is based on formulating and accepting the general moral principles that underlie these rules.”\(^47\) At this level, if the rules conflict with these general moral principles, the principles and not the rules are followed.\(^48\) The postconventional individual has “differentiated his or her self from the rules and expectations of others and defines his or her values in terms of self-chosen principles.”\(^49\)

Kohlberg’s six stages of moral development can be described as follows. At Stage 1, the Heteronomous Morality orientation, the physical consequences of an action determine its goodness or badness.\(^50\) One is motivated to avoid punishment because of the “superior power of authorities.”\(^51\) At Stage 2, the Individualism, Instrumental Purpose, and Exchange orientation, one’s own needs are paramount, yet others’ needs are recognized, so right is defined by what’s fair in an equal exchange,
deal or agreement (i.e., you scratch my back and I’ll scratch yours). At Stage 3, the *Mutual Interpersonal Expectations, Relationships, and Interpersonal Conformity* orientation, good behavior is that which has “good” motives, pleases or helps others, and is approved of by society. The individual conforms to stereotypes of nice, natural, or majority behavior. At Stage 4, the *Social System and Conscience (Law and Order)* orientation, laws, rules, and authority are upheld, the social order and system is maintained, and one’s fixed social obligations are fulfilled. At Stage 5, the *Social Contract or Utility and Individual Rights* orientation, law and rules are important, but the individual also is aware of the relative nature of personal values and rights. Thus, “[s]ome nonrelative values and rights like *life and liberty* . . . must be upheld in any society and regardless of majority opinion” or the law. These nonrelative values and rights may conflict with the law and the individual may find it difficult to integrate them. Stage 5 has been referred to as the official morality of the American government and the United States Constitution. At Stage 6, the *Universal Ethical Principles* orientation, correct behavior is defined by reference to abstract, universal, self-chosen ethical principles that transcend society’s laws. Laws are upheld only if they rest on such principles and do not conflict with them. Such principles include the concepts of “justice, the

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52. *Id.*
53. *Id.*
55. *Id.*
57. *Kohlberg, supra* note 30, at 175 tbl. 2.1.
58. *Id.*
60. *Kohlberg, supra* note 30, at 176 tbl. 2.1.
61. *Id.*
62. *Id.* This is sometimes described as the morality of Gandhi.
equality of human rights, and respect for the dignity of human beings as individual persons. 62

Although Kohlberg's stage theory has been frequently used in empirical studies of moral development, Kohlberg's theory is not without its critics. For example, Carol Gilligan has consistently asserted that Kohlberg's theory of moral development does not adequately describe women's moral development, and is thus gender-biased. 63 She believes, and has performed empirical research to demonstrate, that when Kohlberg's theory and methods are applied to women, they portray women as less morally developed than men. 64 Gilligan asserts that women's moral reasoning differs qualitatively from men's, and Kohlberg's theory and methods do not account for these qualitative differences. 65 As stated above, there is evidence that men and women, including male and female law students, make moral decisions different-

62. Id. at 176 tbl. 2.1.

In response to the famous "Heinz Dilemma," which asks whether a man should steal a drug to save his wife's life when he does not have enough money to buy it and the druggist is charging 10 times its cost and will not negotiate the price, individuals at the various stages could justify either stealing it or not stealing it. Id. at 640-43. However, their rationales for their various choices would vary depending on their moral development stage. Id. at 186-88. In this example, individuals at the various stages would:

Stage 1: Focus on the physical consequences of the act or the size of the theft;
Stage 2: Justify an act based on whether it serves the needs of the individuals involved;
Stage 3: Evaluate an act based on whether the actor's motives were nice, good, or altruistic or bad, mean, and selfish;
Stage 4: Decide that an act is always wrong if it violates the law; one must follow the rules or one's obligations;
Stage 5: Recognize that circumstances justify deviant acts, but do not make the acts right; the ends do not justify the means; and
Stage 6: Justify an act as "right" if it was done to follow general self-chosen principles, even if it violates a law. Nice or good motives are not important.

63. See KOHLBERG, supra note 30, at 338-60 (commenting on and replying to CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982)).

64. Id. at 341-42 (citing Carol Gilligan et al., Contributions of Women's Thinking to Developmental Theory: The Elimination of Sex Bias in Moral Development Theory and Research, Final Report to National Institute of Education (1982). Similar gender differences have been borne out in studies of law students as well. See Taber et al., supra note 26, at 1248-51; Janoff, supra note 26, at 224-26.

65. KOHLBERG, supra note 30, at 339-42.
ly, but the debate among Kohlberg and Gilligan, and others has not been settled.

2. The Moral Development of Law Students
   a. Stage of Moral Development of Law Students

   In 1974, Tapp and Levine investigated the moral stage of graduating law students.\textsuperscript{67} They used open-ended questions to elicit responses from students during a general discussion.\textsuperscript{68} They reported that law students' morality differed from that of college students, teachers, and prison inmates, in that it was consistently more "conventional" and focused on maintaining social order and conformity.\textsuperscript{69} The term "conventional" was used as a term of art to distinguish between Piagetian notions of conventional and postconventional thinking.\textsuperscript{70} Conventional thinking is described as the type of thinking that relies on formal rules and moral conventions approved by the majority within the culture.\textsuperscript{71} On the other hand, post-conventional thinking emphasizes overriding moral principles such as justice, fairness, equality, and social utility, rather than formal, societal rules.\textsuperscript{72} Kohlberg's Stages 5 and 6 are typically considered characteristic of postconventional thought, while conventional thought is associated with earlier, less developed stages such as Stages 3 and 4.\textsuperscript{73} Tapp and Levine concluded that the law students appeared to rely on formal rules and societal conventions more than other groups and may have exhibited a more homogeneous stage of moral development within the group than other groups.\textsuperscript{74}

   A different conclusion was reached in 1981, when Willging and Dunn used a different methodology to study law students.\textsuperscript{75} They

\textsuperscript{66. See id. at 349-60.}
\textsuperscript{67. June L. Tapp & Felice J. Levine, Legal Socialization: Strategies for an Ethical Legality, 27 STAN. L. REV. 1, 22 n.86 (1974). Subjects were graduating law students in Tapp's course in 1971. Id.}
\textsuperscript{68. Id. The responses were then scored by reference to a rating scale developed by them. Id.}
\textsuperscript{69. Id. at 27.}
\textsuperscript{70. See id. at 21-22.}
\textsuperscript{71. Steven Hartwell, Promoting Moral Development Through Experiential Teaching, 1 CLINICAL L. REV. 505, 508-11 (1995) (summarizing the Kohlbergian stages of moral development).}
\textsuperscript{72. Id.}
\textsuperscript{73. Willging & Dunn, supra note 7, at 314, 323.}
\textsuperscript{74. Tapp & Levine, supra note 67, at 30-31. The law students' morality did not appreciably change during law school, and the researchers concluded that "[p]rofessional legal education apparently exerts little influence in changing views of the purposes of law." Id. at 25.}
\textsuperscript{75. See Willging & Dunn, supra note 7, at 355.}
concluded that law students were not significantly more or less morally developed than students in other graduate schools. Willging and Dunn used Rest’s Defining Issues Test (DIT) to assess subjects’ Kohlbergian stage of moral development. The DIT is a paper and pencil test which presents dilemmas and asks the subject to choose a response—an action choice. The DIT then lists 12 arguments and asks the subject to rank them in order of importance to their decision. Each argument represents a moral stage of reasoning. The test then yields a single “P” score, which corresponds roughly to a Kohlbergian stage. Prior empirical studies with the DIT indicate that P scores tend to increase as the subjects mature, with a leveling-off of the scores after adults leave an academic environment. The DIT is a simpler method for assessing stages of moral development than Kohlberg’s original method, which involved a personal interview by a trained interviewer with each subject, written short essay answers, and a complicated scoring system for the subject’s responses.

Willging and Dunn found that the average P scores of entering law students were not significantly different from those of graduate students in other professional schools. The law students’ scores were clustered in Stages 4 and 5A, with relatively few scores at Stages 2 and 3 reasoning. Willging and Dunn apparently performed no statistical analysis to determine whether law students’ P scores differed significantly than other graduate students’ scores; they simply reported the average P scores for various groups and stated that “there does not appear to be much difference.” Although Willging and Dunn concluded that law

76. Id.
77. Id. at 346.
78. Id. at 322.
79. Id.
80. Id. at 322-23.
81. Id. at 348.
82. Id. at 322-23 (citing JAMES REST, DEFINING ISSUES TEST (1972); JAMES REST, MANUAL FOR SCORING THE DIT at 5-1 to 5-5 (1974)).
83. See Willging & Dunn, supra note 7, at 322 (citing LAWRENCE KOHLBERG, MORAL STAGES AND MORALIZATION: THE COGNITIVE DEVELOPMENTAL APPROACH IN MORAL DEVELOPMENT AND BEHAVIOR: THEORY, RESEARCH, AND SOCIAL ISSUES 41-46 (1976)) (comparing Kohlberg’s methodology with the DIT).
84. Willging & Dunn, supra note 7, at 356. Subjects were law students at the University of Toledo during Fall 1976 and Spring 1978. Id. at 345, 351.
85. See id. at 348-50 (comparing the standard scores for law students with “norms from an original sample”).
86. Id. at 350. Also, the P scores did not correlate with grade point average (undergraduate or law) or Law School Admissions Test scores, which indicates that moral development may be independent of abilities measured by these variables. Id. at 356-57. However, Willging and Dunn indicate that others, including Rest, have found correlations between P score and IQ, aptitude,
students' moral development did not differ from that of other graduate students, their results were still somewhat consistent with Tapp and Levine's because they found that law students' moral stage tends to cluster in a conventional, rule-based, Stage 4 or 5A, Law and Order orientation.

b. Effect of Law School on Law Students' Moral Development

Many observers believe that law school has a homogenizing influence on law students, in that their attitudes, beliefs, and reasoning styles tend to become more alike than different as a result of law school. Such a homogenization has not been consistently borne out by empirical studies. However, there is some empirical evidence suggesting that law school tends to promote homogeneous moral decisionmaking by law students; specifically, law school encourages a rights orientation rather than an ethic of care in making moral judgments.

Others have suggested that "law school, especially during the stress of the first year, induces a regression in social and personal values which might be reflected in a regression on moral development measures or at least [retarded] growth," as well as "a decline in ethics and emotional sensitivity." Although empirical evidence does not support this assertion entirely, certain attitudes do appear to change during law school. For example, law students may become more tolerant of ambiguity, more interested in small firm private practice, and less interested in pro bono or social reform work. There may be move-
ment towards increasingly ethical responses to professional ethical problem situations during law school as well.\textsuperscript{95} Other evidence suggests that some of these changes reverse once the student enters law practice.\textsuperscript{96} For example, in a 1969 study, responses to professional ethical problems by graduating law students were more ethical than the responses of practicing attorneys, indicating a regression in professional ethics during practice.\textsuperscript{97}

Studies of the effect of law school on law students' stage of moral development have resulted in conflicting findings. For example, Tapp and Levine in 1974 found that law students' moral reasoning did not appreciably change during law school.\textsuperscript{98} Willging and Dunn in 1981 also found no significant differences in law students' "P" scores on the DIT before and after their first year or before and after a comprehensive third-year course in ethics.\textsuperscript{99} However, when the "P" scores were converted to Kohlbergian stages, there was a trend after the first year for the frequency of Stage 5B to drop and Stage 5A to increase, suggesting a slight regression as a result of law school.\textsuperscript{100} This result is consistent with the hypothesis that law students operate at predominantly a conventional, Stage 4 or 5A of moral reasoning; however, the result also suggests that this conventional moral reasoning may be in part a result of law school.

Other studies conflict with these results. In 1995, Steven Hartwell repeatedly found dramatic and significant differences in the "P" scores of law students before and after professional responsibility courses.\textsuperscript{101} Hartwell concluded that professional responsibility courses were an

\textsuperscript{95} See Wagner P. Thielens, \textit{The Influence of the Law School Experience on the Professional Ethics of Law Students}, 21 J. LEGAL EDUC. 587, 590-91 (1969) (stating that many entering law students chose ethical responses and that this percentage did increase slightly during law school). Thielens considered a decision more "ethical" if it conformed to or was in accordance with the code or rules of professional responsibility for lawyers. \textit{Id.} at 588. Disappointedly, the number of unethical responses was substantial, indicating a disparity between professional ethical norms and their acceptance by law students. \textit{See id.} at 591. Also, this study compared law students to practicing attorneys, and found that the percentage of unethical responses of the lawyers (47.2\%) was higher than that of even first-year law students (45.6\%), suggesting a regression in ethics after graduation. \textit{Id.} tbl. 1. Third-year law students had the lowest percentage of unethical responses, at 39.2\%. \textit{Id.} at 592 tbl. 2.

\textsuperscript{96} See \textit{id.} at 598 (noting the substantial disparity in ethical responses between graduating law students and practitioners).

\textsuperscript{97} See \textit{id.} at 598-99 (stating that one of the reasons for a regression in ethical responses is probably due "to pressures [sic] from competitive older colleagues").

\textsuperscript{98} Tapp & Levine, \textit{supra} note 67, at 25-26.

\textsuperscript{99} Willging & Dunn, \textit{supra} note 7, at 348, 352-53.

\textsuperscript{100} \textit{Id.} at 349-50.

\textsuperscript{101} Hartwell, \textit{supra} note 71, at 524-27.
effective intervention technique that had a substantial positive effect on
the moral development of law students.\textsuperscript{102} Hartwell theorized that his
results differed from those of Willging and Dunn because their third-
year course was "teacher-centered," in which the teacher primarily
presents and dominates classroom material, while his courses were
"student-centered," in which the teacher primarily records and clarifies
student participation and where the students are seeking self-revelation
and self-knowledge rather than offering or defending opinions.\textsuperscript{103} He
suggested that moral development occurs when students engage in
"moral discourse," because they have a chance to step out of the role of
advocate and arguer and into the role of decisionmaker.\textsuperscript{104} However,
Hartwell's reasoning is not compelling because William Penn taught a
"teacher-centered" undergraduate ethics course that also produced a
significant increase in DIT scores among his students.\textsuperscript{105} Hartwell has
suggested that Penn's course was in fact less "teacher-centered" than
reported.\textsuperscript{106}

In 1994, Kurt Saunders and Linda Levine also found that law
school changed students in some ways.\textsuperscript{107} Saunders and Levine
performed a longitudinal study of eight law students designed to
describe what occurs when one is taught to "think like a lawyer."\textsuperscript{108}
By the second year of law school, these researchers identified four
effects, or themes, of law school: awareness of the difference between
law school and the real world, loss of idealism about the legal system
and lawyering, increase in tolerance of the role of interpretation and

\textsuperscript{102} Id. at 527-29. To further verify his results, he administered the DIT to students in five
other experientially taught clinic courses, before and after each course. Id. None of the mean
pre-course DIT scores differed significantly from the mean post-course scores for these five
courses. Id. at 528. Hartwell's results were independent of the manner in which the DIT was
administered and of whether Kohlberg's theory was presented in the course. Id. at 528 nn.77 &
80.

