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Margaret Ann Wilkinson
Western University, mawilk@uwo.ca

Peter Mercer

Terra Strong

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The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers

Peter Mercer, Margaret Ann Wilkinson, and Terra Strong

I. Introduction to the Research Initiative

Lawyers in the Province of Ontario are regulated by the Law Society of Upper Canada,¹ which has produced the *Professional Conduct Handbook*.² Ensuring compliance by its members with the rules contained in the *Handbook* is part of the profession's commitment to public service and of its role as a self governing body. As a former treasurer, Laura Legge, expressed it:

We are the governing body of the lawyers in the province.... We must be there to protect the public and to see that there are qualified lawyers to give service.... We cannot represent the interest of the profession, only insofar as the interest of the profession needs to be represented to protect the public.³

The *Handbook* has undergone significant changes since its introduction in 1964.⁴ Since the inception of the *Handbook*, the practice of law has become highly complicated, lawyers and law firms have become more specialized, costs have risen and firms have grown exponentially in size.⁵ As a result, lawyers operate in an increasingly complex environment, facing such dilemmas as:

1. increased competition;
2. mounting economic pressure;
3. technological change;
4. clients who are more aware of the effects of the law and the legal system on their lives and who are:
 - more discerning and
 - more critical of existing legal standards;

This research was sponsored under a strategic grant from the Social Sciences and Humanities Research Council of Canada. The project is endorsed by the Law Society of Upper Canada and the Canadian Bar Association and has received organizational and financial support from the Westminster Institute for Ethics and Human Values.

1. Law Society Act, R.S.O. 1990 c. L-8.
2. The Law Society of Upper Canada, *Professional Conduct Handbook* (Toronto: Law Society of Upper Canada, 1962, as amended to May 26th, 1995)
3. Legislative Assembly of Ontario, Standing Committee on Procedural Affairs, record of proceedings, 15th September, 1983, afternoon sitting, quoted by Graeme Mew, "Lawyers: The Agony and Ecstasy of Self-Government" (1989) 9 Windsor Yearbook of Access to Justice 210 at 215.
4. See, Darryl Robinson, "Ethical Evolution: The Development of the Professional Conduct Handbook of the Law Society of Upper Canada" (1995) 29 The Law Society of Upper Canada Gazette 162-95. This work was done under the auspices of this research project, supervised by Professor M.A. Wilkinson, and financially supported by the firm of Osler, Hoskin & Harcourt. The history of the Canadian Bar Association's development of its code of ethics is chronicled by W. Wesley Pue in "Becoming 'Ethical': Lawyers' Professional Ethics in Early Twentieth Century Canada" (1990) 20 Man. L.J. 227.
5. See, for example, Edward Greenspan, "The Quality of Life and the Practice of Law" (1992) 26 Law Soc. Gaz. 86

5. clients who are more demanding and who want:
 - increased service,
 - lower fees, and
 - full accountability by lawyers for the fees they charge;
6. greater temptations for lawyers:
 - to cut corners to try to meet client demands, or
 - even to “borrow” client trust funds.

Such authors as Deborah Rhode have described the inadequacy of the legal profession’s responses to external challenges concerning ethics, observing that it is “for the most part ... inadequately illuminated by moral theory and sociological research.”⁶

These extraordinary changes in the practice of law, and the challenges facing the legal profession, have prompted this research.⁷ Has the concept of professional ethics changed for lawyers as the climate of practice has changed? Does the current *Handbook* speak to the ethical issues facing Ontario lawyers?

This paper is an early product of a major research initiative entitled *Professionalism or Profit: The Changing Nature of Legal Ethics*, which was designed and undertaken in an attempt to address these fundamental questions. There is both an empirical and a theoretical side to this collaborative project. Peter Mercer and Margaret Ann Wilkinson are developing the empirical side of the project and seek to identify and describe the reality of legal practice today.⁸ Specifically, the empirical researchers want to address the following questions:

1. What issues in the practice of law involve ethical decision-making?
2. To what extent do practitioners turn to the *Handbook*, to the Practice Advisory Service⁹, to senior members of the Bar, or to other sources in solving ethical issues?
3. To what extent do these sources, particularly the *Handbook*, provide the assistance which practitioners seek in solving ethical dilemmas? To what extent are they perceived to provide solutions? To what extent do they obviate the necessity for ethical decision-making in favour of acceptance of perceived authority?
4. To what extent, if at all, do factors such as the age, gender, or the law school alma mater of the lawyer affect his or her perception and actions in this area and to what extent, if at all, are factors such as the size of firm or geographic location important?

6. Deborah L. Rhode, “Ethical Perspectives in Legal Practice” (1985) 37 *Stanf. L.R.* 589 at 590.

7. See, Ronald J. Daniels, “Growing Pains: The Why and How of Law Firm Expansion” (1993) 43 *U. of Tor. L.J.* 147 (includes analyses of interviews conducted with senior partners in 40 leading Canadian law firms in 1989-90); David A.A. Stager & David K. Foot, “Changes in Lawyers Earnings, the Impact of Differentiation and Growth in the Canadian Legal Profession” (1988) 13 *Law and Soc. Inquiry* 71 (statistical analysis based on evidence in the 1970 and 1980 censuses).

8. The other papers in this issue represent some of the fruits of the theoretical branch of the project.

9. The Practice Advisory Service was established by the Convocation of the Law Society of Upper Canada in 1980. It provides advice and assistance to lawyers who contact it with a problem which has arisen during practice. Patricia Rogerson of the Practice Advisory Service reports that about 800 calls were received in 1993.

