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Reconceptualizing Professional Responsibility: Incorporating Equality

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Are legal professionals concerned with "doing good" or just with "doing well" financially? In an age of increasing and intensifying public scrutiny, there is a need to examine and challenge the legal profession's conception of professional responsibility, and how it translates into practice. This paper expresses the concern that the profession has moved too far in the direction of a "billable hours" culture, a culture that is falling short of the legal profession's obligation as a self-regulated entity to consider and acknowledge the public interest at all points. The author calls for a broader conception of professionalism, one that encompasses more than service for the client. This standard cannot be attained without a commitment to incorporating equality into all facets and corners of the profession. The Charter's broad and generous equality provisions, and the Supreme Court's subsequent expansive interpretations have entrenched the equality value as a fundamental component of the legal system. As a result, it is imperative for the legal profession to exhibit a commitment to justice that moves beyond rhetoric and translates into practice. While acknowledging the lack of simple solutions, the author discusses the National Judicial Institute's Social Context Education Project as an example of the judiciary's efforts to respond to these issues. The profession is challenged to follow the judiciary's lead and incorporate equality issues more fully into its formal institutional structures and informal norms.

Les avocats s'intéressent-ils plutôt à la réussite financière ou au bien-être du client? À l'époque où le public questionne davantage, il faut examiner et questionner comment les avocats conçoivent leurs responsabilités professionnelles et comment cette responsabilité s'applique au quotidien. L'auteure s'inquiète des tendances actuelles où le professionnel s'occupe de la facturation plutôt que de ses responsabilités; cette profession qui établit ses propres règlements ne considère pas toujours l'intérêt du public. Pour atteindre ce but, les avocats doivent s'assurer que l'aspect d'égalité fasse partie de leur travail. Les dispositions généreuses de la Charte et la vaste interprétation de la Cour Suprême par la suite ont enchâssé le concept de l'égalité dans le système juridique. Par la suite, l'avocat doit s'engager à un système qui dépasse la forme pour devenir pratique courante. Tout en tenant compte qu'il n'est pas facile de trouver une solution à ce problème, l'auteure cite le 'Projet de sensibilisation au contexte social de l'Institut national de la magistrature' comme un exemple des efforts de la magistrature pour adresser ces questions. Il faut que la profession suive l'initiative de la magistrature en incorporant les questions d'égalité non seulement dans les normes administratives établies mais également dans le journalier.

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Introduction

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Introduction

This paper is based on a lecture delivered at Dalhousie Law School on November 21, 2002. The F.B. Wickwire Lecture on Professional Responsibility is co-sponsored by the Nova Scotia Barristers' Society and Dalhousie Law School. The topic area of the lecture series, professional responsibility, reflects the commitment and professional engagement of Frederick Wickwire Q.C., whose outstanding work as chair of the Handbook Committee is reflected in the *Legal Ethics and Professional Conduct Handbook* of the Nova Scotia Barristers' Society.¹ When I was preparing to deliver the lecture which is the basis for this article, I spent many anxious hours searching for my "hook." The hook, in my imagination, would be a clever oratorical device intended to capture the audience's attention, engage their interest, serve as a unifying theme, and, in a perfect world, make them laugh. Lacking confidence in my ability to spin a good tale, or even to deliver a joke effectively, I turned to the Internet to find a cartoon which

1. *Legal Ethics and Professional Conduct Handbook* (Nova Scotia Barristers' Society, 2001), online: NSBS Online <<http://www.nsbns.ns.ca/handbook>> [*Handbook*].

could be incorporated into a PowerPoint presentation.² When I happened on the cartoon which is described below, I knew I had found my hook. Audience reaction confirmed my instinct. The cartoon shows three people, two men and one woman, sitting at a boardroom table. They are of indeterminate age. All are professionally attired. Papers and coffee mugs are scattered across the table. The speaker, who sits at the head of the table, is a man. The caption reads: “Some days I think the firm does more harm than good. Fortunately, I’m totally OK with that.”³

To me, the caption captures an uneasy truth about the profession—our professional commitment to the ideal of justice may be more rhetorical than real. Are we actually “doing good?” Or are we just “doing well”—at least in individual financial terms?⁴ And if we are not, in fact, “doing good” are we really “totally OK with that”? The image is more complex. Who are the two silent colleagues? Junior lawyers? Partners? What is the significance of their silence? Does it signal agreement? Acquiescence? (Their facial expressions are neutral.) Or is one or the other about to speak? What would or could they say if they were, in fact, appalled?

In this paper, I use the ideal of equality to respond to the cartoon. I intend to develop an argument about the meaning of the equality value⁵ in the context of professional responsibility. In my view, legal professionals are implicated in two significant shifts—one, a shift in the way law is practiced, increasingly in large firms where billable hours are the bottom line and the best lawyers are those who work the longest hours⁶; and second,

2. My experience in search of legal humour was instructive. When I typed “lawyer jokes” into my search engine, I came up with 234,000 sites in 1/4 of a second. *Res ipsa loquitur!*

3. “Stu’s Views”, online: <<http://www.stus.com/sv/subjects/attacks.htm>>.

4. There is a vast American literature on professional responsibility. The contrast between doing good and doing well comes from the work of Deborah Rhode, Professor of Law and Director of the Keck Center on Legal Ethics and the Legal Profession at Stanford Law School. Professor Rhode is the author of eight books and numerous articles dealing with professional responsibility, legal ethics, the public interest, and women in the profession. Her most recent book, *In the Interests of Justice: Reforming the Legal Profession* (New York, N.Y.: Oxford University Press, 2001), offers a systematic study of the challenges confronting the American legal profession. Collections of articles on the book can be found at (2002) 54 *Stan. L. Rev.* and (2002) 70 *Fordham L. Rev.* The Canadian literature on professional responsibility is surprisingly underdeveloped. A good place to start is with Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (Scarborough, Ont.: Carswell, 1993). See also Gavin MacKenzie, “Breaking the Dichotomy Habit: The Adversary System and the Ethics of Professionalism” (1996) 9 *Can. J.L. & Juris.* 33 and “The Valentine’s Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession” (1995) 33 *Alta. L.Rev.* 859 [MacKenzie, “The Valentine’s Card”].