\textsuperscript{103} Id. at 533. Hartwell hypothesized that the critical feature of his courses was that the
students had an "opportunity to engage in truly 'moral discourse.'" Id. at 530.

\textsuperscript{104} Id. at 530-32.

\textsuperscript{105} William Y. Penn, Jr., Teaching Ethics—A Direct Approach, 19 J. MORAL EDUC. 124,

\textsuperscript{106} See Hartwell, supra note 71, at 534 (stating that "Penn's direct instruction [may have]
entailed a form of experiential work by the students, so that his course was less teacher-
centered").

\textsuperscript{107} Kurt M. Saunders & Linda Levine, Learning to Think Like a Lawyer, 29 U.S.F. L.

\textsuperscript{108} Id. They began by asking entering law students to illustrate their concept of the law
in a map or diagram and to describe what it means to think like a lawyer. Id. at 144. Eight of
the 94 entering students were re-interviewed about these ideas during their first year and once
in their second year. Id. at 155-80.
ambiguity, and description of problem-solving methods. However, they were unable to observe any student fully progress through the stages of any of the educational models of moral development, including Kohlberg's. Furthermore, they observed that the students did not appear to reason consistently at a particular level; for example, a student's reasoning might exhibit postconventional thought in one situation and conventional thought in another. Thus, their results suggest that, although law school does have an effect on law students' thinking, reasoning, and attitudes, it may not always change their stage of moral development in a measurable amount. Also, unlike the findings of previous researchers, their results suggest that law students do not uniformly use one stage of moral reasoning to solve problems. This may be in part due to demographic differences in the makeup of law student populations in the 1970s, 1980s, and 1990s. Since 1980, the number of women and minority law students has steadily increased. Female law students may not employ the same style of moral reasoning employed by male law students.

c. Gender Differences in Moral Reasoning Through Law School

An extensive survey was conducted of the entire population of law students enrolled in Stanford Law School (Stanford Study) as of 1986. This survey was designed to assess gender differences in a wide variety of areas. Unlike 1960s and 1970s studies of law

109. Id. at 175-76. The loss of idealism and increase in disillusionment and disenchantment with the legal system and lawyering occurred even after a summer clerkship experience. Id. at 176-77. These results are consistent with the increasing pragmatism and increasing cynicism about the legal profession found in law students by James M. Hedegard in 1979. See Hedegard, supra note 94, at 828-35.

110. Saunders & Levine, supra note 107, at 180. Saunders and Levine found that existing educational models of learning and development were ill-fitted to describe the changes they observed in the students, and reported that the short time frame involved in the study prevented them from observing such progression through the stages. Id. at 180-81.

111. Id. at 181-82 (discussing the shift in the ways law students think as they move through law school).

112. See id. at 181-82 (discussing the shift in the ways law students think as they move through law school).

113. See supra text accompanying notes 69 & 86.

114. Saunders & Levine, supra note 107, at 181.


116. See, e.g., Janoff, supra note 26, at 201-03 (stating that a care morality tends to assume "that others are different from oneself" while a right's morality tends to assume "others are the same as the self").

117. Taber et al., supra note 26, at 1232.

118. Id.
students, over forty-five percent of the sample was female. They found, among other things, support for Gilligan’s contention that the moral reasoning of men and women differ. When presented with legal hypothetical situations and asked to rate the importance of various facts to their decisions, women tended more frequently to rate contextual factors highly while men tended more frequently to rate abstract factors highly. Contextual factors are “factors based on relationships, care, and communication,” while abstract factors are “factors relating to rights, logic, and abstract justice.” The women’s emphasis on contextual factors is consistent with a style of moral reasoning referred to as an “ethic of care” or “distinct moral voice,” hypothesized to be characteristic of women, which typically emphasizes interpersonal concerns. However, not all contextual factors were important to the women surveyed, perhaps indicating a case-by-case analysis of each factor or a non-global approach to weighting the factors’ importance. The authors explain the results by reference to Gilligan’s idea that women’s morality focuses on people, which may have caused the differential weighting of different contextual factors, some of which were more people-oriented than others. Alternatively, they theorized that women students and graduates had been sufficiently socialized by legal training so that they no longer stereotypically considered all contextual factors or ignored all abstract factors. The authors also found, contrary to their expectations, that women were not less inclined to follow legal precedent than men. Perhaps this is due to the influence of legal training because such training tends to de-emphasize an ethic of care and rely instead on precedent.

Sandra Janoff in 1989 investigated the effects of law school on the moral reasoning of female and male law students in a study which

119. Id. at 1230.
120. Id. at 1249.
121. Id. These results were found to be somewhat consistent between two hypothetical situations presented to the students, one hypothetical involving media law and the other hypothetical involving the law of standing. Id. at 1249-51.
122. Id. at 1248.
123. Id. at 1250.
124. Id. at 1248.
125. Id. at 1227.
126. See id. at 1249-50 (discussing the possible reasons why with some contextual factors, the women’s results were the same as the men’s).
127. Id.
128. Id. at 1250. This latter idea is supported by later research by Sandra Janoff. See infra text accompanying notes 131-45 (summarizing Janoff’s research).
129. Taber et al., supra note 26, at 1250.
130. Id.
serves as an excellent continuation of the work of the Stanford Study. \(^{131}\) Janoff assessed the moral reasoning of law students enrolled in Temple University Law School when they first entered law school and again at the end of their first year. \(^{132}\) She was particularly interested in whether the gender differences posited by Gilligan, in response to Kohlberg's research on moral development, existed in her law student sample, and whether law school affected these gender differences. \(^{133}\) Janoff considered whether women's moral reasoning would more often reflect an ethic of care, meaning that women would tend to value interpersonal harmony, maintaining relationships, people's needs, and preventing harm. \(^{134}\) This approach resolves conflicts by asking what best maintains relationships, what each person needs, and how to avoid hurting oneself or another. \(^{135}\) In contrast, Janoff expected men's moral reasoning to more often reflect a "rights orientation," which focuses on rights, rules, standards, individuality, independence, justice, fairness, objectivity, accomplishments, ambitions, principles, personal beliefs, and freedom from others' influence. \(^{136}\) This approach resolves dilemmas by impartially weighing competing claims and assessing the relative weight of the positive and negative consequences of a decision. \(^{137}\)

Janoff found her expectations were generally fulfilled. At the beginning of law school, the majority of female law students studied displayed an ethic of care orientation, while significantly more male law students evidenced a rights orientation in moral reasoning. \(^{138}\) Furthermore, there was a significant decrease in the amount of care orientation and a significant increase in the amount of rights orientation exhibited by all of the law students from the beginning to the end of the first year of law school. \(^{139}\) Women's care orientation shifted significantly to a

\(^{131}\) Janoff, supra note 26, at 194-96.

\(^{132}\) Id. at 209.

\(^{133}\) Id. at 208-09.

\(^{134}\) Id. at 218-22.

\(^{135}\) Id. at 218-21.

\(^{136}\) Id. at 222-23.

\(^{137}\) Id. at 224.

\(^{138}\) Id. at 217-18, 222. The methods employed were a Sentence Completion Test compiled from the Washington University Sentence Completion Test, the Real-Life Moral Conflict and Choice Interview, and a demographic information questionnaire. Id. at 211-12. The Sentence Completion Test and Interview were coded and scored for a care orientation versus a rights orientation. Id. at 215. Resulting data were then statistically analyzed for significant differences. Id. at 215-16. While men displayed both orientations, they tended to favor rights orientations overall. Id. at 224. Janoff explains that the two orientations are not mutually exclusive and the same individual can express sentiments consistent with both orientations, but generally prefers one over the other. Id. at 233.

\(^{139}\) Id. at 226.
rights orientation during the first year of law school, but men's rights orientation did not significantly change. From these findings, Janoff concluded that law students, particularly women, submerge their orientation towards an ethic of care in order to "align with the rights assumptions of law school," and that law school tends to silence the voice of care. Further, she hypothesized that law schools' efforts to teach students to "think like a lawyer" were responsible for the shift from an ethic of care to a rights orientation because thinking like a lawyer means focusing on rights and placing oneself in an emotionally neutral state in order to be an advocate.

Therefore, some of the earlier studies of law students' moral development which found no change in moral reasoning during law school may conflict with later studies due to the influx of female students into law schools. Women may initially exhibit a different moral reasoning style than male students, but may be molded by law school into a more "masculine" approach. Moreover, more recent studies may reflect a less conventional, homogeneous approach to moral decisionmaking by law students simply as a result of this change in the makeup of the law student population. There is, however, still evidence that law students' moral reasoning is or becomes somewhat

140. Id. at 229-32.
141. Id. at 227. Janoff also concluded that law school "does not incorporate the relational side of human nature." Id. However, this may be due to law students' pre-existing tendency to ignore relationships and interpersonal concerns. There is an empirical finding that before they come to law school, law students prefer the decisionmaking style known as "Thinking" rather than "Feeling," as measured by the Myers-Briggs Type Indicator, more than does the general population. Vernellia R. Randall, The Myers-Briggs Type Indicator, First Year Law Students and Performance, 26 CUMB. L. REV. 63, 91 & n.138 (1995); see also Paul V. Miller, Personality Differences and Student Survival in Law School, 19 J. LEGAL EDUC. 460, 466 (1967) (finding that Thinking types drop out of law school at a lower rate than Feeling types); Lawrence R. Richard, Psychological Type and Job Satisfaction Among Practicing Lawyers in the United States 229-30 (1994) (stating that lawyers generally prefer Thinking over Feeling) (unpublished Ph.D. dissertation, Temple University). Thus, the fact that legal education ignores relationships and human issues may simply reflect characteristics of the individuals who make up the law schools. Richard suggests that preferences for Thinking are fixed personality traits rather than being situationally-induced attributes. See id. at 230-34 (discussing type theory); see also infra text accompanying notes 155-58. For an exhaustive discussion of personality characteristics of lawyers and law students, see generally Daicoff, supra note 28.
143. See, e.g., Tapp & Levine, supra note 67; Willging & Dunn, supra note 7. These studies may have included few women in their samples, due to the demographic makeup of law school in the 1970s and early 1980s.
144. See, e.g., Taber et al., supra note 28, at 1250; Janoff, supra note 28, at 228.
145. See, e.g., Saunders & Levine, supra note 107, at 181.
homogeneous and primarily conventional, in the Kohlbergian sense, by the end of law school.

3. The Moral Development of Lawyers
   a. Stage 4 Moral Reasoning Predominantly Used by Lawyers

In 1982, Lawrence Landwehr applied Kohlberg's theory of moral development and methodology in studying developmental moral stages of attorneys. He found that the responding attorneys were disproportionately "clustered" at one stage of moral development when compared with the distribution of the general population. The results of Landwehr's survey revealed that 90.3% of the responding lawyers were at Stage 4 and that negligible proportions were at Stage 5 (2.5%) or Stage 3 (7.2%).

These findings are in marked contrast to the distribution of adults that would normally be expected across the six stages. According to Landwehr, other studies have indicated a basic pattern of 30 to 50% of adults, including university graduates, in Stage 4. For example, in 1989 Diomedes Markoulis found that 61% of the university graduates he studied (secondary schoolteachers) operated at Stage 4, while 39% operated at Stage 5. Similarly, in a 1980 longitudinal study of undergraduates, almost all of whom received postgraduate degrees, Murphy and Gilligan found that approximately 65% were predominantly at Stage 4 and approximately 35% were predominantly at Stage 5. When compared, the results of these studies and Landwehr's results suggest that lawyers' moral reasoning is less developed and more homogeneous than that of other similarly-educated individuals.

146. Landwehr, supra note 6, at 44-46.
147. Id. at 45 (fig. one). Landwehr used Kohlberg's interview methodology and randomly chose practicing attorneys in California, Wisconsin, and New York to survey. Id. at 42-43. Landwehr obtained only 195 responses—a 21% return rate—but he noted that the responding lawyers did not differ from the nonresponding lawyers on any observable criterion, such as size of law firm. Id. at 43 n.7. Landwehr's study was likely done without the benefit of Willging and Dunn's findings, due to the timing of publication of their study. See Willging & Dunn, supra note 7, at 587.
148. Landwehr, supra note 6, at 44.
149. Id. at 44-46.
150. Id. at 44 & n.8.
152. John M. Murphy & Carol Gilligan, Moral Development in Late Adolescence and Adulthood, 23 HUM. DEV. 77, 88-90 (1980). At the end of the study, all but one subject had degrees beyond the baccalaureate. Id. at 84.
Landwehr’s findings suggest that lawyers make decisions primarily on the basis of rules, and generally do not make decisions in accordance with more universal, abstract ideas of right and wrong. In other words, lawyers can be expected to rely on logic, rationality, rules, and regulations, rather than on principles of interpersonal harmony or other values. This is consistent with a well-established empirical finding that lawyers and law students exhibit a personality style known as “Thinking” (rather than “Feeling”) much more than does the general population. Thinking and Feeling are two exclusive categories on the Myers-Briggs Type Indicator, a personality test based partially on Carl Jung’s theories of personality and widely used to assess individual differences. Thinking and Feeling both represent rational, valid decision-making methods. Both involve thought, and neither process is related to emotions. . . . Those who prefer to make decisions on the basis of Thinking prefer to come to closure in a logical, orderly manner. . . . They are excellent problemsolvers. They review the cause and effect of potential actions before deciding. Thinkers are often accused of being cold and

153. See Landwehr, supra note 6, at 46 (the majority of lawyers have a cognitive structure that permits careful scrutiny of whether someone is acting within the rule, but limit the ability to question the rules themselves).

154. Id.; see also supra text accompanying notes 136-37.

155. Randall, supra note 141, at 91 & n.138; Richard, supra note 141, at 229-30; see also Miller, supra note 141, at 465 (stating that a higher percentage of law students were Thinkers when compared to undergraduates); Frank L. Natter, The Human Factor: Psychological Type in Legal Education, 3 RES. IN PSYCHOL. TYPE 55, 61-63 (1981) (stating that in general law students prefer thinking over feeling). It is also consistent with Janoff’s “rights orientation.” See Janoff, supra note 26, at 223 (stating that rights-oriented people tend to stress objectivity and fairness). For a more exhaustive review of lawyer characteristics, see Daicoff, supra note 28.