While the empirical study is being conducted, the theoretical side of the project has been developed under the guidance of the other two members of the research team, Barry Hoffmaster and Don Buckingham.¹⁰ That inquiry has examined the conceptual and philosophical foundations of professionalism. The challenge for the entire research group, once the theoretical examination is completed and the empirical data have been collected, will be to determine whether in fact gulfs now exists between the norms of professionalism and the new realities of daily practice. The goals of the legal community and the individual aspirations of lawyers will be examined to determine whether conflicts exist. The evolving nature of the solicitor/client relationship and the legal profession's obligations to society will also be examined. If gulfs are found to exist between the expressed norms of professionalism and the actual practice of law, the inquiry will continue to pursue some further questions:

1. What may be expected to happen if the norms of professionalism and the practice of law continue to diverge?¹¹ Can the practice of law be regulated through other means?¹² Can lawyers simply abandon the traditional norms of professionalism?
2. How might the norms of professionalism and the current practice of law be reconciled? Could the structure of legal education, the structure and context of the *Handbook*, or the operation of law offices, for example, be changed to reach some kind of stable and morally defensible accommodation?

In this way, the notion of professionalism in the practice of law will be examined to determine what it means, whether it is outdated, and whether there continues to be a basis for self-regulation. As this paper demonstrates, the empirical inquiry has gathered evidence which will assist the research team in exploring the following:

1. Whether a shift in the ethical standards of the legal profession is occurring, particularly whether the way in which lawyers perceive their responsibilities to society at large is changing;
2. Whether a shift in the attitudes of law firms from the norms of professionalism to the standard of "law as a business" is occurring;

10. Barry Hoffmaster is Professor of Philosophy at the University of Western Ontario and Director of the Westminster Institute for Ethics and Human Values. Don Buckingham was formerly Visiting Professor at the Faculty of Law at the University of Western Ontario and Assistant Director at the Westminster Institute for Ethics and Human Values. He is now an Associate Professor of Law in the Working Group on Agriculture, Law and the Environment at the University of Saskatchewan.

11. The recent difficulties being experienced by the Law Society of Upper Canada may make this a very timely inquiry. See, for example, Margaret Canon, "Uncivil Society: Legal overseer Susan Elliot must try to stifle an Ontario Lawyers' revolt and restore the reputation of Canada's most influential and mismanaged law society" (1995) 12(5) *The Globe and Mail Business Magazine* 108.

12. Discipline of lawyers is handled through the courts in the United States. See, H. Patrick Glenn, "Professional Stimulus and Professional Ethics" (1990) 35 *McGill L.J.* 424. In Ontario, the self governing mechanism of enforcement through the discipline committee and then through Convocation of the Law Society is at least as rigorous, if not more rigorous, than court enforcement. See, Jim Middlemass, "Denizens of the discipline process: Lawyers who represent colleagues in trouble argue before one of the toughest benches around: Convocation" (1993) 2(5) *The National* 30.

3. Whether a shift in the attitude of individual lawyers from the ethos of “professionalism” to the standard of “law as a career/lifestyle” is occurring;
4. Whether the effectiveness of the current formal mechanisms for promulgating ethical standards in the profession is diminishing.

II. The Contribution of Empirical Research to the Problem of Professional Ethics:

To determine whether a discrepancy exists between the expressed norms of legal professionalism, such as the rules of professional conduct in the *Handbook*, and the day-to-day reality of legal practice, empirical data are needed about the behaviour and attitudes of lawyers with respect to ethical issues.

In designing this research, the example of previous Canadian research on the ethical decision making of family doctors was considered.¹³ Based on this model, distribution of a questionnaire, developed after exploratory, in-person interviews with several lawyers, was anticipated. On closer consideration of the nature of the legal profession, however, it appeared that a questionnaire approach to legal ethics research would be problematic.¹⁴ In the first place, all members of the Bar of Ontario are bound to follow the rules of professional conduct set by the Law Society of Upper Canada as the profession’s governing body. Consequently, the ethical behaviour of lawyers is largely prescribed. Secondly, research has already demonstrated that there is considerable reluctance among subjects to report deviant behaviour¹⁵ or to reveal information regarding sensitive issues.¹⁶ The fact that the intended subjects in this study were lawyers particularly compounded that problem. Lawyers are reminded daily of the consequences that ensue when rules are violated. Thus, if lawyers were in fact violating ethical guidelines or were aware of such violations, it was very unlikely that they would report such behaviour. To introduce the topic of ethics or of the *Professional Conduct Handbook* could be expected either, at worst, to inhibit exploration of the issues at all, or, at the very least, to

13. See, Ronald J. Christie, C. Barry Hoffmaster & Moira A. Stewart, “Ethical Decision Making by Canadian Family Physicians” (1987) 137 *Can. Med. Ass’n J.* 891; Ronald Christie, Charles Freer, C. Barry Hoffmaster, & Moira Stewart, “Ethical Decision-making by British General Practitioners” (1989) 39 *J. of the Royal Col. of Gen. Practitioners* 448. C.B. Hoffmaster, M.A. Stewart & R.J. Christie, “Ethical Decision-Making by Family Doctors in Canada, Britain and the United States” (1991) 33 *Soc. Science and Med.* 647. C. Barry Hoffmaster, Moira A. Stewart & Ronald J. Christie, “A Survey Method for Investigating Ethical Decision-Making in Family Practice” (1992) 24 *Family Medicine* 433.