5. The term “equality value” reflects a normative, systemic and institutionalized commitment to the ideal of substantive equality as fundamental constitutional value. In my view, the “equality value” must be understood to underpin every aspect of law and legal practice, in the same way as a commitment to individual liberty undergirds our understanding of the rule of law. See section titled “The Equality Value”, below, and notes *infra*.

6. See MacKenzie, “The Valentine’s Card”, *supra* note 4; The Honourable Mr. Justice Frank Iacobucci, “The Practice of Law: Business and Professionalism” (1991) 49 *Advocate* 859.

a shift in the norms and values which animate the legal system, a shift which reflects the increasing significance of what I will call the equality value, a value which is responsive to change, diversity, discretion, perspective and fairness.⁷ One of the most profound questions faced by lawyers today is whether those two shifts are commensurate with, or antithetical to, each other. Whatever the nature of practice, it is now fair to say that understanding equality is a core competence for every legal professional. Just as the equality value is changing the law, so should it change our notions of what lawyers do and what professional responsibility requires.

This article is organized into four sections. The first two are introductory in nature—they examine the nature of professionalism and the increasing significance of the equality value to law. The third section describes the Social Context Education Project at the National Judicial Institute, a project which I coordinated for two and a half years and which, in my view, reflects the judiciary's commitment to an operationalized equality value in judicial education. The final section explores the relationship between professional responsibility and the equality value, and specifically considers three areas where equality could be incorporated into our ethical and practice norms.

I. *Professional Crisis or a Crisis of Professionalism?*

The legal profession, as indeed other professions, is under public scrutiny as never before. This is perhaps as it should be. We have, after all, a public trust of considerable magnitude... Practice in Nova Scotia, on the eve of publication of this *Handbook*, is facing rapid change, technological and otherwise, characterized by growing law firms with expensive overheads... It is commonly said that the practice of law is now a business. There is talk of national and even international law firms. This will no doubt intensify as we approach the 21st century. These changes must not come at the expense of our ethics and standards.⁸

This excerpt from the foreword to the Nova Scotia *Legal Ethics and Professional Conduct Handbook* was written by Frederick Wickwire Q.C., in February of 1990. Some thirteen years later, the words remain disturbingly prophetic. What does it mean to practice law? Is law primarily a business?

7. Richard F. Devlin, "Jurisprudence for Judges: Why Legal Theory Matters For Social Context Education" (2001) 27 *Queen's L.J.* 161.

8. Frederick B. Wickwire, Q.C., Chairman, Legal Ethics Handbook Committee, "Foreword" in *Handbook*, *supra* note 1.

Or is it (should it be) more than that? My experience on the admissions committee at my law school (both as chair and member) suggests that at least one segment of the public, potential students, does not envision the practice of law as a business. Applicants to our faculty submit a personal statement explaining their reasons for wanting to study law as part of their admissions portfolio.⁹ A common theme in these statements¹⁰ is the applicants' desire to use a legal education to promote "justice," variously conceived and understood. We rarely receive a statement which expresses a keen interest in what one author has described as the most common work experience for lawyers, that is to provide "legal assistance to business corporations and business officials in their competitive struggles with other business and their compliance struggles with government regulatory authorities,"¹¹ or, even more pragmatically, to sell 1900 hours a year of specialized legal-financial services to corporate interests. Yet, many of our students end up in exactly this kind of practice, and are both envied and admired for doing so. Not surprisingly, the student hierarchy reflects how we seem to measure success in our profession. Even the law schools are trapped in the ethic of profit-making. Our increasing dependence on private funding for programs and services makes us reliant on the generosity of large firms and financially successful alumni. Every student who heads for Wall Street or Bay Street is a potential donor in ways that those who head for government or public interest advocacy are not.

In a 1999 speech on professionalism, Justice Rosalie Abella suggested that "the intensity of the public's disaffection [with the profession] is now so palpable that it has started to affect the profession's own perception of its professionalism."¹² To many members of the public, the legal system is unwieldy, unintelligible and unaffordable,¹³ and lawyers are primarily responsible. While few within the profession might characterize it as a profession in crisis, many would no doubt agree with Justice Abella that as professionals who enjoy the power of self-regulation in the public interest, we need to take the evidence of public disaffection seriously. She suggests

9. Applicants are asked to explain their interest in law studies and to describe how significant achievements in their lives, extracurricular activities, volunteer work or paid work experience have shaped their views or created an interest in law. Applicants are also invited to discuss how their language, culture, sexual identity, physical or learning disability, or racial background relate to their interest in law studies.

10. I read over 6,000 statements during three years as chair and three years as committee member.

11. Geoffrey C. Hazard Jr., "Is There an American Legal Profession?" (2002) 54 *Stan. L. Rev.* 1463 at 1469.

12. Rosalie Silberman Abella, "Perspectives: Professionalism revisited" (1999) 3:6 *Ont. Law. Gaz.* 20 at para. 6, online: Ontario Lawyers Gazette <<http://www.lsuc.on.ca/news/gazette/gazette.jsp>>.

13. Rhode, *supra* note 4 at 2.

that “the consensus about what it means to be a professional has broken down, as has the consensus about what the criteria should be for awarding good reputations”¹⁴ and argues that this fragmented consensus is a threat to the profession’s very legitimacy. Of course, one might argue that any fragmentation of consensus is a good thing if it reflects the increasing diversity of both the profession and the public which it serves. The Honourable Bertha Wilson, in her capacity as chair of the Canadian Bar Association (C.B.A.) Task Force on Gender Equality in the Legal Profession,¹⁵ suggested that the influx of women had triggered a rethinking of the meaning of professionalism.¹⁶ For her, professionalism encompassed more than service to the client, it required a commitment to justice, and specifically to equality. More recently, the C.B.A. Task Force on Racial Equality in the Legal Profession has affirmed the notion that professionalism implies a commitment to equality.¹⁷ Both of these Task Force reports provide an apparent opportunity for rethinking our professional and ethical norms. I am concerned that this is not happening and that in fact the profession is moving inexorably toward a vision of responsibility which is increasingly individualized and corporatized and which prioritizes the bottom line over the public interest.