156. The Myers-Briggs Type Indicator assesses individuals on four dimensions: Extraversion/Introversion; Intuiting/Sensing; Thinking/Feeling; and Judging/Perceiving. Randall, supra note 141, at 75-76. Attorneys tended to more often prefer: (1) Introversion; (2) Intuiting; (3) Thinking; and (4) Judging. Richard, supra note 141, at 230. Lawyers differ from the general population in that the majority of lawyers prefers Introversion and Intuition, while the majority of adults prefers Extraversion and Sensing. Id. Additionally, lawyers disproportionately prefer Thinking and Judging (as opposed to Feeling and Perceiving) compared to most people. Id. Specifically: (1) about 65% of the general population prefer Extraversion, while 57% of lawyers prefer Introversion; (2) about 69% of the general population prefer Sensing, while 56% of lawyers prefer Intuiting; (3) about 61% of all men and 33% of women in the general population prefer Thinking, while 81% of male lawyers and 66% of female lawyers prefer Thinking; and (4) about 55% of the general population prefer Judging, while 63% of lawyers prefer Judging. Richard, supra note 141, at 230. Similar results are also consistently found with law students. See Randall, supra note 141, at 79-80, 86-87; Miller, supra note 141, at 464-66.
somewhat calculating because their decisions do not reflect their own personal values. They focus on discovering truth, and they seek justice.

Those who prefer to make decisions on the basis of Feeling apply their own personal values to make choices. They seek harmony and, therefore, are sensitive to the effect of their decisions on others. ... They seek to do what is right for themselves and other people and are interested in mercy.\footnote{157}

Attorneys’ preference for the Thinking style in making decisions is arguably consistent with a Stage 4 rules and regulations orientation, which resolves moral dilemmas by reference to objective, rational analysis of the rules applicable to the problem, rather than by reference to feelings, needs, values, or interpersonal concerns arguably consistent with a Stage 3 or 5 orientation.\footnote{158} It is also consistent with Janoff’s rights orientation found in most male law students before starting law school and the majority of law students after the first year of law school.\footnote{159} Thus, Landwehr’s results can be interpreted as consistent with some of the studies involving the personality of attorneys and law students.

However, Landwehr’s results are inconsistent with Willging and Dunn’s assertion that law students’ moral reasoning does not appreciably differ from that of other groups.\footnote{160} One possible explanation for this inconsistency is that the Stage 4 lawyers were more likely to respond to Landwehr’s questionnaire. Landwehr argued, however, that Stage 4 individuals should feel no special duty to respond to a mailed questionnaire received from a stranger, because Stage 4 individuals would tend to respond only to those in authority.\footnote{161} Alternatively, his results may


158. See Landwehr, supra note 6, at 40 n.2 (referring to Stage 4 as the “law and order orientation”). If lawyers and the general population approach moral dilemmas as differently as Landwehr’s and Richard’s data suggest, it also may explain why laypersons are critical of lawyers. Id. at 44-46; Richard, supra note 141, at 229-30; see also supra text accompanying notes 54-56.

159. See Janoff, supra note 26, at 222, 233; supra text accompanying notes 85-88.

160. See Willging & Dunn, supra note 7, at 356; supra text accompanying notes 84-86.

161. Landwehr, supra note 6, at 44 n.9. Another explanation for his results is that the lawyers believed they should appear to rely on laws, rules, and authority because of their identities as attorneys, and responded in the way they thought they should. Thus, his results may reflect a social desirability response bias rather than a valid reflection of what these attorneys would actually do. However, the fact that this bias does not appear to be present in the studies involving law students (and that it does not appear to be present in the instant study) makes this
be unreliable due to a low response rate, or the studies may be incomparable due to the different methodologies used. His findings are consistent with Willging and Dunn's if Stage 5A responses in their study would have been scored as Stage 4 responses in his study, so that law students' cluster in Stages 4 and 5A corresponds to lawyers' clustering in Stage 4 under Landwehr's method. Alternatively, perhaps lawyers' moral development does crystallize at Stage 4, but only after graduation and entrance into practice. The latter possibility would posit a regression in moral stage and a homogenization of moral development in attorneys after graduation, a possibility which has not been investigated.

Additional research is needed to replicate or refute Landwehr's findings. Research also is needed to determine how the moral development of lawyers compares to law students and to the general population, particularly now that women make up such a large percentage of the legal profession. Although the attorney and law student studies do not unequivocally demonstrate that lawyers' moral reasoning differs from that of the general population, there is some evidence, corroborated by other studies of lawyers, that the decisionmaking style of lawyers is more homogeneous and more focused on objective, rational analysis of rights than is that of the general population.

b. The Relationship Between Moral Development and Moral Behavior

(i) Relationship of moral stage to moral behavior

Landwehr theorized that overt behavior is consistent with a person's stage of moral development and asserted that lawyers' behavior would therefore tend to follow law and order, to preserve the status quo, and to uphold existing laws. However, in 1983, Tsujimoto and Emmons found that, while a certain Kohlbergian moral stage was predictive of moral intentions, it predicted actual moral behavior much less reliably. After studying college students' moral stages, moral

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162. See Willging & Dunn, supra note 7, at 349, 354 (figs. 1 & 2).
163. See supra text accompanying notes 96-97.
164. See, e.g., Randall, supra note 141, at 91 & n.138; Richard, supra note 141, at 232-34; Miller, supra note 141, at 466.
165. Landwehr, supra note 6, at 48-51. This is consistent with Tapp and Levine's findings of "conventionality" in the moral reasoning of "fledgling law professionals." See Tapp & Levine, supra note 67, at 27 (finding that 67% reflected a conventional orientation); see also supra text accompanying notes 67-69.
166. See Richard N. Tsujimoto & Kathy A. Emmons, Predicting Moral Conduct:
intentions, and actions, Tsujimoto and Emmons found that the students did not always take the moral actions that they stated they intended to take.\textsuperscript{167} They concluded that moral stage is the major determinant of the intention to engage in moral conduct, but that other variables are important in determining whether intentions will translate into moral conduct.\textsuperscript{168} Thus, attorneys' stage of moral development may not necessarily accurately predict their moral behavior.

(ii) Relationship of self-reported behavior to actual behavior

Other researchers have found that lawyers' actual behavior often differs from what attorneys report they do in situations other than in resolving moral conflicts. For example, in 1985, Robert Meadow and Carrie Menkel-Meadow found that how legal services lawyers described their approach to cases differed from the lawyering tasks they actually performed, indicating a discrepancy between lawyers' perceptions of their work and their actual activities.\textsuperscript{169} In investigating legal services attorneys' perception of their autonomy from rules and regulations, Meadow and Menkel-Meadow compared attorneys' perceptions to the

\textit{Kohlberg's and Hogan's Theories}, 115 J. PSY. 241, 243-44 (1983) (theorizing instead that the ego strength of a person determined whether the conduct of that person would actually follow the person's moral intentions).

\textsuperscript{167} Id. at 242-44.

\textsuperscript{168} Id. at 243-44. Specifically, these researchers assessed the Kohlbergian moral stage of college students using Rest's DIT and also assessed the students based on another theory, Hogan's theory of moral development. \textit{Id.} at 242 (referencing R. Hogan, \textit{Moral Conduct and Moral Character: A Psychological Perspective}, 79 PSYCHOL. BULL. 217 (1973)). Then, they asked the students to volunteer to stuff envelopes for a charity and assessed moral behavior by whether or not the students who volunteered actually "showed up" for the envelope-stuffing. Tsujimoto & Emmons, \textit{supra} note 166, at 242. They found that Kohlberg's Stage 5A and Hogan's autonomy dimension correlated positively and significantly with showing up. \textit{Id.} at 243-44. They determined that combining Kohlberg's and Hogan's measures predicted showing up better than did either theory alone. \textit{Id.} However, they also interpreted their findings as supporting Krebs and Kohlberg's claim that "moral judgment stage is the major determinant of the intention to engage in moral conduct," but that "ego strength variables are important determinants of whether intentions are actually translated into moral conduct." \textit{Id.} at 243-44 (referencing R. Krebs & L. Kohlberg, \textit{Moral Judgment and Ego Controls As Determinants of Resistance to Cheating} (unpublished manuscript, Harvard University 1973)); see also Leonard J. Haas et al., \textit{Personal and Professional Characteristics as Factors in Psychologists' Ethical Decision Making}, 19 PROF. PSYCHOL. RES. & PRAC. 35, 39 (1988) (citing A. Blasi, \textit{Bridging Moral Cognition and Moral Action: A Critical Review of the Literature}, 88 PSYCHOL. BULL. 1 (1980)) (noting the "nonequivalence of moral reasoning and moral behavior" on logical and empirical grounds).

lawyers’ timesheets which recorded their daily tasks. They found that attorneys often claimed that they worked hardest on the most interesting cases and that they maintained independence in their work. Yet, the attorneys’ timesheets revealed that they worked constantly on cases that were up against deadlines, indicating that they had less control over their work than they believed.

Similarly, Lawrence Galie in 1978 cited a study finding that civil commitment lawyers’ descriptions of their lawyering style often did not match their actual behavior. Civil commitment lawyers are lawyers who represent individuals recommended for involuntary psychiatric hospitalization. These lawyers are usually categorized as either adversary lawyers, meaning they vigorously represent their clients and actively oppose hospitalization, or best interest lawyers, meaning they personally weigh the available evidence and decide whether hospitalization is in the best interest of the client, and if it is, they tend to allow the client to be hospitalized at the hearing. This study surveyed approximately 100 attorneys and found that they were almost evenly divided in describing themselves as “adversary” or “best interest” attorneys. However, subsequent observation of civil commitment hearings in which these attorneys represented clients revealed that the overwhelming majority of these attorneys functioned as best interest lawyers in practice because they tended not to strenuously oppose their client’s commitment to a mental institution if they believed commitment was in the client’s best interests. Civil commitment lawyers are faced with an ethical dilemma, having to choose between their duty to vigorously represent their clients and their desire to act in the clients’

170. Id. at 402.
171. Id. at 408.
172. Id. at 407-09. They concluded that legal services attorneys do have some measure of autonomy, although it may not be over the types of tasks they think they have control over. Id. at 409-10. Instead, it may reside “in the highly personalized ways in which attorneys deliver their services[,] . . . not so much in what they perform or who their clients are, but how they choose to perform” their tasks. Id. at 411-12. Apparently, bureaucratic pressures and clients’ demands play a large role in determining what the lawyers actually do. Id. at 409-10.

173. Lawrence P. Galie, An Essay on the Civil Commitment Lawyer: Or How I Learned to Hate the Adversary System, 6 J. PSYCHIATRY & L. 71, 78 n.6 (1978) (citing a “forthcoming” 1978 publication by the University of Pittsburgh Law Review, at 40 U. PITT. L. REV. ___ (1978)). However, the study does not appear to have been published in volumes 39, 40, or 41 of that law review.

175. See id. at 76-77 (discussing the ethical dilemma between acting as adversary counsel and acting in the best interests of the client).
176. Id. at 78.
177. Id.
best interests. Galie’s discussion of attorneys’ behavior suggests that, in an ethical dilemma, lawyers would do something different from what they say they should do.

Research by Meadow and Menkel-Meadow and described by Galie indicates that what attorneys actually do is often different from what attorneys report they do. Thus, with respect to attorneys’ resolution of ethical dilemmas, what they actually would do might differ from what they say they would do.

B. Ethical Decisionmaking by Mental Health Professionals

1. Differences in What They Report They “Should” and “Would” Do

Ethical decisionmaking by mental health professionals has been fairly well-investigated, in contrast to that of lawyers, and thus may serve as a basis for comparison. Recent research regarding ethical decisionmaking by mental health professionals revealed that there is a consistent discrepancy between what psychologists and other mental health professionals report they should do and what they report they would do in hypothetical ethical dilemmas. Specifically, what they report they should do is consistently more restrictive ethically or requires more direct action than what they report they would do if actually faced with the situation.

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178. Id.

179. See id. at 76-77.

180. Galie, supra note 173, at 78; Meadow & Menkel-Meadow, supra note 169, at 407-09.

181. See supra text accompanying notes 169-77.

182. See, e.g., J.L. Bernard et al., The Failure of Clinical Psychologists to Apply Understood Ethical Principles, 18 PROF. PSYCHOL. RES. & PRAC. 489, 491 (1987) (stating that “significant numbers of clinical psychologists would not do as much as they said they ethically should”); J.L. Bernard & Carmen S. Jara, The Failure of Clinical Psychology Graduate Students to Apply Understood Ethical Principles, 17 PROF. PSYCHOL. RES. & PRAC. 313, 315 (1986) (finding that psychology graduate students would not always do as much as they said they should); Todd S. Smith et al., Clinical Ethical Decision Making: An Investigation of the Rationales Used to Justify Doing Less than One Believes One Should, 22 PROF. PSYCHOL. RES. & PRAC. 235, 238 (1991) (finding a “discrepancy between what clinicians know to be the [ethical] course of action . . . and their stated willingness to implement this [course of action]”); Margaret A. Wilkins et al., Willingness to Apply Understood Ethical Principles, 46 J. CLINICAL PSYCHOL. 539, 544 (1990) (“Clinicians indicated that they would be unwilling to follow through in response to [an] ethical violation to the same degree that they previously had indicated they should.”).

183. See Smith et al., supra note 182, at 238 (confirming the findings of previous researchers).
For example, in 1986, Bernard and Jara found that half of the clinical psychology graduate students they surveyed would not do as much as the students thought they should regarding a peer’s clear violation of an American Psychological Association ethical principle. In a 1987 study, Bernard and his colleagues found that 26% to 37% of practicing clinical psychologists would do less than they thought necessary regarding a colleague’s clear violation of an ethical principle. In both studies, only a minute percentage of the subjects reported that he or she would do more than he or she thought should be done. In 1990, Smith and his colleagues presented mental health professionals with a wide variety of professional ethical dilemmas, including, but not limited to a colleague’s misconduct. They found that mental health professionals’ “should” choices were more consistent with American Psychological Association principles than were their “would” choices. Finally, in 1990, Wilkins and her colleagues found...
that among clinical psychologists faced with an ethical violation by themselves or a close colleague, the "should" choices were significantly more restrictive and ethical on the average than were the "would" choices.\textsuperscript{189}

These studies did not investigate whether mental health professionals' actual behavior differed from what they said they should or would do in an ethical dilemma; rather, these studies consistently found that what mental health professionals said they should do was generally more ethical, direct, severe, or conservative than what they said they would do.\textsuperscript{190}

2. Studies of Their Rationales for Ethical Decisions

Researchers extended the foregoing research with mental health professionals by investigating the bases for ethical decisions made by mental health professionals. In 1988, Haas, Malouf, and Mayerson found that psychologists' more restrictive, more direct choices were more frequently based on codified reasons, such as upholding a law or an ethical code, while their less restrictive, less direct choices were based on noncodified reasons, such as personal standards or protecting society's and clients' interests.\textsuperscript{191} They described the codified-
noncodified dichotomy as representing "two fundamental aspects of fundamental reasoning; that is, one can make a decision to act in a particular way either because the rules indicate the correctness of this action or because one's own personal standards indicate this to be the correct response. . . ." They defined codified reasons as "based on written standards or laws" and noncodified reasons as "based on social ideals or personal standards." Consistent with this study, in 1991, Smith and his colleagues found that, when faced with hypothetical ethical dilemmas, mental health professionals' "should" choices were more restrictive and were more frequently based on codified reasons, while their "would" choices were less restrictive and were based on codified and noncodified reasons equally often. More restrictive, more ethical choices were more often based on upholding the law or a code of ethics, while less restrictive, less ethical choices were based on personal standards or other interests. This suggests that laws and ethics codes for mental health professionals provide a higher standard for conduct than do mental health professionals' personal values.