14. Singleton *et al.* report that C. Argyris found that a questionnaire irritated a significantly higher proportion of top-level managers than did an interview with similar content. See, Royce A. Singleton, Jr., Bruce C. Straits, & Margaret Miller Straits, *Approaches to Social Research* 2d ed. (New York: Oxford University Press, 1993). C. Argyris, “Some Unintended Consequences of Rigorous Research” (1968) 70 *Psychological Bulletin* 185. Cited *ibid.* at 242.

15. DeMaio demonstrated the “social desirability” response bias problem in 1984; T.J. DeMaio, “Social Desirability and Survey Measurement: a Review” in C.F. Turner & E. Martin, eds, *Surveying Subjective Phenomena* vol. 2 at 257 (New York: Russell Sage Foundation). Cited in Singleton *et al.*, *ibid.* at 286.

16. See, Harper W. Boyd Jr., Ralph Westfall & Stanley F. Stasch, *Marketing Research: Text and Cases* 5th ed. (Homewood, IL: Richard D. Irwin, 1981).

bias the data.¹⁷ It was critical to the success of this research initiative to adopt an approach that avoided these related problems. Therefore it was decided that the research would not raise the topic of ethics with subjects directly but rather would focus on the practitioner's behaviour, feelings and attitudes in the context of difficult decisions in practice.

The goals of the methodology for the empirical study were that it:

- be manageable;
- avoid pre-judging the outcome of analysis;
- serve the needs of the theoretical team; and
- engage the participation of the practising bar.

In light of these goals, a pretest was administered to test a methodology that could be used with a larger sample of Ontario practitioners. Structured, face-to-face, in-depth interviews gather information from the subjects. It was felt that the wealth of information which would be available in the language of the subjects themselves using this primarily qualitative approach to data gathering would serve the exploratory nature of the research and the developing needs of the researchers as the theoretical branch of the inquiry unfolded.¹⁸

III. Verification of the Methodological Choices through the Pretest

Several different approaches to examining ethical issues empirically have been used in the past.¹⁹ Specifically, in exploring decision making, two ways of eliciting the subjects' views and experiences of decisions appeared possible in this context. The first approach, "the vignette", entails presenting a common hypothetical scenario to all interviewees. An example of this approach is a study done by Donn B. Parker, Susan Swope, and Bruce N. Baker in which researchers were looking for a consensus on ethical issues among practitioners in the computer field.²⁰ Twenty-seven individuals known for their interest in ethics in the computer field participated in 20 minute discussions of scenarios or vignettes involving the computer field. Each participant voted before and after the discussion on whether actions of each actor in the vignettes were unethical, not unethical or did not raise an ethics issue. In the context of another professional group, the medical ethics studies referred to earlier were also based on vignettes.²¹ The vignette approach was also

17. The researchers were thus trying to avoid the biasing effect of the subjects' expectations. See, Singleton et al., *supra* note 14 at 189ff.

18. As will be further described below, the data gathering was conducted in a structured design that will permit a combination of quantitative and qualitative analytic techniques—thus permitting the researchers maximum flexibility without sacrificing methodological rigor. See, Alan R. Sandstrom & Pamela E. Sandstrom, "The Use and Misuse of Anthropological Methods in Library and Information Science Research" (1995) 65(2) *Library Quarterly* 161.

19. See, (1992) 14(2) *Knowledge: Creation, Diffusion Utilization*: this issue was devoted to papers about scientific misconduct and includes various approaches to research.

20. *Ethical Conflicts in Information and Computer Science, Technology and Business* (Wellesley, MA: QED Information Sciences, 1990).

21. *Supra* note 13.

used to elicit women's responses to a situation of wife assault.²²

The advantages of using vignettes are: that all participants discuss a common situation or set of situations; that the researcher has more control over the content of the interview; that data analysis can be simpler and more efficient; and that the respondents have more comfort and freedom in responding and do not have to take the risks inherent in presenting their own experiences.²³ Impersonal and objective vignettes may encourage more potential subjects to participate. A significant disadvantage of this method is that, at best, it provides an indication of what the subject *might* do in the posed situation rather than a report of how the practitioner *actually* behaves in similar circumstances. At worst, the method yields evidence about how the subjects feel others should conduct themselves and provides no evidence about the attitudes of the subjects themselves.²⁴

Another way of gathering empirical evidence about ethical decision-making is the "anecdote" approach.²⁵ Subjects are asked to relate actual examples of decision-making in their lives. This can also be referred to as the "critical incident" approach. The subject is prompted to give a complete account of the processes of information-seeking and decision-making in which he or she actually *did* engage on a particular occasion. The choice of which decision or incident to describe rests with the subject.

The advantage of the critical incident technique is that the participants are more likely to convey actual experiences from their daily practices. The disadvantage to this technique is that analysis and comparison among subjects is more difficult because every practitioner's experience is unique. Another anticipated drawback, for this project in particular, was that it might appear to the lawyer participants that they would have to compromise their ethical obligations under the Rules. There was concern about potential violations of Rule 4.7, which reads:

The lawyer should avoid any indiscreet conversations, even with the lawyer's spouse or family, about a client's affairs and should shun any gossip about such things even though the client is not named or otherwise identified. Likewise, the lawyer should not repeat any gossip or information about the client's business or affairs that is overheard or recounted to the lawyer. Apart altogether from the ethical consideration or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being discussed, could result in prejudice to the

22. Patricia Dewdney & Roma M. Harris, "Community Information Needs: The Case of Wife Assault" (1992) 14 *Library and Information Science Research* 5 (winners, for this paper, of the 1991 Jesse Shera Award for Research given by the American Library Association).