II. *The Equality Value*

In June of 2001, Justice Iacobucci, in a speech to a gathering of judges, academics, lawyers and community representatives, characterized equality as one of the fundamental moral underpinnings of our constitution.¹⁸ In 1998, speaking after his retirement from the Supreme Court of Canada, Justice Peter Cory predicted that legal debates in the early decades of the 21st century would be dominated by discussions of the meaning and

14. Abella, *supra* note 12 at para. 10.

15. The Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: The Canadian Bar Association, 1993) [*Touchstones for Change*].

16. For a discussion of the implications of *Touchstones for Change*, and in particular its recommendation about ongoing continuing education about gender equality, see Mary Jane Mossman, “Gender Equality Education and the Legal Profession” (2000) 12 Sup. Ct. L. Rev. (2d) 187.

17. The Working Group on Racial Equality in the Legal Profession, *Racial Equality in the Legal Profession* (Ottawa: The Canadian Bar Association, 1999), online: CBA <<http://www.cba.org/CBA/Racial/PDF/ReportRacialEquality.pdf>> [*Racial Equality*]. The Report contains two papers “The Challenges of Racial Equality: Putting Principles into Practice,” as well as a paper prepared by co-chair Joanne St. Lewis, “Virtual Justice: Systemic Racism and the Canadian Legal Profession.”

18. The Honourable Frank Iacobucci, “The Context of Social Context Education” June 2001 [on file with the author].

implementation of equality rights.¹⁹ Both the entrenchment of a Charter of Rights with a broad and generous equality guarantee and its subsequent substantive interpretation by the courts have confirmed the fundamental nature of the principle of equality in the Canadian legal system.²⁰ The Supreme Court has given clear direction to the courts—judges are required to administer the law in accordance with *Charter* principles and specifically in a manner that conforms to and enhances the constitutional norm of equality.²¹ This means that attentiveness to equality is required in every legal context, not only when a *Charter* or human rights argument is made. While the centrality of the Canadian equality value is beyond controversy, and the need to take equality into account is legally mandated, the exact nature of what is required in a particularized context remains contested and contestable. In my view, attentiveness to equality requires, at the least, attentiveness to four issues: 1) context; 2) the direct and indirect impact of legal rules on lived experience; 3) a questioning of assumptions and a willingness to think critically about the values embedded in the rules and norms (including who is over and underrepresented, who is invisible and who has power); 4) systemic dimensions. Being mindful of these four aspects of any legal problem will help in the identification of the equality dimensions of any legal issue but will not provide an answer. Paying

19. Speech given at the spring education meeting, May 1998, Superior Court of Justice for Ontario [notes on file with the author]. Justice Cory predicted that cases dealing with the relationship between aboriginal peoples and the legal system would also continue to increase.

20. Equality is constitutionalized in two ways. The first and most obvious is through the specific *Charter* provisions which guarantee equality rights, s. 15 and s. 28. The second is through the language and ideas used by courts to describe the fundamental values of our free and democratic society. In the words of Chief Justice Dickson in *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. Thus, when courts interpret and apply the law they are obliged to ensure not only that equality rights are protected, but also that the constitutional value of equality is respected and, if possible, enhanced.

21. The Supreme Court has held that the judiciary has an obligation to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution, including the fundamental value of equality. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129, Cory J. wrote at para. 92:

Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.

See also *RWDSU v. Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12.

attention to equality is often hard, often confusing and always complex. So is delivering justice.

III. *The Social Context Education Project at the National Judicial Institute*

Between January 1997 and July 1999, I acted as the full-time coordinator of a national education program for judges at the National Judicial Institute.²² The social context education project received funding from the Department of Justice and had its genesis in a resolution of the Canadian Judicial Council.²³ The Canadian Judicial Council is chaired by the Chief Justice of Canada and includes the Chiefs and Associate Chiefs of every federally appointed court in the country. Its mandate is to “promote efficiency and uniformity, and to improve the quality of judicial service in superior courts.”²⁴ The Council focuses on issues such as judicial continuing education, the handling of complaints and the development of consensus on issues involving the administration of justice. The social context resolution, passed by Council in 1994, provided as follows:

[T]hat the Council approve the concept of comprehensive, in-depth, credible education programs on social context issues which includes gender and race [aboriginal peoples, black and other visible minorities].²⁵

In September 1997, the Council made a further commitment that Chief Justices would provide opportunities for judges to attend social context programming²⁶ and in September 2000 the Council reaffirmed

22. Information about the National Judicial Institute (NJI) can be found on its website, <<http://www.nji.ca>>, which contains the following description:

The NJI is dedicated to the development and delivery of educational programs for all federal, provincial, and territorial judges. The Institute's programs stimulate continuing professional and personal growth and reflect Canada's cultural, racial, and linguistic diversity, as well as the changing demands on the judiciary in a rapidly-evolving society. The programs focus on the three major components of judicial education: substantive law, skills training, and social context issues.

23. Information about the Canadian Judicial Council (CJC) can be found at the Council's website, <<http://www.cjc-ccm.gc.ca>>.

24. Canadian Judicial Council, “About the Canadian Judicial Council”, online: CJC <http://www.cjc-ccm.gc.ca/english/about_cjc.htm>.

25. Canadian Judicial Council, *Annual Report 1993-1994* (Ottawa: Canadian Judicial Council, 1994) at 26, online: CJC <[http://www.cjc-ccm.gc.ca/english/annual_reports/Annual_Report_1993-1994_\(English\).pdf](http://www.cjc-ccm.gc.ca/english/annual_reports/Annual_Report_1993-1994_(English).pdf)>.