C. Hypotheses About Ethical Decisionmaking by Attorneys

Reasoning by analogy, previous research involving mental health professionals suggests several hypotheses with respect to attorneys. First,
if attorneys respond similarly to mental health professionals when presented with hypothetical professional ethical dilemmas, then attorneys' "should" choices are likely to be more restrictive and more frequently based on "codified" reasons than on "noncodified" reasons than are their "would" choices. Second, if Landwehr's results are true of lawyers in general, then all choices made by attorneys are likely to be more frequently justified by codified reasons than by noncodified reasons, due to attorneys' predominantly Law and Order orientation. The instant study was conceived to test these hypotheses.

This study investigated what attorneys say they should do and what they say they would do when faced with several hypothetical dilemmas involving ethical issues specific to the practice of law. This study also investigated the attorneys' reasons for those "should" and "would" choices. It was hypothesized that:

1. There would be a significant difference between the "should" solutions and the "would" solutions chosen by lawyers in response to ethical dilemmas, and that, on the average, their "should" choices would be significantly more restrictive or more ethical than their "would" choices. Attorneys were expected to report that they "would" do less than they report they "should" do in such situations.

2. Overall, lawyers' chosen solutions to ethical dilemmas would more frequently be based on codified rationales as opposed to noncodified rationales, consistent with Landwehr's finding that lawyers primarily rely on laws, rules, and regulations in decisionmaking.

3. Overall, the chosen solutions that were based on codified rationales would be more restrictive or more ethical than those based on noncodified rationales, consistent with the study conducted by Haas and his colleagues.

Replicating prior research on the ethical decisionmaking of mental health professionals, with attorneys as the subjects instead, seemed to be an interesting and feasible study. Further, given the current emphasis on professionalism and ethics in the legal profession, it appeared important and relevant to perform an empirical assessment of the ethical decisionmaking processes of attorneys. Finally, in contrast to previous empirical studies of attorneys and law students, adequate prior

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197. Landwehr, supra note 6, at 40 n.2, 50-51.
198. Tapp & Levine, supra note 67, at 21-22; see supra text accompanying notes 67-69.
199. See supra text accompanying notes 191-96.
200. See supra text accompanying notes 182-90.
201. See Landwehr, supra note 6, at 50-51.
202. Haas et al., supra note 191, at 40.
203. See supra text accompanying notes 1-4.
research had been done in the area, albeit with a different profession, so that the proposed study was more an extension of prior research than a de novo undertaking.\textsuperscript{204} This previous research served as an ample basis for comparison and provided a context in which to interpret the results, thus enabling assessment of whether lawyers differ from other populations rather than simple reporting of the results.

III. AN EMPIRICAL STUDY OF ETHICAL DECISIONMAKING BY ATTORNEYS

An empirical study was conceived and conducted, in which attorneys in Orange County, Florida were asked to complete an anonymous, multiple-choice questionnaire containing five professional ethical dilemmas. Each dilemma presented a professional ethical problem and offered several “action choices.” The questionnaire asked the attorneys to select one action choice and then asked them to choose the basis for their decision from four reasons. Two of the reasons were “codified” rationales (i.e., based on the ethics code or on the law), and two reasons were “noncodified” (i.e., based on personal values, intuition, or undetermined). Half of the attorneys received questionnaires asking them what they should do if faced with the situation in their law practice, while half received questionnaires asking what they would do. By this methodological design, the should/would discrepancy discovered in the research involving mental health professionals was investigated in a different way than it had been in the past. Prior research with mental health professionals asked in the same questionnaire what each subject would do versus what he or she should do.\textsuperscript{205} Thus, the subjects in prior situations were aware that there could be a difference between what they reported they should and would do. The attorneys were not alerted to this possibility.\textsuperscript{206}

\textsuperscript{204} See supra note 162 and accompanying text.
\textsuperscript{205} See, e.g., Bernard & Jara, \textit{supra} note 182, at 313-14.
\textsuperscript{206} Methodologically speaking, in the instant study the should/would variable was studied as a “between-subjects” variable, while in the previous mental health studies, it was studied as a “within-subjects” variable. The difference is that by alerting a subject to the potential for a should/would discrepancy, the subject may then expect one or think the researcher is looking for one. Thus, the researcher has artificially created one. A between-subjects design eliminates the possibility that the subject develops an expectation of such a discrepancy and thereby reports one; thus, any should/would discrepancy found using a between-subjects design arguably deserves more confidence due to this lack of expectancy or bias.
A. Subjects

Ethical dilemma questionnaires were initially mailed to a random sample of 250 members of the Orange County Bar Association in Orange County, Florida in 1991. Based on the response rate to this sampling, it was determined that questionnaires would be mailed to an additional random sample of 150 members of this bar association (for a total of 400 attorneys). The total membership of the Orange County Bar Association was approximately 1800; almost all of the practicing attorneys in Orange County belonged to this voluntary association.

B. Materials

Two different questionnaires were used, each presenting the same five hypothetical ethical dilemmas. One questionnaire asked the attorneys to choose, from several choices for action, what they should do in each case (the “should” questionnaire) and the other questionnaire asked them to choose from several choices what they would do in each case (the “would” questionnaire). Both questionnaires also asked the attorneys to choose, from four different rationales, the rationale that best described their reasons for making each action choice. The four rationales for the attorneys’ choices were separated into two categories; two were codified rationales, and two were noncodified rationales. Codified rationales were based on adherence to rules and regulations; for example, following the dictates of law or a provision of the Rules Regulating The Florida Bar (the legal code of ethics in effect in Florida at the time). Noncodified rationales were reasons for decisions based on concepts other than rules and regulations, such as personal values or standards, but also included “unable to identify a specific reason and/or intuition (i.e., it feels right).”

The ethical dilemmas chosen were based on reported disciplinary actions against attorneys, as well as on hypothetical ethical dilemmas presented in written and videotaped educational materials prepared by the American Bar Association. Because the dilemmas were based

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208. ABA Special Coord. Comm. on Professionalism, *Ethical Dilemmas and Professionalism: A Study for the Video Program* (1990) (available from the American Bar Association, Special Coordinating Committee on Professionalism, Center for Professional Responsibility, 541
on actual cases or on dilemmas deemed significant by the American Bar Association, they represented significant current legal ethical issues. The five dilemmas were: (a) referral (client's problem is outside the attorney's area of expertise), (b) conflict of interest (representation of former and present clients may create a conflict of interest), (c) disqualification and misuse of confidential information (attorney must decide whether to stop representing a client due to a conflict of interest or create a "Chinese Wall"), (d) dishonest client (on the day before trial, the attorney learns the client has been lying and may perjure himself), and (e) reporting a colleague's malfeasance (attorney must decide whether to report a former law partner's client neglect and ethical misconduct to the appropriate authorities). The full text of the "should" questionnaire can be found in Appendix A.

C. Design and Procedure

Each attorney received one questionnaire, along with a cover letter explaining the study and requesting participation. To maximize return rate, a one-dollar bill was included with each questionnaire.

Subjects were randomly divided into two groups; one-half of the attorneys received the "should" questionnaire and the other half received the "would" questionnaire. The questionnaires were completely anonymous and relatively brief, in order to maximize return rate.


209. Precise citations to those provisions of RULES REGULATING THE FLORIDA BAR, in FLA. B.J., Sept. 1996, at 564; MODEL CODE OF PROFESSIONAL RESPONSIBILITY; and MODEL RULES OF PROFESSIONAL CONDUCT, which each dilemma was designed to involve are found in Appendix B.

210. The "should" and "would" questionnaires were identical except that the word "should" was replaced with the word "would" and vice versa, thus, only one questionnaire has been provided in the Appendices.

211. This was done to avoid the low response rate in Landwehr's study. See Landwehr, supra note 6, at 43 (21% response rate). The methodological soundness of this procedure is supported by a 1990 study demonstrating a dramatic positive effect of financial compensation on response rate. A.Y. Williams, Survey Return Rate as a Function of Personalization of Cover Letters and Monetary Incentives (1990) (unpublished M. thesis, University of Central Florida (Orlando)).

212. As stated above, the should-would variable was studied between subjects, to eliminate any bias resulting from attorneys' expectancy that their should and would choices should differ or be the same. The should-would variable has been previously studied only as a within-subjects variable. The results of this between-subjects study may assist researchers in suggesting direction for further research to determine if the previously-found discrepancy between "should" and "would" choices is a result of the research methods or actually of the subjects' ethical decisionmaking processes.
Unbeknownst to the attorneys, numerical values ("restrictiveness ratings") were assigned to each choice for action provided on the questionnaire, with the highest value assigned to the choice which was most consistent with the Rules Regulating The Florida Bar and zero assigned to the ethical choice which was least consistent with these Rules. For example, if three choices were provided, a restrictiveness rating of two was assigned to the most ethical choice, a rating of one was assigned to the next most ethical choice, and a rating of zero was assigned to the least ethical choice. Choices which were equally restrictive or ethical were assigned the same restrictiveness rating (same value). An explanation of the restrictiveness ratings assigned to each action choice in each dilemma can be found in Appendix B.

D. Results

Of the 400 questionnaires mailed, 8.25% (33) were undeliverable. Of the 367 delivered questionnaires, 69.2% (254) were returned by the attorneys and 57.8% (212) were usable. Of the 212 usable questionnaires, 109 were "would" questionnaires, and 103 were "should" questionnaires. One hundred of the 254 responding attorneys, or 39.4% of those who responded at all, sent back the dollar bill. All data received were used in the data analyses, meaning that partially completed questionnaires were included, to the extent possible, in vignette-by-vignette analyses of the data.

1. Statistical Methods Used

In testing the first and third hypotheses of this study, two-way mixed analyses of variance were done for each vignette. It was necessary to perform these analyses of variance on a vignette-by-vignette basis because the ranges of values for the dependent variable varied across vignettes. For example, the ethical restrictiveness ratings of Vignette 1's four action choices ranged from 0 to 3 while the ratings of Vignette 2's two action choices ranged from 0 to 1. Therefore the

213. Of these 254 responses, 212 included completed or partially completed questionnaires (constituting a 57.8% usable response rate to the questionnaire), 33 returned blank questionnaires, and nine returned only the dollar bill included as a good will gesture, without the questionnaire. One subject returned the dollar bill and expressed the belief that the dollar bill was indeed the real focus of the study and that the questionnaire was a ruse.

214. The should versus would condition was the first independent variable (between subjects); codified versus noncodified rationales was the second independent variable (within subjects); and the ethical restrictiveness ratings of the action choices selected was the dependent variable.
restrictiveness ratings from the vignettes were incomparable and could not be combined.

2. Hypothesis 1: Were Should Choices More Ethical or Restrictive than Would Choices?

Results varied from vignette to vignette. There were no significant differences in the restrictiveness of the should and would action choices for Vignettes 1, 2, and 4, while the would choices were significantly more ethical or restrictive than the should choices for Vignettes 3 and 5. The results for Vignettes 3 and 5 thus were the exact opposite of the hypothesis. The attorneys indicated that what they would do in these two situations would be more ethical or restrictive than what they believed they should do.

3. Hypothesis 2: Did Lawyers Rely on Codified Rationales More Frequently than Noncodified Rationales?

Chi-square goodness of fit analyses for each vignette were used to determine the frequency with which codified versus noncodified rationales were chosen, for purposes of testing the second hypothesis of this study. Across all vignettes, there was no significant difference in the frequency with which codified rationales were chosen as compared to noncodified rationales. However, results again varied from vignette to vignette, suggesting a case-by-case approach to the dilemmas. Significant differences appeared for four of five vignettes when they were analyzed separately. For Vignettes 1 and 5, significantly more attorneys relied on noncodified rationales instead of codified rationales. For Vignettes 2 and 4, significantly more attorneys chose codified rationales than chose noncodified rationales. In Vignette 3, codified and noncodified rationales were chosen with exactly the same frequency.

Additional chi-square analyses of the four rationales chosen (identified as “A,” “B,” “C,” and “D” on the questionnaires, see Appendix A) revealed that rationales “B” (based on the Rules Regulating The Florida Bar) and “C” (based on personal values and/or

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215. $f = 496$ for both codified rationales and noncodified rationales.
216. Vignette 1: $f = 137$ for noncodified rationales and $f = 60$ for codified rationales, $\chi^2(1, N = 197) = 29.32$, $p = .000$. Vignette 5: $f = 114$ for noncodified rationales and $f = 82$ for codified rationales, $\chi^2(1, N = 196) = 4.90$, $p = .025$.
217. Vignette 2: $f = 128$ for codified rationales and $f = 70$ for noncodified rationales, $\chi^2(1, N = 198) = 16.41$, $p = .000$. Vignette 4: $f = 124$ for codified rationales versus $f = 73$ for noncodified rationales, $\chi^2(1, N = 197) = 12.69$, $p = .001$.
218. $f = 102$ each.
standards) were significantly more frequently chosen than rationales “A” (based on the law) and “D” (unable to identify a specific reason and/or intuition). Thus, attorneys based their decisions on the legal code of ethics applicable in Florida at the time (a codified reason) and on their personal values and standards (a noncodified reason) significantly more frequently than they based their decisions on the law and/or intuition or were unable to identify a specific reason.

4. Hypothesis 3: Were More Ethical or Restrictive Action Choices Typically Associated with Codified Rationales Rather than Noncodified Rationales?