23. This was one explicit reason for the use of this approach by Dewdney and Harris, *ibid.*, who presented subjects with a hypothetical scenario involving a battered neighbour's request for help.

24. Indirect questioning is relatively infrequently used today because its validity and reliability are questionable; see, Singleton et al., *supra* note 14 at 271, citing L.H. Kidder & D.T. Campbell, "The Indirect Testing of Social Attitudes" in C.F. Summer, ed., *Attitude Measurement* 333 (Chicago: Rand McNally, 1970).

25. See, Roma M. Harris, "The Information Needs of Battered Women" (1988) 28 *Reference Quarterly* 62, where 40 residents of a shelter were asked how they made sense of their worlds and used resources in so doing. See, also, Patricia Dewdney & Catherine Sheldrick Ross, "Flying a Light Aircraft: Reference Service Evaluation from a User's Point of View" (1994) 34(2) *Reference Quarterly* 217. (This article was winner of the 1993 Research Paper Competition of the Association for Library and Information Science Education and recently also received a 1996 Reference Service Press Award.)

client. Moreover, the respect of the listener for lawyers and the legal profession will probably be lessened.

This worry required the researchers to be clear and comprehensive in making arrangements for confidentiality. Three steps were taken to enable subjects to adhere to their obligations:

- 1) Subjects were invited to omit all confidential references as they spoke;
- 2) All references to particulars were deleted by the transcribers (these deletions included both client and individual references; for example, if the subject referred to a specific case which could enable anyone to trace which firms litigated the case, all reference to the case was removed;
- 3) All the transcribers signed confidentiality agreements; and
- 4) All transcripts were sent to the subjects for final review before being included in the research database.

It was significant for many participants that the project had the support of the Law Society of Upper Canada.²⁶

To explore the advantages and disadvantages of these two approaches, the pretest incorporated a comparison between the two.²⁷ For the vignette component of the pretest, a set of 36 vignettes was prepared and tested in a series of panel discussions conducted in conjunction with workshops developed as part of the research programme (held March 1993). From this experience, a vignette was suggested by a conference participant that ultimately led to development of the pretest vignette. Thus, the vignette used in the pretest for this research was developed in consultation with practitioners and was refined through discussions with several other Ontario practitioners who were not otherwise involved in the study. The following is the vignette that was used in the pretest:

You are sharing space with a sole practitioner who practices in the area of real estate. Your colleague has instituted a charging schedule for house deals which is deliberately slightly below the prices charged in the local market. Your colleague discovers that with the costs of disbursements (including fees for disbursements), compensation for the clerks' time (whether billed directly or absorbed as overhead), compensation for your colleague's own time on the files, and adequate secretarial support for both your colleague and his clerks, the pricing schedule is unworkable. The pricing schedule has attracted a large number of clients. Your colleague has come to you seeking your advice on the best way out of this dilemma. What advice do you give your colleague?

The pretest was conducted in the summer of 1993 with practitioners from firms of different sizes in one city in Ontario and two nearby towns. Twenty lawyers were contacted. The pretest interviews were conducted by the two researchers on the empirical side of the project, each doing half. Each interviewer used the vignette

26. Even so, a handful of lawyers cited this concern about confidentiality as a reason for not participating in the final project.

27. The comparative strengths and weaknesses of asking subjects to report on their own experiences, as opposed to asking them to report on their views of what others should do, was canvassed by Donald E. Buzzelli, "The Measurement of Misconduct" (1992) 14(2) *Knowledge: Creation, Diffusion and Utilization* 205.

for half of the interviews and explored an anecdote of the subject's own choosing for the other half. It was anticipated that interviews would last 45 minutes. Each interview was followed by a short set of objective questions about the subject.²⁸ All interviews were tape-recorded for later transcription. From the sample, 18 transcripts were ultimately made available for analysis.²⁹

IV. Finalizing the Methodology

Based on the experience of the pretest and analysis of the transcripts of the interviews, the researchers, in consultation with their colleagues on the theoretical side, rejected the vignette approach and decided to adopt an anecdotal approach for the main study. With the vignette all the interviews were shorter, and the interview experience was more difficult. The quantitative evidence gathered at the end of the interviews showed that most of the interviewees responding to the vignette did not currently practice in the area of law dealt with in the vignette, and many of them had never had any exposure to real estate practice.³⁰ Finally, the qualitative comments of the subjects indicated that the vignette was probably not capturing the data which the study was seeking. The following quotation from one of the interviewees demonstrates this:

You have to sort of think what ah, I don't even know what the particular problems of a sole practitioner are really, other than those that I sort of imagine there would be.

The data gathered in the anecdote interviews, in the opinion of both the empirical and the theoretical researchers, was far richer. A broad range of topics were raised by the practitioners. Among them were the relationships between a firm and individual lawyers practising within its structure (in two cases), relationships with lawyers outside a firm (in two cases), relationships with clients, and the conduct of litigation, all matters which the researchers felt it was important to investigate.³¹

V. Developing the Sampling Frame for the Main Study

Having decided which method of data gathering to use, the next step was to design a process for selecting subjects. Among the factors the researchers thought could influence the perceptions and actions of lawyers in problem solving were

28. See, "Demographic Questions" section of Appendix B.

29. A response rate of 90%, which encouraged the researchers to be optimistic about practitioners' involvement in the full study. This optimism was borne out in the study, as noted below.

30. This may indicate a more distinct separation into speciality areas than was the case for the practitioners of family medicine surveyed earlier. See, *supra* note 13.