26. Canadian Judicial Council, *Annual Report 1997-1998* (Ottawa: Canadian Judicial Council, 1998) at 7, online: CJC <http://www.cjc-ccm.gc.ca/english/annual_reports/1997-1998e_with_appendices.pdf>.

the importance of pervasive treatment of relevant social context issues including gender, aboriginal peoples, race, age and disability, in all contexts in which judicial education occurs²⁷

I arrived at the Institute in January 1997 with little more than the text of the initial resolution and two background reports, both written by legal academics,²⁸ proposing both a justification and a general structure for the implementation of the resolution. This project was immensely controversial among the judiciary. Resistance to the concept of social context education was primarily based on an ideal of judicial independence concerned with advocacy outside the courtroom, the provision of unique access to judges for “special interest groups”²⁹ and the appropriate use by judges of

27. T. Brettel Dawson, “The Social Context Education Project at the National Judicial Institute: An Overview” (May, 2002) [on file with the author]. It is interesting to note the change in the language of the resolutions, and in particular, the expansion of the “social contexts” requiring examination. The language of the resolutions reflects the evolution of thinking about the program by its designers, by judge participants, by the NJI and by the CJC. The project began (Phase I) by offering intensive, designated programs on “social context” broadly conceived to include equality, impartiality, judicial independence, and the judicial role in addition to workshop sessions on particular subjects such as violence against women, expert evidence on race and culture, and family law in a multicultural and multiethnic society. Judges were given the opportunity to attend these specialized programs. The resolution from 2000 demonstrates an understanding that social context pervades and infuses the judicial task writ large. Phase II of the initiative has focussed on the “integration” of social context into all judicial education primarily through an intensive judicial faculty training program. The current coordinator of the program, Professor T. Brettel Dawson, has been instrumental in developing and delivering a series of faculty development programs for judges from every region of the country with responsibilities for and/or interest in education in their courts.

28. Lynn Smith, “Statement of Needs and Objectives for Continuing Judicial Education on the Social Context of Judicial Decision-Making” [on file with the author]; Katherine Swinton, “Report to the National Judicial Institute on Social Context Education for Judges” [on file with the author]. Both have since been appointed to the bench—Justice Lynn Smith to the British Columbia Supreme Court and Justice Katherine Swinton to the Superior Court of Justice in Ontario.

29. The question of who is a “special interest group” is fraught with political and ideological baggage. Often the terminology is used as a justification for both exclusion and trivialization. Those who were opposed to receiving information from “special interest” groups as part of continuing judicial education tended more often to characterize equality seeking communities as representing special interests. Lawyers, legal academics, and other judges tended not to be labelled in that way. See Gregory Hein, “Interest Group Litigation and Canadian Democracy” (2000) 6:2 *Choices: Courts and Legislatures I*, for an analysis and discussion of interest groups at the Supreme Court of Canada. Hein demonstrates that the interest groups who appear most frequently before the Court represent business and corporate interest. See also F.L. Morton & Avril Allen, “Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada” (2001) 34 *Can. J. Pol. Sc.* 55.

information received during social context programming.³⁰ One of the first tasks for the project developers³¹ was to carefully reflect on the issue of judicial independence. Was it a bar to social context education? The position taken by the project, a position that had been accepted by both the NJI and the CJC at the approval stage was that, in fact, judicial independence provided a justification for social context education.³² Judicial independence is not a stand alone value but rather a means to an end—the end being an impartial judiciary. Impartiality, in turn, requires an open mind—not an empty mind.³³ For the purposes of decision-making, what is most desirable is a judge with as complete a store of knowledge as possible—a store of knowledge which is more than just the accidental result of the judge's particular life experiences and social world.³⁴ Continuing education dealing

30. The issue of if, when and how judges should use/take notice of the information provided during education programs was frequently raised as a concern by judges. The provision of information about social context issues raised special concerns for some judges because the topic was seen as “more sociology than law.” The interrelation between social context education, the law of judicial notice, the requirement of impartiality and the recognition that judges, like all of us, bring their own values, education and world view with them to the bench provoked many important discussions. These issues were also addressed in many of the initial programs through education sessions on impartiality, judicial notice and expert evidence. The decision of the Supreme Court of Canada in *R. v. R.D.S.*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193 was especially timely, and was used as a vehicle for analysis and discussion. For a range of views on these issues, see Bruce P. Archibald, “The Lessons of the Sphinx: Avoiding Apprehension of Judicial Bias in a Multi-racial, Multi-cultural Society” (1997) 10 C.R. (5th) 54; David M. Paciocco, “The Promise of *R.D.S.*: Integrating the Law of Judicial Notice and Apprehension of Bias” (1998) 3 Can. Crim. L. R. 319; Judge R. James (Jim) Williams, “Grasping a Thorny Baton . . . A Trial Judge Looks at Judicial Notice and Courts’ Acquisition of Social Science” (1996) 14 Can. Fam. L.Q. 179; Marilyn MacCrimmon, “Developments in the Law of Evidence: The 1995-96 Term: Regulating Fact Determination and Commonsense Reasoning” (1997) 8 Sup. Ct. L. Rev. (2d) 367; Marilyn MacCrimmon, “Fact Determination: Common Sense Knowledge/Judicial Notice/Social Science Evidence” Conference Presentation [On File with the Author]; The Honourable Justice Claire L’Heureux-Dubé, “Making Equality Work in Family Law” (1997) 14 Can. J. Fam. L. 103.

31. I was the first Coordinator of the Project and was employed full-time by the NJI for two and a half years. Two judicial special directors of the project were appointed by the Chief Justice. They were Justice Donna Martinson, then a member of the Provincial Court of British Columbia and Justice John McGarry, a member of the Ontario Superior Court of Justice (Trial Division). A special advisory group to the Social Context Education Project was appointed and met three times a year. In addition, the project was overseen by the Board of Directors of the National Judicial Institute and ultimately by the Canadian Judicial Council. Professor T. Brett Dawson was the second Coordinator of the Project at the NJI. Justice Donna Hackett, a member of the Ontario Court of Justice replaced Justice Martinson as Special Director and served in that position and as an Associate Director of the National Judicial Institute until September 2003.