Again, results varied from vignette to vignette. However, in three of the five vignettes, in sharp contrast to what was expected, attorneys’ choices based on noncodified rationales were more ethical or restrictive than were choices based on codified rationales. This result was the opposite of the hypothesis. In one vignette, there were no significant differences in ethical or restrictiveness ratings of choices based on codified versus noncodified reasons. Only in the last vignette did the predicted hypothesis operate, i.e., the choices based on codified rationales were more restrictive or more ethical than the choices based on noncodified rationales.

Specifically, for Vignette 1 (which involved taking a case outside one’s area of expertise), there was no significant difference in the restrictiveness ratings between the should and would groups of subjects. However, the action choices of the group of subjects who relied on noncodified rationales were significantly more restrictive than those of the group of subjects who relied on codified rationales. The interaction between the two independent variables was not significant for this vignette.

The results for Vignette 2 (involving a conflict of interest due to prior representation) were the same as the results for Vignette 1. There were no significant differences in the restrictiveness ratings of action choices between the should and would groups, but significantly

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219. B, f = 455; C, f = 415; A, f = 41; D, f = 81; A,B, χ²(1, N = 496) = 343.9, p = .000; A,C, χ²(1, N = 456) = 305.11, p = .000; B,D, χ²(1, N = 536) = 259.57, p = .000; C,D, χ²(1, N = 496) = 223.57; p = .000. “A” and “B” were codified rationales; “C” and “D” were noncodified rationales.

220. In addition, rationale “D” was significantly more frequently chosen than “A,” indicating that reliance on law was least frequently used (χ²(1, N = 122) = 12.47; p = .001).

221. F(1, 191) = .10, p = .75.

222. F(1, 191) = 30.29, p = .000.

223. F(1, 191) = 1.747, p = .188.

224. F(1, 192) = .017, p = .896.
more restrictive ratings were found in those relying on noncodified reasons as compared to those relying on codified rationales for their choices.225 Also, the interaction between the two independent variables for this vignette was not significant.226

The results for Vignette 3 (involving misuse of confidential information) were different than for the first two vignettes. The main effect of the should vs. would condition was significant,227 in that “would” choices were significantly more restrictive than “should” choices. The main effect of the codified vs. noncodified rationale condition was not significant,228 and the interaction was not significant.229

The results for Vignette 4 (involving possible perjury by a client at trial) paralleled those for Vignettes 1 and 2. There was no significant main effect for the should vs. would condition.230 However, the main effect of the codified vs. noncodified rationale condition was significant; the attorneys relying on noncodified rationales again chose significantly more restrictive action choices than those relying on codified rationales.231 The interaction between the two independent variables was not significant.232

For Vignette 5 (involving misconduct by a fellow lawyer), like Vignette 3, the main effect for the should vs. would condition was significant; “would” choices were significantly more restrictive than “should” choices.233 The main effect for the codified vs. noncodified rationale choices was also significant, but opposite of the results for Vignettes 1, 2, and 4, in that the action choices of attorneys relying on codified rationales were significantly more restrictive than those of attorneys relying on noncodified rationales.234 The interaction between the two independent variables was not significant.235

Table 1 sets forth the results by group (should vs. would), by rationale (codified vs. noncodified), and as totals for each of the five vignettes.

225. $F(1, 192) = 5.485, p = .02$.
226. $F(1, 192) = .782, p = .378$.
227. $F(1, 198) = 4.388, p = .037$.
228. $F(1, 198) = .130, p = .719$.
229. $F(1, 198) = .421, p = .517$.
230. $F(1, 193) = .146, p = .703$.
231. $F(1, 193) = 5.877, p = .016$.
232. $F(1, 193) = 1.595, p = .208$.
233. $F(1, 192) = 4.407, p = .037$.
234. $F(1, 192) = 8.98, p = .003$.
235. $F(1, 192) = 2.675, p = .104$. 
IV. ANALYSIS AND DISCUSSION OF RESULTS

A. Efficacy of the Method Used; Response Rate

The 69.2% response rate, with 57.8% usable responses, suggests that the questionnaires returned were a representative sample of the attorneys selected as subjects. This response rate may have been better than Landwehr's 21% response rate for a number of reasons. First, the dollar bill included as a good will gesture probably maximized the response rate, consistent with an unpublished 1990 study by Williams. Williams found that including a dollar bill with a mailed...
questionnaire raised the response rate from 23% to 47%. Second, the questionnaire in this study involved less time and effort than Landwehr's inquiry. Third, the attorneys in this study may have been more likely to respond to a study being conducted by a fellow attorney under the auspices of a local university. For purposes of future research, it is important to note that attorneys were responsive to the methods used in this study.

Only a few attorneys (9) mailed back the dollar only; one attorney noted that he suspected that the dollar was the subject of the study rather than the questionnaire. Thirty-nine percent of the responding attorneys also returned the dollar. In contrast to the popular caricature of attorneys as incorrigibly money-grubbing, many of the attorneys who participated in this study voluntarily returned the financial compensation. A more cynical view is that the money involved in this study simply was not enough to interest attorneys.

B. Should/Would Differences

The results with respect to the should/would variable did not support the hypothesis that what attorneys would do would be less ethical than what they should do. On the two vignettes (Vignettes 3 and 5) where there were significant differences between the restrictiveness of ethical choice ratings, the would choices were actually more ethical than the should choices. In addition, the would choices were more ethical than the should choices on all of the other three vignettes (Vignettes 1, 2, and 4), although the differences were not statistically significant. These findings support a tendency for would choices to be more ethical than should choices, which is the opposite of the predicted result and the opposite of findings concerning mental health professionals.

1. Artifact of the Study's Design

There are several possible reasons for the results discussed above. First, unlike all of the previous studies conducted in the

238. Id.
239. See Landwehr, supra note 6, at 42-43. Although Landwehr only used two hypothetical dilemmas, his questionnaire required written essay-style responses. Id.
240. "More ethical" means that the would choices had higher mean restrictiveness ratings (Vig. 3, M = 1.13; Vig. 5, M = 2.56) than the should choices (Vig. 3, M = 0.99; Vig. 5, M = 2.28). The would choices were more conservative, more restrictive ethically, and more consistent with the Rules Regulating The Florida Bar than were the should choices.
241. See supra text accompanying notes 182-90, 199-200.
242. However, it is unlikely that one of the reasons is a difference in response rates
mental health field, the should/would variable was studied as a between-subjects variable instead of as a within-subjects variable. It is possible that the should/would differences found in previous studies resulted simply from the design of the studies rather than from a true difference. Subjects in the previous studies may have reported what they should do as more restrictive or more ethical than what they would do based on an expectancy that their should and would choices should differ, because the questionnaires asked for both choices. This could be tested by repeating the previous studies in the mental health field using a between-subjects design, that is, half the subjects receiving a “should” questionnaire and half receiving a “would” questionnaire.

Another possibility is that the attorneys simply ignored the words “would” and “should” in the questionnaires and chose action choices and rationales without really considering the question. It is likely that the attorneys completed the questionnaires quickly in light of the fact that an attorney’s time is his or her stock in trade. However, this possibility is unlikely because there were significant differences in the ethical restrictiveness ratings of should versus would action choices for Vignettes 3 and 5, a trend which was also reflected in the results for Vignettes 1, 2, and 4, although the differences were not statistically significant in those vignettes.

2. “Should” Interpreted by Attorneys as the Minimum Standard of Care

Attorneys clearly indicated that they would do more than they felt they should do, in situations involving misuse of confidential information (Vignette 3) and misconduct of a fellow lawyer (Vignette 5). In all of the vignettes, more than one action choice provided was consistent with the Rules Regulating The Florida Bar (Florida Rules). In all except Vignette 2, at least one choice was inconsistent with the Florida Rules, while all of the other choices were partially or completely consistent with the Florida Rules. Thus, the attorneys could choose from more than one choice which complied with Florida’s ethics code. They may have interpreted “should” as asking for the minimum standard of care

between the instant study and the mental health professionals’ studies in which should choices were consistently more ethical than would choices. Although some of the studies had low response rates, others had relatively high response rates. See Bernard et al., supra note 182, at 490 (response rate of 50%); Bernard & Jara, supra note 182, at 314 (response rate of 68%); Smith et al., supra note 182, at 237 (response rate of 44%); Wilkins et al., supra note 182, at 541 (response rate of 34%). Instead, it is likely to have been the result of a difference in methodology (i.e., the variable being studied as a between-subjects variable instead of a within-subject variable) or an inherent difference between attorneys and mental health professionals.
required by the ethics code, and to reflect this minimum, chose the least restrictive of the several choices that complied with the code. Then, they may have chosen the more restrictive choices as their "would" choices to reflect that they would do more than the minimum required by the ethics code. If this is the case, then for at least Vignettes 3 and 5, the attorneys may have interpreted what they "should" do as the minimum required, and indicated that, in these two cases, they "would" do more than the minimum if faced with the dilemma. The trend, albeit statistically insignificant, noted for the other three vignettes suggests that this interpretation may be correct for those situations as well.

3. Possible Differences Between Lawyers and Mental Health Professionals

These findings are inconsistent with similar research involving mental health professionals. In several studies, mental health professionals indicated that in ethical dilemma situations they should do more than they would do. The inconsistency may be due to the subjects involved or differences in the goals of the legal code of ethics as compared to the American Psychological Association's (APA) ethical principles.

First, as described above, attorneys may have responded to this study's questionnaires differently than mental health professionals in the sense that they interpreted "should" as asking for the minimum standard of care. Alternatively, the results suggest that attorneys may be more likely to report only that they would behave more ethically or more conservatively than they believe they should, while mental health professionals may be more willing to report that they would behave less ethically than they believe they should. This would simply reflect a difference in willingness to admit doing less than one should, because lawyers may be more sensitive to and concerned about liability arising when one does less than one believes one should. This could be due

243. See supra text accompanying notes 182-90.
244. For example, if "should" was interpreted as referring to what the Rules Regulating The Florida Bar require, while "would" was interpreted as what the attorney reports he or she would do, then perhaps the attorneys wished to give the impression that they would do more than simply the minimum that is required by the Rules. Even though failure to abide by the legal code of ethics does not constitute malpractice per se in most jurisdictions, many attorneys still may be wary of admitting any conduct which is not exactly compliant with or more conservative than what the Rules require. See Charlotte Moses Fischman & Jeffrey Davis, The Lawyer as Civil Defendant: Recent Developments in the Law of Legal Malpractice, 403 PRAC. L. INST./LITIG. 609, 624-26 (1990) (stating "[t]he virtually unanimous position of state courts is that a violation of the ethical standards does not in and of itself give the client a cause of action in tort or establish per se liability" and discussing recent decisions to this effect). This cautious
to lawyers' sensitivity to potential malpractice liability or disciplinary action resulting from a failure to comply with the legal code of ethics. Mental health professionals may not be as focused on liability, because of the nature of their work and training.

Second, it is possible that "should" was interpreted as referring to the ethics code, and the APA’s ethical principles are interpreted by mental health professionals as providing the appropriate or ideal action to take in certain situations, while the legal code of ethics is interpreted by attorneys as providing the minimum standard of care in professional ethical dilemmas. This interpretation suggests that ethics codes function differently in different professions.

4. Implications for Actual Ethical Behavior

The should/would findings may be consistent with previous studies finding that what attorneys actually do is often different from what they report they do. The finding that what they report they would do is just as or more ethical than what they report they should do is consistent with lawyers’ (and other people’s) tendency to overestimate their actual behavior. Further, the findings may not provide insight into what attorneys actually would do, because of Tsujimoto and Emmons’ finding that, generally, actual moral behavior often differs from stated moral intentions and research described by Galie indicating that attorneys’ actual behavior did not match their descriptions of their lawyering style.

C. Reliance on Codified Versus Noncodified Rationales

The results did not support the hypothesis that attorneys would rely more frequently on codified reasons, such as rules, regulations, and law, when making ethical decisions and also did not support the proposition that lawyers have a predominantly “conventional” or Kohlbergian

conduct may reflect Fischman and Davis’ observation that “[a] significant number of courts have held that while violation of the ethics rules does not represent negligence per se, it does constitute some evidence of the attorney’s negligence.” Id. at 627-28. As a result of this holding, an attorney’s violation of the ethics code may lead to later admissibility of expert testimony about the attorney’s violation at a malpractice trial. Id.

245. See generally id. at 620-31 (describing various situations of attorney’s professional liability involving violations of ethics rules).

246. See supra text accompanying notes 169-77.

247. See supra text accompanying notes 166-68.

248. Tsujimoto & Emmons, supra note 166, at 243.

249. See Galie, supra note 173, at 78 (finding that civil commitment lawyers who claimed to prefer an adversary style of lawyering often actually acted in the best interest of their clients).

250. See supra text accompanying notes 152-56.
Stage 4 orientation. While codified rationales were not chosen more frequently overall than noncodified rationales, this appears to be a result of a strong interaction between specific vignettes and rationales. Thus, for Vignettes 2 and 4, codified rationales were chosen more frequently than noncodified rationales (consistent with expectations). Noncodified rationales were chosen more frequently for Vignettes 1 and 5. For Vignette 3, codified and noncodified rationales were chosen with equal frequency. This may have been due to the fact that some vignettes' situations are covered by the Rules Regulating The Florida Bar and others are not, so that in some of the vignettes, the code of ethics provided specific guidance for action while in others there was no code provision on point.

1. Possible Failure in Study's Design

One possible reason for these results is that the questionnaires used may not have adequately matched codified rationales to Kohlberg's Stage 4 or conventional moral reasoning. In other words, the study's questionnaires' simply may not have accurately measured or reflected lawyers' stage of moral development. Attorneys may have used a conventional, Stage 4 analysis to arrive at their choices and yet not have believed that they were relying on law, rules, and regulations to make their decisions. This uncertainty could possibly be resolved by replicating Landwehr's study or administering Rest's DIT to a random sample of practicing attorneys while ensuring that the response rate was similar to the 69.2% achieved in the instant study. Thus, further research is necessary to determine whether lawyers differ from the general population in their moral development.

251. See supra text accompanying notes 146-58.

252. See supra text accompanying note 201.

253. See generally infra app. B (discussing which provisions of the ethics code apply to each vignette).

254. Other reasons for the inconsistency with Landwehr's findings and conclusions may be that there was a flaw in Landwehr's study, such as the low response rate making an unrepresentative sample. See Landwehr, supra note 6, at 43-44.