31. In making this choice, the researchers are aware that they will be unable to make certain claims to automatic generalizability of their results. In particular, the range of problem areas and number of cases within each area represented by the interviews may not reflect accurately the proportions of those problems encountered by practitioners in Ontario. However, the researchers plan to compare their results with other external evidence in an attempt to assess the representativeness of the findings in this regard.

two external to the lawyers themselves: the size of the firm and the geographic location of the lawyer's practice. These independent variables were incorporated into the research design to allow data about their possible import to be gathered.

A sampling method was designed to provide as geographically representative a picture of practitioners throughout the province as possible, given the fiscal constraints of the project. A list of Ontario urban areas (an area which has a population concentration of at least 1 000 and a population density of at least 400 per sq. km) was compiled.³² This list created the initial database. These urban centres were then classified into four groups based on population:

- Metropolitan centre:
- Large urban centres: 100 000 – 499 999 +
- Medium urban centres: 10 000 – 99 999
- Small urban centres: 1 000 – 9 999

Urban centres that were a long distance from the research team's geographic location (more than 400 km) were deleted because of financial constraints. The remaining urban centres were then classified into six geographical regions to ensure that the interviews were not concentrated in only one area. Next the pretest locations were deleted from the file for methodological reasons. Finally, because practitioners from urban centres bordering on the metropolitan centre would probably be similar to those in the metropolitan centre in aspects such as attitude and style of practice, these centres were deleted. Each urban centre remaining in the database file was classified in terms of both geography and population factors.

The research team decided to conduct the interviews in one metropolitan region, one large urban centre, and two medium urban centres. No small urban centres were included because in the pretest the researchers found that lawyers in small towns were quite concerned that they might be identified with their interview despite the extensive precautions taken to ensure confidentiality. This concern was greater in the anecdote approach, the approach adopted for the major study. It was felt that the design of the main study should recognize and respect this concern, particularly given that, from the pretest, there appeared to be no reason to expect that small town practitioners varied from medium-sized centre, small-firm practitioners on ethical questions.

The final determination of sites was done by selecting a "large" city from one region, a "larger medium" city from another, and a "smaller medium" city from a third area. Thus the study was conducted in a total of four sites, as indicated in Diagram 1.

32. Kim Roebuck, a graduate of the Graduate School of Library & Information Science at the University of Western Ontario was instrumental in helping to unearth this, and other, relevant information for the project. Sources consulted included, Statistics Canada, *Urban Areas* (Ottawa: Statistics Canada, 1992); Statistics Canada, *Population and Dwelling Counts* (Ottawa: Statistics Canada, 1992); *Canadian Markets 1992* 66th ed. (Toronto: Financial Post Publications, 1992); Statistics Canada, *Profile of Census Divisions and Subdivisions in Ontario, Part A* (Ottawa: Supply and Services Canada, 1992).

Size of the Firm

The size of firm was thought to be an important variable to investigate because of the anticipated effect of different organizational contexts on lawyers' individual experiences and attitudes.³³ To operationalize this variable, all of the firms in the four urban interview locations were grouped by size:

- Small: sole practitioner
- Medium: 2 – 8 practitioners³⁴ in the firm
- Large: 9 – 30 practitioners in the firm³⁵
- Mega: 30+ practitioners in the firm³⁶

Ensuring that the sample contained adequate representation and distribution of both geography and firm size was a challenge. The number of practitioners in each firm-size category was calculated as a percentage of the total number of practitioners in all four regions. The mega category accounted for 43% of the practitioners in the geographic areas being covered by the study sample. Thus, 43% of the total 150 interviews planned with practitioners in private practice involved lawyers who practice in mega firms (60 interviews; see the values in the row beside the “mega” category in Diagram 1).

On the other hand, if the number of interviews from the smallest geographic region were determined purely as a percentage of the firms in the region, there would be very few interviews in this category. However, across the province there are a large number of practitioners in small geographic regions. The viewpoints of practitioners from small geographic regions consequently needed to be adequately represented in this study. To ensure such representation, interviews of practitioners in small and medium firms were evenly distributed across the urban centres rather than being concentrated in the larger centres (see the distribution beside the “medium” category in Diagram 1). There was one exception. Because there were very few firms in the smallest centre, eight interviews would have been too dense. Therefore, the number of interviews in that centre was reduced to six sole practitioners (this resulting distribution appears in the row beside “sole practitioners” in Diagram 1). A similar process was used to determine the distribution of interviews in large firms among the larger medium city, large city and metropolitan centre categories of subjects (see the values of the large firm size from Diagram 1).

The final variable in the sampling frame was a contrast between lawyers in private practice and those engaged as in-house (also known as corporate) counsel. It has been argued that corporate counsel form a unique population in the profession, whose perspectives might differ on the issues being investigated.³⁷ Moreover,

33. *Supra* note 6 at 591. The ability to segregate responses from large firms should allow some comparison with other research findings such as those of Robert L. Nelson, “Ideology, Practice & Professional Autonomy: Social Values and Client Relationships in the Large Firm” (1985) 37 *Stan. L.J.* 503. This was a case study of large firms in one city, viz., Chicago.

34. Partners, associates, and employees were all included. For the sampling frame, no distinction was made as to the form of association with the firm. However, this information was elicited during the interviews.