32. See Smith, *supra* note 28; Swinton, *supra* note 28.

33. I am grateful to Lynn Smith (as she then was) for this lovely turn of phrase.

34. See e.g. The Honourable Justice Beverley McLachlin (as she then was), “Judicial Neutrality and Equality” (Paper presented to the Aspects of Equality: Rendering Justice Conference, November 1995) [unpublished, on file with the author]; The Honourable Justice Beverley McLachlin (as she then was), “The Judicial Vision: From Partiality to Impartiality” (Paper presented to Nova Scotia Judicial Education Seminar, June 1998) [unpublished, on file with the author]; Jennifer Nedelsky, “Embodied Diversity and the Challenges to Law” (1997) 42 McGill L.J. 91; The Honourable Maryka Omatsu, “The Fiction of Judicial Impartiality” (1997) 9 C.J.W.L. 1; Rosemary Cairns Way, “What is Social Context Education” (1997) 10:3 National Judicial Institute 5; Devlin, *supra* note 7.

with social context issues was one way of increasing that store of knowledge and, therefore, of ensuring judicial impartiality.

The objectives of the project were developed over time and with the benefit of experience. They were developed in consultation with judges, academics and community leaders and included:

1. to assist judges to gain better understandings of the diverse communities that they serve, the impacts of disadvantage and the particular social, cultural and linguistic issues that shape the persons who appear before them
2. to assist judges to examine their own assumptions, perspectives and views of the world
3. to explore the impact of contextual inquiry on issues related to the judicial role, judicial process and the process of judgment³⁵

In my view, the social context education project is about the implementation of the equality value. Essentially, the project is a continuing education vehicle which assists judges in examining the implications of the fundamental norm of equality for the task of judging. Indeed, the objectives set out above mirror the four equality related skills/questions identified earlier—attention to context, examination of impact, critical analysis and systemic thinking.

The Council's decision to recommend social context education programming reflects, in my view, the Council's recognition of the increasingly complex nature of judging in a legal system and society characterized by change, diversity and inequality. It reflects an understanding that the role of the judge is to ensure, inasmuch as possible, equal justice to all, and that the delivery of equal justice requires both an openness and an enlarged perspective that is attentive to difference. Essentially, the judiciary was tracking something that had been occurring in the academy for a number of decades, in the works of feminists and critical theorists, critical race scholars and disability advocates, gay, lesbian and bisexual theorists and poverty lawyers, and of aboriginal scholars: a recognition that law is situated in a society of unequal power and access to justice, that so-called neutral principles have disparate effects and that learning about the law requires more than learning about the rules. Judicial commitment to social context education is part of the larger project of

35. Faculty Development Materials, Phase II, Social Context Education Project, National Judicial Institute [on file with the author].

public legitimacy.³⁶ The continuing involvement of the judiciary in social context education signals a changing conception of the role of the judge in a constitutionally-based democracy. All lawyers should heed this signal. It is undeniably significant to our understanding of the meaning and scope of professional responsibility.

IV. *Professional Responsibility and the Equality Value*

How have we taken equality into account in the context of professional responsibility? How can we do it better? The implementation of the equality value is no longer optional, but legally imperative, and the judiciary has taken the lead with the social context education project. It is essential for lawyers to begin thinking about how equality might be incorporated and operationalized into our conception of professional responsibility. Taking equality into account is implicit in our obligation to regulate the profession in the public interest, an interest which includes a commitment to equality.

The Mission Statement of the Nova Scotia Barristers' Society is a classic articulation of the aspirational ideals of the legal profession:

It is the object and duty of the society to regulate the practice of law within Nova Scotia by:

- (a) upholding and protecting the public interest through:
 - (i) preserving and protecting the rights of all persons in the fair and impartial administration of justice,
 - (ii) ensuring the independence, integrity and honour of the legal profession and its members, and
 - (iii) establishing, monitoring and enforcing standards for the education, professional responsibility and competence of its members.³⁷

As the statement makes clear, the intended beneficiary of self-regulation is the public. The public interest is served by having a legal system which is fair and impartial, and a legal profession which is independent, honourable

36. Justice Rosalie Abella, *supra* note 12 at para. 15, describes the legitimacy issue this way: The public is our audience, the people for whom we perform the justice play. They do not direct us, but they are very interested in what is going on. If they stop clapping, we are in deep trouble. We have to figure out if it is because of the script, the props, the cast, or all of them. We know we will always have an audience, because the play is called the Rule of Law, and the public's attendance is mandatory. Since we give the public no choice about whether or not they are subject to the rule of law, we have to care about whether they like the performance. They may not always be right, but they always have a right to be heard.

37. *Nova Scotia Barristers & Solicitors Act*, R.S.N.S. 1989, c. 30, Regulation 1A (Mission Statement of the Nova Scotia Barristers' Society).

and competent. This final section of the paper will briefly examine three aspects of self-regulation and practice. Each example—the role and authority of the equity office within a professional regulatory body, the structure and dimensions of professional continuing legal education and its relation to competence, and the nature of client service—deserves a far more detailed consideration than is possible here. The examples are offered as catalysts for discussion, to begin a conversation about how the equality value might be incorporated into professional responsibility.

