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Learning Professionalism in Practice

Shelley M. Kierstead
Osgoode Hall Law School of York University, skierstead@osgoode.yorku.ca

Erika Abner

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Working Paper

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Abstract:
This paper describes exploratory research into learning professionalism, ethics and civility in the legal workplace. We begin by setting out the issue as described by scholars, regulators, insurers, courts, and practicing lawyers, then examine the literature on developing a professional identity through learning at work. We employed a focus group method to gather data on the issues that practicing lawyers experience during their working day, as well as how they learn to define, identify, and manage these professionalism and ethical issues.

Author(s):
Shelley M. Kierstead
Assistant Professor
Osgoode Hall Law School
York University, Toronto
E: skierstead@osgoode.yorku.ca

Erika Abner
Faculty Lead, Ethics and Professionalism
Faculty of Medicine
University of Toronto
E: Erika.abner@utoronto.ca

> After all these years, I still have a tough time some days figuring out what's right and wrong. Maybe that's part of being professional is that you're always worried about whether you're right or wrong. (Focus Group Participant)

PART I BACKGROUND AND INTRODUCTION

This paper describes exploratory research into learning professionalism, ethics and civility in the legal workplace. We begin by setting out the issue as described by scholars, regulators, insurers, courts, and practicing lawyers, then examine the literature on developing a professional identity through learning at work. We employed a focus group method to gather data on the issues that practicing lawyers experience during their working day, as well as how they learn to define, identify, and manage these professionalism and ethical issues. The level of support and generosity across the profession is a significant finding: "cold calls" to senior lawyers for assistance were important and valued sources of learning. As cited by Justice Goudge, in 1968 Arthur Martin (as he then was) noted:

> A magnificent tradition exits among the senior members of the bar of willingness to make their judgment and experience available to their

colleagues and especially to the younger members of the bar without regard to compensation.[2]

Part II of the paper is the literature review, addressing the background to the current concerns over professionalism and ethics in Ontario as well as the interrelation of professional identity and professionalism in practice. The distinctive curriculum of workplace learning, including the formal, informal, and hidden curriculum, is reviewed. Part III describes the method in more detail. Part IV describes the major findings from the focus groups, organized thematically in accordance with the analysis. Part V discusses the findings and conclusions regarding development of an ethical professional identity. We then offer our thoughts on how to improve learning in practice.

This paper recognizes but does not address important debates in the literature. We do not exhaustively define what it means to be a "good lawyer." We do not engage in the debate on whether it is possible to teach professionalism or ethics, again accepting that the scholarly work of Bebeau and Hamilton leads to the conclusion that some components of professionalism are teachable and all are learnable.[3] While we comment on teaching and learning in law school, our position is that learning in practice is profoundly different than learning in school; while scholars and practitioners agree on the signature pedagogy of law school we have only a modest understanding of the differing pedagogy of practice.[4] We accept that lifelong learning can be

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[2] Stephen Goudge, "Looking Back and Looking Forward on Learning in Professionalism" (2010) Canadian Legal Education Annual Review 109 at 113.

[3] See discussion below on development of professional identity.

[4] The concept of a signature pedagogy in professions education has been described in Lee Shulman, "Signature Pedagogies in the Professions" (2005) 134 Daedalus 52 at 54. Signature pedagogies "implicitly define what counts in a field and how things become known. They define how knowledge is analyzed, criticized, accepted, or discarded." MacKenzie describes, in part, the signature pedagogy of practice, noting that "[A]fter law school, education in lawyers' ethics proceeds almost entirely by example rather than precept. The process of osmosis whereby articling students and junior lawyers learn by observing more senior lawyers in practice influences ethical decisions significantly. The more apprentice-like is the training received by lawyers, the greater is the relative influence of more senior lawyers, compared to the influence

enhanced through formal continuing professional development requirements, with some residual skepticism about methods.

Finally, we recognize that our sample of convenience – 62 lawyers - is necessarily small in a province of over 21,000 lawyers.[5] We maintain, however, that the sample includes findings that allow the profession to begin to develop an understanding of the signature pedagogy of practice, and to design learning interventions that enhance professional development.

Professionalism: An Introduction

The starting point for this work rests with the concept of professionalism set out by the Chief Justice of Ontario Advisory Committee on Professionalism.[6] The Advisory Committee indicates that "professionalism as a personal characteristic is revealed in an attitude and approach to an occupation that is commonly characterized by intelligence, maturity and thoughtfulness."[7] Within its subsequent description of the building blocks of professionalism, the Advisory Committee refers to a "social contract" aspect of professionalism. This social contract has been described as encompassing the preconditions of professionalism required of a peer reviewed profession.[8] According to the Advisory Committee, the elements of professionalism may be summarized as follows: scholarship; integrity; honour; leadership;

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of law school, on their professional conduct." Gavin Mackenzie, *Lawyers and Ethics Professional Responsibility and Discipline* (Carswell 1999) at 1-6. The signature pedagogy of undergraduate legal education has been extensively reviewed in William Sullivan, *et al.*, *Educating Lawyers: Preparation for the Profession of Law. The Carnegie Foundation for the Advancement of Teaching* (San Francisco, CA: Jossey-Bass, 2007) [the Carnegie Report].
[5] Federation of Law Societies of Canada, *2010 Statistical Report* (Federation of Law Societies of Canada, 2010).
[6] Chief Justice of Ontario Advisory Committee on Professionalism Working Group on the Definition of Professionalism, "Elements of Professionalism" (October 2001, as revised December 2001 and June 2002).
[7] *Ibid* at 1.
[8] See, for example, Eliot Friedson, *Professionalism, The Third Logic: On the Practice of Knowledge* (Chicago: University of Chicago Press, 2001).

independence; pride; spirit and enthusiasm; collegiality and civility; service to the public good; and balanced commercialism.

To embody these elements an individual would need one or more of these four capacities[9]:

1. the ability to recognize a moral problem, which would include a knowledge component (sensitivity);
2. the ability to justify actions by communicating internally persuasive arguments, which would include specific problem-solving abilities (reasoning);
3. the ability to prioritize moral over personal issues (motivation); and
4. the ability to act on moral conclusions (implementation).

This paper examines how these capacities develop over time in the workplace, so that as lawyers grow and develop as practitioners, they also grow and develop as professionals.

The Problem

Over the past three decades, the profession in Ontario has become increasingly focused on issues of professionalism and ethics. In analyzing case law (civil, criminal, and regulatory), disciplinary decisions, and media reports, Dodek describes the more florid examples of unethical and unprofessional behaviour: fraud, money laundering, "conduct in the courtroom and in the bedroom", cheating by law students and articling students, and conflicts of interest.[10] Less florid examples can be found in the Treasurer's Report on the

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[9] These capacities mirror Rest's Four Capacities, which are further described below in the section on professional identity.

[10] Adam Dodek, "Canadian Legal Ethics: Ready for the Twenty-First Century at Last" (2008) 46 Osgoode Hall LJ 1 [Canadian Legal Ethics] at 10-20 describes key ethical and professionalism events in Canada in the early years of the 21st century. David Tanovich also describes a number of incidents of unprofessionalism within law schools in "Learning to Act Like a Lawyer: a Model Code of Professional Responsibility for Law Students" (2009) 27 Windsor YB Access Just 75.

Civility Forum, described below.[11] We can draw on special reports, such as the Law Society statistics on complaints and misconduct and LawPro statistics on malpractice to further illuminate the size and scope of professionalism, ethics, and civility issues.[12]

The Civil Justice Reform Project, reporting in 2007, examined potential areas of reform of the civil justice system to make it accessible and affordable for all Ontarians. In examining civility in the adversary system, the Report recommends an emphasis on learning appropriate behaviours in law school and articling, as well as a "zero tolerance" approach by judges to incivility in the courtroom.[13] In examining the criminal justice system, the Code/LeSage

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[11] *Infra* note 16.

[12] Dodek provides an overview of the civility issue, including the debates about regulating civility in Adam Dodek, "Ethics in Practice-Correspondents' Reports-Canada: An Education and Apprenticeship in Civility" (2011) 14 Legal Ethics 239 at 243. [Apprenticeship] The debates are framed as whether and the extent to which courts should regulate lawyer conduct, as well as whether the subjective nature of civility necessarily excludes certain groups, as polite behaviour is determined by the mainstream of the profession: "notions of professionalism and civility have been used by the legal elite to exclude dissenting and outsider groups." Incivility is quite often characterized as 'rudeness' towards other parties to a dispute, as evidenced in the *Wagman* case where a lawyer was disciplined for writing a letter to a mediator with whom he had a billing disagreement in which he said "get ready because I can be ten times a bigger asshole than you. You want to fight, go ahead." *Law Society of Upper Canada v. Wagman*, 2007 ONLSHP 39 14 and 15.
One of the major cases that has come to symbolize civility in the legal profession in Canada is *Law Society of Upper Canada v Joseph Peter Paul Groia*, described in [Apprenticeship] at 241. Mr. Groia was accused of professional misconduct by the Law Society stemming from his role as counsel in defending John Felderhof on charges of insider trading. Felderhof was the Vice President of the mineral company Bre-X, which collapsed in the1990s following exposure of large-scale fraud, resulting in billions of dollars of losses to investors. The Law Society found that Groia failed to treat the court with respect and undermined the integrity of the profession through abusive communication tactics. *See Law Society of Upper Canada v. Joseph Peter Paul Groia*, 2012 ONLSHP 94 (CanLII) http://canlii.ca/t/frw1r (accessed November 9, 2012).
Other academics have addressed the subjectivity inherent in the civility issue: Amy R. Mashburn "Making Civility Democratic" (2011) 47 Hous. L. Rev. 1147 at 1148-1149; Brent E. Dickson & Julia Bunton Jackson. "Renewing Lawyer Civility" (1994) 28 Val. U. L. Rev. 531. Alice Woolley has written extensively on the issue of zealous advocacy and civility. See, for example, 'In Defence of Zealous Advocacy', in Alice Woolley (ed),*Understanding Lawyers' Ethics in Canada* (Lexis-Nexis, 2011).

[13] Coulter Osborne, 'Civil Justice Reform Project: Summary of Findings and Recommendations', in Ministry of the Attorney General, 2007 at 119. The Report notes the "array of remedies available, including moral suasion, reporting the offending counsel to the Law Society, cost

Report noted that disruption/distortion of incompetent and/or uncivil counsel caused great harm to the administration of justice.[14] It recommended significant penalties where the due administration of justice was distorted through misconduct that had a disrupting, delaying, or undermining effect on criminal proceedings. Further, judges should use sanctions such as cost orders and contempt citations for extreme forms of misconduct, and the Law Society should employ significant penalties, such as suspension, where misconduct disrupts or distorts criminal proceedings.

In addition to the sources noted above, statistics from the Law Society's complaint process provide further data. Complaint statistics are included in the Law Society's Annual Report; since 2005 civility issues have been bundled into a category titled Integrity (which also includes integrity-other and integrity-misleading). From a low of 29.57% in 2005 the Integrity category climbed to a high of 57% in 2008 and has since declined to 41% in 2010 and 2011.[15]

The profession's perspectives on civility have been recorded in the Treasurer's Report on the Civility Forum, which describes a dispiriting list of behaviours: lateness, improper attire (including failure to gown and grumbling when gowns are required), making faces, behaving rudely to witnesses, slamming down books, door slamming, general expressions of disrespect, and bullying.[16] Participants described their personal management strategies in the

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orders and, in egregious circumstances, the contempt process." The Report concludes, in part, that lawyers should report instances of uncivil behaviour to the Law Society.

[14] Patrick Lesage & Michael Code, 'Report of the Review of Large and Complex Criminal Case Procedures', (Ministry of the Attorney General, 2008) at 143-144.

[15] The 2011 Annual Report notes that civility complaints peaked in 2009 and have declined overall – with only a slight increase in 2011 over 2010. Law Society of Upper Canada, 'Annual Report', (Law Society of Upper Canada, 2011). See Appendix A for further information on percentage of complaints by category.

[16] The Treasurer's Report on the Civility Forum can be found at: http://www.lsuc.on.ca/media/convmay10_treasuers_report.pdf accessed July 6, 2012. The Treasurer of the Law Society of Upper Canada held a series of meetings throughout Ontario to discuss civility issues with lawyers and paralegals and to consider possible solutions. Nearly 900 individuals attended. The experiences ranged from

face of uncivil behaviour, which included "remaining calm", defusing the situation, and where the behaviour was persistent, considering complaints to the Law Society. There was broad consensus on the possible causes of incivility, including both societal causes and those linked to the nature of practice and legal services.

Apart from civility, statistics from the malpractice insurer on the risk profile for Ontario lawyers illuminate other errors in practice that are associated with professionalism.[17] The percentage of errors leading to claims is consistent across size of firm and type of practice: the most frequent claims concern is the "profession-wide" issue of lawyer/client communications. These communication-based claims include failure to follow client instructions, failure to obtain client consent or to inform the client, and poor communications. The second highest claims concern is time management, with inadequate discovery (including fact investigation) as the third. Failure to know the law is the fourth, at 13% of claims.[18]

Responses

Within the profession there is widespread support for more robust responses to counter effects of unprofessional behaviour on the administration of justice, to address negative perceptions of the public, and (although less frequently cited) to restore the non-pecuniary rewards of practicing law.[19]

"lack of respect to harassment." (at 5) Societal causes included, for example, economic and business stresses as well as personal stressors. Lack of training and competency, as well as increasing competition, were cited at possible causes linked to the nature of practice.

[17] The LawPro data provides insights into issues of competence as an aspect of professionalism. Information on claims profiles can be found at: http://www.practicepro.ca/LawPROmag/Pinnington_Biggest_Malpractice.pdf

[18] *Ibid.*

[19] Other initiatives are described in this section and include definitions and descriptions of professionalism (including Codes), such as the Chief Justice Advisory Committee's *Elements of Professionalism* and the Advocate's Society *Principles of Civility for Advocates,* as well as recent and continuing initiatives to gather data about the nature and severity of the problem, such as the Treasurer's Civility Forum, the Law Society statistics and information on complaints and discipline, and LawPro information on malpractice risks.

These responses include increased focus on educational efforts throughout the continuum. Education – whether formal or informal - may be preventive or remedial. That is, programs and supports may be designed to respond to complaints or to prevent problems. Educational initiatives have included:

1. Initiatives designed to respond to civility complaints, such as the Law Society's mentoring program.
2. Initiatives designed to support scholarship, such as the Chief Justice Advisory Committee's annual colloquia as well as the Fellowship research awards, and the establishment of the University of Toronto's Centre for the Legal Profession.
3. Direct educational initiatives, such as LawPro's publications and presentations, and the LSUC's and Advocates' Society mentoring programs.

These initiatives by the judiciary, the professional regulator, and the insurer assume a certain level of education through law schools and bar admission courses. The past twenty years of legal education in Ontario have been characterized by major shifts in intensity and focus of professionalism and ethics courses and programs. Further changes, as described below, will occur in the next few years. Past shifts include changes in law school legal ethics courses (more focus), bar admission courses (less focus) and the continuing professional development requirement (more focus). Future changes will include the recently approved revised articling process as well as the Federation of Law Societies' changes to the undergraduate degree.[20] These

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[20] See "Pathways to the Profession: A Roadmap for the Reform of Lawyer Licensing in Ontario" Articling Task Force Final Report (Law Society of Upper Canada, October 2012) available online http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489848, accessed December 13, 2012 and Federation of Law Societies, *Task Force on the Canadian Common Law Degree* (Federation of Law Societies 2009) available online at http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf ,accessed December 21, 2012.

shifts have affected how and what lawyers have learned, so that lawyers called to the bar within the past ten years have had different formal learning experiences than more senior lawyers. Current law students will likely have different formal learning experiences than either of the previously described groups.

Legal Education

This section will briefly review current initiatives and changes across the continuum of legal education in Ontario. Cotter and Maher describe the evolution of legal ethics education in law schools in Canada, analyzing three surveys on legal ethics instruction (most recently in 2008).[21] They describe significant and encouraging initiatives, which include:

1. the expansion of legal ethics throughout the curricula provides some confidence that large number of law students are "exposed in a systematic way to the principles and themes";
2. the courses include "meaningful content and critical analytical frameworks" taught by increasing numbers of full-time faculty;
3. the courses seem to be resonating better with students; and
4. law schools are building "more sophisticated educational programs."[22]

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[21] W. Brent Cotter & Eden Maher, "Legal Ethics Instruction in Canadian Law Schools: Laying the Foundation for Lifelong Learning in Professionalism" (2010) Canadian Legal Education Annual Review 66 at 68-71. These recent findings include:
1. Eleven schools included a compulsory legal ethics course, with a number also offering an elective course in upper year. The remaining five schools offer legal ethics as an elective.
2. Combined enrollment in compulsory and elective courses for 2008 suggests that approximately 80% of a year's cohort at the common law schools took a legal ethics offering.
3. 80% of instructors believed legal ethics should be a compulsory course.
4. Legal ethics instruction throughout the curriculum is expanding.

[22] *Ibid* at 87-88. See also Joshua Henderson and Trevor Farrow, "The Ethical Development of Law Students: An Empirical Study" (2009) 72 Sask L Rev 75.

The expansion of formal teaching within law schools across Canada will continue as the Federation of Law Societies of Canada, through its Task Force on the Common Law degree, requires that all law schools by 2015 offer at a minimum a 24 hour course on legal ethics that include formal student assessment and meet a defined set of competencies as set out in the Report.[23]

As law schools have steadily increased their offerings on professionalism and ethics, the Ontario Bar Admission Course [BAC], which includes the articling term, has reduced its requirements. From 1990 to approximately 2003 the BAC was taught as a four-month, two part formal program of lectures and seminars that gathered students from across the province into three centres [Toronto, London and Ottawa]. Professional responsibility was offered as a separate course with a separate licensing examination. Sometime after 2003, in response to a Law Society review, the second term of the course was eliminated and the course was delivered in a five-week Skills and Practice course held at the six centres within the province where law schools were located. The course incorporated the professionalism examination into the newly developed Barrister and Solicitor examinations. Sometime after 2007, also in response to a Law Society review, the Skills and Practice course was eliminated; articling students are now required to take an electronic on-line professionalism program (previously a paper program) to be discussed with their articling principal. Professional responsibility and ethics continue to be included in the licensing examinations.

Post bar admission, the Law Society now requires 12 hours of Continuing Professional Development [CPD] annually, which must include at

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[23]*Supra* note 20 at 30-34. In contrast to the general recommendations that each law school can determine how law students meet the competencies, the Task Force report at 17 recommends specific requirements for the ethics and professionalism course. These include knowledge of relevant legislation, regulations and rules, nature and scope of lawyer's duties, range of legal responses to unethical conduct and professional incompetence, and different models of the lawyering role, as well as skills to identify, decide and think critically about ethical problems in practice.

least 3 hours on Professionalism.[24] These requirements can be fulfilled through a variety of programs and activities, including formal courses (attending, viewing or listening), teaching, acting as an articling principal or mentor, and participating in study groups of two or more people. This recent initiative is consistent with commentary by Canadian scholars supporting a robust approach to lifelong learning. Woolley, for example, argues that continuing professional development courses should "develop and foster ethical decision-making by individual lawyers" and "should work in conjunction with other regulatory initiatives to address lawyer conduct which leads to poor outcomes for clients or the public.[25] Devlin and Downie argue for a shift in emphasis from teaching to learning together with "participatory and engaged reflection on actual issues in legal practice."[26]

In Canada few educational researchers have turned their attention to how and what lawyers learn about ethics and professionalism in the workplace, despite the reality that the majority of the issues occur in and derive from practice.[27] The growing body of research literature on lawyers in the United

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[24] As of April 12, 2012, eligible educational activities can include, for example, participation in CPD courses (including certain types of online programs), teaching, mentoring or being mentored (covering professional responsibility or ethics topics), and study groups that address topics of professional responsibility, ethics and/or practice management). http://rc.lsuc.on.ca/pdf/cpd/CPDEligibleEducationalActivities.pdf accessed September 18, 2012. Professionalism programs and activities must be accredited by the Law Society.
[25] Alice Woolley, "The Character of Continuing Education in Legal Ethics" (2010) Canadian Legal Education Annual Review 27 at 41. John Hunter, "Post-Call Professional Legal Education - the British Columbia Experience" (2010) Canadian Legal Education Annual Review 93. In the United Kingdom context, Webb argues for ethics teaching at the vocational stage that includes three developmental dimensions: a sensitising role, a competence dimension, and a critical/reflective dimension. Julian Webb, "Teaching Ethics to the Legal Profession: Is There a Better Way" (2000) 3 Legal Ethics 128.
[26] Richard Devlin and Jocelyn Downie, "Continuing Professional Development, Lifelong Learning, and Legal Ethics Education" (2010) Canadian Legal Education Annual Review 9 at 21.
[27] Dodek, *supra* note 10 at 47 notes the "dearth of empirical, interdisciplinary, and comparative research on the legal profession in Canada." See, for example, Jean Wallace & Fiona Kay, "The Professionalism of Practising Law: A Comparison across Work Contexts" (2008) 29 Journal of Organizational Behavior 1021 for a study of how solo practitioners and law firm lawyers differ in their sense of professionalism. Fiona Kay & Jean Wallace, "Is More Truly Merrier? Mentoring

States, which is referenced in the section below on teaching and learning, focuses on the context of learning and the process of socialization into norms specific to the community of practice. These norms can be practice specific (norms for criminal lawyers may be different than norms for corporate litigators), geographic (norms across the country can be different), firm or department specific (the culture of law firms dictates expectations of professional behaviour) or even individual (the expectations of an individual supervisor may dictate behaviours).[28] Many of these studies include research into the specifics of learning in practice and are reviewed in that section.

Ethics in Practice

To some extent the debate about teaching and learning professionalism and ethics rests on the particular aspect of professionalism and ethical behaviour at issue and the time and place of learning. As is evident from the brief review above, professionalism and ethics span a wide range of conduct, from day-to-day uncivil or negligent behaviours through to criminal activity.[29] The major issues – conflicts, regulation of the profession, administration of

and the Practice of Law" (2010) 47 Canadian Review of Sociology 1. See Jean Wallace, "The Benefits of Mentoring for Female Lawyers" (2001) 58 Journal of Vocational Behavior, and Erika Abner, "Situated Learning and the Role of Relationships: A Study of Mentoring in Law Firms" (2008) 2 Canadian Legal Education Annual Review for further research into mentoring in law firms. A cluster of Canadian studies have examined decision making by lawyers:
Peter Mercer,*et al.*, "The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers" (1996) 9 Can. JL & Jurisprudence 141; Margaret Wilkinson, "Information Sources Used by Lawyers in Problem Solving: An Empirical Exploration" (2001) 23 Library & Information Science Research 257; Margaret Wilkinson, *et al.*, "Do Codes of Ethics Actually Shape Legal Practice" (2000) 45 McGill LJ 645.
[28] Researchers in Australia and the United Kingdom have also contributed to the growing literature on learning in practice. For a study on the transitions experienced through the first year of practice see Holmes, *infra* note 30. For similar research on the difference in perceptions of ethical supports by junior and senior lawyers, see Christine Parker & Lyn Aitken, "The Queensland Workplace Culture Check: Learning from Reflection on Ethics inside Law Firms" (2011) 24 Geo. J. Legal Ethics 399. Economides, *infra* note 30 studied lawyers' reflections on moral dilemmas in everyday work settings, finding that stories were part of the process both for handling everyday dilemmas and for teaching new lawyers.
[29] Wilkinson, 2000 *supra* note 27 at 678; These researchers concluded that the majority of participants in their study did not use the [Law Society of Upper Canada Professional Conduct] Handbook as a means of solving problems, even where they classified the situation as an ethical problem or dilemma.

justice, lawyers' reputation – tend to be the focus of the profession, the public, and legal scholars. However, issues that include the smaller, but not less vexing, issues of day to day practice also merit concern. These "minor" issues have been described recently in the medical education literature as "micro-ethics."[30]

Epstein describes micro-ethics for physicians as "tacit ethics of the moment"[31] and argues that even small daily decisions include an ethical dimension. In contrast to discussions of ethics that focus on dilemmas and employ analysis of a "detached critical morality", micro-ethical questions are more pervasive and more finely textured. For physicians, such questions may include:

- When do I stop gathering information about the patient's concern and move on to recommending treatment?
- What do I say to an anxious patient during a genital exam?
- How should I respond to a patient's racist comment?
- How convincingly should I write an application for disability when I am not sure I believe the patient?

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[30] Ronald Epstein, 'Mindful Practice and the Tacit Ethics of the Moment', in Nuala Kenny & Wayne Shelton (eds), *Lost Virtue* (Emerald Group Publishing Limited, 2006). Robertson and Tranter argue that lawyering involves choices about "seemingly 'small' things, such as where and when to return calls and emails", so that these 'small' decisions "help to define the characteristics of the lawyer." Kieran Tranter & Michael Robertson, "Grounding Legal Ethics Learning in Social Scientific Studies of Lawyers at Work" (2006) 9 Legal Ethics 211 at 224. Economides' study found that ethical failings occurred because of "stumbles" over ordinary challenges. Kim Economides & Majella O'Leary, "The Moral of the Story: Toward an Understanding of Ethics in Organizations and Legal Practice" (2007) 10 at 21. Holmes' work confirmed that unprofessional behaviour can occur in "routine" ways: "failure to communicate well, being satisfied with sloppy work, failing to explain matters to clients adequately..." and doing "what everyone else does" Vivian Holmes, *et al.*, "Practising Professionalism: Observations from an Empirical Study of New Australian Lawyers" (2012) 15 at 53. Dodek, *supra* note 10 at 7 provides a somewhat different interpretation, defining micro-ethics as the ethical issues that confront individuals within the legal system, such as "conflicts, confidentiality and client perjury." Macro-ethics "address systemic issues within the legal system."

[31] Epstein, *ibid* at 117.

- How much should I care about his patient who does not seem to care much about him-/herself?

Recognizing and responding to micro-ethical issues is a tacit process, and learning micro-ethics is often acquired tacitly through the socialization process of becoming a physician.[32] Mindful practice, which incorporates self-awareness and critical reflection on these micro-ethical moments, is learned through apprenticeship models that allow for on-going modeling, close observation, reflection and feedback.[33] In particular, new learners learn to develop a certain level of comfort with uncertainty – a hallmark of professional practice.

This research seeks to begin to fill the gap within the legal profession by examining how learning professionalism and ethics happens in daily practice.[34] Our research question was simple: How do lawyers learn about professionalism in practice? Rather than asking about the recognition and resolution of major ethical dilemmas, we asked about daily events and problems. Many of the descriptions of these problems could be categorized as "micro-ethics", although as we examine the findings more closely we will see that some of these micro-ethical issues touch on the larger issues of concern to scholars: challenging the dominant paradigm of lawyer as "hired gun", recognizing the effects of unprofessional/unethical conduct on the administration of justice, and taking measures to manage individual acts of unprofessional/unethical conduct themselves without judicial or regulatory intervention. Throughout we found a rich tradition of understanding professional behaviours as having roots in the

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[32] Epstein, *ibid* at 121.

[33] *Ibid* at136. Shulman notes the importance of learning to deal with uncertainty as "one of the most crucial aspects of professionalism, namely, the ability to make judgments under uncertainty." Shulman, *supra* note 4 at 57.

[34] Dodek, *supra* note 10 at 48, notes the need for empirical research into the legal profession, in part to "test some of our assumptions about ...things we claims to know, but remain completely matters of faith in the legal profession."

past, but modified for the present reality of the complexities of modern legal practice.

PART II – Literature Review

Professional Identity and the Lawyer's Role

A discussion of the development of professionalism must include some contemplation of both the lawyer's role and the concept of "professional identity." It seems to follow that one's view of his or her professional role will impact upon both his or her definition of professionalism and integration of that definition as part of his or her professional identity.

Increasingly, the lawyering model that understands lawyers as "hired guns" whose interests are defined only by their client's interest is being challenged by theories that reject the idea that practical and moral consequences are the sole responsibility of the client.[35] While the concept of "zealous advocacy" still figures prominently in codes of professional conduct, it is being tempered with language such as "resolutely" and "honourably," which depicts the lawyer as more than simply a neutral partisan.[36] Some authors have suggested that a much more significant departure from the neutral partisan stance is required, and that "[l]egal ethics is a life-long challenge in which lawyers must be encouraged to go beyond simply learning the rules and how to apply them; they should constantly interrogate themselves and their colleagues about the moral status of their work and practices."[37] Others go

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[35] Robert Atkinson, "How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day" (1995) 105 Yale Law Journal 177.

[36] Rule 4.01 (1) of Ontario's Rules of Professional Conduct provides:
When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect. Law Society of Upper Canada, Rules of Professional Conduct (Adopted by Convocation June 22, 2000).

[37] Allan Hutchinson, "Legal Ethics for a Fragmented Society: Between Professional and Personal" (1998) 5 International Journal of the Legal Profession 175.

further, suggesting that client choice should be guided by one's own moral compass: "You should feel guilty, and we should disapprove of you, if you go ahead and argue a cause you think will do more harm than good."[38] It seems safe to conclude that the evolving characterization of the lawyer as an "ethical" professional is one that involves a fusion of personal and professional attributes. Trevor Farrow suggests that we are engaging in

> a new discourse for lawyers and the legal profession that is seeking to become personally, politically, ethically, economically, and professionally sustainable. It is a discourse that makes meaningful space for a lawyer's own principles, interests, and life preferences by balancing them with other important interests—including, but not dominated by, those of the Client ...[39]

Professor Farrow's view is consistent with the premise that personal values and experiences are relevant to the development of a strong professional identity.

Professional Identity and Its Development

There is no simple response to the question of how professional identity develops over time. This work is based on the premise that a lawyer's professional identity reflects her or his incorporation and expression of professional values. As such, the discussion of professional identity becomes key to an analysis of the development of professionalism within practice. This approach is similar to the one adopted by Hamilton, who writes that

> "[p]rofessionalism," as used herein, describes the important elements of an ethical professional identity into which each peer-reviewed profession should socialize students and practicing

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[38] Duncan Kennedy, "Responsibility of Lawyers for the Justice of Their Causes" (1987) 18 Texas Tech Law Review 1157 at 1158. Alice Woolley and W Bradley Wendel discuss different conceptions of the role of lawyers, and explore "*who* is the person tacitly presupposed as the ideal lawyer by these normative theories, and *how* that person is likely to fare as an ethical decision-maker in actual practice" in "Legal Ethics and Moral Character" (2010) 23 Geo J Legal Ethics 1065 at 1067.

[39] Trevor Farrow, "Sustainable Professionalism" (2008) 46 Osgoode Hall Law Journal 51 at 55.

professionals. These elements of an ethical professional identity capture the correlative duties of the profession's social contract for both the individual profession and the relevant professional peer-review groups.[40]

Professional identity has been described as "the constellation of attributes, beliefs, and values people use to define themselves in specialized, skill-and education-based occupations or vocations."[41] Professional identity's significance has been highlighted by the Carnegie Foundation's recent studies of how professional schools educate physicians, nurses, clergy, engineers and lawyers.[42] The Foundation's president concluded that "In every field that we studied, the most overlooked aspect of professional preparation was the formation of a professional identity with a moral code of service and responsibility."[43] In a subsequent synthesis of a number of professionalism reports and the Carnegie Foundation's research on legal education, Hamilton articulated a model of professionalism[44] that consists of: (1) personal conscience (which involves the type of moral development described by Rest)[45]; (2) the ethics of duty (which focuses on understanding the profession's specific ethical rules); and (3) the ethics of aspiration (which encompass core principles

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[40] Neil Hamilton, "Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity" (2008) 5 U St. Thomas Law J. 470 at 471 [Hamilton 2008].
[41] Holly S. Slay & Delmonize A Smith, "Professional Identity Construction: Using Narrative to Understand the Negotiation of Professional and Stigmatized Cultural Identities" (2011) 64:1 Human Relations 85 at 87 [Slay].
[42] The work on lawyers is found at William Sullivan *et al, supra* note 4.
[43] Lee S. Shulman, Foreword to Molly Cooke *et al, Educating Physicians: A Call for Reform of Medical School and Residency* 41, 60 (2010). For an analysis of ways that law schools could benefit from the experience of clergy externships to better foster professional identity formation in law students, see Daisy Hurst Floyd, Timothy W Floyd & Sarah Gerwig-Moore, "Learning from Clergy Education: Externships Through the Lens of Formation" (2012) 19 Clinical Law Rev 83. See also N. Hamilton, "Fostering Professional Formation (Professionalism): Lessons from the Carnegie Foundation's Five Studies on Educating Professionals" (2012) 45 Creighton Law Review 763 for a discussion of how legal educators can learn a great deal about professional formation from the Carnegie Foundation studies.
[44] Hamilton 2008, *supra* note 40 at 482-498.
[45] JR Rest, "Morality" in PH Mussen, J Flavell, & E Markman eds, *Handbook of Child Psychology*, vol 3: Cognitive Development, 4th ed (New York: Wiley, 1983). See also JR Rest & DF Narvaiz, eds, *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ: Erlbaum, 1994).

and ideals that guide the profession).[46] These elements are consistent with the

Advisory Committee's focus on intelligence, maturity and thoughtfulness.[47]

Hamilton describes the first element – personal conscience – as an

analog to J. R. Rests "Four Capacities". Rest argues that the four capacities

most significant to moral development are: the ability to recognize a moral

problem (sensitivity); the ability to justify actions by communicating internally

persuasive arguments (reasoning); the ability to prioritize moral over personal

issues (motivation); and the ability to act on moral conclusions

(implementation).[48]   According to Hamilton and Monson, professionalism

requires the lawyer to integrate the ethics of duty and the ethics of aspiration

with a personal conscience that reflects these capacities of sensitivity,

reasoning, motivation and implementation.

Researchers generally consider the process of identity formation to be

one that continues throughout an individual's career; it is usually only after an

extended period of time that one fully internalizes his or her profession's core

values.[49] This developmental process is often characterized as occurring in

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[46] In Neil Hamilton and Verna Monson, "The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law" (2008) 24 Geo J. Legal Ethics 137 at 152, the authors list the following as representative of the ethics of aspiration: competent representation; client loyalty; confidentiality of client information; zealous advocacy subject to restraints placed on the lawyer as officer of the legal system; independent professional judgment; peer-review to hold other lawyers accountable for upholding the ethics of duty; self-restraint where self-interest in profitability is balanced with devotion to the client and the public good; public service; respect for the legal system and all persons involved in the legal system; commitment to seek and realize excellence at both the skills of the profession and the other core principles and ideals of the profession; integrity; honesty; and fairness.

[47] Advisory Committee, *supra* note 6.

[48] Bebeau provides the terms in parenthesis in Muriel M. Bebeau, "Promoting Ethical Development and Professionalism: Insights From Educational Research in the Professions" (2008) 5 U. St. Thomas Law J. 365 at note 4.