35. Only the large centres and the metropolitan centre had firms this size.

36. Only the metropolitan centre had firms this size.

37. See, for example, Peter Wright, “What is a Profession” (1951) 29 *Can. B. Rev.* 748 at 753.

corporate counsel constitute a substantial and increasing percentage of our profession. Therefore, it is important to establish whether their views do indeed differ significantly from the views of lawyers in private practice. To develop a sample of in-house counsel, the researchers obtained the co-operation of the Canadian Bar Association – Ontario, which has a Corporate Counsel section with a membership of just over 400. Based on an analysis of telephone areas codes for these practitioners, the researchers discovered that the overwhelming majority, 88%, were located in the metropolitan centre area, so this sub-sample was drawn from that region.

Final Design — Diagram 1

City Size => Firm Size	Smaller Medium	Larger Medium	Large	Metropolitan Centre	Total
Sole Practitioner	6	8	8	8	30
Medium	8	8	8	8	32
Large		2	13	13	28
Mega				60	60
Corporate Counsel				30	30
Total	14	18	29	119	180

Once the number of interviews that would be conducted in each category was determined, practitioners were randomly selected from all the lawyers practising in the four geographic regions. The size of the pool of practitioners varied in each category. For example, there were more than 1000 sole practitioners in the metropolitan centre, and fewer than 20 sole practitioners in the smaller urban centre. Within each category of practitioners for each centre, the interval technique was employed to select potential participants.

A “back-up” list of potential participants was created for each urban centre and size of firm, also using the interval technique. This list was created to ensure random selection in the event that some of the originally selected potential participants declined to participate.

Potential interviewees were sent an introductory letter from the investigators (see Appendix A). This letter provided a skeletal outline of the research and indicated that the researchers would be calling to schedule an interview. Members of the research team subsequently called the lawyers, hoping to schedule interviews. If the lawyer was not interested in participating, the first person on the back-up list was substituted and contacted by mail. This procedure was followed until the target number of interviews was scheduled for each cell in the sampling frame.

VI. The Interviews

In the pretest the two principal researchers conducted the interviews, but in the main study, a team of three law students conducted the interviews.³⁸ Each interviewer received training before the research began. The interviewers were briefed about interviewing skills generally and given specific information pertaining to the project.³⁹ The basis for the briefing was a twenty-page “Interviewer’s Manual,” prepared by student assistant Terra Strong, which contained information on interviewing skills.⁴⁰ The interviewers critically reviewed the pretest interviews, and each interviewer conducted a mock interview with a volunteer lawyer. These interviews were then critically reviewed by the researchers. This extensive training and support was intended to reduce the possible impact of interviewer bias in the study. The interviews were conducted at the subject lawyers’ offices. Although estimated by the researchers to require thirty minutes or less, the interviews varied in length from 20 minutes to an hour. Following the structure established in training and reinforced in the package taken to all interviews [see Appendix B], the interviews began with the same basic structure:

1. The critical incident question was introduced approximately as follows:

“I would like you to reflect on your recent practice and describe an incident where you had to make a particularly difficult decision. What decision did you make? How did you come to that decision?”

If the subject needed clarification, the interviewer would elaborate with a comment such as:

“We are interested in a difficult decision that you had to make, which you feel is unique to the legal profession.”

OR

“We are interested in exploring the difficult decisions you have recently faced within the realm of your practice.”

38. One reason for the change involved an aspect of the researchers’ own obligations as members of the Law Society of Upper Canada, which occurred to the team in the process of refining the methodology after the experience of the pretest. The empirical researchers, who are both members of the Bar of Ontario, would probably themselves be under a duty to report any breaches of ethics which they heard during the interviews, pursuant to Rule 13.1. On the other hand, law students are not members of the Law Society of Upper Canada and therefore would not be subject to that duty to report. As arranged in the final study, the content of the interviews was not seen by the researchers until after the consent of the participants to use the interviews had been received and filed and all identifying information had been removed from the transcripts. Therefore the subjects could be assured of complete anonymity by the time the content of their conversation was reviewed by other members of the Bar. The researchers were also free to concentrate on the content of the transcripts entirely from a research point of view. The researchers are very much indebted to the fine work of Terra Strong, Melissa MacKewn, and Monica Song.

39. The researchers gratefully acknowledge the assistance received by the team from Patricia Dewdney, Associate Professor at the Graduate School of Library and Information Science, and the access she provided to methodological materials used in her research, see *supra* notes 22 and 25.

40. The manual had been updated since the completion of the pretest. Such sources as Jun Aburatani, “Psychological Analysis of Ordinary People and the Structure of Interviews” (1990) *Journal of Advertising Research* 47 were used in the training of the interviewers and preparation of the supporting material for the research.

2. The subject would then raise a topic. If the example was relevant, the interviewer would turn on the tape recorder and ask the subject to describe the incident fully. The subject’s description would be followed by the interviewer’s probes and prompts until the incident had been thoroughly examined. If the first example raised was not relevant, the interviewer would probe for relevant examples as follows:

“Can you think of other examples?”

OR

“Your example of [EXAMPLE] is an interesting decision-making situation, however we are more interested in looking at your decision-making process as it relates specifically to the legal profession. Can you think of another example that is more closely related to your legal work?”

The preparation and training of the interviewers prepared them particularly to note responses which could involve ethical issues and to prompt for development of these responses.

VII. The Data Gathered through the Study

All the interviews for the study were conducted in the summer of 1994. The distribution of the completed interviews is shown in Diagram 2. The ideal sample from Diagram 1 is noted in each cell in brackets.⁴¹

Completed Interviews — Diagram 2

City Size => Firm Size	Smaller Medium	Larger Medium	Large	Metropolitan Centre	Total
Sole Practitioner	6 (6)	7 (8)	10 (8)	8 (8)	31 (30)
Medium	6 (8)	8 (8)	8 (8)	8 (8)	30 (32)
Large	–	2 (2)	11 (13)	15 (13)	28 (28)
Mega	–	–	–	58 (60)	58 (60)
Corporate Counsel	–	–	–	29 (30)	29 (30)
Total	12 (14)	18 (18)	28 (29)	118 (119)	177 (180)

⁴¹ The information upon which the interview had been arranged (in terms of firm size) was verified during each interview, which occasionally resulted in reclassification.