255. This was the instrument used by Willging and Dunn in their study. Willging & Dunn, supra note 7, at 308.
2. Lawyers Exhibit Case-by-Case Decisionmaking Rather than a Stage 4 Rule-Based Orientation

In contrast to previous research by Tapp and Levine, Landwehr, and Janoff, the codified/noncodified results of the instant study may indicate that attorneys did not uniformly display a law and order, rule-based, conventional, Kohlbergian Stage 4 orientation. The results may be consistent with other research indicating that moral development of attorneys does not appreciably differ from that of the general population. Instead, rationales for attorneys' ethical decisions may depend primarily upon the situation. The results of the instant study support that research in this area has yielded inconsistent and conflicting results and that clarifying research needs to be done.

The results of this study can be interpreted as suggesting that the participating attorneys generally responded to ethical dilemmas involving their professional practice on a case-by-case basis. They may have determined what they would/should do and the reasons for those decisions differently depending on the situation presented. Instead of being predominantly rule-oriented, Stage 4 decisionmakers, lawyers may be as flexible in their approach to ethical dilemmas as are nonlawyers. Alternatively, because the dilemmas presented were not always covered by a particular provision of the Rules Regulating The Florida Bar, perhaps even the most rule-oriented attorney was forced to rely on noncodified reasons for his or her decisions. Finally, a less favorable explanation is that attorneys do different things in different situations, based on whether or not there will be externally enforced consequences for their actions.

3. Lawyers May Display Different Moral Reasoning in Personal vs. Professional Situations

Alternatively, the inconsistency with previous studies may represent a difference in lawyers' decisionmaking in a "real-life," personal dilemma, which Landwehr studied, versus a dilemma involving the

256. See supra text accompanying notes 67-74, 131-42, 146-52.
257. See, e.g., Saunders & Levine, supra note 107, at 181-82; Willging & Dunn, supra note 7, at 157-58.
258. See infra text accompanying notes 280-81.
259. In a Kohlbergian sense, this would be consistent with a Stage 1 morality. See supra text accompanying notes 50-51 (stating the Stage 1 morality is based on avoidance of externally enforced consequences). Although there may be some who would argue that lawyers are this "undeveloped" morally, most empirical studies suggest that attorneys' Kohlbergian stage of moral development is at least higher than Stage 1. See supra text accompanying notes 67-164.
260. See Landwehr, supra note 6, at 43 n.6.
attorney in a professional role and subject to a legal code of ethics, which was the focus of this study. It is possible that attorneys rely on rules and regulations more heavily in personal dilemmas, but they utilize rules and regulations and personal values and standards to different degrees, depending on the situation, in professional ethical dilemmas. This interpretation is consistent with findings of Saunders and Levine that law students did not appear to reason consistently at one level, but rather they might employ postconventional reasoning in one situation and conventional reasoning in another.261

4. Lawyers May Employ Different Moral Reasoning in Others' Dilemmas than in Their Own Dilemmas

Another possible interpretation is that attorneys operate almost exclusively at Stage 4 when considering others' ethical dilemmas, but operate in a less rigid manner when considering ethical dilemmas involving themselves. Kohlberg's Heinz dilemma, one of the vignettes used by Landwehr, asks the reader to determine what Heinz (a fictional person) should do and why.262 The ethical vignettes used in the instant study asked the reader what the reader would or should do and why. This distinction may provide another explanation for the difference in results between Landwehr's study and the instant study. If lawyers are typically asked by clients or others what the law is in a situation and what the right thing to do is under the law, then it makes sense that lawyers would tend to assess others' dilemmas according to this unspoken question, which is a Stage 4-type of inquiry. At the same time, lawyers may assess their own ethical dilemmas according to a more flexible inquiry (demonstrating Stages 3-6 reasoning), which could explain the variety of reasons for decisions reported by the attorneys in the instant study.

Thus, lawyers may be internally inconsistent. They may apply Stage 4 reasoning to others' problems and apply Stage 3, 4, 5, or 6 reasoning to their own dilemmas. If such an inconsistency exists in lawyers' bases for decisions, it would tend to highlight and support the existence of a personal dilemma for lawyers. One of the theorized reasons for attorney dissatisfaction is the personal struggle resulting from the need to think logically, "like a lawyer," at work and to be a human being at home.263 Similarly, the result of this study may explain

261. Saunders & Levine, supra note 107, at 181.
262. Landwehr, supra note 6, at 43 n.6.
263. Adrienne Drell, Chilling Out, A.B.A. J., Oct. 1994, at 70 (arguing that attorneys cannot turn it off at home and are overly aggressive and argumentative); see also Phil Nuernberger, From Gunfighter to Samurai: Bringing Life Quality to the Practice of Law, 66
why the public can be frustrated when interacting with attorneys and why it perceives that attorneys do not seem to talk or think like regular human beings do.

5. Lawyers May Employ Stage 4 Reasoning in Litigation Settings and Not in Office Settings

A vignette-by-vignette analysis yields results suggesting an even further distinction in lawyers’ approaches to ethical decisionmaking. In Vignettes 1 and 5, which deal with taking a case outside one’s area of expertise and a fellow lawyer’s misconduct, respectively, attorneys relied significantly more frequently on noncodified rationales. Thus, in these situations, attorneys’ decisions were more frequently based on personal values and standards than on what the law or ethics code requires. In Vignettes 2 and 4, which deal with conflict of interest with prior representation of a client and possible perjury by the client in a civil trial, respectively, attorneys relied significantly more frequently on codified rationales. This result suggests that in these situations, decisions were more frequently based on what the law or ethics code requires. Vignettes 2 and 4 both dealt with litigation. Perhaps attorneys considered these vignettes to be situations in which the attorney’s conduct would be more visible and, therefore, more likely to be subject to censure by other attorneys or by a member of the judiciary. Vignettes 1 and 5 may have been seen as situations more within the realm of attorneys’ good judgment in conducting their practice, rather than situations involving their role as officers of the court. Codified and noncodified rationales were equally frequently chosen in Vignette 3, a situation involving litigation and possible misuse of confidential information, and, therefore, neither supports nor refutes the above explanation for the results in the other vignettes.2

One possible conclusion of this analysis is that attorneys rely more frequently on rule-based, codified rationales such as the legal code of ethics in situations involving litigation, and rely more frequently on noncodified rationales such as personal values and standards in situations involving office practices that do not involve the courts. This

N.Y. St. B.J. 6 (1994). This theorized conflict is also consistent with Jack and Jack’s assertion that some women lawyers experience disequilibrium and struggle because they are unable to successfully resolve the conflict between having a caring, emotional personality and being a lawyer. Janoff, supra note 26, at 230 (citing RAND JACK & DANA C. JACK, MORAL VISIONS AND PROFESSIONAL DECISIONS: THE CHANGING VALUE OF WOMEN AND MEN LAWYERS 20, 130-55 (1988)). These women are believed to continually experience an unresolved and unsettling conflict between their private and professional personas. Id. at 230-31.

264. However, Vignette 3 is somewhat different from the others, in that there is no ethics rule directly addressing the fact situation presented in the vignette. See infra app. B.
is somewhat consistent with Smith and his colleagues’ findings that codified rationales were “legal” dilemmas while solutions to “nonlegal” dilemmas were equally frequently based on codified and noncodified reasons. Perhaps this result also fleshes out Landwehr’s findings; perhaps lawyers do tend to operate at a rule-based, Stage 4 orientation, but only when litigation is involved. Because the public often comes into contact with lawyers only via litigation, a layperson’s perception of lawyers may be degraded by the conflict between the person’s own feelings about the litigation and the lawyers’ rule-oriented approach in that setting.

6. Influx of Women Into the Profession
May Explain Results

Finally, the results of the instant study may be consistent with Landwehr’s 1982 study and with Tapp and Levine’s 1974 study if one considers the effect of the influx of women into the legal profession after 1980. Tapp and Levine studied graduating law students in 1971, and Landwehr studied practicing lawyers before 1982; thus their samples were likely to be predominantly (if not entirely) male. Both studies found predominantly conventional or Stage 4 moral reasoning in the subjects.

In contrast, the Stanford Study and Janoff found gender differences in the moral reasoning styles of law students; unlike male law students, female law students often did not display a rule-and-regulation, conventional, rights-, logic-, or justice-oriented style of moral reasoning. Thus, the inclusion of women in the sample, whose moral reasoning may differ from men’s, could explain why later studies have found no consistent stage of moral reasoning in lawyers and law students. For example, Saunders and Levine found this lack of

265. See supra note 194.
266. Landwehr, supra note 6, at 50.
267. The author has found this phenomenon to be supported by much anecdotal evidence gathered from laypersons. Laypersons tend to become frustrated with lawyers after they relate their tales of lawsuit woe to a lawyer, and then the lawyer responds with the statement, “But that’s the law.”
269. Landwehr, supra note 6, at 43 (may have been in 1978); Tapp & Levine, supra note 67, at 23 n.86.
270. Id.
271. Janoff, supra note 26, at 222; Taber et al., supra note 26, at 1249-51.
272. Even though some women appear to be molded by law school into the masculine
consistency in 1994 in the law students they studied, and the instant study (performed in 1991) also found no consistent, Stage 4 or conventional moral reasoning among practicing lawyers.

D. **Codified Rationales Were Not Associated with More Ethical Choices (Except for Colleague’s Misconduct)**

It was predicted that attorneys’ choices based on codified rationales would be more restrictive ethically than their choices based on noncodified rationales, consistent with Haas, et al.’s and Smith, et al.’s findings. However, this was true only in Vignette 5, dealing with reporting a fellow lawyer’s misconduct. For Vignettes 1, 2, and 4, the results were opposite the predicted hypothesis; that is, attorneys’ choices based on noncodified rationales were more ethical than choices based on codified rationales.

1. **Lawyers’ Ethics Codes Function as Minimums, Unlike Other Professionals’ Codes**

In Vignettes 1, 2, and 4, attorneys’ more restrictive and ethical choices appeared to come from their personal values and standards. In these situations, perhaps simply relying on laws and the Rules Regarding The Florida Bar would have resulted in a minimum standard of care. Thus, higher or more conservative choices resulted from reliance on personal values dictating a standard above and beyond what the Rules required. Vignette 3 may be distinguishable, since the Rules did not provide a clear answer as to the appropriate action to be taken in that situation. Vignette 5 also may represent a unique situation, as discussed below.

Again, these results suggest that, unlike mental health professionals, lawyers view ethics codes based on the Model Rules of Professional Conduct as a minimum standard for behavior rather than as reasoning style, some may retain their different orientation or revert back to that orientation once in practice. See supra text accompanying notes 117-45.

273. Saunders & Levine, supra note 107, at 181.
274. See Haas et al., supra note 191, at 40; Smith et al., supra note 182, at 237-38.
275. See infra app. B (a complete analysis of the rules applicable to each vignette, including Vignette 3).
276. The results of this study of lawyers were quite different from the results of several prior similar studies of psychologists and other mental health professionals. See supra text accompanying notes 182-96.
277. This assertion is limited to ethics codes such as Florida’s, which follow the Model Rules of Professional Conduct. Codes which follow the Model Code of Professional Responsibility may function somewhat differently, based on the different structure of the Model Code and the Model Rules.
an ideal towards which lawyers should strive. In articulating ideal behavior, it appears that attorneys look to their own personal values and standards instead. This empirical result indirectly suggests that such codes of ethics are insufficient and inadequate in assisting lawyers to identify ideal or optimal ethical behavior. It also undercuts the public perception of attorneys as unethical and seems inconsistent with recent concern about lawyers' "growing" lack of ethics.

In interpreting the empirical findings of this study, it may be important to note that the Rules Regulating The Florida Bar essentially follow the Model Rules of Professional Conduct, rather than the Model Code of Professional Responsibility. The Model Code provides minimums for action, in its "Disciplinary Rules," as well as aspirational goals for behavior, in its "Ethical Considerations." In contrast, the Model Rules provide only minimums for action, and then provide additional explanation in the Comments to the Rules. If Florida was using an ethics code based on the Model Code, then perhaps the responding attorneys could have viewed the rationale called "Based on what the Rules Regulating The Florida Bar provide or allow" as referring only to the Disciplinary Rules and not to the more aspirational

278. For example, Brent Dickson and Julia Jackson discuss individual case decisions and civility standards separate from ethics codes as two ways of increasing civil behavior by attorneys. Brent E. Dickson & Julia B. Jackson, Renewing Lawyer Civility, 28 VAL. U. L. REV. 531, 534 (1994). They explain that aspirational standards are needed above and beyond ethics codes. See id. at 541. As part of this discussion, they quote Justice Harold G. Clarke, who expresses the inadequacy of ethics codes, in discussing the work of the Georgia Supreme Court's Commission on Professionalism thus:

It seems to me that the spirit of the calling to the law practice needs to get more attention. We ought not to ignore the letter of the law and the letter of ethics, but we need also give attention to the spirit that's behind it, and maybe that is part of what professionalism is. Maybe once you've got slavish adherence to all the rules—the standards and the Code of Professional Responsibility—then the next thing is to not only adhere to them technically but to try to live up to the reasons behind them in a more philosophical way.

Id. at 534 (quoting SUPREME COURT OF GEORGIA, CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM 27 (1990)).


280. See generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

Ethical Considerations. However, Florida follows the Model Rules so the attorneys’ reliance on noncodified reasons for their more ethical choices does not appear to be an artifact of the structure of the ethics code in Florida.

2. Reliance on Rules and Regulations Only When Reporting Another’s Misconduct

In contrast, when dealing with reporting a fellow lawyer’s misconduct, undeniably an unpleasant task for any lawyer, the attorneys’ more restrictive choices were associated with codified rationales. This is consistent with the findings of Smith and his colleagues with respect to mental health professionals faced with reporting a colleague’s misconduct.282

It appears that, in this situation, if left to one’s personal values and standards, the choice might be less ethical and less conservative than if one followed what the law or legal code of ethics requires. It may be that it is easier for a lawyer to choose a more ethical and conservative choice in situations involving one’s own ethics than in situations involving policing a colleague’s actions. When carrying out an unpleasant task, like reporting a colleague’s misconduct, it may be easier to accept that the law or legal code of ethics requires some particular action than to justify taking action based on one’s own personal standards. This would explain why attorneys tended to rely on laws and codes in justifying their more ethical, conservative choices only in Vignette 5.

Apparently, lawyers view reporting a colleague’s misconduct as different from other professional ethical dilemmas involving only one’s own potential misconduct.283 It is likely that this dilemma evokes different responses due to the unpleasantness of reporting a colleague, lawyers’ tendency to be protective of other lawyers,284 and the fact that another person besides the lawyer is involved.

282. See Smith et al., supra note 182, at 237. However, Smith and his colleagues also presented their subjects with a variety of ethical dilemmas and consistently found that more restrictive choices were associated with codified rationales for a variety of situations, id. at 237-38, unlike the lawyers in the instant study, who displayed this association only in Vignette 5.

283. Contrast this finding with the implication of the results of the study of Wilkins and his colleagues which found that mental health professionals say they would do less than they believe they should regarding a colleague’s misconduct as well as in dilemmas involving their own ethical conduct. Wilkins et al., supra note 182, at 540-42.

284. Don S. Anderson et al., Conservatism in Recruits to the Professions, 9 AUSTL. & N.Z. J. SOC. 42, 44 (1973) (finding that lawyers, engineers, and doctors become more protective of their professions during their professional training).
E. No Relationship Between Should/Would Choices and Codified/Noncodified Rationales

The lack of any significant relationship between should/would choices and codified/noncodified rationales in the statistical analyses (e.g., ANOVAs) for each vignette suggests that there was no relationship between choosing should or would action choices and different rationales. Alternatively, this finding could have been an artifact of the study's design, in that it simply reflects the result of testing the should/would variable as a between-subjects variable.

V. CONCLUSION

Ethical decisionmaking by attorneys as studied herein is a complex phenomenon and varies from situation to situation. It appears that attorneys approach ethical decisionmaking on a case-by-case basis. It seems that attorneys do not take a consistent or rigid approach to ethical decisionmaking; rather, they consider the facts of each situation, respond differently to different situations, and base their decisions on different rationales in different settings. This is consistent with the idea that lawyers are trained in law school to study law on a case-by-case basis. Although it appears that attorneys do approach ethical decisionmaking differently than do mental health professionals, they may not necessarily be rigid, conventional, or homogeneous in their ethical decisionmaking. Indeed, they may be no different from the general population. Finally, lawyers’ ethics codes seem to function as minimum standards for ethical behavior, while mental health professionals’ ethics codes may represent aspirational ideals for behavior. This distinction may indirectly support the criticism that existing legal ethics codes do not provide adequate guidance in establishing optimal behavior.

The results of this study indicate that accurate prediction of ethical decisionmaking behavior by attorneys is unlikely to be possible, due to the case-by-case approach of attorneys to their tasks. The public can be assured, however, that lawyers do seem to approach ethical decisionmaking carefully and with due consideration of the facts of each situation. Also, attorneys often report that they would do as much as or more than they think they should, while psychologists and other mental health professionals consistently have reported that they would do less than they think they should. Attorneys thus compare favorably to mental health professionals empirically, despite the public’s negative

285. See supra text accompanying notes 191-96.
286. See supra text accompanying notes 182-90.
perception of the integrity of lawyers and the legal system. Of course, further research is necessary to determine the extent to which attorneys' moral intentions translate into moral actions, in the context of professional ethical dilemmas. It is hoped that continued research in this area can enhance the public perception of attorneys and the integrity of their decisions in the practice of law.

287. See supra text accompanying notes 1-4.
APPENDIX A

Cover Letter and “Should” Questionnaire

August 26, 1991

Dear Attorney:

I am writing to request your participation in a research study of attorneys’ ethical decisionmaking. This research is part of my master’s thesis for the graduate clinical psychology program of the University of Central Florida, under the supervision of Dr. John M. McGuire, Professor of Psychology, University of Central Florida (407/823-2216). If you are interested in receiving a summary of the results of this study, when completed, please write or call Dr. McGuire at the above address and he will forward a copy to you. A copy of the full thesis will be available at the UCF library under my name.

Your participation will be completely anonymous and should only take a few moments—just circle your answers to the multiple choice questions on the attached questionnaire and mail it back to me with the prepaid return envelope which has been enclosed for your convenience. Although late questionnaires will be gladly accepted, please try to return the enclosed questionnaire by September 16, 1991.

As a lawyer, I realize how difficult it is to want to spend your nonbillable time on a project like this. Your participation in this study will not only allow me to graduate (!), but should add to research benefitting the legal profession. Please accept the enclosed dollar as a good will gesture for your taking the time to consider and hopefully respond to this project. While your participation in this research is entirely voluntary and you may choose not to participate or to refrain from answering any particular question, I hope that you will participate fully in this effort.

For any questions or comments, please contact me at the address below. Thank you for your participation—it is greatly appreciated.

Very truly yours,

Susan Daicoff, J.D., LL.M.
10151 University Boulevard Number 150
Orlando, Florida 32817-1904

(Please turn page over)
ETHICAL DILEMMA QUESTIONNAIRE

This questionnaire contains five vignettes presenting dilemmas involving legal ethical questions.

Read each one carefully and, based on the information given, choose ONE answer which best reflects what you think you SHOULD do in the situation. Then, from the four rationales at the bottom of each page, select ONE rationale which best fits your reason for your decision as to what you SHOULD do.

There is no reason to perform any legal or ethical research to answer this questionnaire, although you may do so if you wish. Thanks again for your kind participation.

Please answer all of the questions; do not leave any blank.

I. A client comes to see you for the first time. He has never hired a lawyer before. In the first interview, it is clear that the client’s legal problem is one which you consider to be outside your area of expertise. You have never handled a similar type of problem before. However, the legal issue is interesting and the client is clearly willing and able to pay all legal fees necessary to resolve the matter.

You SHOULD (circle your choice):

1. Accept him as a client only after discussing with him your level of experience with issues such as his, and you plan to educate yourself in that area of law.

2. Accept him as a client but engage an expert lawyer as your co-counsel on the case (one who’s expert in the client’s problem area). You will not be “fee-splitting,” you will perform all the necessary legal work on the case, enlisting the other lawyer’s help only with the special legal issues.

3. Accept him as a client and do not discuss your inexperience with him.
4. Not accept him as a client, but refer him to another lawyer who has more experience in the client’s problem area.

Rationale for your decision (circle your choice):
A. Based on what the law provides or allows.
B. Based on what the Rules Regulating The Florida Bar (the legal code of ethics) provide or allow.
C. Based on personal values and/or standards.
D. Unable to identify a specific reason and/or intuition (i.e., it feels right).

II. A woman who had been a longstanding client of yours came in with her second husband to discuss estate planning. Her husband discussed his finances with you only in a general way. You drafted wills for both of them, but only the wife executed her will, and you had no further contact with the husband. Thereafter, the woman files for divorce from her second husband and is represented by other counsel. In the course of the divorce proceedings, it is found that her second husband has been sexually molesting her daughter from her first marriage. Criminal proceedings against the husband are possible. She approaches you and asks you to represent her daughter in a civil suit against her estranged second husband.

You SHOULD (circle your choice):
1. Agree to represent the daughter in a civil suit against the second husband.
2. Refuse to represent the daughter in a civil suit against the second husband due to your prior representation of him in connection with his estate planning.

Rationale for your decision (circle your choice):
A. Based on what the law provides or allows.
B. Based on what the Rules Regulating The Florida Bar (the legal code of ethics) provide or allow.
C. Based on personal values and/or standards.

D. Unable to identify a specific reason and/or intuition (i.e., it feels right).

III. You belong to a 17-member law firm, and you represent the plaintiff in a civil case. During the pendency of the suit, the defendant’s attorney’s secretary leaves his employ and is hired by your firm’s office manager to work for another attorney in your firm. Because of this, the defendant’s attorney is seeking your disqualification from representing the plaintiff in the civil case. The secretary was directly and substantially involved in the case while she worked for defense counsel. You were unaware that she was being hired by your firm.

You SHOULD (circle your choice):

1. Continue to represent the plaintiff, but build a “Chinese Wall” around the defense counsel’s former secretary, meaning that you ensure that she is not involved in any way with the work done on the civil case.

2. Withdraw from representation of the plaintiff.

3. Continue to represent the plaintiff in the civil case. You do not solicit any information from the defense counsel’s former secretary about the case, but you do not feel it is necessary to take special action to isolate her from the work being done on the case.

Rationale for your decision (circle your choice):

A. Based on what the law provides or allows.

B. Based on what the Rules Regulating The Florida Bar (the legal code of ethics) provide or allow.

C. Based on personal values and/or standards.

D. Unable to identify a specific reason and/or intuition (i.e., it feels right).

IV. You represent the plaintiff in a civil case. On the night before the trial, your client asks you questions and makes comments which clearly lead you to believe that the client has lied to you and will continue to lie at trial. If what the client is hinting at is the truth, then the client has
a much weaker case. The client also lets you know that he intends to stick with his previous story at trial, which means he will perjure himself. When asked, the client denies that his statements are untrue, but you are unconvinced.

You SHOULD (circle your choice):

1. Withdraw from representation of the plaintiff immediately, even though it is the day of the trial.

2. Continue on with the trial and allow the plaintiff to testify, because he has denied to you that he is lying.

3. Ask for a continuance of the trial, giving a reason which does not breach confidentiality, such as: the fact that you have received “new evidence” and need more time to prepare your case. Then, let the client know that you will withdraw from representation if he does not stop lying.

Rationale for your decision (circle your choice):

A. Based on what the law provides or allows.

B. Based on what the Rules Regulating The Florida Bar (the legal code of ethics) provide or allow.

C. Based on personal values and/or standards.

D. Unable to identify a specific reason and/or intuition (i.e., it feels right).

V. You are a partner in a medium sized law firm. You learn that one of your former partners (while he was your partner) failed to file a suit within the limitations period, failed to tell the client of this “oversight,” then paid the client a sum of money and told the client that it was received in settlement from the putative defendant’s insurer.

You SHOULD (circle your choice):

1. Inform your former partner’s client of his actions, but do not report him to the grievance committee of The Florida Bar.
2. Report your partner to the grievance committee of The Florida Bar but do not report his actions to his client.

3. Report the actions of your former partner to both his client and to the grievance committee of The Florida Bar, without contacting your former partner.

4. Do nothing.

5. Talk to your former partner and urge him to “come clean” with the client (but you don’t report him to his client or to the Bar).

6. Talk to your former partner before you contact his client or the grievance committee of The Florida Bar, and give him the chance to tell his client and The Florida Bar of his actions before you do. If he does not do so, you inform the client and the grievance committee of The Florida Bar of his actions.

Rationale for your decision (circle your choice):

A. Based on what the law provides or allows.

B. Based on what the Rules Regulating The Florida Bar (the legal code of ethics) provide or allow.

C. Based on personal values and/or standards.

D. Unable to identify a specific reason and/or intuition (i.e., it feels right).
APPENDIX B

RATIONALES FOR ETHICAL RESTRICTIVENESS
RATINGS OF CHOICES

The five dilemmas are: (a) referral (client’s problem is outside the attorney’s area of expertise), (b) conflict of interest (representation of former and present clients may create a conflict of interest), (c) disqualification and misuse of confidential information (attorney must decide whether to stop representing a client due to a conflict of interest), (d) dishonest client (on the day before trial, the attorney learns the client has been lying and may perjure himself), and (e) reporting client neglect (attorney must decide whether to report a former law partner’s ethical misconduct to the appropriate authorities). The following is an explanation of the rationales behind the assignment of an ethical restrictiveness rating to each action choice in each of the five dilemmas.

Dilemma I:

1. **Rating: 1.** This is permissible under the legal code of ethics. A lawyer can take cases in areas in which she is not experienced if she ensures that she educates herself sufficiently so that the client is getting adequate representation. The lawyer also has informed the client so that the client can make an informed decision about hiring the lawyer.

288. See Rules Regulating The Florida Bar Rule 4-1.1 & cmt., in Fla. B.J., Sept. 1996, at 564 [hereinafter Florida Rules] (requiring that a lawyer provide competent representation to clients); Florida Rules ch. 4 pmbl. (“In all professional functions a lawyer should be competent, prompt, and diligent.”); Model Rules of Professional Conduct Rule 1.1 & cmt. 4 (1994) [hereinafter Model Rules] (stating that a lawyer may accept representation when through preparation that lawyer can reach the “requisite level of competence”); Model Code of Professional Responsibility EC 6-3 (1981) [hereinafter Model Code] (discussing failure to act competently); Model Code DR 6-101(A) (stating a lawyer should not handle a matter that he or she is not competent to handle). The Florida Bar has adopted, with some alterations, the Model Rules of Professional Conduct as its ethics code. See Florida Rules ch.4. Any distinctions between the two codes will be noted parenthetically.

289. See Florida Rules, supra note 288, Rule 4-1.4(b) (requiring that the client receive sufficient information to make an informed decision in a matter); Model Rules, supra note 288, Rule 1.4(b) (same); Model Code, supra note 288, EC 2-22 (stating that a lawyer should not bring in another lawyer unless the client consents); Model Code EC 7-8 (“A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.”).
2. Rating: 2. This is less restrictive than 4, but more conservative than 1. Because the lawyer has engaged expert help on the case, he is less likely to miss some important point of law due to his inexperience.\textsuperscript{290} It is important that he is not "fee-splitting"—taking a referral fee from the client for referring the client to the expert lawyer—which is unethical.\textsuperscript{291} However, this choice is not as safe as 4, where he has no responsibility for the case.\textsuperscript{292}

3. Rating: 0. This is the worst choice, because the lawyer does not inform the client. As a result, the client is not making an informed decision to hire the lawyer.\textsuperscript{293} Also, there is no statement in this choice that the lawyer will educate herself adequately in the area of law. Ethically, the lawyer has the responsibility to take steps to educate herself in the area of law in which she is hired to work.\textsuperscript{294}

\textsuperscript{290} See \textsc{Florida Rules, supra} note 288, Rule 4-1.1 cmt. ("Competent representation can also be provided through the association of a lawyer of established competence in the field in question."); \textsc{Model Rules, supra} note 288, 1.1 cmt. 2 (same); \textsc{Model Code, supra} note 288, EC 5-11 (stating that a lawyer’s "personal interests should not deter him from suggesting additional counsel be employed").

\textsuperscript{291} See \textsc{Florida Rules, supra} note 288, Rule 4-1.5(g) (permitting division of a fee between lawyers only (1) when the division is in proportion to the work done by each lawyer or (2) when the client consents to the division after being fully informed about the fee division and each lawyer “assumes legal responsibility for the representation and agrees to be available for consultation with the client”); \textsc{Model Rules, supra} note 288, Rule 1.5(e) (permitting division of a fee between lawyers only when the client is fully advised of the fee division and (1) the division is in proportion to the work done by each lawyer or (2) "by written agreement with the client each lawyer assumes joint responsibility for the representation"); \textsc{Model Code, supra} note 288, EC 2-22 (requiring that a fee division be in proportion to the services performed and if each lawyer assumes joint responsibility for the representation).

\textsuperscript{292} Division of a fee between lawyers usually results in both lawyers assuming responsibility for the representation of the client. See supra note 291 and accompanying text.

\textsuperscript{293} See supra note 289 and accompanying text.