[49] See for example, Neil Hamilton, "Analyzing Common Themes in Legal Scholarship on Professionalism" University of St. Thomas School of Law Legal Studies Research Paper No. 11-24, Working Paper (2012) at 25 [Hamilton 2012], available at http:// papers.ssrn.com/sol3/papers.cfm?abstract_id=1917058.]; Muriel J. Bebeau, *ibid*; Marjorie A Silver, "Commitment and Responsibility: Modelling and Teaching Professionalism Pervasively" (2005) 14 Widener LJ 329 at 353; and Melissa Weresh, "I'll Start Walking your Way, you Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence on Generational Differences" (2009) 61 SCL Rev 337.

stages. Early in their careers, individuals tend to be rule-oriented and self-interested. Over time, they shift toward a more flexible understanding of their relationships with others and their responsibilities to their profession. All professionals do not, however, move through this process at the same rate.[50]

A theory of progressive legal identity formation is consistent with the work of constructive developmental psychologists such as Robert Kegan, whose model of identity development spans early childhood through to adulthood.[51] The three stages most relevant to the development of lawyers' professional identity are: the Socialized Mind (Stage 3), the Self-Authored Mind (Stage 4) and the Self-Transforming Mind (Stage 5). Movement from one stage to the next involves "transformative learning", which happens when individuals change not only the way they behave or feel, but the way they know.[52]

According to Kegan, each level of development represents a very different way of knowing the world.[53] For example, at Stage 3, the socialized mind has moved from a very egocentric status to a consciousness that is able to internalize and be shaped by others' perspectives. An individual at Stage 3 is described by Kegan as a team player; a faithful follower who seeks direction and is reliant on those with whom he or she identifies.[54] At Stage 4, the self-authoring mind has developed the capacity to "step back enough from the social environment to generate an internal 'seat of judgment' or personal authority that evaluates and makes choices about external expectations." [55] An individual at Stage 4 exhibits leadership and independent problem solving

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[50] Hamilton 2012, *ibid* at 25-26. Also see Molly Cooke, David M Irby, Bridget C O'Brien, *Educating Physicians: A Call for Reform of Medical School and Residency* (San Francisco: Jossey-Bass, 2010).
[51] Robert Kegan, *The Evolving Self: Problem and Process in Human Development* (Cambridge: Harvard University Press, 1982) [Kegan 1982]. The model is also the foundation for R. Kegan, *In Over our Heads: The Mental Demands of Modern Life* (Cambridge: Harvard University Press, 1994) [Kegan 1994] and R. Kegan and L. Lahey, *Immunity to Change: How to Overcome it and Unlock Potential in Yourself and Your Organization* (Cambridge: Harvard Business Press, 2009).
[52] Kegan 1994, *ibid* at 17.
[53] Kegan and Lahey, *ibid* Chapter 1.
[54] *Ibid* at Figure 1-4 and accompanying text.
[55] *Ibid.*

skills that are aligned with his or her personal code. Finally, the few self-transforming minds who reach Stage 5 are able to step back from and reflect on the limits of their own personal authority, to see that any one system is in some way incomplete, and to understand problem solving as involving the recognition of the interdependencies of different systems and reconciliation of contradictory ways of constructing meaning. [56]

There is debate about the degree to which individual and structural factors influence the development of professional identity. Some view the process as driven by the specific individuals experiencing the identity development process. From this perspective, individuals develop their professional identities as they actively attribute meaning to their experiences and build a narrative for their professional lives.[57] This attribution of meaning occurs after individuals participate in their profession's defining activities, develop social bonds with other professionals, and gain a sense of responsibility regarding the development of their profession's ideals. [58]

In contrast to individual-focused perspectives, some suggest that the development of professional identity is largely determined by structural forces

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[56] *Ibid.* For an example of the application of Kegan's theory to research related to early career lawyers, see Verna E Monson & Neil Hamilton, "Ethical Professional (Trans)Formation: Early Career Lawyers Make Sense of Professionalism" (2011) 8 U St. Thomas L. J. 129, esp. at Table 3. In an earlier Canadian study, a Kegan-type interview protocol was used to explore how middle-aged, prominent Canadian lawyers at the peak of their careers defined success: Sheelagh O'Donovan-Polten, *The Scales of Success: Constructions of Life-Career Success of Eminent Men and Women Lawyers* (Toronto: University of Toronto Press, 2001).

[57] Nikki Graves & Molly Epstein, "Eportfolio: A Tool for Constructing a Narrative Professional Identity" (2011) 74:3 Business Communications Quarterly 342 at 344; Bebeau, *supra* note 48 at 375; Hilary Sommerlad, "Researching and Theorizing the Processes of Professional Identity Formation" (2007) 34:2 Journal of Law and Society 190 at 193.

[58] Monica Johannesen & Laurence Habib, "The Role of Professional Identity in Patterns of Use of Multiple-Choice Assessment Tools" (2010) 19:1 Technology, Pedagogy and Education 93 at 94-95. Throughout this process, factors relating to an individual's background, such as racial status or family history, may impact the development of that individual's professional identity. For example, some scholars argue that entrants from marginalized backgrounds are more likely to develop a professional identity by defining the meaning of professionalism based on their own values, whereas those entrants from non-marginalized societal groups are more likely to focus on replicating the behaviour of others and reflecting on their experiences. See Slay, *supra* note 41 at 99-100.

that remain intact unless forced to adapt because of macro-historical changes.[59] In other words, the norms structuring individuals' environments (these concepts may be understood as part of the "hidden curriculum" discussed later in this report)[60], whether professional or non-professional, are the primary influencers of their identity development,[61] and in this context, young professionals are viewed as receptors of norms rather than producers.[62]

Bourdieu's theory of 'social fields'[63] attempts to balance these two perspectives. Within this theoretical framework, the legal profession represents a semi-autonomous social field. Structural factors are influential because the behavior of the social field's members is determined by traditions that have been internalized. However, because traditions are frequently evaluated and changed as a result of each field member's experiences, it is more that individual agency is limited within this theoretical framework rather than non-existent.[64] This interactive process between individual agency and structural values receives support from some scholars,[65] especially in relation to their discussion of corporate lawyers.[66]

Bourdieu's process requires professionals to reflect and question their profession's stated values. The ability to reflect is also a key aspect of Rest's Four Capacities. While reflection is generally understood to promote a more

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[59] *Ibid.*
[60] See discussion of Hidden Curriculum, *infra* at notes 101-103 and accompanying text.
[61] Bebeau 2008, *supra* note 48 at 372.
[62] Nicola A Boothe-Perry, "Professionalism's Triple E Query: Is Legal Academia Enhancing, Eluding, or Evading Professionalism?" (2009) 55 Loy L Rev 517 at 523 [Boothe-Perry].
[63] See Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38 Hastings Law J 814.
[64] Sommerlad, *supra* note 57 at 193-95.
[65] Katarzyna Kosmala & Olivier Herrbach, "The Ambivalence of Professional Identity: On Cynicism and Jouissance in Audit Firms" (2006) 59:10 Human Relations 1393 at 1396.
[66] Timothy Kuhn, "Positioning Lawyers: Discursive Resources, Professional Ethics and Identification" (2009) 16:5 Organization 681 at 682.

sophisticated level of professional identity,[67] it has been noted that questioning professional ideals that do not fit with one's own moral understandings does not necessarily lead to their rejection or compromise. In some cases, although professionals are critical of their profession's ideals, their conduct perpetuates them.[68]

Teaching and Learning in the Workplace

General Overview

In the past fifteen years educational researchers have turned their attention to learning in the workplace, first theorizing and then finding profound differences between learning in school and learning at work.[69] Robust theoretical frameworks – including social constructivist and community of practice – have informed studies into learning in a variety of settings. Wilkerson and Irby note that "in the social constructivist view, learning is defined as socialization into a new knowledge community through the student's active participation in the community and internalization of socially constructed meanings" and "(M)ajor sources of learning include socializing experiences, role models that new members seek to emulate, collaborative

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[67] Bebeau, *supra* note 48; Neil W Hamilton & Verna E Monson, "Ethical Professional (Trans)formation: Themes from Interviews About Professionalism with Exemplary Lawyers" (2012) 52 Santa Clara L Rev 921.

[68] Kosmala and Herrbach, *supra* note 65 at 1399.

[69] In an early influential article Resnick describes the differences in learning at school and learning at work. Lauren Resnick, "Learning in School and Out" (1987) December 1987 Educational Researcher 13. Abner and Kierstead provide an overview of the literature on the differences between writing in school and writing at work, noting the differences in complexity, multifunctionality, and power relations. Erika Abner & Shelley Kierstead, "A Preliminary Exploration of the Elements of Expert Performance in Legal Writing" (2010) 16 Legal Writing 363; *ibid* at 374-5. For an excellent overview on current learning theories as they relate to workplace learning, see Ilene Harris, 'Conceptions and Theories of Learning for Workplace Education', in Janet Hafler (ed),*Extraordinary Learning in the Workplace: Innovation and Change in Professional Education* (Springer, 2011).

learning with peers, and direct engagement with the beliefs, roles, power, and culture of the learning environment."[70]

Situated learning theorists observe that full participation in a community of practice requires doing, talking, listening, observing, and being in relation to others in the community.[71] Participation begins at the outer edges of the community moving to full participation. From their outsider to insider position,

> Apprentices gradually assemble a general idea of what constitutes the practice of the community: what they do, what everyday life is like; how masters talk, walk, work and generally conduct their lives; how people who are not part of the community of practice interact with it; what other learners are doing; and what learners need to learn to become full practitioners. It includes an increasing understanding of how, when, and about what old-timers collaborate, collude, and collide, and what they enjoy, dislike, respect, and admire."

The professional community of practice is "characterized by conditions of complexity, uniqueness, uncertainty, ambiguity and conflicting values and ethics orientations." [72] New learners require multiple processes to understand and perform, including both problem-solving strategies,[73] and reflective approaches.[74] Reflective approaches are those where individuals "explore their

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[70] Luanne Wilkerson & David Irby, "Strategies for Improving Teaching Practices: A Comprehensive Approach to Faculty Development" (1999) 73 Academic Medicine 389 at 389.

[71] Jean Lave & Etienne Wenger, *Situated Learning: Legitimate Peripheral Participation* (Cambridge University Press 1991) at 95.

[72] Harris, *supra* note 69 at 5.

[73] Kevin Eva, 'On the Relationship between Problem-Solving Skills and Professional Practice', in Clive Kanes (ed), *Elaborating Professionalism: Innovation and Change in Professional Education* (Springer, 2010). Eva argues that there is not a single best method of problem-solving and that the best solutions appear to arise from analogical reasoning (this problem is similar to a problem that has been solved previously). He concludes, at 28, that we become better problem solvers in part simply by being exposed to many problems.

[74] Karen Mann, "Learning and Teaching in Professional Character Development" (2006) 10 Advances in Bioethics 145.

experiences in order to lead to new understandings and appreciations."[75] Shön has described a reflective process that involves both an experienced and a new practitioner making sense of challenging problems.[76] We would, therefore, anticipate a community of practice that promotes both active problem-solving and reflective capabilities. The next section explores our current understanding of learning curriculum in the workplace.

The Learning Curriculum

Curriculum theorists and adult educators describe different types of curricula: the formal, the informal, and the hidden curriculum. The first two elements of the multidimensional learning environment are: "1) the stated, intended, and formally offered and endorsed curriculum (generally, law school and formal continuing professional development programs); 2) an unscripted, predominantly ad hoc, and highly interpersonal form of teaching and learning that takes place among and between faculty and students (in the workplace the informal curriculum includes learning resources and work).[77] The third curricular element has been described as the hidden curriculum, which is "a set of influences that function at the level of organizational structure and

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[75] *Ibid* at 169, quoting David Boud, *et al.*, 'Promoting Reflection in Learning: A Model', in David Boud, *et al.* (eds), *Reflection: Turning Experience into Learning* 1985).

[76] Donald Schön, *The Reflective Practitioner: How Professionals Think in Action* (Basic Books, Inc. 1983); Donald Schön, *Educating the Reflective Practitioner* (Jossey-Bass 1987).

[77] Frederic Hafferty, "Beyond Curriculum Reform: Confronting Medicine's Hidden Curriculum" (1998) 73 Academic Medicine 403 at 404.

culture",[78] or the "cultural mores that are transmitted, but not openly acknowledged, through formal and informal educational practices."[79]

The informal workplace curriculum includes the "field of learning resources in everyday practice as viewed from the perspective of the learners,"[80] which includes people, artifacts, and the actual work. In the legal field, the following may be encompassed: the people with whom practitioners work – their colleagues, clients, opposing counsel, courts and regulatory administrators, judges and other decision-makers – and artifacts, which in the legal context are primarily documents and systems[81], both electronic and paper. Resources in the form of people can be further characterized as role models, mentors, supervisors, and friends – who may combine to form a developmental network.[82] Learners may rely on different network members for different learning needs.[83]

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[78] *Ibid.* Research and commentary on the hidden curriculum in medical education has been extensive since the initial description of the phenomenon, culminating in specific recommendations to examine and control the hidden curriculum in both undergraduate and postgraduate medical education by the Association of Faculties of Medicine Canada. At the undergraduate level, these include, for example, engaging learners and teachers in "identifying and acknowledging the hidden curriculum" through mentoring and discussion. Nick Busing, *et al.*, "The Future of Medical Education in Canada (FMEC-PG): A Collective Vision for MD Education" (2009) The Association of Faculties of Medicine of Canada (AFMC) at 23.

[79] Frederic Hafferty & Janet Hafler, 'The Hidden Curriculum, Structural Disconnects, and the Socialization of New Professionals', in Janet Hafler (ed), *Extraordinary Learning in the Workplace: Innovation and Change in Professional Education* (Springer, 2011) at 17.

[80] *Supra* note 71 at 97.

[81] Systems can include, for example, diary systems or billing systems that support lawyers' time management capabilities. These systems can be a significant source of support for new learners; for example, Abner found that office systems that would prevent missed deadlines provided support to a busy commercial real estate lawyer. Abner, *supra* note 27 at 146.

[82] Eraut*, infra* note 85 in his study of early learning in three professions – nurses, engineers, and accountants – found that managers and supervisors can play an important role by developing the appropriate levels of challenge and support, increasing opportunities for informal learning, and providing feedback.

[83] These developers can be distinguished by:
1. Relationship *purpose*: a supervisor is responsible for allocating and overseeing work while a mentor may be responsible for career advice and advancement.
2. Relationship *closeness:* a role model can be distant (where the only connection is the opportunity for observation) while a friend can be proximate and readily available.

Finally, and perhaps most obvious, a workplace curriculum relies on the actual work available to and experienced by learners. Schön has observed that "as a practitioner experiences many variations of a small number of types of cases, he is able to 'practice' his practice. He develops a repertoire of expectations, images and techniques. He learns what to look for and how to respond. His knowing in practice tends to become increasingly tacit, spontaneous, and automatic."[84]

The complexity, type, and volume of "cases" or everyday work activities substantially affect what is learned and how it is learned. Eraut developed a framework for learning events that relied on different types of relationships and activities. He observed that work activities could be divided into three categories: <u>Work Processes</u> with learning as a by-product, <u>Learning Activities</u> located within work or learning processes, and <u>Learning Processes</u> at or near the workplace.[85] Work Processes include participation in group processes, working alongside others, and working with clients. Learning Activities include asking questions, listening and observing, and learning from mistakes. Learning Processes include supervision, mentoring, workshops, and short courses. Significantly, this study found relatively limited learning from traditional formal programs such as short courses or conferences. Instead, the key learning factors were informal: *working alongside others* and *working with clients* provided opportunities to learn tacit knowledge or the "knowledge that underpins routines and intuitive decisions and is difficult to explain. When people see what is said and done, explanations can be much shorter because

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3. Degrees of *trust*: a friend may benefit from a high level of trust while a supervisor may experience a lower level.
4. The *power dynamics* in workplace relationships affect learning in two ways: first, through the ability to provide or withhold work, and second, through appropriate support leading to confidence and engagement.

[84] Schön, 1983 *supra* note 76 at 60.

[85] M. Eraut, "Learning from Other People in the Workplace" (2007) 33 Oxford Review of Education 403. See also Michael Eraut, 'Knowledge, Working Practices, and Learning', in Stephen Billett (ed), *Learning through Practice: Professional and Practice-Based Learning* (Springer, 2010). [Knowledge, Working Practices and Learning]

the fine detail of incidents, such as tone of voice or visual features, contributes to their understanding."[86] Eraut's workplace learning curriculum is grounded in all aspects of the work available to a new professional, so that the context of learning is paramount to understanding learning processes and outcomes. [87]

The next section reviews the general literature on informal learning by examining different categories of human learning resources in the workplace, followed by a review of the research literature on those learning resources in law firms. The final section addresses the hidden curriculum.

Role Models

Role models function at all three levels of the curriculum: in the formal through explicit teaching, in the informal through unscripted and unplanned learning, and in the hidden curriculum through barriers to appropriate behaviours.[88] Role models are "a cognitive construction based on the attributes of people in social roles an individual perceives to be similar to him or herself to some extent and desires to increase perceived similarity by emulating those attributes…[it is] a cognitive process in which individuals actively observe, adapt, and reject attributes of multiple role models."[89] Gibson suggests that "the role model construct is better thought of as a selection process of attributes rather than a search for a 'whole' role model."[90] Role models can be remote, where learning occurs though observation and personal reflection, or close, where learning occurs through observation and discussion.

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[86] Eraut, *ibid* [Knowledge, Working Practices and Learning] at 47.

[87] *Ibid.* For example, Eraut found different learning trajectories across the three professionals studied, based in part on the volume and type of work. New nurses were expected from the outset to undertake complex, high volume work. The learning curve was very steep and very stressful. New accountants were expected to work in teams and provided with work appropriate for their level of understanding, which resulted in a reasonably even trajectory. New engineers were expected to forage for work, so that they were underutilized and experienced a slow trajectory of learning

[88] Sylvia Cruess, *et al.*, "Teaching Rounds: Role Modelling—Making the Most of a Powerful Teaching Strategy" (2008) 336 British Medical Journal 719 at 719.

[89] Donald Gibson, "Role Models in Career Development: New Directions for Theory and Research" (2004) 65 Journal of Vocational Behavior 134 at 136.

[90] *Ibid.*

Ibarra examined role models and the development of professional identity,[91] arguing that identity forms over time with varied experiences and meaningful feedback that allow people to gain insight about their central and enduring preferences, talents and values. In studying consultants and investment bankers, she found that they employed a three-step process to construct a professional identity: observing role models, experimenting with "provisional" selves, and evaluating the results according to internal standards and external feedback.[92] Both researchers confirm the importance of multiple role models.

Negative role models are generally described as undesirable, sometimes with lasting adverse effects. Negative behaviours of role models may lead to conscious or unconscious adaptation by the observer, depending on the context and the learner's degree of awareness and the "match" described by Ibarra and Gibson. However, negative role models may also offer instructive lessons in how poor behaviours and decisions lead to undesirable consequences. Alternatively, observers may actively reject these behaviours where the role model's attributes do not "match". The value of negative role models remains an open question.[93]

Networks

Networks have been described as "groups of people brought together by common interests, experiences, goals or tasks" with regular communication, no defined centre, mutual aid and generalized reciprocity, and an open,

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[91] Herminia Ibarra, "Provisional Selves: Experimenting with Image and Identity in Professional Adaptation" (1999) 44 Administrative Science Quarterly 764.

[92] *Ibid.* at 765. Ibarra describes a process where participants employed different approaches to experimentation. Some were prepared to "try on" different styles by observing several role models simultaneously, while others focused on one senior person at a time. She found that the former approach was more effective because these observers "can accumulate a larger repertoire of possible styles to choose from – and more quickly-than holistic observers."

[93] Abner, *supra* note 27, found that, in mentoring others, associates adopted or rejected their own mentors' behaviours; in some instances her participants observed that they were better mentors for having rejected poor role models.

interlocking set of connections.[94] General networks – as distinguished from developmental networks – are important sources of learning; the quality and composition of one's network has a significant impact on learning and decision-making.[95]

Researchers have also designated certain types of networks as specifically developmental: "a set of people the protégé names as taking an active interest in and action to advance the protégé's career by providing developmental assistance."[96] Developmental assistance includes both career support and psychosocial supports, which may not be a feature of the learner's more general network.[97]

Mentors

Pivotal research on mentoring in business settings has described mentoring functions as "those aspects of a developmental relationship that enhance both individuals' growth and advancement."[98] Mentoring functions have been divided into two broad categories: career functions, which enhance "learning the ropes and preparing for advancement" and psychosocial functions, which enhance "a sense of competence, clarity of identity, and effectiveness in a professional role."[99] Career functions include sponsoring, exposure and visibility, coaching, protection, and challenging assignments. Psychosocial functions include role modelling, acceptance and confirmation, counselling, and friendship.

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[94] Don Cohen & Laurence Prusak, *In Good Company: How Social Capital Makes Organizations Work* (Harvard Business School Press 2001).

[95] *Ibid* at 152.

[96] Monica Higgins & David Thomas, "Constellations and Careers: Toward Understanding the Effects of Multiple Developmental Relationships" (2001) 22 Journal of Organizational Behavior 261 at 265.

[97] *Ibid.*

[98] Kathy Kram, *Mentoring at Work: Developmental Relationships in Organizational Life*, (Glenview IL: Scott Foresman and Company, 1985) at 252.

[99] *Ibid.*

Finally, the field of learning resources must include the nature of the work undertaken, addressing the issues posed by Eraut regarding complexity and sequencing, especially in the early years. Abner found that law firms did not provide smooth entry into practice: at entry, participants regularly engaged in work that was over their heads. Learning tasks were not sequenced after the first year; work assignments occurred based on client needs and associate availability. Learning technical or practice skills appeared to have happened almost entirely through the work and it was rare for participants to receive focused instruction or consistent feedback. Feedback was a consequence of the work rather than an end in itself: documents mark-ups, commentary during a trial or proceeding, or strategy discussions. Lawyers who experienced very challenging work at the outset of their career developed more quickly than lawyers who did not have those experiences.[100]

The Hidden Curriculum

The hidden curriculum in undergraduate legal education has been described as the "curriculum of unexamined practices and interaction among faculty and students and of student life itself....much of this informal socialization is tacit and operates below the level of clear awareness."[101] The

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[100] Abner, *supra* note 27. Levin's study of immigration lawyers, infra note 107 at 423 is an excellent example of the importance of context for learning at work. These factors influenced the learning processes: individual immigration (generally within a solo or small firm) or corporate immigration (generally within a larger firm); the enormous amount of time needed to keep up to date, due to frequent changes in the law; the lack of mentors with specific immigration experience; and the different structure of the administration of justice, where the lawyer may more often be attempting to persuade an official than appearing in a formal setting. Learning practice norms is another feature of learning through work. Kirkland found that corporate litigation associates learned "practice norms" or "the unwritten rules that govern their approach to litigation." In addition to learning a variety of different norms, the associates also needed to learn partner preferences for specific norms as well as differing contexts where different norms might apply. Kimberly Kirkland, 'The Ethics of Constructing Truth: The Corporate Litigator's Approach', in Leslie Levin & Lynn Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012) at 164.

[101] [Carnegie Report] *supra* note 4 at 29. Three articles describe the hidden curriculum in legal education. O'Brien discusses the deeply embedded adversarialism in U.S. and Australian law

hidden curriculum includes four areas that affect learning: 1) policy development – what is implicitly conveyed about what is and is not valued; 2) evaluation, which also conveys what is and is not important within the institution; 3) resource allocation, how the institutional resources shape mission and values, and 4) institutional slang at the organizational level, for example, the use of business language to describe faculty and programs.[102] Within law schools, the hidden curriculum can include messages that reinforce competition, with the "widespread perception that students have entered a high-stakes, zero-sum game."[103]

Understanding the hidden curriculum in workplace learning in law firms allows us to develop insights into the messages sent to new learners about professionalism and ethics in practice and offer explanatory power for behaviours that appear unprofessional. The section below reviews available studies on learning ethics in practice for evidence of any or all of the four components of the hidden curriculum.

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schools, including classroom practices, assessment, and contests, such as moots and other practice-related competitions. Molly O'Brien, "Facing Down the Gladiators: Addressing Law School's Hidden Adversarial Curriculum" (2011) 37 Monash University Law Review 43. Arterian examines what inappropriate faculty behavior teaches students; describing classroom behaviors (lateness, disorganization, personal remarks about others) and outside classroom behaviors (violating boundaries, gossiping about students, undermining staff). Law deans do not get a pass – various decanal behaviors associated with boosting school ratings are described as well. Hannah Arterian, "The Hidden Curriculum" (2009) 40 U. Tol. L. Rev. 279. See also Rosemary Way & Daphne Gilbert, "Resisting the Hidden Curriculum: Teaching for Social Justice" (2008) Canadian Legal Education Annual Review 1;
Hafferty, *supra* note 79 at 29 notes that medical students find a disjuncture between the formal codes of conduct taught in medical school and "what was held up as professionalism in the workplace." Hafferty suggests at 30 that educators should prepare students by addressing these disjunctures between professional values and workplace realities.
[102] Hafferty*, supra* note 77 at 404-405.
[103] *Ibid.*

The Informal Learning Curriculum in Law Firms

The studies on the processes of learning in law firms are consistent with the more general literature. A number of studies highlight the significance of learning through "osmosis" – role modelling and observation.[104] Role models could be positive or negative; one study notes that associates "did not necessarily feel that the most commonly modeled behaviors were particularly conducive to ethical practice."[105]

The studies also cite the importance of networks for advice and learning.[106] Networks could be "highly embedded and long term" with frequent discussions or a simple information exchange as required.[107] A discussion network could include friends within the firm, mentors, and supervisors; while a simple information exchange could include reaching out to strangers[108] or

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[104] Mark Suchman, "Working without a Net: The Sociology of Legal Ethics in Corporate Litigation" (1998) 67 Fordham L. Rev. 837; Leslie Levin, "The Ethical World of Solo and Small Law Firm Practitioners" (2004) 41 Hous. L. Rev. 309; Austin Sarat, "Enactments of Professionalism: A Study of Judges' and Lawyers' Accounts of Ethics and Civility in Litigation" (1998) 67 Fordham L. Rev. 809. Lynn Mather, *et al.*, *Divorce Lawyers at Work: Varieties of Professionalism in Practice* (Oxford University Press 2001) describes the process by which family law lawyers in a particular setting learn the norms through their overlapping communities of practice. Leslie Levin, "Preliminary Reflections on the Professional Development of Solo and Small Law Firm Practitioners" (2001) 70 Fordham L. Rev. 847.
[105] Suchman*, ibid* at p 863. See also Levin, *infra* note 107 at 894 noted the importance of learning from negative examples. The most powerful examples of negative role models are found in Hellman, who describes multiple examples of student exposure during externships to "flagrant and rampant professional misconduct." Lawrence Hellman, "The Effects of Law Office Work on the Formation of Law Students' Professional Values: Observation, Explanation, Optimization" (1991) 4 Georgetown Journal of Legal Ethics 537 at 601-602. The misconduct included, for example, bribery, coaching witnesses, communication with adverse party, conflicts, unauthorized practice, and excessive fees.
[106] Suchman, *ibid* at 863, found that associates expressed "a pervasive desire for more vibrant ethical dialogues in the firm as a whole"; Levin, *supra* note 104 [2004] found that solos and small firm lawyers would have developed an advice network of three to twelve lawyers, both within and outside their firm or suite; Seron found that solos and small firm lawyers developed networks of "attorneys and court officials on whom they could call to ask questions, copy legal forms, or clarify court procedures." Carroll Seron, *The Business of Practicing Law: The Work Lives of Solo and Small-Firm Attorneys* (Temple University Press Philadelphia 1996) at 8.
[107] Levin, Leslie "Guardians at the Gate: The Backgrounds, Career Paths, and Professional Development of Private US Immigration Lawyers" (2009) 34 Law & Social Inquiry 399 at 425
[108] *Ibid.*

cold calls to experts.[109] A feature of learning in a law practice not cited in the general studies includes direct learning from judges (as opposed to story-telling about cases and judges) – where judges might step in to help out[110] or issue a stern lecture about conduct.[111] Mentors could be a significant source of learning[112] for lawyers fortunate enough to connect with a mentor.[113]

Law school and continuing professional development (including in-house curricula and programs) do not appear to have been a significant source of learning about professionalism and ethics.[114] This is due, in part, to a mismatch between the types of problems presented in a particular program and the actual problems of daily practice as experienced by the research participants.[115]

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[109] Levin, *supra* note 104 [Preliminary Reflections] at 875 noted that technology has enhanced the ability to seek expert advice, but may have reduced the opportunity for richer, face to face interactions.

[110] Levin, *supra* note 107 at 428.

[111] Ellen Yaroshefsky & Bruce Green, 'Prosecutors' Ethics in Context: Influences on Prosecutorial Discretion in Leslie Levin & Lynn Mather (eds),*Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press, 2012).

[112] There are significant definitional differences in the mentoring literature, so that it is not entirely clear whether a mentor provided only career advice, or practice advice, or both. Further, the mentoring relationship has been defined in some studies as fairly short and in others as being long term.

[113] Seron, *supra* note106 at 9 found that a minority of solo and small firm lawyers learned through mentors; Levin, *supra* note 104 at 882-3 [Preliminary Reflections] found that most lawyers in her study could identity mentors who taught lessons about practicing law. Mentors included employers, suite mates, or even family members. In her study of immigration lawyers, Levin, *supra* note 107 at 423 also found about half of her participants cited the importance of mentors in learning to practice; Hellman, *supra* note 105 at 611 found that an absence of mentors was an impediment to externship learning, especially since he found a significant gap between law school teaching on legal ethics and their own externship experiences: "[A]t the same time that the working student students are being exposed to this subpar performance, many of them find themselves adrift in a supervisory gulf where no mentor is available or willing to confirm the inappropriateness of the conduct being observed." Abner's qualitative research study is consistent with large-scale surveys of mentoring in law firms in finding that a significant percentage of associates report minimal mentoring, *supra* note 27.

[114] Suchman, *supra* note 104 at 862-3 also found that formal training in ethics that took place early on was unhelpful to associates who had not yet grappled with ethical dilemmas in practice. William Gallagher, "Intellectual Property Legal Ethics in the Everyday Practice of Law: An Empirical Perspective on Patent Litigators" (2011) 10 J. Marshall Rev. Intell. Prop. L. 309.

[115] Suchman, *ibid*, cited associates' concerns that formal training provided insufficient guidance in dealing with sharp practices of opponents – an everyday ethical problem.

These studies also describe the more subtle learning processes that take place within a community of practice: everyday interactions with colleagues and clients[116] that include overheard conversations,[117] case law on troubling practices,[118] storytelling about cases,[119] and scholarly work[120].

In comparing the studies of learning in solo or small firms and learning, the themes of learning through role modelling, advice networks, and doing (sink or swim) are remarkably consistent. Despite the perception that solo or small firm lawyers are isolated, and large firm lawyers enjoy robust relationships – both groups rely on similar processes. Indeed, there is some evidence that large firm associates appear more isolated even though they are surrounded by colleagues.[121] Further, large firm associates reported self-teaching of a critical litigation activity – deposition practice and document production – which requires skills of client management and ethical problem-solving.[122]

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[116] Gallagher, *supra* note 114 at 329 found that most lawyers learned on the job, in "everyday interactions with colleagues and clients."

[117] Leslie Levin & Lynn Mather, *Lawyers in Practice: Ethical Decision Making in Context* (Univ of Chicago Press 2012) at 15.

[118] Gallagher, *supra* note 114 describes how patent lawyers learn the requirements of the duty of candour through significant cases.

[119] Sarat, *supra* note 104 at 826, finding that associates learned through observation and the firm transmitted its values through stories about specific cases rather than through formal mechanisms. Economides, *supra* note 30 at 22 notes that stories provide a range of viewpoints on a given problem and engage learners at both the affective and intellective level.

[120] Levin, *supra* note 107.

[121] Suchman, *supra* note 104 at 863.

[122] Self-teaching is a consistent theme. Sarat, *supra* note 104 at 821 cites an example of a judge finding that — in preparing document production at 3am — he needed to exercise judgement with minimal mentoring support; Gallagher, *supra* note 114 at 330 noted a consistent theme that lawyers learned how to do a discovery by asking other lawyers for assistance. Seron, *supra* note 106 at 8 described this approach as learning by trial and error, which included making "mistakes."

The Hidden Curriculum in Law Firms

In addition to examining the stated curriculum and the interpersonal curriculum in the workplace, available studies also describe components of the hidden curriculum in law firms.

Policy Development and Evaluation

Policies that convey institutional values can be found in various handbooks, manuals, work contracts, and admission and recruitment brochures.[123] In law firms policies that explicitly or implicitly provide messages about what is valued by the institution include, for example, various orientation information provided to students and new associates, website and other recruitment materials, policies regarding client recruitment and processes (including conflicts searches). Evaluation instruments include performance management systems, which include associate and partner evaluations for the purpose of advancement and most importantly, compensation and bonuses.[124] As Hafferty notes, "Tools of evaluation, however, are not simply instruments of assessment. They also are vehicles for conveying what is and is not important within the organization"[125] Messages derived from evaluation practices may well conflict with more general messages; these disconnects appear in the research literature discussed below.

The research literature provides examples of the types of law firm policies that affect professionalism in practice – both from the point of view of what associates learn as well as their confusion about the overt and subtle messages.

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[123] Hafferty, *supra* note 77 at 404.

[124] *Ibid* at 405. Hafferty includes the traditional evaluation instruments such as examinations in various forms, dean's letters, selection of chief residents; for faculty, criteria for promotion and tenure; at the organizational level, accreditation requirements. In law firms, for example, the National Association of Law Placement has recommended that firms examine their associate compensation for the behaviours it rewards. NALP Foundation for Research and Education, 'Keeping the Keepers: Strategies for Associate Retention', in (National Association for Law Placement, 1998) at 80.

[125] Hafferty, *ibid* at 405.

Billing Practices

A number of studies note the effect of law firm billing policies that affect learning about professionalism and ethics.[126] First, the requirement to bill a large number of hours requires that associates and partners work very long hours with limited time for reflection. Second, the billing requirements leave little opportunity to interact with others for advice and resolution of professional or ethical issues. Since evaluation is tied into billing, the priority appears to be that lawyers must meet billing targets rather than connect more deeply to professional values. This imperative may be less of an issue in smaller firms that are more flexible in their billing practices.[127]

Pleasing Partners

For associates, the road to promotion requires pleasing partners. Associates may be told explicitly that they need to be aggressive (and may cross the line to incivility) or they may learn through observation that aggression is necessary.[128] Aggressive practices may be specifically required during the discovery process.[129]

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[126] Gallagher, *supra* note 114 at 329 concludes that "even in firms that discuss ethics and professionalism, the over-riding ethos is billing hours, pleasing powerful partners, and keeping clients happy". Robert L. Nelson, "The Discovery Process as a Circle of Blame: Institutional, Professional, and Socio-Economic Factors That Contribute to Unreasonable, Inefficient, and Amoral Behavior in Corporate Litigation" (1998) 67 Fordham L. Rev. 773. Nelson notes at 784 that billing pressures from clients have affected the apprenticeship process – there are fewer opportunities are available for young lawyers to attend discoveries, trials, etc., so that training is much more haphazard. Garth and Sterling posit that "major structural shifts in corporate law practice have transformed the apprenticeship period from one that combined symbolic capital with a good portion of human capital – the skills necessary to be a successful lawyer – to an apprenticeship that generates mainly symbolic capital." Symbolic capital are "things associated with prestige." Bryant Garth & Joyce Sterling, "Exploring Inequality in the Corporate Law Firm Apprenticeship: Doing the Time, Finding the Love" (2009) 22 Georgetown Journal of Legal Ethics 1361 at 1368.
[127] Mather, *supra* note 104.
[128] Sarat, *supra* note 104 at 828, points out that in large firms the emphasis appears to be on pleasing clients rather than developing a counselling relationship.
[129] Nelson, *supra* note 126 at 778-9 describes associates who were chastised for being "too reasonable" or lost assignments by being "too restrained." The associates interviewed in Sarat's study, *supra* note 104, believed that firms could do more to promote higher standards of conduct; in particular, to stop rewarding incivility.

Managing Clients

Associates and partners are expected to manage (and please) clients, as there are economic consequences to not doing so. Some research studies note the difficulties in managing clients, particularly through the discovery process,[130] while others address tensions in managing in-house counsel.[131]

Resource allocation

The "availability and distribution of institutional resources shapes what faculty and students learn about institutional values."[132] Lawyers' time is clearly the most important resource in a law firm; in addition to file work, lawyers are expected to engage in teaching and mentoring activities (formal or informal), firm administration, business development and client management (which may include community service), service to the profession, pro bono work and continuing professional development.[133] Resource allocation obviously also addresses where the firm spends its money: lawyer support services (including professional support lawyers, libraries and knowledge management systems, research lawyers), business development budgets (including large marketing departments), professional development staff and programs (including internal programs within large firms, which may be delivered by outside consultants, as well as sending associates to various programs), as well as art and office furnishings.

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[130] Gallagher, *supra* note 114 at 332 and 334 found that even senior partners expressed concern about keeping clients happy, and the challenges in ensuring that clients complied with document requests.

[131] Sarat, *supra* note 104 at 830 describes the clash between autonomy and business values as "two different and deeply held views of what law practice should be like ...one which imagines itself as the carrier of the practical wisdom of a learned profession, the other which seeks to subject lawyers to business values."

[132] Hafferty, *supra* note 77 at 405.

[133] Law firm published competency models provide some evidence of expectations. For example, one published framework expects, in addition to legal work, that associates "develops self and others", engages in "teamwork and collaboration", operates as a leader and manager, and "grows existing business while developing new business." Hildebrandt Institute Virtual Seminar: From Lockstep to Levels: How is it Working So Far? May 18, 2010.

Institutional Nomenclature or Slang

Finally, the importance of nomenclature used at the individual level (students and faculty), as well as at the institutional level has been noted; in particular, the increasing use of business language within the educational institution.[134] The law firm studies do provide some examples of language used for lawyers who behave unprofessionally, referring to them as "assholes".[135]

Conclusion

The workplace learning literature focuses on processes and supports for learning rather than on techniques and topics for teaching, so that learners are included in a rich curriculum that includes the work, the culture of the workplace, and the resources in the form of people and artifacts. Thus, the question about whether ethics and professionalism can be taught should be re-framed to consider how ethics and professionalism are learned. In reviewing the studies on workplace learning generally, and the law workplace specifically, we find definite trends in supports and process for learning ethics and professionalism; these processes may be available in law schools, but in a muted form.[136]

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[134] Hafferty, *supra* note 77 at 405; the theme that law has become a business is persistent in the literature and was cited by our participants as an issue relevant to civility.

[135] Nelson, *supra* note 126 at 775 found the transcripts of his interviews "littered" with the term "asshole", defined as an obnoxious, obstructive litigator; Gallagher, *supra* note 114 at 325 found on the other hand that it was important to not be perceived as a "jerk", or someone who "made it harder for everyone to do their job."

[136] Clinicians have written extensively on the value of legal clinics and externships in learning about practice and professionalism; for example, Kelly Terry, "Externships: A Signature Pedagogy for the Apprenticeship of Professional Identity and Purpose" (2009) 59 J. Legal Educ. 240. Clinics and externships are, however, time limited. As we discuss, development of a professional identity takes place over many years. For a recent discussion of using the Carnegie Foundation Studies as a guide to reform legal education in a manner that better fosters professionalism, see Neil Hamilton "Fostering Professional Formation", *supra* note 43.

PART III METHOD

This project used focus groups to generate ideas about the types of professionalism and ethical problems experienced in practice across a range of practice settings and types of practice. Focus groups as a primary method were chosen for a number of reasons:

Given the limited Canadian research on learning in practice, we needed a broad range of views from a variety of perspectives, including different practice settings, different types of practice, different stages of development, and different urban settings. While many of the studies cited in the literature review employed interviews, for this descriptive and exploratory research we needed the efficiency of focus groups, while recognizing the limitations:

a. We were unable to pursue any individual issue in depth, e.g. specifics on learning.

b. Participants may have been reluctant to disclose unprofessional or unethical behaviour to their peers or resolution of mistakes.

c. We are not always able to generalize from the discussions, since it is not always clear when participants are in agreement (although they appeared to agree on major points).[137]

d. Participants were self-selected, which potentially led to participation by individuals with greater awareness/interest in professionalism issues than exists overall within the profession.

However, focus groups allow "people to spark off one another, suggesting dimensions and nuances of the original problem that one individual might not have thought of."[138]

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[137] Colin Robson, *Real World Research* (Blackwell Publishing 2002) at 284 provides a helpful chart of the advantages and disadvantages of focus groups.

The broad range of views allowed us to develop at the outset a wide range of themes, which were consolidated through constant comparison while conducting the focus groups. Further, we analyzed points where the themes saturated across the different perspectives, and compared points where the themes appeared to be divergent.

Nine focus groups were conducted: six in Toronto, one in Ottawa, one in Sarnia and one in Thunder Bay. Two focus groups took place in a large national multi-service firm – one with only associates and one with only partners. Two focus groups took place in a medium multi-service firm - – one with only associates and one with only partners. These four focus groups included both corporate and advocacy lawyers. Two focus groups in Toronto included members of solo and small firms (fewer than 15 lawyers) and included a number of different advocacy bars: criminal, family, prison law, mental health and real estate, as well as generalists. These focus groups included relatively new lawyers (around 5-6 years in practice) as well as senior lawyers with more than 25 years in practice.

The focus group in Ottawa included lawyers from the larger firms as well as very small firms and included a very new lawyer (just over one year) up to a very senior lawyer (more than 30 years).

The focus groups in Sarnia and Thunder Bay included solo and small firm lawyers who practiced primarily family and criminal law as well as two Crown attorneys and one duty counsel. This group included two relatively new practitioners as well as very senior lawyers.

In total, 62 lawyers participated in the study, including 36 men and 26 women. Other demographic information was not sought or recorded.

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[138] Herbert Rubin & Irene Rubin, *Qualitative Interviewing: The Art of Hearing Data* (Sage 1995). at 140.

Participants were recruited through both convenience and snowball sampling. Participants were recruited through: 1) an invitation to lawyers with the two multi-service firms through their respective directors of professional development, 2) an invitation to all lawyers on the moot list of the law professor/investigator (the solo and small firm lawyers in Toronto), and 3) an initial invitation to participate sent to selected lawyers through their County and District Law Association representatives (Ottawa, Sarnia and Thunder Bay). This method was successful only in Ottawa; lawyers in Sarnia and Thunder Bay were recruited through former graduate students of the professor/researcher.

Participants were offered and received 1.5 hours of Continuing Professional Education credit in Professionalism through the Law Society of Upper Canada.

The focus group discussion was divided into two stages. The first and longest stage involved responses and discussion around a series of questions, described in Appendix B. The second stage, which took place after the discussion had been closed, asked participants to write out their thoughts on two or three ways in which teaching and learning professionalism could be improved. These suggestions were anonymous.

Appendix B contains further information on the coding and transcript analysis.

The use of the focus group method and the convenience samples raise further issues about the limits of the research. First, we did not seek out bar-specific participants, so that we did not capture professionalism issues that might be different depending on the practice. We did not ask for specific rule-based ethical issues, so we do not know how often, for example, participants would need to address a conflicts problem. We did not review or discuss ethical

case studies, so we did not address their specific problem-solving processes. Finally, we did not specifically include members of equity-seeking groups, so that we do not know if they face unique challenges.

PART IV FINDINGS

Findings are drawn primarily from the transcribed focus group discussions. Where written comments relate to these findings, they are also included.   Additional findings located primarily within the written comments are included separately within this section. The presentation of the findings begins with participants' definitions of the concepts of civility, professionalism and ethics. This is followed by a discussion that broadly addresses professional identity, in contexts ranging from the role of lawyers to the professionalism lapses that participants deal with in day to day practice, observations about the motivations for these lapses, and approaches to responding to and learning from lapses. This is followed by results of discussions about ways that professionalism develops for lawyers in the workplace. Finally, comments that were not frequently enough stated amongst the groups to be considered to have "saturated" – that is, to be representative of the participants overall – are summarized in a separate section.

Civility, Professionalism, Ethics

The participants made some effort to define and distinguish professionalism, civility and ethics, although there was some disagreement on whether civility and professionalism are intertwined or separate concepts.

Generally, civility was broadly described as a set of behavioural norms that characterized an effective lawyer. While civil behaviour could be described as polite behaviour in any context (not being rude or abusive) it could also

include behaviour that was disruptive to the orderly process of managing a file (not returning phone calls or taking an unreasonable position). Professionalism was described as knowing one's job, doing one's best for the client, and meeting the standards of the profession (presumably a complementary set of normative standards to those of civility). It also includes the societal role. Ethics was described as behaviour that conforms to the (technical) rules of professional conduct; ethics could also include "honest" and trustworthy behaviour.

Civility

- Civility means treating others the way you would have them treat you.
- But the definition that a lot of the community that's engaged in the issue is using is broad enough to include things that I think aren't intuitively uncivil. Essentially any behaviour that is disruptive or that for no particular good reason holds things up, makes it difficult to conduct business. And it includes all the things that would be obvious, abusive, rude conduct, in court and out, which may not have any actual consequence other than making people feel bad. And so they looked at a sort of a broad definition and sort of broad consequences to it as well.
- To me civility is about respect, respect for the other participants in the justice system from the judiciary all the way down to the witnesses or the accused person's fellow counsel in the courtroom. To me civility deals with respect, and I think that overflows into the other areas as well quite frankly so to me that's one of the bases for all of those, especially for professionalism and civility.

Professionalism

- I agree with that and I think that the way I've looked at professionalism is to know your craft, know what you're there to do and know your job. But then it's to work with opposing counsel or the other side of the deal, I'm a transactional lawyer, with a demeanour of respect and cooperativeness to get the job done in a way that does respect all and yet represent your client to the best of your ability.
- So, to me, professionalism means doing something in accordance with the standards of your profession. So, if you're behaving professionally as a lawyer, it means preparing documents in the correct way, or if you're behaving professionally as a doctor, it means not leaving your instruments all over the place while you're in surgery.

- I drew little diagrams, I can't help it. I think when we say 'professionalism' the problem is the use of the word 'professionalism' actually has different meanings in the English language today. I think there's probably two primary ones. There's one that simply says, this is what you do for a living or what you do for money, in the sense of, he's a professional athlete versus an amateur athlete. And the other way we use the word 'professionalism' is very much what Alan suggested. It talks about it being your code of behaviour at a certain level as a result of, in our case, a given benefit privilege to act as lawyers in our system.

Ethics

- And then there's the side of it that's the technical, professional rules of conduct, which probably none of us ever read, but probably all of us practice for the most part. But it's not like you go back and read them, at least I never do. So, I wasn't sure exactly what … but maybe it's all aspects of it that you're dealing with.
- Ethics I consider a substantive imperative as opposed to a practice modality. I mean there are just things you don't do that break the very clear ethical rules that we're all familiar with.
- I mean ethics to me is how you behave when no one's looking. I mean if someone's looking over, what's the gut call? And I don't think there's a moveable post in ethics and let me give you the example that comes up constantly in litigation is, do you have to produce this document?

Inter-Connections

- Civility, I think, is different in that it's more of an approach. It's connected to professionalism in that it's the way you carry out those professional goals.
- Well it's interesting because I don't associate professionalism and civility with what I thought the topic was, which was legal ethics. I can see that one could see one as a subset of the other perhaps but they're compartmentalized very differently in my brain although I think I'm acutely aware on both, I don't see one as necessarily connected to the other.
- I think there's a difference but at the risk of kind of defining words, I think there's a huge overlap between professionalism, civility and ethics.

Enactments of Professional Identity

On several occasions within the focus group discussions, participants suggested linkages between issues of professionalism and ethics and their own professional identity.

Public Service and Role Identity

A number of participants reported having a sense of personal pride in the public aspect of their work.

- We are a profession, we are a self-regulated profession and we are given a position of privilege to ensure that we're a key component to the justice system. I think professionalism means that you have a higher obligation beyond… the immediate financial interests and your immediate personal interests and your immediate client interests to ensure that the system works.

Representing the Law Firm

While professional identity was usually discussed within the context of individual pride in service, it was also at times associated with one's role within his or her law firm.

- I don't just have a duty to the client, I have a duty to the court, I have a duty to the profession, I have a duty to my name and my firm's name.

Control and Collegiality

The ability to reflect on the impact of action was a subject of comment. This reflection was often in the form of the ongoing need to deal effectively with other lawyers.

- That kind of bugs my sense of professionalism because you've got to do the right thing but it's also you just can't deal … I haven't learned how effectively to deal with that [difficult] lawyer yet.

Reflection also led to a sense of hopelessness for some participants. While recognizing that lapses in professionalism were occurring, some

expressed a sense that institutional forces stronger than their own personal resources made the lapses inevitable.

- One problem you have in a small community like here though is there's not any kind of emphasis on efficiency, such as showing up on time and getting your paper in on time, that type of idea. It's because you don't have the time constraints. I was a Crown in the GTA as well as here, and down there you've just got the time constraints. If you're not there at the opening bell, I'll give you an example. At the Bail Court in Whitby and Oshawa, we would have 60 every day. If you weren't there at the crack of dawn, your guy was going back and the next guy was coming in. Here we don't have that, and that goes to professionalism for sure being on time and being responsive to your client so that type of idea; whereas, here you can lollygag around.

The Lawyering Role

Part of the complexity within the profession seems to stem from differing perceptions of the lawyering role. In essence, lawyers described a tension between being client's "mouth piece" – which could give rise to unprofessional behaviour, and taking a "reasonable" stance with respect to client issues.

- I'm not directing them to say as to exactly how they should behave or what they should do, but when I get an absolute ridiculous request there are lawyers out there who will just follow it blindly. As you said, they'll just follow instructions, instead of sitting in [sic] the client down and explaining the consequences and explaining that what they want me to do is just not going to be in their best interest. It's not going to advance their case.

Participants also discussed some lawyers' inability to "control their clients":

- The one thing that we (senior lawyers) have learned is that you can stand up to your clients. There are ways to tell them they have gone too far without them feeling that you're fighting with them. Or there are ways of framing how you give advice that guides them back to where they should be.

Development of Professional Identity

Developing Ethical Sensitivity and Reasoning: Dimensions

Participants described three different dimensions to the recognition of a professionalism or ethical lapse. The first dimension is best described as tacit, that is, a number of participants noted that they would recognize a professionalism or ethical issue through a physical reaction, a sense of confusion or discomfort, or instinct. The second dimension is problem solving, that is, where a professionalism or ethical problem was recognized as a possible dilemma, the participant described a method to reason to a conclusion. As set out below, often the method involved discussions with others. Finally, participants identified a knowledge dimension, that is, they were able to recognize an ethical problem because they knew the Rules. Conversely, not knowing the Rules could lead to a failure to recognize an ethical problem.

Tacit Dimension

- I think sometimes it's just common sense. I think there have been times, not a lot of times but I could count on one hand where you just feel it in your gut. You may not know why exactly, what rule it's breaching or what it is but you just know that it doesn't make sense and it's probably not something that you want to be a part of.
- …and it's interesting because I think the initial reaction of the associate is, I don't understand what's going on, I'm confused. I don't think they necessarily see it initially as an ethical dilemma, they think they're misunderstanding something. And sometimes that happens at 10:00 at night and they're pondering their instructions or a letter that's gone out that's not clear. And without thinking it's an ethical dilemma, because [lawyer] is an office next door, I walk over and I say … I don't understand what's happening here.

Problem Solving Dimension

Some participants identified methods of problem solving of ethical issues, which might begin with an initial discussion of whether an issue existed (note

that this approach contrasts with that described in the section on tacit understanding.) Problem solving could include an internal dialog, or discussions with trusted sources.

- Because I think the places where we have difficulty knowing what's right and what's wrong is where there is a systemic concept of, you have a responsibility to your client to advance his case, runs, bang, right up against the, but you're obviously doing wrong to the other person. I think that's where most of those problems arise, is when those two … sometimes they go hand in hand but sometimes they do conflict, and that's where the uncertainties come up. Otherwise, the rest of the time, you kind of know.
- Obviously, you go to your mentors that are either official or unofficial when you have problems that you don't understand and often I think those are professional or ethical issues where you're basically going to someone because they are gray areas. It's not like there are really many rules of professional conduct. These things are certainly hard to apply in specific circumstances.

The Knowledge Dimension

- I mean there are just things you don't do that break the very clear ethical rules that we're all familiar with. The biggest problem there is that I find is there are two reasons people break ethical rules. There are the people who don't know the ethical rules and then there's the human element of forgetting to obey the ethical rules. I find that a lot of younger lawyers fall afoul of ethical rules at times because they don't know them. They're not taught them. Some law schools have introductory courses first year, others don't. Older lawyers, by and large, but not exclusively, know the rules but we're all human and we can all have a lapse, hopefully not a serious one and hopefully one that's remediable but essentially, we know the rules.

Some participants also discussed not knowing ethical rules or forgetting ethical rules as a reason for professionalism occurrences.

- I find a lot of younger lawyers fall afoul of ethical rules at times because they don't know them. They're not taught them. Some law schools have introductory courses first year; others don't. Older lawyers, by and large, but not exclusively, know the rules but we're all human and we can all have a

lapse – hopefully not a serious one and hopefully one that's remediable – but essentially, we know the rules.

- And the problems in the real estate sector are that young lawyers have come up and there's no Bar Admission course where they might have met mentors like [participant] was talking about. And they're not conducting themselves properly and they're not satisfying undertakings and they're releasing keys. And they've got ads that aren't allowed and they just don't know.

In addition to knowing the Rules, participants noted the importance of learning about opposing lawyers, and about knowing specific clients.

- You do adjust your practice because you also have to learn to manage your client's expectations based on the lawyers on the other side of the file.
- Some clients are better than others but there are some that no matter how many times you explain it they do not view it as any obligation besides putting their case forward so you really have to hammer it in. Obviously, you wouldn't stay to represent them if you knew they were holding back but if they assure you that they're compliant, it's difficult to do anything beyond that.

Developing Ethical Sensitivity and Reasoning: Experiences

Lawyer pressures

Bullying and disrespect

A number of lawyers who were junior in years of experience, or who recalled that time frame within their careers, described bullying or disrespectful behaviour being displayed by more senior counsel:

- I can tell you the junior associates deal with a lot of stuff from more senior counsel, and it's like some of the things X was talking about, a refusal to talk to them like they're the lawyer in the room and treating them as errand people for more senior people.

In addition to seniority, some lawyers described a perception of being disrespected by virtue of where their firm was situated, the size of their firm, and whether they were in a law firm versus government setting:

- … I used to see that (bullying) on Bay Street too, firm to firm, but I think that was more because there might be someone at a senior level and the person on the other side was a junior level. But now I see it even at government because you are a government lawyer and you don't know what you are doing. And then now in the "905" (region) – same thing, but I'm finding more now it is something more concrete like a win that will usually turn things around.

  [Moderator Question] When you say bullying, what does bullying actually look like?

  [Response] Condescension. Assumption that you don't know what you're talking about. Really, there is just a view that if you're on your own or you are not in one of the downtown firms … I don't know how to tell you anything more about bullying; the pushy assumptions that you are not going to know you're client's rights, you're not going to take a reasonable position on something, or just pushing.

Some comments seem to confirm an impression within large firms that lawyers from smaller firms are responsible for occurrences:

- And my experiences with the partners here has been that they will teach you, consent to reasonable requests, consent to reasonable adjournments, don't bring ridiculous motions, get back to people on time, mind the tone of your correspondence. So all of the things that we're trained to do dovetail with all of that. And I think it's because these are people that are very much rooted in the organizations that have a dog in that hunt. As soon as you get outside of the big firms the experience, I think, can be very different. And any time I deal with an uncivil lawyer it's typically somebody at a small shop or a solo practitioner or it's somebody who doesn't litigate full time and doesn't really know how they're supposed to behave. They're the ones that don't follow the rules of the game.

Tactical incivility

Some participants described situations where senior lawyers used their seniority to gain strategic advantage:

- I think, typically, when you're in your first few years of practice, the ones who are less professional will try to abuse that differentiated potential. If they know something is complete[ly] wrong, they will take a ridiculous position at your first discovery when you're on the record with someone transcribing what you're saying.
- It depends on the senior counsel but some of them will take absolute advantage of junior lawyers or attempt to take advantage. You have to stick up for yourself but it's a nightmare.

Somewhat related to the client bullying discussion below was the topic of displaying tactical incivility in an effort to create an impression for the benefit of clients:

- …[S]ome lawyers view incivility not so much as a negative personality trait but as a deliberate attempt to gain advantage, not necessarily for themselves, but for their clients. If they can intimidate the other side, if they can put off lawyers, if they can throw them off their stride, it's a tactic like any other.

Deliberate misleading/sharp practice

Beyond incivility as a mechanism for impressing clients is the problem of deliberately misleading others in a [misplaced] eagerness to serve clients:

- Well, you send a document over with the report to say, these are all the changes, but whoops, I forgot to track that one. I put the "not" in that place which reverses the meaning of it but I just didn't tell you.

Competence

In addition to emotional control, insecurity about level of competence was causally linked to professionalism occurrences.

- It's happened to me a lot where people try to slip these little things in. It comes from insecurity. They don't trust their own skills enough to draft it properly and tell you what their position is, so they're going to try to sneak it in because they don't want to have that discussion with you because they think it's a confrontation they're going to lose. So, they'll come around the other way and try to slip it in there.

Lawyer incompetence was also linked to bullying behaviour.

- However, there is the other aspect of bullying in that it's sometimes you just get incompetent counsel who don't understand what they are doing and so they just keep pushing and pushing because they don't understand how to properly litigate a file. I have an example of a woman who dragged me into a single motion at a Provincial Court over two days that cost my client $15,000 in costs awards, just simply through incompetence – she didn't know what she was doing.

Hostility Associated with Inability to Separate Self from File

A number of participants identified lapses in professionalism that they attributed to lawyers personalizing the legal communications associated with their files.

- That's where I really notice the difference. It's whether they personalize the matter or they realize that's their client's position so they'll push but it's not their fight, it's their client's fight.
- … I find that on an almost daily basis, but not quite that extreme but I get lawyers who seem to take their own client's issues personally for some reason or they just have their own issues to deal with.
- … there's that emotional involvement that comes with family law, and it's easy to perhaps act unprofessionally when dealing with a case that you may take to heart or feel strongly about.

At times, the occurrences were illustrated by emotional outbursts and hostility being displayed from one lawyer to another.

- Hostility would probably be my number one because on a day to day basis I run into lawyers who are absolutely hostile and they take their client's issues personally and that creates an environment in which you are unable to negotiate with the other side. And it causes ethical issues because their behaviour tends to border on the unethical side because they are trying to advocate for their client.

One participant recognized the problems associated with one's own lack of emotional control.

- When I was a young lawyer … I used to get upset and would rise. I could be freaking out at a client or another lawyer who was just being a complete idiot but I finally just had a moment one day when I looked at myself that I am hurting myself far more than I am hurting them or accomplishing anything here.

Deliberate Misleading

Beyond incivility as a mechanism for impressing clients is the problem of deliberately misleading others in a [misplaced] eagerness to serve clients:

- Misleading. Leading another lawyer or his client in some context to believe that a state of facts exist that you know not to be true. Because you're so eager to serve your client's interests that you may fall afoul of wanting to do such a good job for your client that you deliberately leave the wrong impression and don't even see it as an ethical issue.

Business pressures

In addition to personal approaches to legal practice, participants frequently referred to the business model of lawyering that has emerged over the past 20 odd years, as creating pressures that can lead to professionalism occurrences. These pressures can be broadly characterized as cost pressures and time pressures, with the additional feature of technology as a contributor.

Cost Pressures

The need to maximize "billable hours" was a recurring theme with various participant groups.

- Lawyers have always been a target of jokes but it's just in the last, I think, 20 year time frame as one of you mentioned. And I think it is all the talk by these non-legal consultants about the legal industry. Every second lawyer-oriented seminar that I get an email about is how to maximize your billable hours, and I think that our clients have picked up on this and it has detracted from the professionalism.
- I think that's sometimes the biggest problem – that people get so stressed about – is because they have financial pressures forcing them to do things that they don't want to do.

Time Pressures

Some participants commented on the inability to take time to reflect on the work being done. For some, this was linked to the billing pressure.

- I'm really big about people being inquisitive. And I think they're so hell-bent on the billable hour that they will not stop and question anything. And I ask them and encourage them not to be automatons out there just following the precedent. You need to stop and think and really, really judge what it is you're doing..
- Frenetic paced practice breeds stress which breeds high emotion which breeds defensive incivility [Written comment]

For others, technology was seen as the driving force behind time pressures.

- You used to be able to write the letter and phew, now you know it's got two or three days to go the other way. It needs to sit there for five days and then it's going to take three days to come back. You get the mail, you'll send it to the client or you'll call them to discuss. You won't even send it but now it's – we're all hamsters in the wheel running like crazy and that doesn't allow for the type of behaviour that I think we'd all like to engage in a little bit more because we're just running.

Technology

Technology (and younger lawyers' affinity with newer technological devices) was also identified as a contributor to civility issues.

- I think sometimes people can't read the tone of an email. Like, I've seen people blow up over emails and you end up getting all the emails on your desk and you're looking at them, and you think, what went wrong here, and you say, here's what went wrong. You really upset him when you said that. I know you didn't mean to, but you did and you can just see that it went downhill right from there. But it is a generational thing. Young people do not like to pick up the phone , for sure …

Developing Ethical Sensitivity and Reasoning: Time

A number of lawyers discussed the ways that the learning in which they had engaged over time had contributed to both their own sense of identity and the trust that such learning engendered in others.

- The difference between the experienced lawyers and the young lawyers is besides the fact and generally if they're here, it is because reputation, trust, that type of thing. That one thing that we have learned is that you can stand up to your clients. There are ways to tell them they have gone too far without them feeling that you're

fighting with them. Or there are ways of framing how you give advice that guides them back to where they should be.

One of the important learning identified was the complexity of the profession.

- This profession is extraordinarily complex and there are very few black and white areas. Most of it is grey. And if you're not seeing grey on a regular basis, it's because you're not aware of the rules, you have to keep going back to them and governing yourself according to those rules as opposed to your own moral compass. Because just because you're a good person, doesn't mean you make the right choice.

There was some support for the view that professional judgment develops over time, and that often occurrences reflect an early point in that process. Lack of judgement was associated with professionalism lapses.

- I think that's consistent with what [participant] was saying that this isn't a person that's motivated to make bad decisions or bad judgment; it's a lack of experience, the inability to identify. And one of the things we're talking about professional development … it's the ability to know sometimes what you don't know and to look around the corner and to have that ability and that only comes with experience.
- "Professionalism" does not spring fully formed into being. It is a process, learned and observed over time [Written comment].

Learning Outcomes: Implementation

Throughout the focus groups the participants identified specific learning outcomes from their experiences and their reflective discussions. First, they learned self-management, either through their own reflective process or through assistance from another lawyers. They learned consequences of responding in kind to rude behaviour, as well as the advantages of adopting a civil and even friendly approach. Finally, they described how they learned various norms of practice that illustrate professionalism in action.

Learning self-management

- I think through experience you learn to get to a point where you feel a bit more confident in terms of handling it and not letting things really affect you or escalate. And you can somehow suggest that to the opposite side, or whoever you're dealing with, that the behaviour's not quite acceptable.
- I guess having dealt with those types of experiences and realizing that it doesn't end your desire to be a lawyer or end your career. No one is calling you on it because some other lawyer was being a jerk. They're not saying you're a bad lawyer. It's almost like a rite of passage so you just go on and grow a thicker skin I suppose. I continue to ignore those personal attacks and not let them see that it's serving any purpose so actually they stop. That's what you learn from doing it a couple of times.

Learning consequences

- I usually print out the e-mail and we go in to talk about it. I try to get that junior lawyer to see the e-mail from the other side. If you were just receiving this e-mail, how are you going to receive it? Are you going to be pleasant about it or are you going to think that they're in a pretty assertive way telling you where to go and how fast to get there?
- I'm thinking about a fellow who I juniored for way back when who said, in terms of the letter writing, for every letter that you write think of it as being the first exhibit at a trial and do you want it there? I now do that with the junior lawyers in my office.
- I remember very early on in my articles, my principal sat me down, not because I had done anything wrong but just because of the kind of mentor he was. And he said you've got two hands, two feet, two eyes, two ears but you've only got one reputation. If you squander it, it's extremely hard to get it back. And that was the way he practiced and the way everything had to be done.
- And the way we teach our young people professionalism and civility is very simple; you explain to them that if they wish to get a deal done they must be working with people who want to complete the deal.

Learning practice norms

Reasonableness

- And my experiences with the partners here has been that they will teach you, consent to reasonable requests, consent to reasonable

adjournments, don't bring ridiculous motions, get back to people on time, mind the tone of your correspondence. So all of the things that we're trained to do dovetail with all of that.

- When I give a talk on how to argue motions to the associates and students once a year and I say to them, don't bring a motion for the sake of bringing a motion. Don't bring it to delay or be difficult or as a tactic, bring it only if it's going to advance your client's case. We don't practice law like that here.

Communication

- That's good advice I definitely think for the more junior people coming into the profession too because they see instant communication via e-mail and they may be a little more short in their communications but you have to always be respectful to who is on the other side.

Recognizing limitations and seeking assistance

- But what he did was said you've got to stop and tell me how this works. Start at step one and tell me. Now stop and tell me about step two. The client couldn't have cared less but he was very happy that the partner understood how that worked. I thought that was really impressive because the client knows this guy is super smart and handles this stuff all the time but his pride isn't too big to allow something like that to happen.

Assisting others

- He looked at me and said you haven't done this before, have you? I said no so then he said okay and he just explained assuming I knew nothing, not in a condescending manner but just very plain spoken. This is what I want and this is how you do it so structure it like this. That was really helpful because it didn't require me to have to feel like I was looking incompetent in front of the head of the whole practice group because I didn't know what I was doing. I was so junior I had never done it and I really appreciated that from him.

Courtroom behaviour

- But you know what, there was a situation in that trial where he had an opportunity, he was closing. It was not even, he didn't have to, he did

according to the rules of professional conduct but nobody would have known about it. He was just doing something that you don't want to do but because you have to disclose it, it was just really stand up and it was a really good demonstration of how it's supposed to be and even if it's not in your client's interest. It's just those are the rules and it has to be done and you have to act that way.

- It's interesting that you said that because I was thinking what if your client or when your client is being bullied by the other side who is not represented? It is actually the person who is doing the bullying and then you try to look to the judge to say, please step in here and do something, please. You want to maintain your civility and not step over that line. And you're looking at the judge with pleading in your eyes saying, please put this person in their place because what they're asking for is ludicrous, what they're doing is impossible, they have already had a cost award against them that they haven't paid and they're not going to and they're telling you that they're not going to. Please do something. There seems to be nothing that can be done.

- Yes. It is impossible to explain to your client and a huge waste of their time and money. If the judge says, this is on next Friday's peremptory, you should be able to tell your client it's absolutely going to be argued next Friday, but it isn't because next Friday there's another reason why we need an adjournment so next Friday it's going to really be peremptory. But then the next Friday, it's really, really going to be peremptory.

The Learning Curriculum

When asked about how they learned professionalism in practice, participants in all focus groups noted elements of the informal curriculum as having the most influence. The formal curriculum was rarely discussed, apart from the written comments (addressed below). Institutional policies and the reward structures in the form of billing practices were evidence of a hidden curriculum in professional legal education.

The Informal Curriculum

Role models and observation

Role modelling and observation were frequently cited as methods of learning, and may include focussed discussion or not. Role models included lawyers both inside and outside the individual's firm. Negative role models were sources of learning. While not described as role models, problematic opposing lawyers were rich sources of learning.

Positive Role Models

- But in terms of where I learned the approach, I think it was mostly in the first three or four years being an associate. Being taken along to hearings and seeing how the more senior lawyers behave and the standards they set for you, their corrections to your drafts of letters and things to opposing counsel if you're contentious, their careful use of language. You kind of see that and you pick it up in the first couple of years of practice and then you carry that forward. And also, in attending meetings and attending court, you see that the most effective advocates are ones who don't lose their temper and just stay calm and pick apart the other side's argument logically and without getting upset or showing that they're upset. And that's just what I've seen as the most effective way to behave and so I've tried to emulate that.

Negative Role Models

- One thing that interests me though is when you're in a transaction as a corporate lawyer and the worst behaved person in the room is the person you're working with, this is (inaudible, over-talking). You really get a very good view of it and I think you learn a lot by watching somebody else. Because you spend so much more time, relatively, with them than you do with the other side, their misbehaviour I think has a bigger impact in a corporate world.
- And how you learn that was probably in kindergarten or something. I'm not sure, but I think you learn a lot of it actually by observing how you

don't … observing people's practice traits that you don't want to follow, the things that you can't say at the time but you're kind of shocked how somebody behaves and you just make a note, note to self, don't ever behave like that. It didn't impress anyone.

Mentors

Mentors were broadly defined as any sort of helper. Participants frequently cited the importance of mentors and others within a developmental network. These relationships arose through proximity within an office (which could include friendships developed during articling), arising from work within a file (assistance from lawyers on the same side, or judges), or through "cold-calling" (seeking assistance from another lawyer with whom the learner did not have a pre-existing relationship). The availability and generosity of these helpers was a positive note throughout the focus groups.[139]

- I've had I don't know how many mentors, informal and formal. Especially when I was first starting out, it was quite comical. I would just call people up to say hi, would you mentor me? They're within my firm. My senior mentor is if I have problems with counsel, if I have problems with the clients, actual real ethical questions or file questions, I have access to him and that's an open-door policy as well. I think it takes a lot of time pressure off of senior counsel because that means when I have a … like it's a stupid question. For him it's a stupid question but for me it's not. I can go to the junior lawyer and say have you ever done this or I want to write this letter, am I pushing the limit a little bit, like is this rude or can I do this? I'll have my letter or e-mail or my submissions or whatever reviewed so that I feel more competent about it.

Some participants identified their own mentoring/teaching practices, including how they taught professionalism.
- I know that many of the people in the room here are mentors to associates. I have two associates that I mentor, and I obviously try to lead by example and take them along with me to hearings, client

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[139] Generosity was not always evident in lawyer interactions. At least two participants noted times when they were escorted out of an office by a lawyer who was clearly too busy to provide assistance.

interviews, not just to develop their techniques in terms of lawyering skills and abilities, but they're professionals. Returning phone calls, answering emails, don't let a phone call or email – this is my own rule – go unanswered for more than 24 hours. Certainly if you're in a hearing, it's difficult. Obviously, put your out of office assistant on if you're going to be away from the office for a length of time. Give feedback to the associate, not just on their skills and abilities, but on the behaviour of the people in the room. Talk about what happened in that meeting, in that negotiation, in that mediation, so that they get an understanding of the dynamics, the personalities and how to respond to those personalities.

Networks of friends, colleagues, and others

Networks were forged through shared experiences, such as law school or articling; availability, such as the person in the next office; seniority and experience, which included a dedicated support person; and "cold-calling" of knowledgeable people.

- I still call up my friends. I started in a big firm before I went to a small firm so there is a group of us who survived articles together. I think when you do that you forge a bond that you keep for a long time. We still call each other with our ethical dilemmas and I would probably go to them first, only because I feel very comfortable talking to them and they can see it from as many perspectives as maybe someone a little bit more senior.

Individual capacity (learning through doing)

- Not as much shadowing because I articled for [name] so I only did work on files within the two of us and because the firm was so new at that point my experience as an articling student is probably different than the articling students we have now. Just because there was too much work and too little people, too little man hours, that I was thrown into the deep end frequently, but that's what happens. It happens.
- I think my experience is a little different than everyone else's at the table because I literally started from scratch when I came out of law school. I had an articling position but the articling principal was not the type who took me to court. Basically he said, here, go do my set dates and I don't want to see you again. So I scrounged around for

whatever and I had half a day where I could go off to court and do whatever I wanted in my free time.

The formal curriculum

Additional Written Feedback

While reference to the importance of law schools teaching professionalism was casually made with some focus groups, law school training was specifically addressed within the written commentary as a method for improving professionalism:

- In law school, make professionalism as important as any substantive law course. People need to learn from the beginning that a high level of behaviour is required of them.
- Start early. In other words, educate law students more in our law schools about professionalism and practice. Perhaps include more and emphasize more practical learning in law school.

Likewise, more frequent and pointed reference to Continuing Legal Education Programs appeared within the written comments than was the case within the focus groups.

- LSUC is clearly very conscious of this problem and requiring professionalism hours is a very concrete step in this direction. I have appreciated the availability of free CPD programs that I can access from my computer in real time.
- I suppose all LPD programs could devote a portion of the time to discussions of various issues of ethics and professionalism that relate to the subject matter of the programs.
- Sponsoring group discussion or panels for older and younger lawyers
- … Seminars, presentations, role playing – NOT PANELS!

The Hidden Curriculum

There was considerable discussion of the corrosive effect of law as a business. A number of the specifics of the effects on professionalism have been addressed in the section above on Business Pressures. These points refer directly to firm policies that would affect learning.

- Then I went with a big firm and was there for a long, long time. I was an associate for six or seven years and then I became a partner and I just know from the big firm side of it that there was so much emphasis on billing, so much emphasis on how many hours somebody spent on billing in a year.
- We're now at the point where a young lawyer comes into a firm and he or she is given a file and told to go like hell. They go to their principal when they have got a problem but they don't see the practise of law. And I think you have got to see it, you have got to see it done by somebody who is civil and is polite and is professional. And then you take on what you see, that's the learning process. If you don't see it and you get to see the boor in court who bullies people and is disrespectful then I guess you think that's how it's done. So we have really lost, I think

Unsaturated Categories

There were a number of categories of feedback that arose within some focus groups but not others. While the comments did not "saturate" to the point where they can be described as representative of the groups overall, they are worthy of note, and of potential further research.

Self-Represented Litigants

A number of participants within small and solo practitioner firms mentioned the challenges to professionalism posed by the rising incidence of self-represented litigants within the court system.[140] The problems were manifested in different ways. First, for a lawyer dealing with an unrepresented party as the opposing party, it was viewed as difficult to deal with civility issues relating to a party who has no (professional) obligation to behave with civility. Second, participants commented on the accommodating approach taken by some judges to unrepresented parties:

- And, just to deal with the question you asked in terms of the judges, I really think that the judges now more than ever are

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[140] Note that a distinction is sometimes drawn between unrepresented litigants - individuals who would retain a lawyer if they could afford to do so – and self-represented litigants – individuals who choose not to retain counsel because they believe they can represent themselves effectively. See Carol Cochrane, "A Family Law Practitioner's Guide to Dealing with the Self-Represented Litigant" (2006) 25 Can Fam Law Q 131.

concerned about complaints. They're particularly concerned about getting complaints from unrepresented parties. And so, they may slander right, left, and centre while they're in court, but they're not going to be overly aggressive with an unrepresented party because they fear what will happen, that they're going to then have to spend days, weeks, months, dealing with this issue, this side issue that has nothing to do with the case. But they will assume that [participant] has got thick skin and can take care of himself, and I'm not really listening to that, I'm not paying attention to these attacks on him.

Judicial Role

There was some feedback relating to the role of judges in promoting professional behaviour amongst lawyers. Often, these comments were linked to the issue of dealing with unrepresented litigants, as illustrated in the quote above. Other participants, however, were of the view that better judicial guidance of counsel behavior was warranted:

- …. And this lawyer walks in, sits down, and never even said I'm sorry, let alone an explanation. We've got the clerk, we have witnesses, me, the judge, everybody is waiting for one person who is like the other lawyer. And that same lawyer, recently I was on a motion, started citing cases for annotations out of Ontario Family Law, by Steinberg et al. Like, no cases, no hard copies for anybody to read, but "have you got the same volume I have, Your Honour?" And he's citing cases. That's a 32-year lawyer. Come on. You should have done your homework. Not acceptable. And that's where I called about bravery. I want judges who call people up on that bad behaviour, because they need to learn at the hands of the judges. …

Gender

Some participants suggested the existence of unprofessional behaviour linked to gender bias:

- I've seen it, like with male lawyers who are like, "Yes, sweetie, that's because you don't know how things really are."
- I think that there is, unfortunately, to a certain degree, being a female in this profession, there are definitely other hurdles that sort of come into play.
- I was in a discovery last week where a senior male partner said to a junior female associate from the other side I'd like to take a longer break for lunch than normally scheduled. He took an hour and a half instead of an hour. He says, go shoe shopping or something.

Formal Complaints

When discussing avenues for dealing with unprofessional behaviour by other lawyers, some participants noted that they were reluctant to lodge a formal complaint with the Law Society:

- Somebody mentioned a complaint to the Law Society and I really feel in my career over 35 years there have probably been three or four times when I have really felt when a complaint to the Law Society would have been valid and reasonable and I have never done it. I can't imagine doing that to another lawyer even though the lawyer has treated me or my client or the Court horribly, to bring myself to make a complaint to the Law Society, to me is somehow a bridge that once you have crossed it there is no return on it. It is really a very final thing to do and I have never done it.
- A written comment suggested that a less formal mechanism might be helpful: Finding an acceptable means, short of the complaining to the Law Society, in which ethically borderline behaviour can be brought to a lawyer's attention and corrected.

Partner Behaviour

Within the large firm groups, a few lawyers touched on the unprofessional behaviour of partners within their firm, and the need to manage that behaviour:

- … I think the firm has made it very clear that they're not going to countenance bad behaviour and that includes being disrespectful to each other or associates even you could be one of the biggest

lawyers in the firm and we'll talk about being shown to the door because you're just ungovernable.

Negative Institutional Influence/Portrayals

A final thread of comment that did not saturate discussions, but that is worthy of note, was directed toward the role that both judges and the Law Society play in diminishing perceptions about lawyers as professionals.

- It drives me to distraction that there is a person [referring to a judge], instead of supporting the profession, is criticizing it for a whole bunch of things. There's no access, it's too expensive, it's this, that and the other thing. Well, people don't want to go to the … they want to see, whether it's a family law lawyer, they want to see us in an office space, we need office space, it's expensive. We have to pay salaries. We're a big institution in this country.
- Well, I'm a lawyer. I feel I'm a professional. I believe it's one of the great professions. I'm disappointed in my governing body that refers to me as a licensee and no longer as a lawyer. I think words matter, and I don't like the fact that the Law Society now refers me to as "Dear Licensee". I find that insulting.

PART V – DISCUSSION AND CONCLUSIONS

Views of Professionalism and Civility

Many of the participants' views reflected the building blocks of professionalism articulated by the Advisory Committee.[141] In particular, discussions of leadership, especially by way of mentoring, and service to the public suggested a level of comfort with the extent to which these elements were achieved. By way of contrast, while collegiality and civility were frequently raised within the discussions, these topics were often discussed in a negative context – that is, in relation to behaviours that diminished professionalism.

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[141] *Supra* note 6.

Likewise, it seemed that lawyers recognized the value of "balanced commercialism", yet found it difficult to achieve in light of time and billing pressures.

Participants engaged in a more nuanced discussion of honour – involving courage and character in everyday actions. This courage and character often involved making difficult decisions and having difficult discussions with other lawyers and clients. There was some evidence that the ability to demonstrate the courage required for such decisions and conversations became easier over time. Pride and enthusiasm were not consistent – some groups appeared quite disenchanted with their practice and the practice community where they worked; others took pride in and seemed to draw energy from their interactions with clients. Overall, then, the building blocks identified by the Advisory Committee seem to resonate with participants, though adherence to the principles represented by the building blocks is not always easy.

Description of Lapses

The description of professionalism lapses was quite consistent with those described within the Treasurer's Report.[142] As noted in the introductory passages of this report, often the lapses that practitioners faced in their day to day work focused on difficulties in client management, challenges related to management of problematic behaviour by other lawyers, and the challenges associated with trying to achieve the sort of "balanced commercialism" advocated for by the Advisory Committee.

Certain types of problems required balancing different interests, while others were more straightforward. Certain types of problems could not be resolved without reference to authority such as the Rules of Professional Conduct, together with a defined problem-solving strategy, while others

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[142] *Supra* note 16.

engaged tacit learning to resolve daily decision making. Participants' ethical sensitivities developed over time and a number of the experienced lawyers noted that they were still learning and that resolving problems did not always become easier. All lawyers used a variety of resources for assistance; however, there was a sense that they were unable to rely on institutional sources of support. Further, although comments about reluctance to report other lawyers to the Law Society were not raised in all focus groups, there seemed to be at least some discomfort with the idea of formally reporting instances of uncivil behaviour to the Law Society, as the Civil Justice Reform Project authors recommended.[143]

The complexity of the experiences cannot be underestimated. Many were central to being a lawyer: managing client expectations, creating and managing conflict, growing the depth and breadth of their knowledge base, and learning strategy and tactics. These experiences engaged the participants at the affective and cognitive level; so that individuals required assistance to make sense of the experience, manage their emotions, and formulate an appropriate response.

Professional Identity

Participants' feedback about both professionalism lapses and positive influences on professional identity formation resonate with both the Advisory Committee's concept of professionalism, as noted above, and with Hamilton's framework for professionalism.[144] Some of the comments about lapses made implicit reference to professional identity (for example, the reference to bullying being associated with a knowledge deficit); others were more explicit (for example – "It's anything for a buck sometimes and it's not a credit to our profession when lawyers individually or aggregately as a firm conduct

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[143] *Supra* note 13.
[144] *Supra* notes 40 and 46, and accompanying text.

themselves that way.") Participants made reference to ethical duties (adherence to both the letter and spirit of the rules) and aspirational duties such as honesty and duty to the public. Frequently, personal conscience, articulated as the acts of recognizing and acting upon ethical challenges, provided a key context for discussions.

Role of Lawyers

As illustrated in the quoted passages, many, but not all participants reject the "Hired Gun" dominant paradigm. This rejection illustrates a degree of reflection about how to balance client demands with the lawyer as advocate and lawyer as advisor. Some participants were more at ease with the balance than others. Comments about the problems associated with "personalizing" client matters seem to highlight an unease with the balance, and perhaps illustrate a different stage of professional formation. Additionally, reported "posturing" for clients' benefit points to possible discomfort or uncertainty about the lawyer's role in relation to clients. It is possible that this behaviour is also representative of the phenomenon described by some scholars of professionals who may be critical of their profession's (perceived) ideals (i.e. aggressive hired gun) and yet may exhibit conduct that perpetuates these ideals.

Formation of Professional Identity

Participants' statements about both the lawyering role and lapses in professionalism suggest both implicit and explicit linkages between lapses and understandings of professional identity. Lapses that relate to competence are representative of the knowledge dimension of professionalism – as discussed by the Advisory Committee in relation to the "scholarship" building block of professionalism, and by Hamilton, in the context of both the ethics of duty and the ethics of aspiration. Civility discussions link directly to the Advisory Committee's discussions of collegiality.

The research findings suggest that lapses may occur within a complex framework of professionalism and stages of identity formation. While we did not find a significant number of specific references to development in accordance with stage theory, implicit within some of the comments about the complexity of various legal matters and the difficulty involved in developing the ability to stand up for one's own principles in the face of probable negative feedback, is a description that coincides with this developmental theory. Indeed, as Monson and Hamilton suggest, some lapses may be unintended:

> Individuals embedded in Stage 3 [Socialized mind] thinking may simply fail to account for the full complexity of codes of ethics or professional responsibility and instead follow norms and status quo, complying with the minimum, rule-based black letter of the law.[145]

Understanding the complexity of professionalism formation can shape teaching and learning strategies.

Teaching and Learning

Participants across the nine focus groups identified very similar learning processes regardless of size of firm or setting. This finding is consistent with the literature from other jurisdictions, and supports the importance of apprenticeship models of learning in practice. Participants identified an apprenticeship model of learning that closely corresponds to Eraut's typology of early career learning (and even later career learning).[146]

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[145] Monson and Hamilton, 2011, *supra* note 56 at 141.
[146] *Supra* note 85.

The Curriculum as Viewed by the Learners

Informal Curriculum

Learning occurred primarily through the informal curriculum. The informal curriculum was characterized by learning through the work itself, so that professionalism lapses occurred in various points throughout a matter – at the outset when deciding to accept a client, during discoveries or negotiations, in the courtroom or at a registry office, or after having completed the file. At any of these points participants learned through observation and reflection, discussions with mentors and other members of a developmental network, or through successes and failures in the work itself.

Role modeling and observation appeared to be the primary informal learning process, which is also consistent with literature on law firms. Role models could be found anywhere – clients, judges, other lawyers, or even parents – and could be either close or distant. The process described – of choosing particular attributes – is consistent with Ibarra's research.[147] That is, participants chose a particular attribute – such as assisting a lawyer for the other side – rather than a "whole person." Participants may have chosen attributes based on observed consequences of that behaviour – the calm, well-prepared opponent described as "just deadly", or on whether the behaviour was consistent with their values and inclinations – "I never wanted to be like that." Observation appears to be a life-long enterprise; senior lawyers noted instances of observing behaviours that they would either accept or reject. These behaviours were often very subtle: tone of voice, managing reactions, appearance of calm, lack of condescension, careful use of language, patience. Other behaviours were less subtle: blustering, hostility (in person or in correspondence), profanity, misleading, being late.

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[147] *Supra* note 91.

Negative role models were rich sources of learning, with participants actively rejecting certain behaviours. Negative role models have been portrayed in the literature as obstructions to learning, and even detrimental, in that they undermine spirit and enthusiasm. While these participants found unprofessional lawyers dispiriting, as negative role models they may have offered some variation of "safe" learning. That is, participants observed the consequences of certain types of behaviour, rather than experiencing it themselves. They learned from the mistakes of others.

Mentors were also an important source of learning. Mentors were defined expansively as anyone who provided assistance. In contrast to much of the literature on mentoring, these participants described mentors as providing psychosocial assistance about law and lawyering rather than career advice – with the possible exception of some mentors who discussed the value of reputation. Mentors could also be found both within and outside the participant's firm or office. It is unclear whether the mentoring relationships described by these participants enjoyed the level of trust and closeness described in the literature.

Participants described many instances of reaching out for assistance, often to senior practitioners with specific experience. In nearly every instance, the experienced practitioner responded with generous assistance. This "reaching out" process is also documented in the law firm literature, and may be particularly important for solo and small firm practitioners. It requires a certain level of courage to engage with strangers; and is a testament to the profession that members behaved with generosity.

Networks, which could include mentors, were another form of learning process. Networks often included long-term relationships, which may have developed in law school or bar admissions, or in practice. Networks do appear to be characterized by closeness, so that members could talk to each other on

many topics at some level of intimacy. Similar to mentors, the importance of networks for learning is found in the law firm literature. However, in this study we did not find that either large firm associates or solo and small practitioners could be described as "lonely." They would be pro-active to find support as needed.

Both networks, and mentors within networks, assisted participants to make sense of their experiences through direct instruction and reflection. For example, a mentor would discuss the consequences of a particular action (generally an intemperate response) so that the lawyer would develop an understanding of the range of possible responses. Network members, such a law firm colleagues, could act as a sounding board to discuss a particular course of action – thus assisting in a reflective process both on action and in action.[148]

Formal Curriculum

The formal curriculum was rarely referenced in the focus groups, although the written comments included a number of references to programs or other formalized events. Law school, bar admission, and continuing professional development were, with few exceptions, not identified within the learning curriculum.[149] These findings are also consistent with the law firm literature. Because of the multiple changes in Ontario for the past twenty years, it is difficult to assess the influence of formal learning across the participants.

Hidden Curriculum

Two elements of the hidden curriculum could be described as barriers to the participants' professional behaviour. The first is the pressure to bill (derived

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[148] *Supra* note 76.
[149] Note that the Continuing Professional Development requirement in Ontario began in 2010, so that it is too early to measure its impact.

from law firm policies), which affected the ability to focus and to "be curious" as well as the availability of time to shadow and observe other lawyers. The second is the evaluation process, where lawyers are rewarded for billings as a primary metric. These hidden curricular elements were frequently noted in the law firm literature. Participants also cited some instances of language use as affecting their understanding of their professional role, but that element does not appear to be as influential in this study as in those cited above. It should be noted that the nature of this research did not provide the opportunity to gather in-depth information from actual law firm policies or other documents that would provide more precise data. As a result, this work presents a preliminary discussion derived solely from the feedback provided by focus group participants.

The Learning Process

These participants learned through multiple rich experiences occurring over time. Experiences over time may have been both repeated and new. In many instances they described learning that required management in situations of uncertainty – with the complexities and tensions inherent in practice. These experiences were different depending on whether they involved clients, other lawyers, judges, or others such as unrepresented plaintiffs – so that different elements of professionalism were engaged. These included, for example,

- Responding to rude behaviour or correspondence.[150]
- Deciding how far to press for client compliance.
- Recognizing individual limitations and seeking advice.
- Being alert to sharp practice.
- Controlling emotions.
- Taking the time to think through a dilemma.
- Reconfirming their role as advisor.

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[150] Many of these instances were also noted in the Treasurer's Forum, *supra* note 16.

Many experiences could be described as "micro-ethics" or small daily decisions.[151]

Participants engaged in different problem solving and affective processes as they recognized and managed professionalism lapses, both their own and others. They learned to manage the affective aspects of practice through experiencing anger, fear, and frustration, while developing personal control systems that promoted their ability to act in the best interests of their clients. They exhibited tacit reasoning in their ability to recognize professionalism lapses or issues even without being able to pinpoint the exact issue. Finally, they engaged in problem-solving, either alone or with others, to reach a conclusion regarding a choice of action.

The development of tacit knowledge is unclear. It is not entirely clear how these lawyers developed an "ethical sensitivity" that includes the physical, "you just know" or "you feel something is wrong". It may be that the research method employed was too broad and not sufficiently specific to each individual to allow probes for these statements. Arguably, this tacit response develops through repeated exposure to experiences and decisions.

CONCLUSIONS

We conclude that there is a signature pedagogy involved in developing an ethical professional identity. This pedagogy is unplanned and episodic. Development unfolds over time and requires multiple experiences of grappling with the complexity, ambiguity, and uncertainty of professional practice. These causal processes of problem solving and reflection embedded in the workplace are essential to learning ethical sensitivity, reasoning, and management of professionalism and ethical issues. Following from this theory, we observe the following:

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[151] *Supra* note 131.

First, recognize that law school is limited in what it can teach and the outcomes it can ensure. Law school can provide the essential knowledge base, multiple reasoning processes, an understanding of lawyers in society, and an overview of the most pressing issues facing the profession. Law schools can convey foundational expectations that are not open to debate [basic professional expectations] and then engage students in both the affective, reasoning, and management of complex dilemmas.[152] Law schools can also prepare students for the realities of practice by preparing students for both ethically supportive contexts, as well as contexts that undermine the profession's fundamental purposes and standards.[153] The increased focus on experiential learning within some law schools is a positive and supportive step toward providing students with some understanding of the practice setting.

Second, many of the current initiatives support teaching and learning of professionalism. We note in particular the broad approach to learning professionalism through CPD credits that includes mentoring, teaching, and small group discussions. However, it is problematic that the Bar Admission Course continues to decrease the amount of time devoted to learning professionalism in the context of relationships; and that apart from articling there appear to be limited transitional opportunities for learning through work.

Third, organizations devoted to promoting professionalism —regulators, insurers, bar associations, judiciary, CPD providers, and others —should focus on both formal and informal learning opportunities. Consideration should be given to supporting and celebrating lawyers (and judges) as teachers, mentors, coaches, and role models, as part of the social contract. The organizations should continue to develop programs and enhanced supports for coaches, mentors and supervisors to understand and develop as teachers within an

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[152] *Supra* note 48.
[153] *Supra* notes 4, 49 and 105 at 164.

apprenticeship. That is, they should consider programs that support a version of faculty development within law firms.[154]

Fourth, initiatives on professionalism learning should be expanded to provide multiple opportunities for reflection on values; consider how professionalism and ethics can be learned pervasively through formal programs and general meetings of bar organizations throughout the province. Professional developers and instructional designers should consider how programs can more closely replicate the informal processes considered most helpful by participants – for example, development of programs based on role-plays or small group discussions facilitated by experienced practitioners who can share their insights and also benefit from the "fresh" perspective provided by younger lawyers, both as newcomers with fresh energy and in some cases, as individuals with enhanced knowledge of the sorts of electronic communication devices that have been identified as giving rise to professionalism lapses.

Programs that aim to replicate more informal learning experiences may also require different implementation methods. For example, program providers may wish to consider the availability of video conferencing (rather than web-streaming) to reach more remote areas of the province for at least some programs. Cooperative initiatives between law schools and the Law Society to share technological resources in order to provide the most effective program delivery mechanisms should be considered.

These conclusions are only a starting point for further inquiry. For example, we need more research on the different ethical tensions and dilemmas experienced within the different bars in order to develop more targeted

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[154] Yvonne Steinert, *et al*, "Faculty Development as an Instrument of Change: A Case Study on Teaching Professionalism" (2007) 82 Academic Medicine 1057.

approaches to professionalism lapses. We have only a limited understanding of lawyers' stages of identity formation; further research would form the base to consider how coaching/mentoring programs could be tailored to respond to individuals' stage of identity formation.[155]

Finally, we end as we began – by celebrating the generosity of the profession. Measures to support, celebrate, promote, and increase generosity should be considered. Generosity can be learned through role modeling and observation, so that instances of generous behaviour should be, where possible, made public. Publicity could include teaching and mentoring awards, positive stories about the effects of support in various publications, and regular "spotlights" on mentors on the Law Society website.[156]

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[155] Monson and Hamilton, 2011, *supra* note 56.

[156] In November, 2013, the Law Society of Upper Canada approved the creation of a Task Force to develop a proposal for mentorship services for lawyers and paralegals. The Task Force is to submit a final report by January, 2015. Policy Secretariat, *Treasurer's Report* (21 November 2013), online: Law Society of Upper Canada <http://www.lsuc.on.ca.

Appendix A –Analysis of Complaints to the Law Society of Upper Canada 2001-2011

Complaints Received in Professional Regulation by Area of Law											
Area of Law	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Civil litigation	27%	28%	25%	24%	23%	21.28%	22.36%	16.94%	18.3%	16.4%	16%
Matrimonial/family	20%	20%	20%	19%	21%	21.94%	23.13%	19.07%	20.9%	19.5%	14%
Real estate	17 %	17%	23%	23%	21%	21.5%	20.54%	32.17%	21.7%	17%	11%
Criminal/quasi-criminal	11%	11%	9%	9%	7%	7.72%	6.23%	4.82%	5.1%	4.5%	4%
Estates/wills	8%	7%	7%	7%	9%	6.1%	5.5%	6.63%	7.5%	6.6%	5%
Administrative/immigration	8%	10%	6%	4%	4%	4.37%	3.25%	2.81%	3.3%	2.4%	2%
Corporate/commercial/business	7%	5%	4%	4%	4%	4.34%	2.23%	2.83%	2.6%	4.4%	2%
Employment/labour	2%	1%	2%	2%							
Student misconduct						0.07%	0.49%	0.67%			
Other					20%	12.68%	16.28	14.05%	20.7%	21.9%	27%
Unassigned										7.2%	19%

Complaints Received in Professional Regulation by Issue											
Issue	2011	2010	2009	2008	2007	2006	2005	2004	2003	2002	2001
Conflicts	8%	8%	11%	10%	3%	4.02%	6.24%				
Financial	12%	10%				0.04%	0.7%				
Governance	21%	21%	15%	11%	5%	2.82%	3.62%				
Integrity	41%	41%	56%	57%	28%	24.87%[157]	29.57%[158]				
Client Service Issues	56%	55%	71%	67%	57%	68.09%[159]	57.16%[160]				
Special Applications	6%	5%									
Other					7%	0.15%	2.71%				

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[157] Report broke the integrity complaints into the following categories: 1) integrity-other (8.83%); 2) integrity-misleading (6.65%); and 3) integrity-civility (9.39%).
[158] Report broke the integrity complaints into the following categories: 1) integrity-other (6.99%); 2) integrity-misleading (10.66%); and 3) integrity-civility (11.92%).
[159] Report broke the service issues into the following categories: 1) service issues-other (13.49); 2) service-withdrawal/abandonment (2.74%); 3) service-failure to follow instructions (11.8%); 4) service-failure to communicate (16.72%); and 5) service-failure to serve client (23.34%).
[160] Report broke the service issues into the following categories: 1) service issues-other (11.53%); 2) service-withdrawal/abandonment (5.02%); 3) service-failure to follow instructions (8.56%); 4) service-failure to communicate (12.31%); and 5) service-failure to serve client (19.74%).

Complaints Received by Issue				
Issue	2004	2003	2002	2001
Relations with clients and other lawyers	29.91[161]	26%[162]	23.2%[163]	18.5%
Financial issues	8.13%	11.1%	19%	17.5%
Miscellaneous/other		5.9%	16%	16%
Negligence		3.9%	8%	14.5%
Quality of service	15.54%[164]	12.3%	8%	10%
Complaints about another party's lawyer				8.5%
Outside Law Society jurisdiction			6.8%	5%
Conflict of interest	4.37%	3.2%	2%	2%
Conduct unbecoming				2%
Inappropriate behaviour	7.26%	5%	2%	1.8%
Third-party complaints	3.35%	4.7%	9.4%	
Legal advice			4.7%	
Failure to communicate	20.82%	11.1%		
Failure to account	5.75%	10.2%		
Other/unidentified	4.88%			

Commentary from Reports

2011

- The volume of complaints received year-over-year increased marginally in 2011 by 1.4% to 4,801.
- Complaints about lawyers increased by 3.4%.
- The number of civility complaints peaked in 2009 and have declined overall thereafter, with only a slight increase in 2011. The 2011 report implies that

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[161] Report presents these as separate categories with relations with clients accounting for 21.23% of complaints and relations with other lawyers accounting for 8.68%.
[162] Report presents these as separate categories with relations with clients accounting for 17.7% of complaints and relations with other lawyers accounting for 8.3%.
[163] Report presents these as separate categories with relations with clients accounting for 16.2% of complaints and relations with other lawyers accounting for 7%.
[164] Report added "Breach of Confidence" as a counterpart to this classification.

this is at least in part due to the LSUC's programs aimed at promoting professionalism that were introduced in 2009 and 2010.

2010

- The Professional Regulation Division received 4,801 new complaints, an increase of 1.4% over 2009.
- In 2010, there was a decline in the number of complaints alleging unprofessional conduct by lawyers and paralegals, from 1,362 in 2009 to 1,250 in 2010. The LSUC highlighted the programs it introduced in 2009 and 2010 as part of this trend's cause.
- LSUC introduced the Civility Complaints Protocols in September 2009 which allows judges to submit complaints about a lawyer's unprofessional conduct to the LSUC. 42 complaints were received during the program's initial year of operation. After a complaint has been submitted, the LSUC may pursue a range of strategies from mentoring to prosecution.

2009

- The Professional Regulation Division received 4,735 new complaints, an increase of 3.2% over 2008. The report suggested this increase was the result of an increase in complaints against licensed paralegals as well as complaints about unauthorized practice or unauthorized provision of legal services (UAP).
- The report states that the department has seen an increase in the complaints that involve integrity and conflict issues. This conclusion was embedded within the report and was not highlighted like it was in 2010 and 2011.

2008

- In 2008, the department received 4,591 new complaints, a 15% increase over 2007. The number of cases referred for additional action also rose in 2008 (66% compared to 63% in 2007) suggesting that a greater number of cases included substantive issues requiring investigation.

- The report notes an increase in complaints involving integrity and governance issues.
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2007

- This report contains minimal commentary on 2007's relationship to previous years.
- There is no mention of trends relating to integrity based complaints.

2006

- This report focused primarily on describing the complaints process used by the LSUC. It gave no analysis of the types of complaints they receive or the areas of law from which they come.

2005

- Comments from 2006 apply to 2005 report.

2004

- Complaints received increased by 9% year-over-year in 2004.

2003-2001

Comments regarding 2006 report apply to these reports.

Appendix B – Method, Focus Group Questions, Coding Framework

METHOD

The focus group discussions were professionally transcribed. Transcripts were loaded into Nvivo for coding. The coding process began with each researcher separately coding the same transcript; then meeting to review and refine the codes. Agreement on coding differences (including both framing the codes and applying the codes to particular text) was reached through discussion. After the initial development of coding categories, each researcher individually coded later transcripts; one further transcript was jointly coded to reconfirm the analytical framework. The coding framework is included in this Appendix.

The researchers divided the coded findings by topic to develop themes, i.e. Kierstead examined findings relating to development of professional identity, types of professionalism lapses, and rationales for lapses, while Abner examined findings relating to definitions, processes of teaching and learning, and recognition of professionalism and ethical issues. Throughout the data gathering process which occurred over a number of months [Feb-August 2012], the researchers together reviewed the combined findings within and across the focus groups.

Themes were developed both inductively, from the raw data, and deductively from the literature.[165] Themes relating to teaching and learning in the workplace derive from the literature, while types of professionalism lapses, rationales, and recognition of professionalism/ethical issues derive from the raw data. Once the themes had been developed and findings grouped, our analysis focused on whether we could identify any causal processes that

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[165] Richard. Boyatzis, *Transforming Qualitative Information: Thematic Analysis and Code Development* (Sage Publications 1998) at 161.

resulted in particular outcomes[166] or whether some events appeared to influence others.[167]

We undertook a search for disconfirming evidence regarding our themes as well as our developing theory. Each researcher read through all transcripts to note instances where participants made contributions that were inconsistent with the prevailing views. These instances have been noted in footnotes in the findings section.

Finally, we addressed trustworthiness issues through:

1. Triangulation of participants from different practice locations, types of practice, size of practice, and number of years in practice were included;
2. Triangulation of methods, that is, asking for individual written comments on how to improve teaching and learning of professionalism and ethics in addition to focus group interviews; and
3. Thorough review of disconfirming evidence.

An audit trail is also provided through provision of the focus group questions and coding framework.

FOCUS GROUP QUESTIONS

1. Ask participants to provide their definition/understanding of professionalism and civility.
   Go around the table, ask each participant for his/her understanding. Probe for details. Check for agreement

2. Have participants describe positive experiences around professionalism and civility.

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[166] Joseph Maxwell, "The Importance of Qualitative Research for Causal Explanation in Education" (2012) 18 Qualitative Inquiry 658.
[167] Joseph Maxwell, "Causal Explanation, Qualitative Research, and Scientific Inquiry in Education" (2004) 33 Educational Researcher 5.

3. Have participants describe experiences of having been mentored or of having mentored others, including discussions of ethical issues in practice.

4. Have participants describe experiences of observing role models at both current and any former law firms

5. Ask participants to describe particular experiences of having managed ethical dilemmas.

CODING CATEGORIES

Name
Changing norms of professionalism
Control
Definitions
Gender Issues
Historical changes
Jurisdictional Differences
Managing a professionalism issue - bullying or abuse by opposing lawyer
Practice Area Differences
Professional Identity
Managing Client Compliance
Managing Client Expectations
Managing professionalism issue - approaches by opposing clients
Reasons for professionalism lapses
client service
accepting or rejecting clients
eager to serve client interests
identification with client
unethical client service
forgetting ethical rules
judgement or experience
Lack of knowledge
law as a business
financial pressures
time pressures
Use of technology
Recognizing professionalism and ethical issues
Teaching and Learning
barriers to teaching and learning
focused questions and discussion
Mentoring
rationales for mentoring
observation and role models
sink or swim
who are the learners
Tensions
Types of lapses
Bullying or abuse of new lawyer
client instructions
eager to serve
poor client service
unethical client service
Unrepresented litigants