Following the interviews, transcripts were prepared and sent to the subjects for review and editing.⁴² At this time consent to allow the interview transcript to be used for the study was sought. After consent was received, any editing of the transcript by the subject was added to the machine readable version of the transcript with font differences used to show the editing that had been done. For example, the bold highlighting (“**”) and “economic”) in the following excerpt indicates editing by the subject:⁴³

Ultimately, the wife had the surgery. After the surgery—I believe it was within two months after she had the tubal ligation—**, she became pregnant. They decided that they were not prepared to abort the baby, but rather she would carry the child through to term. And she did. So they went from two to three. And the decision they made to not have any additional children was an **economic** decision, because they were not well off. That’s why she underwent the sterilization procedure.

The transcript was then included in the project database.⁴⁴

The outstanding co-operation by our colleagues from the Ontario Bar is indicated by the final response rate of over 85% (see Diagram 3).⁴⁵ There does not appear to be any particular bias in the responses—all cells of the sampling frame indicate excellent support and co-operation from the Ontario bar.⁴⁶

At this point the analytic work of developing an index to the material began.⁴⁷ This coding is an iterative process.⁴⁸ We are coding for both manifest (direct visible content) and latent content (overall meaning). Coding for the latter does involve a certain element of bias—however, we have minimized it by having one consistent coder throughout and verifying that coding through the three remaining researchers over about 1/6th of the transcripts (30 of 180) on our first iteration of coding. Another way of enhancing the reliability of this approach is to consciously compare the manifest and latent content, which is part of our planned analytic strategy.⁴⁹ The index has been developed from the content of the transcripts and from issues raised by the research team. These issues include ones posed at the inception of

42. Students involved in this process include Terra Strong, Larry Yelen, Calvin Ho, and Alan Tonner.

43. The percentage of transcripts edited by the subjects was 40%. Of these roughly 10% were changes to the material itself, such as further deletions over confidentiality concerns, with the remaining 90% being changes purely of a grammatical nature.

44. For help in analyzing the transcripts the research team decided to employ AskSam for Windows database software. This database program allows for search and retrieval of transcripts based on freeform text of pre-defined fields. As inductive coding of the transcripts will be undertaken for the main study, the use of the search capabilities within pre-defined fields will be extremely useful.

45. Based on the number of interviews actually completed, as indicated in Diagram 2, and including two interviews which were unable to be transcribed due to technical difficulties. Percentages are liable to slight variation as transcript approvals are still arriving as this article goes to press.

46. Toronto and the large centre were transcribed last and are therefore the jurisdictions where late arriving transcript consents are expected to increase the percentages slightly.

47. At this point the project is being ably assisted by law student Lloyd R. Starratt.

48. Klaus Krippendorff, *Content Analysis: An Introduction to its Methodology* (Newbury Park, CA: Sage, 1980) at 72.

49. This is discussed in Earl Babbie, *The Practice of Social Research* 6th ed. (Belmont, CA: Wadsworth Publishing Company, 1992) at 318-19.

the project by the researchers and additional themes derived from the workshops and conferences that have been an integral part of the project.⁵⁰

Consent Percentages — Diagram 3⁵¹

City Size => Firm Size	Smaller Medium	Larger Medium	Large	Metropolitan Centre	Total
Sole Practitioner	6 (100)	7 (88)	6 (75)	8 (100)	30 (90)
Medium	8 (100)	8 (100)	7 (88)	8 (100)	31 (97)
Large	—	1 (50)	11 (85)	9 (69)	21 (75)
Mega	—	—	—	52 (87)	52 (87)
Corporate Counsel	—	—	—	26 (87)	26 (87)
Total	14 (100)	16 (89)	23 (82)	102 (86)	154 (87)

This research project, with the co-operation of practitioners of the Ontario Bar, has created a unique and exciting database that contains lawyers' actual descriptions of dilemmas they have faced in practice and their analyses and responses to those dilemmas. It will provide important evidence against which to test hypotheses derived from a theoretical inquiry into the nature of legal ethics. The outcomes will help those trying to develop solutions for today's challenged and challenging legal profession.

50. The transcripts also provide a rich source of data on contrasts between "what people do" and "what people say they do" in the evidence provided about how these practitioners viewed their particular problems and solved them; what they said about their views in general; and how the researchers independently viewed the same problems. See, *supra* note 18 at 191.

51. The number of responses are given in each cell with the response rate percentages shown in brackets.

APPENDIX A — Letter of Introduction

(Name)
(Address)

Dear (Name)

We are conducting a three year inter-disciplinary study examining the decision-making styles of practitioners across the province. This project is funded by the Social Science and Humanities Research Council of Canada (SSHRC), and is endorsed by both the Canadian Bar Association and the Law Society of Upper Canada.

This past summer a number of practitioners participated in the pre-test portion of the study. We are now ready to begin the main study. We hope you will help us by allowing our research assistant to interview you. The interview will take approximately one half hour of your time. Our assistant would be happy to attend at your office for this meeting. Your participation is strictly voluntary, and of course your responses will remain completely confidential.

One of our assistants will contact you soon to give you further information and answer any questions you may have. Thank you for your anticipated co-operation and participation.