\textsuperscript{294} See supra note 288. However, nothing in the Rules Regulating The Florida Bar nor the Model Rules of Professional Conduct requires that the lawyer disclose to the client that the lawyer is inexperienced. Also, the Model Code of Professional Responsibility does not require that the lawyer tell the client that he is inexperienced, but only suggests that the lawyer “may accept such employment if in good faith he expects to become qualified through study and investigation.” \textsc{Model Code, supra} note 288, EC 6-3. The lawyer must either seek training in the field or associate with another lawyer (in which case the lawyer must advise the client). See supra text accompanying notes 288-91. The statements of the lawyer to the client must be truthful and not misleading. See \textsc{Florida Rules, supra} note 288, Rule 4-7.1 ("A lawyer shall not make . . . a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer’s services."); \textsc{Model Rules, supra} note 288, Rule 7.1 (same). Otherwise, in theory, the lawyer may be subject to sanctions for misconduct if there is “dishonesty, fraud, deceit or misrepresentation.” \textsc{Florida Rules Rule 4-8.4(c); Model Rules Rule 8.4(c); see also Model Code DR 6-101 (forbidding a lawyer from handling a matter in “which he knows or should know that he is not competent to handle”).
4. Rating: 3. This is the most restrictive choice because it is the most conservative. The lawyer has no risk of malpractice due to handling a case in an area in which he is not skilled. Additionally, the lawyer avoids the appearance of impropriety by not subjecting the client to possibly poor or inadequate representation simply because the client is eager to pay.

Dilemma II:

Both Choice 1 and Choice 2 are permissible under the legal code of ethics. Because the lawyer limitedly represented the husband and received only general information about the husband’s finances, the lawyer’s prior representation of him has ended and is not inconsistent with this later lawsuit, the present representation does not create a conflict of interest. In regards to confidential information, because in the later lawsuit the lawyer would have access to the same type of financial information that the lawyer received in the prior representation—when the lawyer tried to collect a judgment—the lawyer would not be using confidential information against the husband in a later case. His financial information is only relevant to the later case in the sense of whether she can collect a judgment from him.

1. Rating: 0. This choice is permissible and ethical, although it is somewhat more risky than Choice 2.

295. See Florida Rules, supra note 288, Rule 4-1.16(a) (stating a lawyer must decline to represent a client if that representation violates the rule); Model Rules, supra note 288, Rule 1.16(a) (same); Model Code, supra note 288, EC 2-26 (stating that although legal services should be available to any person, a lawyer has the right to decline to represent a person); see also Florida Rules Rule 4-1.16(a) cmt. (“A lawyer should not accept representation in a matter unless it can be performed competently . . . .”); Model Rules Rule 1.16(a) cmt. 1 (same); Model Code EC 2-30 (“Employment should not be accepted by a lawyer when he is unable to render competent service . . . .”).

296. This dilemma was based on A.B.A. & B.N.A., LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT: ETHICS OPINION 1986-1990, at 901:4327 (citing Comm. on Ethics of the Md. Bar Ass’n, Formal Op. 89-61 (Sept. 21, 1989)).

297. See Florida Rules, supra note 288, Rule 4-1.9(a) (requiring that for a lawyer to be disqualified from representing the present client, the present matter must be the same or substantially related to the prior matter); Model Rules, supra note 288, Rule 1.9(a) (same); see also Model Code, supra note 288, EC 9-6 (stating that a lawyer should “strive to avoid not only professional impropriety but also the appearance of impropriety”).

298. See Florida Rules, supra note 288, Rule 4-1.9 cmt. (stating that a lawyer may use generally known information about a former client); Model Rules, supra note 288, Rule 1.9 cmt. 12 (same).

299. See Florida Rules, supra note 288, Rule 4-1.9 cmt. (stating that information obtained during the representation of a client may not later be used against that client); Model...
2. Rating: 1. This choice is the more restrictive choice because the lawyer is taking no risks of having a conflict of interest, being charged with a conflict of interest, or having a conflict of interest arise sometime during the sexual abuse litigation. One example of a risk that the lawyer could face is if the husband later lies about or attempts to conceal his assets, the lawyer could face a confidentiality problem if that lawyer attempts to find those assets.

Dilemma III:

1. Rating: 1. This choice is possibly permissible, ethically, but involves more risk than Choice 2 because the attorney is responsible for keeping the secretary totally isolated from the case and must ensure that she does not reveal any information inadvertently to anyone that could circle back to the attorney or his secretary. The size of the law firm

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300. See supra note 297 and accompanying text.

301. See FLORIDA RULES Rule 1.6(a) & cmt. (stating that "a lawyer shall not reveal information relating to representation of a client" and that the confidentiality must be maintained even for former clients); MODEL RULES 1.6(a) & cmt. 21 (same); MODEL CODE, supra note 288, EC 4-6 ("The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment."); MODEL CODE DR 4-101(A) (stating a lawyer must not only keep confidential matters protected by the attorney-client privilege, but also "other information gained in the professional relationship" between the lawyer and the client).

302. Nothing in the Rules Regulating The Florida Bar, the Model Rules of Professional Conduct, or the Model Code of Professional Responsibility is exactly on point. These ethical codes only to lawyers and not to secretaries. See FLORIDA RULES, supra note 288, Rule 4-1.10(b) (stating that a firm may not represent a client if any of the lawyers in that firm could not represent that client); MODEL RULES, supra note 288, Rule 1.10(b) (same); MODEL CODE, supra note 288, DR 5-105(D) (stating that if a lawyer is not allowed to represent a client, then none of his partners or associates may represent that client). Only with a strained reading do the rules regarding nonlawyer assistants apply because these rules primarily deal with the present conduct of the assistant. See FLORIDA RULES Rule 4-5.3(c) (stating that the conduct of a nonlawyer assistant will be imputed to a lawyer only if the conduct violates the rules and either (1) the lawyer orders or ratifies the conduct or (2) the lawyer is a partner in the law firm or has direct supervisory authority over the assistant); MODEL RULES Rule 5.3(c) (same); but see MODEL CODE DR 4-101(D) (stating a lawyer should prevent his employees from disclosing or using the confidences and secrets of a client). Another potential problem that the lawyer may
matters; he could not build an adequate Chinese Wall if his firm was tiny (e.g., three lawyers) but would be easier to maintain in a larger firm. Although this choice may be unethical in many cases, because of the size of the firm, this choice is in the gray area.\textsuperscript{303}

2. \textit{Rating}: 2. Withdrawing is the most restrictive choice, even though Choice 1 may be permissible under the code of legal ethics. Withdrawing is also consistent with the ethical code, but involves less risk of malpractice or ethical violation or of having the Chinese Wall be faulty.\textsuperscript{304} Attorneys are bound to avoid even the appearance of impropriety and the Chinese Wall with continuing representation has elements of possible impropriety or the air of impropriety.\textsuperscript{305} One case found that, because the lawyer should avoid even the appearance of impropriety, building a Chinese Wall is not appropriate or practical in such a situation, thus withdrawal is appropriate.\textsuperscript{306}

3. \textit{Rating}: 0. This is the least ethical, because the lawyer is taking no precautions to not use, in the lawyer's representation of the plaintiff, privileged information the secretary received as the employee of the defense counsel. He could easily acquire privileged information from the secretary and use it against the defendant, which may be unethical.\textsuperscript{307}

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\textsuperscript{303} See FLORIDA RULES, supra note 288, Rule 1.9 cmt. 7 ("Preserving confidentiality is a question of access to information."). However, creating a Chinese Wall is probably not a good idea because it may be impractical or even impossible to build an adequate Chinese Wall.

\textsuperscript{304} See supra text accompanying notes 302-03.

\textsuperscript{305} See supra note 302.


\textsuperscript{307} See supra notes 302-03 and accompanying text.
Dilemma IV.308

1. Rating: 0. This choice is conservative in the sense that the attorney is taking no risks by withdrawing representation, but she is also potentially prejudicing her client's case by withdrawing right before trial.309 The client will not receive adequate representation from another attorney that he hires on the day of the trial.

2. Rating: 1. This choice is arguably ethical because the attorney must have more than a reasonable belief that his client is lying—he must have actual knowledge of the deception or some corroborating evidence of the deception before he must mandatorily withdraw.310 However, this choice is risky and is not ideal because the lawyer has reason to believe the client will perjure himself at trial and should not rely on the fact that the client denies he is lying. He will be in trouble ethically if the client actually does perjure himself at trial and it is later discovered.311

308. This dilemma is based on a hypothetical found in educational materials prepared by the American Bar Association. A.B.A. SPECIAL COORD. COMM. ON PROFESSIONALISM, ABA ETHICAL DILEMMAS AND PROFESSIONALISM: A STUDY GUIDE FOR THE VIDEO PROGRAM (1990) (available from the A.B.A.: Center for Professional Responsibility, 541 North Fairbanks Court, Chicago, IL 60611-3314).

309. See FLORIDA RULES, supra note 288, Rule 4-1.16(d) (stating that when a lawyer withdraws from representation, the lawyer must take reasonable steps to protect the client's interests); MODEL RULES, supra note 288, Rule 1.16(d) (same); MODEL CODE, supra note 288, DR 2-110(A)(2) (stating a lawyer shall not withdraw until the lawyer has taken reasonable steps to insure the client is not prejudiced by the withdrawal). Additionally, a representative from The Florida Bar's Ethics Hotline said that withdrawing in such a manner is probably unethical. Telephone Interview with Timothy Chinaris of The Florida Bar's Ethics Hotline (June 19, 1991).

310. See FLORIDA RULES, supra note 288, Rule 4-1.16(a) to (b) (stating that the lawyer must withdraw if the lawyer knows "the representation will result in violation of the [r]ules;" otherwise the lawyer may withdraw only if "withdrawal can be accomplished without material adverse effect on the interests of the client"); MODEL RULES, supra note 288, Rule 1.16(a)-(b) (same); MODEL CODE, supra note 288, DR 2-110 (stating that as long as reasonable steps are taken to insure the client is not prejudiced, the lawyer must withdraw if "he knows or it is obvious that his continued employment will result in violation of a [d]isciplinary [r]ule" and may withdraw if the lawyer's "continued employment is likely to result in a violation of a [d]isciplinary [r]ule"); but see MODEL CODE DR 2-110(C)(1)(e) (stating that if a client is asking a lawyer to engage in conduct contrary to the judgment of the lawyer but not actually prohibited by the [d]isciplinary [r]ules, the lawyer may not withdraw if the matter is pending before a tribunal). Additionally, according to a representative of The Florida Bar's Ethics Hotline, such a withdrawal would be unethical under Florida case law. Telephone Interview with Timothy Chinaris of The Florida Bar's Ethics Hotline (June 19, 1991).

311. See FLORIDA RULES, supra note 288, Rule 4-3.3 (stating that a lawyer shall not evidence that he knows to be false and if the lawyer later discovers that material evidence the lawyer presented was false, then the lawyer must take remedial measures); MODEL RULES, supra
3. Rating: 2. This choice is the most ethical because the attorney is not prejudicing the client's case by withdrawing the day before trial and yet she is not collaborating in perjury. She is refusing to overlook the client's dishonesty, while still protecting his interests.\footnote{288, Rule 3.3 (same); \textit{MODEL CODE}, \textit{supra} note 288, DR 1-102 (stating that a lawyer shall not engage in conduct involving misrepresentation); \textit{MODEL CODE} DR 7-102(A)(3) (stating that a lawyer shall not conceal information that he required by law to disclose); \textit{MODEL CODE} DR 7-102(A)(4) (stating that a lawyer shall not offer perjured testimony or false evidence). The lawyer later could be faced with conflicting ethical obligations because the lawyer may be required to disclose the perjury of his client and be obligated to preserve the confidences of his client. \textit{See supra} note 299-300 and accompanying text (discussing client confidentiality); \textit{but see} \textit{MODEL CODE} EC 4-2 (stating that a lawyer may disclose client confidences when permitted by the disciplinary rules or required by law).}

Dilemma V:\footnote{299-300, Rule 3.3 (same); \textit{MODEL CODE}, \textit{supra} note 288, DR 1-102 (stating that a lawyer shall not engage in conduct involving misrepresentation); \textit{MODEL CODE} DR 7-102(A)(3) (stating that a lawyer shall not conceal information that he required by law to disclose); \textit{MODEL CODE} DR 7-102(A)(4) (stating that a lawyer shall not offer perjured testimony or false evidence). The lawyer later could be faced with conflicting ethical obligations because the lawyer may be required to disclose the perjury of his client and be obligated to preserve the confidences of his client. \textit{See supra} note 299-300 and accompanying text (discussing client confidentiality); \textit{but see} \textit{MODEL CODE} EC 4-2 (stating that a lawyer may disclose client confidences when permitted by the disciplinary rules or required by law).}

1. & 2. Rating: 1. These two choices are only half-ethical in that the attorney has only fulfilled half of his ethical responsibilities. Reporting only to the client or only to the bar association is each only half of the attorney’s duty—he is required to report to both.\footnote{See \textit{supra} notes 299-300, 309-11 and accompanying text.} Thus, these two are equally restrictive, but less restrictive than Choice 3 and Choice 6.


\textit{See further} \textit{FLORIDA RULES} Rule 4-1.4(a) ("A lawyer shall keep a client reasonably informed about the status of a matter . . . ."); \textit{MODEL RULES} Rule 1.4(a) (same); \textit{MODEL CODE} EC 9-2 (stating that a lawyer should inform a client of material developments).
3. Rating: 2. This choice fulfills the two ethical obligations to the client and to the bar association, so it is more ethical than Choices 1 and 2, but the attorney is not taking the most conservative route because she is not allowing the wrongdoing attorney to have a chance to “come clean.”

4. & 5. Rating: 0. These are equally rated because in neither case has the attorney fulfilled any of his ethical responsibilities. He has failed two ethical duties. Talking to his former partner is a nice idea, but is completely of no effect, because the former partner can simply ignore the attorney’s suggestions to “come clean.” Doing nothing is obviously similarly unethical and ineffective.

6. Rating: 3. This choice is the most ethical because the ethics code requires that the attorney report to both the client and the bar association. Contacting the wrongdoing lawyer is not required but is more conservative than not contacting him, so this is a more conservative choice than Choice 3.

315. See supra note 314 and accompanying text.

316. See MODEL CODE, supra note 288, EC 1-5 (stating a lawyer should encourage fellow lawyers to maintain high standards of ethical conduct).

317. See MODEL CODE, supra note 288, EC 1-4 (stating that the integrity of the profession can be maintained only if the misconduct of lawyers is reported); see also supra note 314 and accompanying text (stating that the lawyer is required to report his partner).

318. See supra note 314 and accompanying text.