1. *Self-Regulation: The Equity Office*

One of the important ways in which the profession has responded to the equality agenda is through the creation of formal institutional structures devoted to issues of equity and diversity. In Ontario, the Law Society of Upper Canada has an equity office,³⁸ in Nova Scotia, the Barristers' Society has an equity officer.³⁹ These institutional structures are the public face of the profession's commitment to equality and equity. The mandates of these programs are variously conceived but are primarily concerned with issues such as the diversity of the profession, employment equity initiatives within law firms, the development and implementation of workplace policies on discrimination and harassment, advice and support on the appropriate workplace accommodation for lawyers with special needs, offering training programs on equity and diversity, delivering public education, providing

38. Information about the Equity Office can be found online: LSUC <http://www.lsuc.on.ca/equity/promo_equity.jsp>, which describes the Law Society's Equity initiatives as follows:

As part of the Law Society of Upper Canada's mandate to ensure access to justice, the Law Society integrates equity and diversity values and principles into its policies, programs and procedures. The Law Society seeks to ensure that both law and the practice of law are reflective of all the peoples of Ontario, including Aboriginal peoples, Francophones and equity-seeking groups. The Law Society also works to ensure that its workplace and the legal profession are free of harassment and discrimination... The Law Society's Equity Initiatives Department plays a leadership role in coordinating all of these activities. The department was created in 1997 following the adoption of the Bicentennial Report on Equity Issues in the Legal Profession by the Law Society's governing body. The report summarizes the work of the Law Society to promote equity and diversity in the legal profession and the challenges of pursuing this direction in the future. The report also contains recommendations to ensure the promotion of equity and diversity in Ontario's legal profession, addressing such areas as ongoing policy development, legal education and governance.

39. The Society's website (www.nsbs.ns.ca/equity.html) offers the following description of the Equity Officer program:

The Society is committed to addressing issues that will make the profession more diverse. The Equity Officer works closely with the Race Relations Committee and Gender Equality Committee in a program designed to increase the number of Black and Aboriginal lawyers practising in Nova Scotia. As well, the Equity Officer is responsible for a wide range of educational programs designed to increase the membership's understanding of issues of prejudice and racism and their import on the legal profession.

mentoring programs and, in some cases, community outreach. While the goals of equity programs are admirable and the individuals who work within them are dedicated professionals, it is nevertheless true that the capacity to make change is directly linked to the resources and the institutional support accorded the change-agent. In my view, the challenge for equity programs is the seeming immutability of legal practice—the culture of law practice is not a culture which gives priority to equality. If the culture of the professional regulatory body is similarly resistant to equality values, the equity office will remain a bit player in the larger drama of self-regulation.

Thus, while the public face of the profession is one that takes equality seriously, the private reality is quite different. One example will suffice. Anecdotal evidence from Career Services at the University of Ottawa Law School, as well as from my experiences as Vice-Dean, suggests that the articling interview process, despite ongoing attempts to educate firms about human rights and diversity, continues to be as nightmarish an experience for students from equality-seeking communities as it was twenty years ago.⁴⁰ Women are routinely asked about their personal lives and when and if they intend to have children while students from racialized communities are routinely asked how they intend to deal with racist clients (as if that is their responsibility), and whether the likelihood of racist clients should be a bar to their employment. These kinds of questions are patently inappropriate and formally condemned by the Law Society⁴¹ (as well as being actionable under Human Rights Legislation). That they seem to continue unabated is testimony to the apparent imperviousness of law firm culture to the language and the substance of equity and equality initiatives. The continuing and disproportionate departure of women from the practice of law, the underrepresentation of women and other members of equality-seeking groups in senior law firm positions, the continuing and

40. The Law Society of Upper Canada has made an enormous effort to improve the articling recruitment process. See generally the materials dealing with articling, online: LSUC <http://www.lsuc.on.ca/services/phase2/pdf/prac_guidelines2002.pdf>. The Summary of Student Hiring Practice Guidelines provides examples of inappropriate interview practices which include the ones I detail in the text as well as, for example, “What country do you come from and what is your nationality?” “Would you have concerns about working with people of religion x?” “What is your father’s occupation?” “How will you balance having kids, a husband and a job?” “Where are your parents/grandparents from? Why don’t you have an accent?”

41. In its Summary of Student Hiring Practice Guidelines, *ibid.*, the Law Society recommends the following Hiring Practices:

Interview questions should be valid and relevant to the job, and not relate directly or indirectly to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status, or disability. In addition, the materials note that the *Ontario Human Rights Code* prohibits the use of a written or oral inquiry that directly or indirectly classifies or indicates qualification by a prohibited ground of discrimination.

disproportionate lack of aboriginal lawyers, and the almost complete absence of lawyers with disabilities⁴² suggests that the profession's public stance about the seriousness of our commitment to equity is at odds with the lived private reality of practice. Of course, the explanatory reasons for the demographics of the bar, and the demographics of those with (and without) power in the profession are complex and multidimensional. But one way to respond to the disjunction between aspiration and reality is to provide significant resources and real power to those who have been charged institutionally with the task of implementing equity initiatives.

2. *Continuing Legal Education (CLE)*

The social context education project at the NJI demonstrated the commitment of the judiciary to take equality seriously. That commitment manifested itself in high-level institutional support (through the CJC, and, at its highest level, the office of the Chief Justice) and, in general, a willingness on the part of most judges to attend and to take very seriously education programs that dealt with social context. During Phase I, every province and virtually every court in the country offered two- and three-day long intensive programs where judges worked with other judges, lawyers, legal academics and community leaders to explore equality issues. Attendance at these programs was not mandatory, but the reality was that the overwhelming majority of judges participated—some reluctantly, but most willingly—and as a result, spent a concentrated period of time confronting the kinds of questions earlier identified. This is of enormous significance; it signals a capacity and willingness by the courts of this country to take equality seriously.

The profession is far behind the judiciary in this regard. I would argue that our professional duty to be competent coupled with our public responsibility to protect the fairness and impartiality of the justice system means that we should take continuing education and professional development far more seriously. In a recent exploration of legal ethics, Justice Bastarache suggested that lawyers take personal and professional

42. The demographics of the profession have been widely examined. See *Touchstones for Change*, *supra* note 15; Mossman, *supra* note 16; *Racial Equality*, *supra* note 17. See also Fiona Kay & Joan Brockman, "Barriers to Gender Equality in the Canadian Legal Establishment" (2000) 8 *Fem. Legal Stud.* 169; Alex M. Johnson, Jr., "The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective" (1997) 95 *Mich. L.Rev.* 1005; Chris Tennant, "Discrimination in the Legal Profession, Codes of Professional Conduct and the Duty of Non-Discrimination" (1992) 15 *Dal. L.J.* 464; Esmerelda M.A. Thornhill, "Ethics in the Legal Profession: The Issue of Access" (1995) 33 *Alta. L. Rev.* 810; Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001); Michael Ornstein, *Lawyers in Ontario: Evidence from the 1996 Census, A Report for the Law Society of Upper Canada* (Toronto: Law Society of Upper Canada, 2001), online: LSUC <http://lsuc.on.ca/equity/pdf/societyreport_revised16_jan.pdf>.

responsibility for implementing the ethic of impartiality, by recognizing the reality of unconscious bias and systemic discrimination.⁴³ Justice Bastarache went on to suggest that “all members of the profession must broaden their knowledge of social realities, appreciate the legal significance of stereotypes and promote equality in every way possible.”⁴⁴ A commitment to equality means a reexamination of our professional commitment to continuing legal education. It means revisiting the question of whether continuing education should be mandatory, and reexamining the connection between continuing legal education and competence.⁴⁵ More fundamentally, it requires careful thinking about the nature of professional competence. The judiciary has recognized and acknowledged the public dimensions of judicial education by actively developing education vehicles which aim for public credibility, not just judicial acceptance.⁴⁶ The profession should do the same. Examining the kinds of education offered through CLE programs is one place to start. I suspect that CLE has too often been shaped by the relatively narrow doctrinal needs of practitioners. Continuing legal education should be responsive to the larger framework within which the law operates—it should engage lawyers in the same way as judges across the country have been engaged on the implementation of the equality value. It should do so because the public interest requires it.

3. *Serving Clients: Aboriginal Residential School Litigation*

The Professional Regulation Committee of the Law Society of Upper Canada is currently considering a set of practice guidelines. The Guidelines for Aboriginal Residential School Litigation began at the C.B.A. in 2000.⁴⁷

43. The Honourable Justice Michel Bastarache, “The Ethical Duties of the Legal Professional” Speech delivered at the Gale Cup Moot, Toronto, 1998 [on file with the author].

44. *Ibid.* at 9.

45. I do not mean to suggest that professional regulatory bodies have not taken these issues seriously. The Law Society of Upper Canada has undertaken exhaustive work on continuing legal education and on the definition of competence. See *e.g.* *The Final Report of the Competence Task Force* (1998) and *Implementing the Law Society’s Competence Mandate* (2000). Both documents are available in pdf format online and contain links to other Law Society reports and background documents. See generally online: Law Society of Upper Canada <<http://www.lsuc.on.ca/services>>. Thirty eight American states make CLE compulsory, as do England and Wales, and New South Wales in Australia. In Canada, nurses, physicians and surgeons, accountants, actuaries and architects all make continuing education mandatory. See the appendices to the Consultation Document on Competence, online: LSUC <http://www.lsuc.on.ca/services/competence_appendix200006.jsp>.

46. The Social Context Education Project has actively incorporated members of the community into all aspects of its planning and delivery process.

47. The guidelines were posted on the website of the Nova Scotia Barristers’ Society in the Announcements section on Nov. 30, 2000 (online: NSBS <http://www.nsbns.ca/notices/cba_guidelines.htm>). The preamble to the posting reads as follows: The Society’s Legal Ethics Committee suggested that these [the guidelines] be made available in an abbreviated form for the information of the membership (*ibid.* at para. 1).

In Ontario, the Professional Regulation Committee struck a special subcommittee in cooperation with the Equity and Aboriginal Issues Committee to consider the C.B.A. guidelines. The subcommittee considered some of the following alleged practices:

- Lawyers sending unsolicited letters to Residential School Survivors which may include detailed and lengthy questionnaires requesting explicit information about experiences in residential schools including accounts of physical and sexual abuse from the survivor...
- Lawyers offering to pay survivors \$50 cash if they agree to sign a retainer agreement with the lawyer...
- Lawyers sending clients detailed opinion letters with complicated instructions requiring clients to opt in or out of certain processes, etc. without making themselves available to the client to discuss and explain the opinion. Lawyers refusing to accept collect phone calls from indigent clients...
- Lawyers requiring aging survivor clients to amend their wills naming the lawyer as Executor of their estates prior to agreeing to proceed with their cases.⁴⁸

Many of these abuses fall within the Rules of Professional Conduct⁴⁹ but the working committee chose to respond to them systemically in the form of guidelines specifically directed to the particular context in which the abuses occurred. Here are some excerpts from the draft guidelines, included in some detail because of the obvious care taken by the committee in their drafting:

1. Lawyers should recognize and respect the unique nature of Aboriginal Residential school cases and appreciate Survivors' need for "healing" in the legal process. Lawyers should recognize and respect the special nature of Survivors' cases and should assist in facilitating their client's healing process through, where possible:
 - a) identifying and providing referrals to appropriate community resources, including counselling resources, to assist the client;
 - b) referring their client to treatment programs, if appropriate;
 - c) recognizing and respecting the need for the client to develop a personal support network.

48. *The Report to Convocation of the Professional Regulation Committee* (Toronto: Law Society of Upper Canada, 2002) at 3, online: LSUC <http://www.lsuc.on.ca/news/pdf/convfeb02_profregulation.pdf>.

49. *Ibid.* at 4.

2. Lawyers should recognize and respect that Aboriginal Residential School cases place unique demands on the lawyer and other law office staff by virtue of the complicated legal issues, the emotional nature of such cases, the amount of time and resources required for each case, the special needs of Survivor clients, the potential need for crisis intervention and management, and the lawyer's role in facilitating the client's healing process. Lawyers should recognize and respect that these demands may place a practical limit on the number of cases which they can competently and responsibly take on at any one time.
3. ... Lawyers acting in Aboriginal Residential School cases are encouraged to ensure employee assistance programs are available for law office lawyers and staff.
4. Given the specific knowledge required to responsibly serve the legal needs of Aboriginal Peoples, the special nature of Residential School cases, and the various legal processes that exist in those cases, lawyers should ensure they are competent to act prior to accepting clients in these matters.
5. Lawyers should appreciate the need for the utmost sensitivity in dealing with Survivors. Lawyers should ensure that the methods they employ in making legal services available to Survivors are culturally appropriate...
...
9. ...Lawyers should recognize and respect the special communication needs that some Survivors may have including language barriers, cultural barriers, and limited access to telephone service...
...
10. Sensitivity to the emotional, spiritual and intellectual needs of Survivors is necessary in the provision of legal services to Survivors. Lawyers acting for Survivors should recognize and respect that many Survivors have had control taken from their lives when they were children and therefore, as clients, should be routinely informed about and consulted as much as possible on direction of the case... Lawyers should also recognize and respect that for Survivors, interaction with lawyers and the legal process can be extremely stressful and difficult.
...
12. Lawyers should recognize and respect that Survivors may be seriously damaged from their experiences which may include cultural damages resulting from being cut off from their own society, culture and traditions. These experiences may be aggravated by having to relive their childhood abuse, and healing may be a necessary component of any real settlement for Survivors. Lawyers acting for both plaintiffs and defendants should endeavour to understand and respect Survivors' cultural roots, customs and traditions.⁵⁰

50. *Ibid.* at 6-9.

The working group is sufficiently self-critical to recognize that their expertise and perspective will be necessarily partial. They ask for comments from other potential stakeholders—most particularly from representatives of the aboriginal community. And finally the preamble to the guidelines explicitly recognizes that the principles in the guidelines may apply to lawyers acting in cases involving other victims of institutional abuse or other vulnerable clients.

These guidelines are exemplary of how ethical practice is informed and transformed by an operationalized equality principle. They particularize the circumstances of the client group that is, they counsel practice which is attentive to context. They locate the lawyer's practice obligations inside a larger social context with respect to the aboriginal community—and characterize the objective of the provision of legal services in a manner which reflects that community. They are attentive to impact. They counsel respect for and inclusion of appropriate community resources. They contextualize competence and encourage critical self-analysis. They challenge lawyers to learn about and be respectful of the client's community—not only for the lawyer representing the client but for all the lawyers involved. The guidelines model an approach to client service which is broadly applicable, not in the sense that all clients will have these particular needs—but in the sense that they establish a protocol for thinking about client service in a way that has the potential to incorporate equality. It is a protocol that reflects the equality value emphasizing context, impact, critical thinking and systemic analysis.

Conclusion

What are the implications of the fact that lawyer self-regulation is explicitly legitimized with reference to the public interest? It is clear that the public interest has an equality dimension. The profession's failure to take account of the equality interest may well be symptomatic of a larger disengagement with the public interest, or at least with a privileging of the private interests of lawyers and clients. Do Law Societies systematically devalue the public interest, or do they have an impoverished vision of what the public interest requires? A public interest which never requires lawyers to compromise their professional self-interest is a public interest without a public dimension, a public interest which has been appropriated in the service of the profession.⁵¹ Deborah Rhode argues that the public interest has played

51. I am indebted to my colleague Joanne St. Lewis for this insight. Professor St. Lewis is a bencher of the Law Society of Upper Canada.

too little part in determining professional responsibilities.⁵² She suggests that the profession's core set of professional commitments (resolute advocacy, client confidentiality, the adversary system) have generated a set of habitual professional practices justified with reference to their socially beneficial aggregate effects. Practices which look unethical—delaying tactics, destructive cross-examination, procedural abuses—are justified through reliance on the larger public interest. In Professor Rhode's view, the difficulty with the justification is that it is plainly demonstrable that in many situations these practices subvert the very values—justice, truth, individual dignity, freedom and equality—that they are intended to serve.⁵³ Rhode's prescription is to encourage lawyers, both individually and collectively, to take responsibility for the consequences of their professional actions and to engage in a process of self-justification which looks beyond immediate self-interest and unexamined generalizations. The lawyer must believe in that self-justification fully, or risk being a mere provider of service for money and not a professional.⁵⁴

These thoughts bring me full circle to my original "hook." It is "not OK to do more harm than good." Being a legal professional requires a lifelong commitment to education, to professional development and critical self-awareness. A commitment to equality requires that habits of client service be attentive to context, impact and the systemic dimensions of the legal issue. An ethical practitioner takes the public interest seriously, and takes responsibility for the consequences of their professional actions. My final words are directed to law students. A famous educator once spoke about how teachers can appeal to the young.⁵⁵ He said that there are three ways of trying to convince the young. One is to preach—that is the hook without the worm—the second is to command—that is the devil—the third is the appeal which does not fail—to tell you that you are needed. You are needed by the profession and by the public—and you can make a difference.

52. Rhode, *supra* note 3 at 17ff.

53. See Robert W. Gordon, "Portrait of a Profession in Paralysis" (2002) 54 *Stan. L. Rev.* 1427 at 1428-29. Professor Gordon suggests that relying on the truth seeking and autonomy promoting qualities of the adversary system to justify resolute advocacy ignores the fact that most people cannot afford to even access the adversary system and that, in fact, effective advocacy often operates to obscure and distort the truth through tactics such as the discrediting of truthful witnesses and the use of competing expert witnesses. Similarly, an ethic which focuses solely on protecting the autonomy of individual clients and which separates the clients from the larger social context in which they operate fails to distinguish between client choices that deserve protection and those that do not, and simultaneously ignores the harms that clients, assisted or protected by lawyers, may inflict on third parties or on society.

54. Justice Bastarache makes the same point in "The Ethical Duties of a Legal Professional," *supra* note 43.

55. The educator was Kurt Hahn, the founder of Outward Bound International and the Gordonstoun School. See online: Kurt Hahn <<http://www.kurthahn.org>> for more information.