Yours truly,

Dr. Peter P. Mercer
Dean

Dr. Margaret Ann Wilkinson
Assistant Professor

APPENDIX B — Content of Interview Package

Introduce Yourself

Overview of the Project This interview is part of a Province-wide empirical research study that Dean Mercer & Prof Wilkinson are conducting. This empirical research is in turn part of a larger interdisciplinary research initiative funded by Social Sciences and Humanities Research Council of Canada, SSHRC

Critical Incident I would like you to reflect on your recent practice & describe an incident where you had to make a particularly difficult decision. In a moment I will ask you to describe this incident, the decision you made, & how you came to that decision.
CLARIFICATION: Practitioners to date have described an array of decision-making scenarios. For eg, some practitioners have described a particularly difficult decision that had to make on a file, others have described a problem faced by their firm, or a problematic situation vis à vis other practitioners. We are interested in any decision making incidents which reflect the problematic issues of practice today.

Purpose	The reality of practice today is that lawyers are constantly faced with difficult decisions. We are hoping to gain insight into lawyers' decision-making processes.
Benefit	This research is of value to practitioners and the populace at large. Your cooperation in this study will contribute to knowledge in the area of decision-making. This project also speaks to the broader community of law students and the public, about the realities of practice.
CBA & LSUC Assistance	This project is receiving full co-operation and the assistance of both the Canadian Bar Association and the Law Society of Upper Canada. Both Associations want their procedures and policies to meet the needs of practitioners. Your participation, and volunteering of candid information will provide the Associations with evidence of the realities of practice today. Your contribution has the potential to shape future policies and procedures of these Associations. However, neither body will see any of the specific data, only the aggregate data and reports which result from the data collection.
Taping of the Interview	The interview will be taped for the purpose of data analysis. We are interested in recording your exact responses. To take notes may result in error and biases on my part. We want the results of this research to be useful, and therefore it is important that the data is as bias free as possible.
Confidential	<p>Having said all of the above, about the importance of the research and its far reaching implications, I now want to ensure you that your identity, and the identity of the firm you work for will remain completely confidential. Furthermore, the cities that we are interviewing in will also not be disclosed. Neither you nor your firm will be personally identified in any publication or presentation resulting from this research.</p> <p>To preserve confidentiality every interview will be assigned a code number which represents but does not personally identify, the interview. Transcripts of the tape recorded interviews will be edited by the investigators to remove references to information which might identify locations or individuals. All tapes will be destroyed at the end of the project.</p>
Ability to Withdraw	<p>Once the interview has been transcribed the transcript will be returned to you so that you can make corrections and/or add clarification where necessary. A consent form releasing the transcript for data analysis purposes will be sent to you at that time. The contents of this interview will only be used if you returned the consigned consent form. All research materials will be kept confidential by the researchers and their assistants, and will be stored in appropriate facilities at the University of Western Ontario.</p> <p>Again, your participation is purely voluntary and you are free to withdraw your participation at any time.</p>
Repeat critical incident	

Probes

What did you do next? Can you tell me more about your thinking on that?
 Why do you feel that way?
 Are there any other issues involved?
 What decision did you make at that point?

Can you give me more details about _____
 In what way? Why is that? Repeating the response.
 “Silent Probe”: wait expectantly for more information.

Clarifying Questions

Can you be a little more specific?
 I’m not exactly sure what you mean by _____, could you explain what that means to you?
 I’m not sure I understand. Could you tell me that again?
 Could you give me an example? Could you define for me what _____ means to you.
 I didn’t quite catch _____
 If your question has not been answered ask the question again.

BEHAVIOURS FEELINGS THOUGHTS

- WHY** – why was this a tough decision to make?
 – why did you choose this course of action?
 – why did you choose this decision to discuss?
- WHEN** – when did the incident occur?
 – how long did you have to make the decision?
- WHERE** – specifics of the setting
- WHAT** – what was the outcome?
 – what was the decision-making dilemma?
 – what issues were involved? what factors were involved?
 – what were the competing interests?
 – what was your thinking throughout the incident?
 – have any long-term strategies evolved from this decision?
 – is this a typical problem you face in practice?
 – what were the alternate courses of action?
 – what information did you need to make this decision? where did you seek this information?
 – what information was at your disposal?
 – in retrospect, what additional information would you seek?
 – was everyone in agreement with your chosen course of action?
 – what type of problem would you characterize this as?

WHO – who were the players?
– who is “we”?

HOW – how did you reach that decision?
– how did you act?
– how did you feel throughout the incident?

Sequence of events

In hindsight were you satisfied with the decision you made?

SUMMARY:

REITERATE THE FACTORS INVOLVED IN THE DECISION!

DEMOGRAPHIC QUESTIONS

Name _____

Gender _____

Age _____

Practitioner’s Area of Practice _____

Year called to the Bar _____

Therefore, you graduated from Law School in _____

Continuous Practice? _____ If no, how long was the absence? _____

EDUCATION

Law School _____

Undergraduate University _____

Area of Study _____

Other Education/Degrees _____

FIRM

Name of Firm _____

Firm size _____

of partners _____

of associates _____

of support staff _____

Type of Firm: general _____ specialized _____

If a Full Service Firm, is anything excluded?

Family _____ Criminal _____

Location of Firm _____

INTERVIEWER'S NOTES

Length of interview:

General Comments:

In your opinion, was this interview biased or influenced in any way?
For example, the presence of another person.

The subject's non-verbal behaviour:

Your general feelings about this interview:

What you have "learned" in this interview that should be noted for future interviewers: