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Jocelyn Downie

Richard Devlin

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**FITNESS FOR PURPOSE:
MANDATORY CONTINUING LEGAL ETHICS
EDUCATION FOR LAWYERS**

Jocelyn Downie* and Richard Devlin**

The authors argue that if we want lawyers to be fit for the purpose of practicing law, and law societies to be fit for the purpose of regulating in the public interest, then it is incumbent upon the Canadian legal profession to adopt programmes of compulsory legal ethics education (CLEE). In support of this argument the authors: provide several reasons why Canadians might be concerned about the ethical fitness of lawyers and law societies; analyse several arguments both in supporting and resisting CLEE; suggest several strategies for overcoming the ethical indolence of the legal profession; and draw inspiration from recent judicial education initiatives in Canada.

Les auteurs prétendent que si nous voulons que les avocats soient aptes à pratiquer le droit et que les barreaux soient aptes à réguler la profession dans l'intérêt du public, il incombe alors à la profession juridique canadienne d'adopter des programmes de formation obligatoire en matière d'éthique juridique (FOEJ). À l'appui de cette proposition, les auteurs : invoquent plusieurs raisons en vertu desquelles les Canadiens devraient se préoccuper de l'aptitude éthique des avocats et des barreaux; font l'analyse de plusieurs arguments pour et contre la FOEJ; proposent différentes stratégies qui permettraient de venir à bout de l'indifférence dont fait preuve la profession juridique en matière d'éthique; et s'inspirent de récentes initiatives de formation juridique au Canada.

1. Introduction

In this article we present arguments for a conclusion – participation in programs of continuing legal ethics education (CLEE) should be mandatory for all practicing lawyers – that is controversial on a number of fronts. For example, at the highest level of generality, the idea that continuing legal education in any form should be mandatory is hotly

* Canada Research Chair in Health Law and Policy, Dalhousie University.

** Associate Dean, Faculty of Law, Dalhousie University. Thanks to Porter Heffernan, Stephanie Lane, and Matthew Kutcher for their excellent research assistance. We have also benefited from the critical insights of Adrian Evans, Lorraine Lafferty, John Rhude, Victoria Rees and anonymous reviewers at the *Canadian Bar*

contested. At the level of the specific issue of mandatory CLEE, the proposition that legal ethics can be “taught,” is often rejected. The consequence of these and other objections is that there are no jurisdictions in Canada, and only a few elsewhere,¹ where ongoing legal ethics education for practicing lawyers is mandatory.²

Our goal is to destabilize this confluence in practice. Our argument will proceed in six stages. First, we will provide a summary of several indicators that suggest there may, in fact, be a significant problem that needs to be addressed. Second, we will consider arguments in favour of mandatory CLEE. Third, we will identify and respond to arguments against mandatory CLEE. Fourth, we will tentatively map out several strategies for overcoming resistance that might be useful to those who are predisposed to making legal ethics education mandatory. Fifth, by way of precedent initiatives, we will briefly discuss judicial education programs in Canada and, in particular, an initiative called the Social

Review. An earlier draft of this paper was prepared for a one day workshop entitled “A Successful Lawyer is an Ethical Lawyer – True or False,” sponsored by the Professional Ethics Committee, International Bar Association, Singapore, October 2007. Another was presented at “Can Legal Ethics Be Taught?” Toronto, April 2008. A modified version was also presented as the Murray Fraser Memorial Lecture, Faculty of Law, University of Victoria, February 2008.

¹ For an overview of some American jurisdictions that have adopted mandatory CLEE see <http://www.abanet.org.cle/mandatory.html>.

² There are signs that change may be on the horizon. As we were completing this article, the following call for tenders from the Law Society of England and Wales came to our attention:

Understanding Ethics in Training

Integrity is a hallmark of the legal profession. Adherence to a strict ethical code sets solicitors apart from unqualified providers of legal services. The Law Society of England and Wales is highlighting this unique feature of our members to promote solicitors to users of legal services and within the profession.

The ability to maintain a strong ethical practice in the face of a changing legal landscape needs to be nurtured from very early in a solicitor’s career. The Society is seeking advice on how professional ethics can best be addressed in the education and training of solicitors. Key issues are how, when, and in what context professional ethics should be included in training programs and how it can be effectively assessed both pre- and post-qualification.

Individuals with knowledge of current issues in legal ethics and a sound understanding of legal education and training within a UK context are invited to tender for the opportunity to provide a written report on these issues to the Society. The timeline for the preparation and presentation of this report is mid January 2008 to March 2008.

“Invitation to Tender on Ethics Review” (18 October 2007), online: Law Society of England and Wales <<http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=367/33>>.

Context Education Programme. Finally, our conclusion will return to the core aspiration that underlies a project of mandatory CLEE: that it can help lawyers and law societies become “reasonably fit for the purpose”³ of practicing and regulating law in the public interest.

2. Inertia: Reasons to be Concerned about Fitness of Lawyers and Law Societies

As law professors with some fifteen years combined teaching and research experience in the area of legal ethics, we have come to the conclusion that the legal profession is suffering from ethical disuse atrophy. In making this assertion we are not claiming that all, or even most, lawyers are unethical. Rather we are suggesting that the profession has atrophied when it comes to legal ethics because it has failed to exercise its ethical muscles in any sort of vigorous way. To be blunt, we believe that the current system is flawed and that it needs to be fixed. So, in this section, we present a summary of the available evidence that suggests all is not well. We will discuss lawyers’ conduct, the profession’s (in)actions and reactions, and an education deficit inference.

A) Lawyers’ Conduct

There are two sets of indicators that raise concerns about the ethical competencies and sensibilities of Canadian lawyers: complaints against

³ The idea of linking ethical competency to fitness for purpose was suggested to us in a remark made by Colin Tyre, President of the Council of Bars and Law Societies of Europe (CCBE), at the International Bar Association (IBA) Conference in Singapore. The requirement of reasonable fitness for purpose is to be found in s. 17(a) *Sale of Goods Act*:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller’s skill or judgment, and the goods are of a description that it is in the course of the seller’s business to supply, whether he be the manufacturer or not, there is an implied condition that the goods will be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to fitness for any particular purpose;

See e.g. *Sale of Goods Act*, R.S.N.S. 1989, c. 408, s. 17(a). See generally, Michael Bridge, *Sale of Goods* (Toronto: Butterworths, 1988) 451-88. The concept is extended to the provision of services in much consumer protection legislation; see eg. *Consumer Protection Act*, R.S.N.S. 1989, c. 92, s. 26(1)(e). In this paper we are not advancing a doctrinal application of fitness for purpose to the provision of legal services; rather our analysis is conceptual.

lawyers; and the willingness of many lawyers to serve as character witnesses for their ethically suspect colleagues.

a) Complaints

Lawyers are the subjects of complaints to their regulatory bodies at the startlingly high rate of one for every five practicing lawyers. While the national average has remained fairly stable, between 1995 and 2005 the number of complaints approximately doubled in Alberta, Manitoba, Saskatchewan, and Nova Scotia; it stayed stable in Ontario, British Columbia, New Brunswick, the Northwest Territories, and the Yukon and decreased by half in Prince Edward Island.⁴ These data do support the claim that there is a problem.⁵

Responding to criticisms of the legal profession and concerns about lawyers' ethics, many suggest that the concerns are misplaced because "it's just a few bad apples."⁶ They also point to statistics that indicate

⁴ Data on which these statements are based is available on the website of the Federation of Law Societies of Canada (FLSC): <<http://www.flsc.ca/en/lawSocieties/statisticsLinks.asp>>. Accessed 9 July 2008. The authors queried the FLSC about unusual patterns in the data (e.g., the 2002 numbers for the *Chambre des Notaires du Québec* report the total number of practicing lawyers as 3121 and the total number of complaints as 2608 (83%), whereas in 2006 the total number of practicing lawyers is reported to be 3230 and the total number of complaints is listed as a mere 29 (0.8%)) and were informed that "the statistics are forwarded to us by the law societies themselves" and because of this the FLSC had "no explanation that would answer... [our] question" [email dated Wednesday, June 25, 2008. On file with authors].

⁵ We do, of course, recognize that not all complaints have merit and that, even where they do have merit, they do not always involve ethics issues. The problem is, however, that in Canada there is no reliable, independent, publicly-accessible source that monitors and reports on complaints and the disposition of complaints by the various law societies such that we can answer the following questions: Of all of the complaints, how many involved ethical issues? And, of all of the complaints that involved ethical issues, how many involved lawyers actually engaging in unethical conduct? Hence we, like others working in this area, must rely on these admittedly de-contextualized statistics.

⁶ This attitude was evident in the response of the Canadian Bar Association to an interview with Philip Slayton published in *Maclean's* magazine (6 August 2007) following the publication of Slayton's book, *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession* (Toronto: Penguin Group Canada, 2007). In a written response to the *Maclean's* article James Morton, President of the Ontario Bar Association, accused Slayton of having "cherry-picked the worst examples of lawyer misconduct": <<http://www.cba.org/cba/newsletters/announce7-07/macleans2.aspx>>. Accessed 9 July 2008). This "few bad apples" response typified many of the arguments launched to counter Slayton's depiction of an ethically barren Canadian legal landscape; see e.g. Natalie Fraser, "Lawyers Get Mad About *Lawyers Gone Bad*"

that a high percentage of lawyers in trouble are sole practitioners struggling at the margins of the profession.⁷ While sole practitioners do make up a sizable proportion of lawyers in trouble, however, it is important to note that a number of ethically problematic lawyers are very high-profile, well-respected, well-supported, and well-resourced practitioners who are at the heart of the profession. They are, or were, leading Canadian lawyers in their respective fields with excellent reputations. Indeed, some are among the *crème-de-la-crème* of the Canadian legal profession. Many are respected, some even revered, by their peers. In an effort to shine a light on a phenomenon that is often overlooked or downplayed, rather than focusing on the relatively well-cannvassed and often-referenced former group, we focus in this section on a few illustrative cases of the latter lawyers.

i) George Hunter

The legal profession in Ontario was shocked in late 2005 when senior lawyer George Hunter, Treasurer of the Law Society of Upper Canada (LSUC), President of the Canadian Federation of Law Societies, and partner at Borden Ladner Gervais, stepped down from his positions without warning and took a leave of absence from his firm.⁸ Over the following year, details of an investigation into a sexual and romantic relationship between Hunter and a client began to emerge. Following a hearing, the disciplinary committee found that he had engaged in a sexual/romantic relationship with a client while retained by her and while she was emotionally vulnerable, had put pressure on the client to sign documents indicating that he was complying with the rules of the law society, and had contacted her on a number of occasions to ask her to verify for his lawyer and law partners that their relationship was as

Lawyers Weekly (10 August 2007), online: <<http://www.lawyersweekly.ca/index.php?section=article&articleid=516>>. See also Robyn Doolittle, "Lawyer Expose Makes Author Public Enemy Number One; Critics Say Slayton 'Cherry-Picked' Content of Lawyers Gone Bad, and Maclean's Sensationalized Story" *The Toronto Star* (2 August 2007) A3.

⁷ For example, the 2008 *Annual Report* of the Nova Scotia Barristers' Society (NSBS) reports that 60% of the lawyers dealt with by the Complaints Investigation Committee (CIC) were solo practitioners, "a number which, as in previous years, is disproportionate to the percentage of solo practitioners in practice." Moreover, another 40% of the lawyers who appeared before the CIC were "with firms of two to five lawyers;" see 2008 NSBS *Annual Report* at 21, online: <<http://www.nsbs.org/annualReport.php>>. See also Harry W. Arthurs, "The Dead Parrot: Does Professional Self-Regulation Exhibit Vital Signs?" (1995) 33 *Alta. L.Rev.* 800 at 805.

⁸ Cristin Schmitz and John Jaffey, "Hunter Quits as Law Society of Upper Canada Treasurer" *Lawyers Weekly* (16 December 2005).

he described.⁹ Hunter was ultimately found to have engaged in professional misconduct.¹⁰

ii) *Edward Greenspan*

Well-known criminal lawyer Edward Greenspan, Q.C., was successfully sued for his involvement in a television program about one of his former clients, Robert Stewart, who had been convicted of criminal negligence causing death for running over a woman and dragging her behind his car on November 27, 1978. As counsel for his sentencing hearing he engaged Greenspan, who achieved a relatively light sentence for his client.¹¹ Years later, Greenspan narrated and helped script an episode about Stewart's case for the CBC television programme *Scales of Justice*.

Unhappy with his portrayal in the episode, and with his former lawyer's involvement in it, Stewart sued. J. MacDonald J. found that Greenspan's fiduciary duties to his client subsisted even after the professional relationship between the two had been dissolved.¹² He further found that Greenspan's portrayal of Stewart was a clear violation of these duties, and stated as much in no uncertain terms:

As I have found, despite his ability to determine what was scripted and thus what was broadcast, he exaggerated the distance Mr. Stewart had dragged Mrs. Jordan screaming in agony and he made no mention of Mr. Stewart's lack of complicity in his first counsel's... [unethical] trial tactics, while at the same time explaining the benefit Mr. Stewart could have derived from them. His public role in 1991 therefore included advancing misperceptions about Mr. Stewart and the nature of his conduct. Mr. Greenspan not only revisited the future benefits and protections he had worked to provide to Mr. Stewart as his counsel, he undermined them.¹³

J. MacDonald J. was particularly critical of the fact that Greenspan had appeared on the programme not to educate the public or to improve the image of his former client, but to display his prowess as a legal advocate:

⁹ *Law Society of Upper Canada v. George Douglas Hunter*, 2007 ONLSP 27 (CanLII) at para. 1.

¹⁰ Cristin Schmitz, "Ex-Law Society Treasurer Gets Two-month Suspension after Affair with Family Law Client" *Lawyers Weekly* (February 16, 2007) [Schmitz, "Ex-Law Society"].

¹¹ *Stewart v. Canadian Broadcasting Corp.*, [1997] O.J. No. 2271, 150 D.L.R. (4th) 24 (Gen. Div.) at paras. 25-38.

¹² *Ibid.* at para. 307.

¹³ *Ibid.* at para. 278.

To the viewer, he explained the case and its legal issues. He was thus seen by close to one million people in the role of knowledgeable professional adviser. His image and his voice were prominent throughout. His name was mentioned and displayed. In my opinion, this broadcast was not just education about the justice system. It was also education about Edward Greenspan, his role in the justice system, and his effectiveness as counsel. I find that Mr. Greenspan's primary purpose in involving himself in this production and broadcast, in which educational content was otherwise assured, was to publicize himself and his services as counsel to a national audience.¹⁴

J. MacDonald J. summarized his findings as follows:

- Mr. Greenspan breached his fiduciary duty of loyalty to Mr. Stewart in the following ways:
- He favoured his financial interests over the plaintiff's interests as alleged in sub-paragraph 25(h) of the statement of claim.
- He put his own self promotion before the plaintiff's interests as alleged in sub-paragraph 25(i) of the statement of claim.
- By the way he publicized his former client and his former client's case in 1991, he undercut the benefits and protections he had provided as counsel, and therefore, increased the adverse public effect on the plaintiff of his crime, trial and sentencing, which falls within sub-paragraph 25(j) of the statement of claim.¹⁵

Stewart was awarded both damages and disgorged profits.¹⁶

iii) Robert Strother

The latest holding from the Supreme Court on legal ethics and professional responsibility is the case of *Strother v. 3464920 Canada Inc.*¹⁷ The case involved Strother's representation of a client corporation set up to take advantage of a loophole in the *Income Tax Act*. When the federal government closed the loophole, Strother, a partner at a major Vancouver law firm, told the client that there was no alternative and the client consequently shut down operations. Some months later, Strother came up with another tax scheme along similar lines, and launched a business venture with an employee of the former client, without notifying the former client that its business might be

¹⁴ *Ibid.* at para. 241.

¹⁵ *Ibid.* at para. 331.

¹⁶ *Ibid.* at para. 334.

¹⁷ 2007 SCC 24, [2007] 2 S.C.R. 177, [2007] 7 W.W.R. 381 [*Strother*].

viable again. The business venture resulted in millions of dollars in profits for Strother before the former client found out and filed a claim against him for breach of his fiduciary duty. The Supreme Court of Canada, by a narrow majority, found that Strother owed a fiduciary duty to the former client, which included a duty to avoid conflicts of interest, that he had breached that duty, and that he was therefore required to account to the client for the profits resulting from that conflict.¹⁸

b) Character Witnesses

Another source of concern about ethics among lawyers comes from the phenomenon of lawyers vouching for the good character of lawyers who have engaged in unethical conduct and have therefore faced sanction or exclusion in the context of discipline or admission processes. Numerous examples of this behaviour could be given;¹⁹ here we provide just three.

First, in the *Hunter* case²⁰ a total of twenty-seven character letters, written by fellow lawyers (including a number of benchers) were introduced before the committee. The letters extolled the virtues and good character of their colleague, variously describing Hunter as “highly professional,” “ethical,” “well-liked,” “honourable” and “a person of the highest integrity.”²¹

Second, consider the case of Dan Cooper, a partner at McCarthy Tétrault, who was found guilty of stealing almost \$250,000 from his firm. According to the discipline committee of the Law Society of Upper Canada, “The letters of character reference from impressive authors are unanimous in their praise of Mr. Cooper. They resonate with words like ‘integrity’, ‘trustworthy’, ‘compassionate’, ‘kind’, ‘intelligent’, ‘polite’, ‘personable’, and ‘the best.’”²² Cooper was disbarred.

Third, in Ontario, a man referred to as “P” sought admission to the LSUC. Prior to seeking admission, he had spent time in jail for sexually

¹⁸ *Ibid.* at para. 113.

¹⁹ One of the more interesting subtexts of Slayton, *supra* note 6, is the enthusiasm that so many lawyers display in support of some of the most egregious lawyers in the recent history of Canada; see also Jocelyn Downie and Richard Devlin, “Are Law Schools Amoral Boot Camps?” (2008) 16 Can. Lit. Rev. 6.

²⁰ *Supra* note 9.

²¹ *Ibid.* at paras. 30-31.

²² *Law Society of Upper Canada v. Cooper*, [1991] L.S.D.D. No. 93 at 4, 1991 CanLII 2405 (ON L.S.D.C.).

assaulting his daughter and having a sexual relationship with another young girl. At the hearing on his application, his request for admission was

supported among other evidence by letters from partners in the law firm for whom the applicant articulated. One partner in the firm described the applicant as an exceptional articling student who “will no doubt be a superb lawyer and a credit to our profession.” She added that the applicant was possessed of “superior intellectual skills, and was dedicated, hard working, sympathetic, insightful, and wise.” She also added that the applicant showed a firm grasp of the ethics of the profession.... “I am of the opinion”, she concluded, “that it would be a tragedy for him and the legal profession if such a talented person were to be shut out.”²³

P’s application for admission to the bar was rejected.

While friendship and solidarity are both human and professional goods, they are not unqualifiedly so. In our opinion, whenever such virtues are indiscriminately displayed, they suggest a dubious understanding of lawyers’ ethical obligations to the public interest.

B) Law Societies’ (In)Actions and Reactions

There is also reason to be concerned about the law societies themselves. First, a number of examples can be provided in which serious ethical breaches have been met with what appear to be very light sanctions.²⁴ It is illuminating to return here to the *Hunter* case described above. Following his hearing, Hunter was handed a two-month suspension, with the disciplinary panel stressing the seriousness of his actions but also his long record of outstanding ethics and buttressed by the numerous character references presented in his favour.²⁵ Commenting on this case, one author has observed “the irony of Benchers urging three fellow Benchers to mete out the mildest possible sentence to a former Bencher guilty of conflict of interest.”²⁶

Norman Rose was a lawyer practicing in Dartmouth, Nova Scotia. He was found to have brought liquor to a seventeen-year-old client,

²³ Gavin MacKenzie, *Lawyers and Ethics Professional Responsibility and Discipline*, 4th ed. (Toronto: Thomson Canada Ltd, 2006) at 23-10.

²⁴ See also Joan Brockman & Colin McEwen, “Self-Regulation in the Legal Profession: Funnel In, Funnel Out, or Funnel Away?” (1990) 5 C.J.L.S. 1; Joan Brockman, “An Update on Self-Regulation in the Legal Profession (1989-2000): Funnel In and Funnel Out” (2004) 19 C.J.L.S. 55.

²⁵ *Supra* note 9 at paras. 50, 56 and 61.

²⁶ Schmitz Ex-Law Society, *supra* note 10.

“told her that he required a dating relationship as a fee and used inappropriate pressure tactics to obtain a personal advantage,” and “misled the Discipline Subcommittee ‘A’ of the Nova Scotia Barristers’ Society during the course of its investigation into the complaint.”²⁷ For this, he was suspended from the bar for thirty days and ordered to pay \$3,000 toward the costs of the proceeding.

Second, the law societies have failed to demonstrate ethical leadership with respect to a variety of ethical issues. For example, in a remarkable exhibition of self-interest, most law societies explicitly allow lawyers to breach client confidentiality for the purposes of collecting their fees but not, say, to prevent one hundred senior citizens from being defrauded of their life savings. On a different tack, a number of law societies ask applicants for admission to the Bar questions about their current and past mental health that are arguably discriminatory. Applicants in British Columbia are asked if they “have ever been treated for schizophrenia, paranoia, or a mood disorder;” applicants in the Yukon must answer whether they have “ever been under treatment for any mental illness;” and applicants in Prince Edward Island are required to disclose whether they are “currently receiving treatment for a psychiatric condition.”

Furthermore, some law societies also fail to provide guidelines and specific guidance on key ethical issues as they confront legal practitioners. The Ken Murray case is illustrative here. In 1993, while acting as defence counsel, Ken Murray was told by later-convicted rapist and serial killer Paul Bernardo of the existence of a number of hidden video tapes that Bernardo and his wife, Karla Homolka, had made of their crimes. Murray covertly retrieved the tapes and held on to them for sixteen months before finally resigning as counsel and passing the tapes on to Bernardo’s new lawyer, who turned them over to the police.²⁸ Murray claimed he had retained the tapes for so long because he felt they would be useful in contradicting the Crown’s key witness, Karla Homolka. Murray was subsequently charged both criminally with obstruction of justice, and under the LSUC *Rules of Professional Conduct*. He was acquitted on the obstruction of justice charge and the LSUC eventually dropped the disciplinary charges.²⁹

Although the ethical problem of receiving physical evidence from a client was not new, Murray could find no guidance in the *Rules of*

²⁷ *Nova Scotia Barristers’ Society v. Rose*, 1996 NSBS 6 (CanLII).

²⁸ “In Depth: Bernardo” *CBC News* (21 February 2006), online: CBC News Online <<http://www.cbc.ca/news/background/bernardo/>>.

²⁹ *Ibid.*

Professional Conduct. After his acquittal, the LSUC formed a special committee to consider the issue and a possible revision to the rules, which reported to Convocation in 2002, proposing the addition of a new rule to deal with the situation.³⁰ Despite the clear need for clarification if not reform of the rules in this arena, the proposal has yet to be adopted and appears to have dropped off the agenda.³¹ Indeed, since the Murray case only Alberta has come up with a rule on receiving physical evidence of a crime.³² This, we would argue, demonstrates a lack of ethical leadership on the part of law societies across the country.

C) An Education Deficit Inference

There is also an education deficit problem.³³ As we have argued in two previously published papers,³⁴ this deficit begins with university-based legal education. With the notable exception of the United States, university-based legal education in the vast majority of jurisdictions does little to introduce legal neophytes to the challenges and nuances of legal ethics. In Canada, for example, until recently, only five of the twenty-one law schools had a mandatory legal ethics course. In the last year, three more have joined the club. We have addressed this deplorable situation in detail elsewhere;³⁵ here we simply highlight the fact that most lawyers practicing today received no legal ethics education as part of their law degrees.

³⁰ Law Society of Upper Canada, Special Committee on Lawyers' Duties with Respect to Property Relevant to a Crime or Offence, "Report to Convocation" (March 2002), online: http://www.lsuc.on.ca/media/convmar02_physical_evidence.pdf.

³¹ Law Society of Upper Canada, *Rules of Professional Conduct*, online: <http://www.lsuc.on.ca/regulation/a/profconduct/>.

³² Law Society of Alberta, *Code of Professional Conduct*, Chapter 10, Rule 20, online: <http://www.lawsociety.ab.ca/resources/codeProfConduct.cfm>.

³³ We would like to thank an anonymous reviewer for sharing their thoughts on this issue.

³⁴ See Jocelyn Downie, "A Case for Compulsory Legal Ethics Education in Canadian Law Schools" (1997) 20 Dal. L. J. 226; Richard Devlin, Jocelyn Downie and Stephanie Lane, "Taking Responsibility: Mandatory Legal Ethics in Canadian Law Schools" (2007) 65:6 The Advocate 761-78.

³⁵ In the articles cited at *ibid.* In the Australian context, Adrian Evans and Josephine Palermo have suggested that even when legal ethics is taught in law school, it may have very little impact because of the way that it is taught; see "Zero Impact: Are Lawyers' Values Affected by Law School?" (2006) 8:2 Legal Ethics 240. They advocate instead a "value awareness educational strategy;" see Adrian Evans and Josephine Palermo, "Relationships Between Personal Values and Reported Behaviour on Ethical Scenarios for Law Students" (2007) 25 Behav. Sci. Law 121 at 134-35 [Evans and Palermo, "Relationships"].

Furthermore, most lawyers practicing today have received no CLEE. This post-graduation deficit can be traced to at least two causes. First, in part no doubt as a result of lack of demand, very few CLEE programs are offered by law societies. Second, increasing one's legal ethics knowledge through participation in CLEE programs is not likely to be seen by most law firms or lawyers as a path to increasing revenue generation – indeed it might well be seen as decreasing it. Consequently, CLEE is not likely to be encouraged by law firms or sought out by practitioners, at least insofar as they are motivated by revenue considerations.

We base our claim of inertia in part on these educational deficits – while one cannot infer ethical conduct from knowledge, one can reasonably infer an increased risk of unethical conduct from a lack of knowledge.

D) Summary Comment

Before moving on, it is important to note that we are not claiming that these data, vignettes and inferences offer proof that there is a widespread ethical problem with the profession. This is not an empirical or sociological paper. Rather, like prostrate canaries in a coal mine, they are a signal that there might be a significant problem with the ethics of Canadian lawyers and the profession more generally. One possible remedy for such a problem is mandatory CLEE for the practicing Bar. That is the subject matter for the remainder of this paper.

3. Overcoming Inertia: Arguments in Favour of Mandatory CLEE

The case for mandatory CLEE for lawyers draws on three different types of arguments: principled arguments; consequentialist arguments; and arguments by analogy.³⁶

A) Principled Arguments

There are three major principled arguments in favour of mandatory CLEE: the professionalism argument; the trust argument; and the covert messages argument.

³⁶ This section builds upon and expands Downie's original argument in favour of mandatory legal ethics education in law schools; see Downie, *supra* note 34.

a) The Professionalism Argument

The first argument appeals to the fact of law being a profession. Regulatory theory tells us that one of the key characteristics and responsibilities of a profession is to establish, monitor and enforce standards of appropriate conduct.³⁷ Therefore, the legal profession must ensure that its members have the knowledge and skills necessary for them to be able to meet the standards of appropriate conduct. Many lawyers never had any legal ethics education and therefore cannot be assumed to have the necessary knowledge and skills. In addition, the standards of appropriate conduct change over time and so, even if they had had education years ago, many lawyers' knowledge and skills could be hopelessly out of date. Therefore, continuing legal ethics education is necessary and the legal profession should mandate such education in order to meet its responsibilities.

At this juncture it is important to foreshadow an argument that we will return to later in this paper. We are not claiming that ethics education can guarantee ethical behaviour by individual lawyers. Legal ethics courses can, however, make lawyers more aware of ethical issues in the system and practice of law. They can give lawyers the tools they will need to determine how to be ethical even if, ultimately, they choose not to be. They can provide a framework for ethical analysis. This is especially important given the historic failure of law schools in most jurisdictions to provide ethics training. Legal ethics education for practising lawyers is, therefore, an imperfect but essential (necessary but not sufficient) way of meeting the obligations that arise from the fact of law being a profession.

b) The Trust Argument

The second principled argument might be called the "trust argument." Lawyers have a fiduciary relationship with their clients that is the result of the power and influence lawyers have over their clients. This power differential is caused by, among many other things, the knowledge differential and the fact that lawyers have been given a monopoly over the provision of legal services. Lawyers are also part of a profession that wields extraordinary power and influence in society more generally. This power is caused by, among many other things, the fact that lawyers have been given the authority to regulate themselves. Lawyers individually, and the legal profession collectively, hold a public trust that must be executed in the public interest. Knowledge of

³⁷ See further Richard Devlin and Porter Heffernan, "The End(s) of Self Regulation?" (2008) 45 *Alta. L. Rev.* 169.

the basic ethics rules which have been developed to protect individual clients as well as the public more broadly is necessary (albeit not sufficient) for meeting the public trust with respect to individual clients. Skills in ethical analysis are necessary (albeit not sufficient) for lawyers to act in the public interest with respect to the regulation of the profession. Thus, in order to deserve and keep the public trust, lawyers should have CLEE.

c) The Covert Messages Argument

The third principled argument might be called the “covert messages argument.” The absence of mandatory CLEE does not result in an ethically neutral professional experience. Lawyers are recipients of pervasive ethical messages in every aspect of their experience. In law school, as students, they receive all sorts of implicit messages about what is ethically appropriate.³⁸ In articling and in the early years of practice, the senior lawyers they observe, whether formally mentors or not, inevitably display normative patterns that encourage emulation.³⁹ The media, and lawyerly publications in particular, are saturated with images of appropriate and inappropriate lawyerly behaviour. Who the legal profession valorizes and how severely or leniently the law societies treat lawyers in discipline cases send significant covert messages about legal ethics. Furthermore, not having mandatory CLEE sends the covert message that neither CLE nor ethics are important. Mandatory CLEE would provide lawyers with both the obligation and the opportunity to reflect upon and question these covert messages and would, indeed, undercut the messages themselves.

B) Consequentialist Arguments

Consequentialist arguments about mandatory CLEE compare its benefits with its burdens. Our analysis will consider the impact of mandatory legal ethics on lawyers, the legal profession, and society in general. In this section we will focus on the potential benefits and in the following section we will consider the possible burdens.

³⁸ In contract law, for example, there are all sorts of implied messages about appropriate behaviour. One of us has taught contract law for twenty years, but it is only since he started teaching legal ethics about five years ago, that he began to recognize some of these himself. For example, *Beswick v. Beswick*, [1966] 1 Ch. 538, [1966] 3 All E.R. 1 (C.A.) provides an excellent opportunity to discuss conflicts of interest, while *B.(D.C.) v. Arkin*, [1996] 8 W.W.R. 100 (Man. Q.B.) provides an opportunity for students to consider how far they can legitimately go in pursuing the interests of a corporate client who is in a position to provide a large amount of work.

³⁹ See also Margaret Ann Wilkinson, Christa Walker and Peter Mercer, “Do Codes of Ethics Actually Shape Legal Practice?” (2000) 45 McGill L.J. 645.

a) Lawyers

Lawyers can benefit from mandatory CLEE in many ways.⁴⁰ Courses in legal ethics can develop lawyers' analytical skills; capacity for moral judgment; sense of moral responsibility; knowledge of relevant ethics codes, rules, and laws; knowledge of legal and quasi-legal responses to unethical conduct (courts and disciplinary committees); awareness of and ability to resolve ethical problems in law; and understanding of the different possible roles for lawyers, the legal profession, and the legal system.

As a result, lawyers who have engaged in legal ethics education may be better able to make informed and reasoned decisions when they are confronted with ethical dilemmas while practicing; recognize the socialization that is taking place while practicing and *choose* whether to continue becoming what the practice of law is making them become; make informed decisions about what kinds of lawyers they aspire to be and how they want to use their legal skills (if at all); make informed and reasoned contributions to the development of the legal profession and legal system; and be more comfortable with their decisions about ethical issues. As a result, they may perform more efficiently, have less trouble with the regulator, better serve their clients, reap the benefits of a reputation for ethical conduct, and reduce corrosive psychological effects of moral distress.⁴¹

b) The Profession

There are also many potential benefits to be gained by the legal profession from mandatory CLEE. First, courses in legal ethics can help improve the public perception of the legal profession. If members of the public were to see a commitment to strengthen the ethical practice of law, they might become more favourably disposed towards the profession. If it became generally known that all lawyers have to take legal ethics courses as part of their ongoing professional development, the public might be more willing to leave discipline and administration of the profession in the hands of the law societies. If no

⁴⁰ The research of Wilkinson, Walker and Mercer in *ibid.* suggests that most practising lawyers have quite constrained frameworks for ethical analysis.

⁴¹ The concept of moral distress is well-developed in the nursing ethics literature; see e.g. Alvita Nathaniel, "Moral Distress" in Joyce Fitzpatrick and Meredith Wallace, eds., *Encyclopedia of Nursing Research: A Sourcebook for Evidence-Based Practice* (New York: Springer Publishing Company, 2005); Andrew Jameton, *Nursing Practice: The Ethical Issues* (Englewood Cliffs, NJ: Prentice-Hall, 1984); Patricia Rodney, "Moral Distress in Critical Care Nursing" (1988) 5(2) *Canadian Critical Care Nursing Journal* 9-11. This concept could be usefully applied in the practice of law.

efforts are made in this direction, there may well be increasingly strong calls for the self-regulation of lawyers to be modified, at least in those jurisdictions that still have self-regulation.⁴²

Second, as more lawyers become involved in teaching legal ethics (as they will if the subject is made mandatory) and some of them dedicate some of their energy to the field, the literature on legal ethics is likely to improve and the critical analysis of the legal system, legal profession, and the practice of law is likely to be strengthened.

Third, courses in legal ethics might better equip professionals to participate in the design and operation of the legal profession. If lawyers are encouraged to develop more sophisticated frameworks for ethical analysis, for example, they might be better able to draft a policy on pressing contemporary issues such as taking possession of physical evidence of a crime, breaching confidentiality when confronted with imminent catastrophic financial harm to innocent third parties, or reporting suspected money laundering by a client.

c) Society

The advantages of mandatory CLEE will flow beyond the legal profession to society at large. First, and most directly, ethics education increases the chances that lawyers will act in a manner that better protects clients' interests and provides a higher quality of service to the consumers of legal services. Ethics rules are largely directed toward precisely these ends. If lawyers have a better understanding of the rules, they are more likely to realize these ends and society is thus more likely to benefit. Second, and more generally, much of the design and operation of the legal system, the legal profession, and the practice of law has been entrusted to lawyers. This public trust will be better served if the people in whom it is placed are competent to engage in the ethical analysis necessary for the task and ethics education increases the chance that those involved in self-regulation are competent.

⁴² See also Mary Seneviratne, "Consumer Complaints and the Legal Profession: Making Self-Regulation Work" (2000) 7 Int'l J. of the Legal Profession 39. We do not necessarily believe that increased external involvement in the regulation of the legal profession would be a harm rather than a benefit; see e.g. Devlin and Heffernan, *supra* note 37. We assume for the sake of argument, however, that the legal profession does and we are enumerating the benefits from the perspective of the legal profession.

C) Arguments by Analogy

Historically, in many jurisdictions, any form of mandatory continuing legal education has been rejected. In recent years, however, in Canada at least, there has been a growing recognition that mandatory legal education may be necessary. For example, when Quebec introduced its new *Civil Code* in the 1990s, it was considered essential to concomitantly introduce a mandatory continuing legal education (CLE) course.⁴³ Similarly, many Canadian provinces require that real estate lawyers take a mandatory course on new legislation.⁴⁴ There is certainly no reason to believe that lawyers have any less need of ethics education than they do for education in these other areas of law. By analogy, at least whenever there is significant law reform that impacts on the ethics of legal practice (as has happened in many jurisdictions), there should be concomitant mandatory CLEE. Furthermore, looking beyond the legal profession, a number of other professions have adopted mandatory continuing education. For example, continuing education is mandatory for physicians, physiotherapists, and pharmacists.⁴⁵ There is no reason to believe that lawyers have any less need for continuing education than these professions.⁴⁶

Finally, if we look beyond the legal community, other professions have adopted mandatory continuing ethics education initiatives. Some examples include: the American Psychological Association,⁴⁷ accountants in New York State;⁴⁸ and the public servants of North Carolina.⁴⁹ The National Association of Realtors has a requirement to

⁴³ Regulation respecting the mandatory training of notaries concerning the reform of the *Civil Code of Quebec Act*, (1996) R.Q. c. N-2, r. 8.1, made under the *Notarial Act*, R.S.Q. N-2.

⁴⁴ See e.g. NSBS, "Annual Report 2002-03" online: <<http://www.195bs.ns.ca/annualreport03/annualreport03.htm>>, at 40.

⁴⁵ See e.g. <http://rcpsc.medical.org/opd/moc-program/index.php>; <http://www.cfpc.ca/English/cfpc/cme/mainpro/maintenance%20of%20proficiency/requirements%20members/default.asp?s=1>; Nova Scotia College of Physiotherapists, Guidelines for Professional Portfolio 2006; and www.nspharmacists.ca/competence/cepolicies.html.

⁴⁶ Indeed, it is worth noting that in Nova Scotia in 2005, there was 1 complaint for every 5 practicing lawyers vs. 1 complaint for every 10 practicing physicians and 1 complaint for every 215 practicing nurses (in 2007). See, http://www.cma.ca/index.cfm/ci_id/16958/la_id/1.htm#prov-spec and <http://www.crns.ca/default.asp?id=190&sfield=Content.Id&mn=414.1116.1123.1135.1189&search=2656>.

⁴⁷ Online: American Psychological Association <<http://www.apa.org/ce>>.

⁴⁸ Online: Office of the Professions <<http://www.op.nysed.gov/cpace.htm>>.

⁴⁹ Online: North Carolina State Ethics Commission <<http://www.ethics>>

participate in ethics training once every four years.⁵⁰ There is no reason to believe that lawyers have any less need of ethics education than these other professionals.

4. Resistance: Arguments Against Mandatory CLEE

In the previous section, we identified the arguments in favour of mandatory CLEE. In this section, we will identify and address possible objections. The objections fall into two broad categories: normative; and pragmatic.

A) The Normative Objection

The central normative objection is that mandatory continuing legal education, in ethics or anything else, is an infringement of a lawyer's autonomy. The autonomy objection rests on a freedom of choice philosophy – a lawyer is a rational, freely-choosing agent whose capacity for self-determination requires others to respect her independence in respect of how s/he conducts her life. So long as that lawyer abides by the ethical principles established by the profession no one has a right to dictate that s/he participate in CLEE.

The infringement of autonomy argument is, in our opinion, invalid for two reasons. First, respect for autonomy is not absolute and, indeed, there are many ways in which lawyers' autonomy is restricted by law societies. Consider a number of examples. In British Columbia, there is now a mandatory CLE practice program for all practising lawyers; they must complete twelve hours of approved educational activities per year and two of those hours must relate to professional responsibility and ethics, client relations, and/or practice management.⁵¹ More generally other provinces, such as Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan and Alberta have moved to, or are currently moving towards, a system of targeted CLE with mandatory reporting.⁵² Furthermore, and more generally, law societies impose many conditions on individuals who would like to begin or continue to practise law – for example with respect to admissions, transfer, and

commission.nc.gov>.

⁵⁰ Online: National Association for Realtors <<http://www.realtor.org/mempolweb.nsc/pages/CEOtraining>>.

⁵¹ Online: Law Society of British Columbia <http://www.lawsociety.bc.ca/licensing_membership/profdev/overview.html>.

⁵² See for example, Law Society of Upper Canada, "Minimum Expectations for Professional Development," online: <<http://rc.lsuc.on.ca/jsp/MinExpectationForprofdev/index.jsp>>; see also Deana Driver, "Mandatory Professional Training Comes to Sask." *The Lawyers Weekly* (June 27, 2008) 3.

insurance.⁵³ All of these conditions are justified by reference to protection of the public and preservation of the reputation of the profession. If such limits on autonomy are acceptable, then we would argue that the limit on autonomy represented by mandatory CLEE is similarly acceptable.

Second, autonomy is not just “freedom from;” rather it is the capacity for self-determination. Education enhances that capacity. CLEE is specifically designed to encourage lawyers to engage in reasoned ethical debate, analysis, and reflection, and this is autonomy-enhancing.

B) Pragmatic Arguments

There are four pragmatic objections to mandatory CLEE: cost; redundancy; futility; and naïveté.

a) Cost

The cost argument is simple: ethics education involves two direct financial costs – someone has to pay for the design and delivery of the programs, and time spent on attending ethics education programs inevitably means time taken away from remunerative work. Some lawyers therefore object to CLEE because of the cost of tuition or registration fees and the lost billable hours. There are four possible responses to the cost objections. First, mandatory CLEE does involve financial costs to lawyers but these costs are outweighed by the financial benefits of being given a license to practise law. A variety of decisions made by law societies cost lawyers money but they are the price of the privilege. Second, law societies could allocate a part of their budgets to subsidize or completely fund such programs. Third, the costs may not be as high as many might fear; as we will argue later, well-designed legal ethics courses will integrate ethics with substantive knowledge and practical skills in other areas. The result could be an enhanced competency all around with a low increase in costs. Fourth, we would suggest that a developed ethics knowledge and skills set might well result in an “ethical premium.” By this we mean that within the legal community itself, there is a market for ethics, that lawyers often have a sense of their colleagues’ ethics, and that a positive ethical reputation can enhance one’s professional (and economic) capital. Such a premium can help redress opportunity costs.⁵⁴

⁵³ See, for example, Regulations made pursuant to the *Legal Profession Act*, S.N.S. 2004, c. 28 (amended to September 2007).

⁵⁴ One additional purported cost to the legal profession is that legal ethics

Finally, we note here that mandatory CLEE can impose unequal burdens with respect to costs as between members of the profession working in organizations that differ in size and location. Attention should be paid to this in the design and implementation of mandatory CLEE programs. There are a variety of ways to redistribute the costs, through differential fees and subsidies or web-based distance education programs.⁵⁵

b) Redundancy

The redundancy argument proposes that lawyers are engaged in CLEE on a permanent basis – they do it every day in their interactions with their colleagues, in their research, in their rigorous representation of their clients and so on. In other words, in ethics as in everything else, CLE happens by osmosis. Consequently, formal CLEE is redundant.

We agree with the premise of the redundancy argument that lawyers are engaged in CLE on a regular basis, but we question the quality and legitimacy of such education for legal ethics. As we indicated earlier in our discussion of covert messages, ethics education is pervasive. This is true in the sense that, for example, messages about ethics are being conveyed all the time. The key questions, however, remain: Are these the right messages? Is this a good way to educate about ethics? In our opinion, given the pressures of practice, the hierarchies of practice, and the underdeveloped knowledge and skills of ethical analysis possessed by most lawyers the answer to these questions has to be “No.” Lawyers need to be provided with exposure to a body of knowledge and the skills of ethical analysis. Osmosis is a very unreliable method of doing this. Imagine a world in which only a small fraction of the practicing bar had ever taken a course in contract law. Would anyone be persuaded by an argument that continuing legal education on contract law could be achieved through osmosis between the practitioners? Sophisticated forms of adult pedagogy acknowledge and embrace the lived experiences of the learners, but they incorporate them into a more reflective learning regime designed and implemented by individuals with the appropriate skills and expertise.

education will result in more challenges to the *status quo*. If the legal profession does not wish such challenges, then it will view mandatory legal ethics education as a cost rather than a benefit. If it views legal ethics education in this way, however, the profession is in worse shape than anyone thought and there is even more of a need for such education than anyone imagined.

⁵⁵ Online lectures and courses are already available through the Canadian Bar

c) Futility

The futility objection takes a different tack. Opponents might object to mandatory CLEE on the grounds that ethics cannot be taught; there are good apples and there are bad apples, and there is nothing that a mandatory legal ethics program can do about that. This argument, however, mistakes the claim of necessity for one of sufficiency. As noted previously, we are not claiming that legal ethics education is sufficient for ensuring ethical conduct at an individual and structural level and thereby protecting the public. Rather, we are claiming that it is necessary. If you have the relevant knowledge and skills you can at least choose whether or not to follow the rules. If you don't know the rules or don't have the skills needed to apply the rules to a specific circumstance, whether you follow the rules will be reduced to a matter of chance. Mandatory CLEE is futile if you misconstrue the objectives of legal ethics education ("to make people be good") instead of recognizing that the goal is to provide lawyers with the knowledge and skills needed to make decisions about ethical policy and practice.⁵⁶

d) Naïveté

The naïveté argument often comes from left wing critics of the legal profession. This objection protests that calls for mandatory CLEE are premised upon an idealist tradition – "If the normativists build it, they will come." It is argued that, on the contrary, the real determinants of ethical behaviour are not abstract ideals, but an "ethical economy" that responds to different economic, social and cultural variables.⁵⁷ If this is where the action is, then mini-courses in micro-ethics will inevitably miss the mark.

We are sympathetic to the ethical economy argument and agree that larger structural forces do have a strong influence on ethical practice and more broadly on the ethical trajectory of the legal profession. We do not accept, however, that idealism and materialism are necessarily antithetical and that calls for mandatory CLEE can be dismissed as

Association; see <<http://www.cba.org/CBA/CLE>> and the British Columbia Continuing Legal Education Society <<http://www.cle.bc.ca>>. Lessons can also be drawn from other professions; see e.g. www.cfpc.ca/mainpro; <http://pharmacy.dal.ca>.

⁵⁶ One interesting issue to explore further is whether gender is a variable in ethical responsiveness. Evans and Palermo, in the sources cited at *supra* note 35 suggest that it might be. Wilkinson, Walker and Mercer suggest it is not; see Margaret Ann Wilkinson, Christa Walker and Peter Mercer, "Testing Theory and Debunking Stereotypes: Lawyers Views on the Practice of Law" (2005) 18 Can. J. L. & Jurisprudence 165 [Wilkinson, Walker and Mercer, "Testing Theory"].

⁵⁷ See e.g. Arthurs, *supra* note 7.

hopelessly naïve. We believe that ethical analysis is a form of practice that shuttles between the ideal and the material. Ethical discourse is keenly aware of larger structural dynamics, but it attempts to contextualize them in the everyday practices of real live human beings such as lawyers. To take a related example, consider the argument in favour of teaching “cultural competency.”⁵⁸ Cultural competency requires an awareness of larger social forces such as globalization, social, economic and political inequality and cultural and religious diversity. At the same time, it requires lawyers to dovetail this larger consciousness with the particularities of family law, criminal law, commercial law, administrative law, even banking law.⁵⁹ Such contextualization is a difficult task, but surely not one that is naïve to pursue.

5. Overcoming Resistance

In the previous section we identified, and tried to respond to, the objections to mandatory CLEE. In particular, we tried to defuse both the general objection to any form of CLE and the more specific objection to mandatory CLEE. The strongest objection, we would suggest, is the costs argument and in the end we believe that this modulated, at least in part, by creative leadership from regulators of the profession.

In our opinion, the real problem in the pursuit of mandatory CLEE, at least in Canada, is not so much principled or consequentialist objections, but what we might describe as “ethical indolence.” The problem is not so much hostility (although there is of course some of that) but failures of ethical imagination. The legal profession, as a collective, has really not made ethics a priority. Rather, attention has been focused on other issues – globalization, mergers, technological innovations, maximizing efficiency and boosting profits. Each of these issues does, of course, have an ethical dimension, but often these get overwhelmed because the ethical muscle has atrophied. In this section we attempt to do two things: first we identify possible sources for this ethical indolence; and second, we advance three strategies for toning the profession’s ethical muscle.

⁵⁸ See e.g. Rose Voyvodic, “Lawyers Meet the Social Context: Understanding Cultural Competence” (2005) 84 Can. Bar Rev. 563.

⁵⁹ See e.g. Jennifer McPhee, “Sharia Mortgage Comes Without Explicit Interest” *Law Times* (11 June 2007) 10.

A) *Identifying the Sources of Ethical Indolence*

The sources for ethical indolence are, in our opinion, twofold: the governing bodies of the legal profession; and the membership of the profession.

a) *The Governing Bodies*

The governing bodies of the legal profession have failed to grasp the ethical nettle. There are at least two reasons for this. First, as many commentators in a variety of jurisdictions have noted, historically the governing bodies of legal profession have had a conflicting mandate; they have had both regulatory and representative functions.⁶⁰ As regulators, most often self-regulators, they are meant to govern in the public interest; but as representatives of the profession they have been beholden to professional interests. Unfortunately, for a very long time the representative function has tended to overwhelm the regulatory function.⁶¹ The reason for the lack of emphasis on ethics is therefore easy to locate; it is the regulatory and not the representative function that most strongly justifies mandatory CLEE and, furthermore, if the membership is opposed to mandatory CLEE, then the leadership is unlikely to introduce and support it.

Second, law societies have historically tended to conflate issues of ethics with discipline. This is problematic for two reasons. The comparative empirical research is clear; disciplinary processes have been both narrowly-focused and seriously underfunded.⁶² More importantly, forcing the square peg of ethics into the round hole of discipline does a disservice to both. While there may of course be disciplinary consequences for unethical behaviour, we suggest that the two must be kept relatively distinct. Ethical awareness and capacity require the *ex ante* development of a particular knowledge base and the deployment of certain discrete analytical and critical skills. Disciplinary matters are retrospective and require a very different set of capacities. Historically the governing bodies have not adequately recognized this distinction and, therefore, have failed to adequately invest in the development of structures and personnel to conceptualize, design and deliver quality ethics education programs.

⁶⁰ For further discussion see Devlin and Heffernan, *supra* note 37.

⁶¹ Arun Arora and Andrew Francis, *The Rule of Lawyers* (London: Fabian Society, 1998).

⁶² See generally Mary Seneviratne, *The Legal Profession: Regulation and the Consumer* (London: Sweet & Maxwell, 1999); Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Toronto: Oxford University Press, 1999).

In addition, the conflation restricts the consideration of ethics to lawyer-client relationships. This renders invisible the ethical nature of self-regulation and the need for ethical knowledge and skills on the part of those lawyers involved in myriad ways in self-regulation.

b) The Membership

Many, but not all, lawyers also appear to be relatively uninterested in ethics education.⁶³ Reflecting the arguments against mandatory CLEE canvassed earlier, there are a number of reasons for this:

- the failure of undergraduate legal education to develop student's ethical consciousness and skills;
- the belief that ethics cannot be taught;
- the pressures of legal practice that tend to relegate questions of ethics to the margins;
- the belief that the norms of the legal community can regulate appropriate conduct;
- the belief that mandatory CLEE is a violation of autonomy; and concerns about costs.

B) Strategies for Overcoming the Barriers

The aforementioned institutional and membership barriers are undoubtedly formidable. Overcoming them will require energy, creativity and industry, perhaps even a transformation of the profession's *Zeitgeist*. For the purposes of this article we have organized the discussion of overcoming resistance into three categories – persuasion, facilitation and compulsion.

a) Persuasion

The first strategy is to try to persuade, by the power of rational argument, both the leadership and the general membership of the legal profession that mandatory CLEE is a positive development for individual lawyers, for the profession as a collective, and for society as a whole. This article is an example of such a strategy, but obviously it is a decidedly modest project.

⁶³ This claim is based in part on anecdotal evidence and in part on the inference that we believe can be drawn from the extremely low volume of offerings in legal ethics in the context of CLE programs across the country – if there is a market, there will be a product.

Another strategy that could fall into the category of persuasion is to encourage more literature in the field, including more and better arguments for mandatory CLEE, especially those that debunk some of the myths. For example, in relation to the claim that legal ethics cannot be taught, commentators have addressed this in the context of undergraduate legal education.⁶⁴ The same type of work needs to be vigorously pursued in the context of professional CLEE.

b) Facilitation

It is sad but true that rational arguments do not always win the day. Rational argument is a necessary, but often insufficient, first step. It helps if change can be made easy. Consequently, a second strategy is facilitation.

Space and time enable us to provide only a few examples of facilitation. First, there is a requirement for good teaching materials. Fortunately this may not be as difficult as one might think, at least in the Canadian context. In the last ten years in Canada there has been a dramatic increase in the amount of literature being produced on legal ethics. The authors are academics, practitioners, and judges and collectively they are making very significant contributions.⁶⁵ Second, it is vital to develop appropriate learning methodologies and modules. Again this is not as challenging as it might seem. As we will discuss later in this paper, a model might already exist in the realm of judicial education programs. Third, there needs to be suitably qualified personnel. Again, we will discuss this in the section on judicial education. Fourth, there is the problem of costs for practitioners. Here we will briefly make two points. We would argue that law societies should pursue the strategies mentioned earlier to reduce, reallocate, or even absorb some of the members' costs.

Finally, at this point in time, advocates for mandatory CLEE are likely to find themselves to be lonely voices in the wilderness in their home jurisdictions. Collegiality and solidarity are essential to maintain

⁶⁴ Alvin Esau, "Teaching Professional Legal Ethics and Responsibility at Law School: What, How and Why?" in Roy J. Matas and Deborah J. McCawley, eds., *Legal Education in Canada: Reports, Background Papers of a National Conference on Legal Education* (Montreal: Federation of Law Societies of Canada, 1987) 308 at 352.

⁶⁵ See e.g. Randal Graham, *Legal Ethics: Theories, Cases and Professional Regulation* (Toronto: Emond Montgomery, 2004); Allan Hutchinson, *Legal Ethics and Professional Responsibility*, 2d ed. (Toronto: Irwin Law, 2006); Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto, Irwin, 2001); see also Alice Woolley, Richard Devlin, Brent Cotter and John Law, eds., *Lawyers' Ethics and Professional Regulation* (Toronto: Lexis Nexis, 2008).

the momentum and vision. Consequently it is important to build networks that can provide constructive support and the sharing of ideas. Potential networking nodes might be developed nationally, regionally and internationally, through vehicles like the Federation of Law Societies of Canada, the Council of Bars and Law Societies of Europe and the International Bar Association.

c) Compulsion

In an ideal world, persuasion and facilitation would be sufficient to stir the legal profession from its ethical somnambulance. Unfortunately, this may not be the case in the real world. Compulsion may be both necessary and inevitable. Two forms of compulsion, indirect and direct, must be contemplated.

By “indirect compulsion” we are referring to the force of peer pressure and/or the politics of shaming. The more benign version of indirect compulsion is captured in Malcolm Gladwell’s book, *The Tipping Point: How Little Things Can Make a Big Difference*.⁶⁶ This is the phenomenon whereby if enough members of a particular community begin to adopt a practice, the balance tends to shift, often suddenly, to create a new norm. We may now be reaching a tipping point in Canada with mandatory legal ethics in law schools; in the last year, three more schools have introduced new mandatory courses, and the issue is on the agenda for several other schools. The same could happen with mandatory CLEE.

The less benign version of indirect compulsion is the politics of shaming. This occurs after the tipping point for those who are laggards and it may be the fate of some Canadian law schools that remain oblivious to ethics education developments elsewhere in Canada. Having a pariah image is probably not in the best interest of any law society.

Direct compulsion occurs when other approaches fail. The possibility of external direct compulsion should be at the forefront of the minds of many leaders of the Canadian legal profession. Across the globe there has been a widespread abolition of self-regulation for the legal profession. This is not the occasion to debate the wisdom of this development.⁶⁷ The point we wish to make here is that a variety of governments have come to believe that the legal profession has failed to meet its regulatory responsibility to protect the public interest.

⁶⁶ (Boston: Little Brown/Back Bay, 2000).

⁶⁷ But see Devlin and Heffernan, *supra* note 37.

Consequently these governments have replaced, or are in the process of replacing, self-regulation with some alternative regime. Our prediction is that in due course the issue of mandatory CLEE will manifest itself in this larger regulatory debate. Consequently, if the Canadian legal profession does not want to lose its self-regulatory authority, it might want to move proactively with respect to mandatory CLEE.

6. *A Training Program: Following Judicial Education in Canada*

The discerning reader may sense two competing impulses in our analysis. On the one hand, we have identified some disturbing ethical practices and several formidable barriers that might thwart the introduction of mandatory CLEE. On the other hand, we have suggested that the combination of persuasion, facilitation, and compulsion might just be enough to get us from here to there. “So which is it?” is a justifiable question. The answer is that we are “pessoptimists.” The challenges are severe, and should not be underestimated but if a proper constellation of stars becomes aligned, mandatory CLEE might become a reality.

In this final section we therefore address what we believe would be necessary to do this well should our pessoptimism turn out to be warranted. To do this, we briefly discuss an analogous development – judicial education for judges in Canada, and in particular the “Social Context Education Programme, Phases I and II.” This development has been described and analysed in detail in another paper,⁶⁸ but we want to bring some lessons learned from the judicial education context to the mandatory CLEE discussion.

Briefly stated, in response to a developing awareness of inequality and discrimination in Canadian society and law, the Canadian judiciary endorsed and adopted a program of “social context education.” This was an ambitious project that brought together judges, academics, lawyers and community representatives to conceptualize, design, deliver and evaluate judicial education programs that were “comprehensive, indepth and credible ...”⁶⁹ The basic architecture for this program was the “Ten Principles of Social Context Education.”⁷⁰

⁶⁸ Donna Hackett and Richard Devlin, “Constitutionalized Law Reform: Equality Rights and Social Context Education for Judges” (2005) 4 J.L. & Equality 157.

⁶⁹ Resolution of the Canadian Judicial Council, March 1994, cited in *ibid.* at 167.

⁷⁰ The key architects of those principles were Justice Donna Hackett and Professor Brett Dawson.

For the purposes of this paper we want very briefly to transpose these principles to the domain of legal ethics to provide an indication of what an effective and realistic system of CLEE might look like.

A) Leadership

The explicit and ongoing commitment of the leadership of the profession is essential for the design and execution of successful legal ethics education. It not only legitimizes the importance of legal ethics education, but it also encourages the leaders to become directly engaged with legal ethics initiatives.

By the leaders of the legal profession we mean the political leaders like presidents of law societies, bar associations, and practice-specific subgroups; the bureaucratic leaders or chief regulators; the ethical leaders; and judges. Such leadership might include:

- publicly endorsing mandatory CLEE in speeches and publications;
- participating in the conceptualization, design and delivery of ethics programs; and
- subsidizing or minimizing the costs for lawyers to participate in ethics programs.

B) Local Relevance

By “local,” we mean local in terms of subject matter and local in terms of the targeted community. First, being local in terms of subject matter means that ethics education needs to be tailored to the areas of emphasis of the audience members. Programs must be specific to the practice of family lawyers, tax lawyers or securities lawyers. Second, qualifying as local in terms of the targeted community means that ethics education must be tailored to the geographic and demographic dimensions of the legal profession. It is now recognized that, in many jurisdictions, the legal profession is highly disaggregated. The norms of an urban context may not be the same in a rural setting. The ethical circumstances of a lawyer in a large firm are radically different from one in a small firm. The needs of the lawyer in private practice are distinct from the needs of in-house corporate counsel.⁷¹ Nuance and sensitivity to context is therefore essential. While it is both efficient and desirable to develop a number of generic “ethics modules,” these will need to be adapted and tailored to respond to local needs, issues, perspectives, priorities, and resources.

⁷¹ See Wilkinson, Walker and Mercer, “Testing Theory,” *supra* note 56.

C) Multiple Pillars

As we have suggested previously, the legal profession like most professions is prone to hubris – “Lawyers know best.” We would argue on the contrary that there are a number of potential stakeholders in legal ethics education and that priority should be given to engaging all of their various perspectives. Thus ethics education programs, to be effective, need to be based on four “knowledge pillars.”

First, there is the perspective of the consumers of legal services; representatives from that constituency should be invited to participate in the conceptualization, design and delivery of ethics programs. Second, there are the regulators, who because of their expertise have a strong sense of the concerns and needs of both the public and the lawyers. Third, there are academics in both ethics and law who can do three things – they can bring subject-matter expertise to the table, they can help translate public interest concerns into specific legal ethical issues, and they can facilitate the deployment of adult pedagogical principles. Fourth and finally, practising lawyers can contribute by critically reflecting on and sharing their own experiences and by helping to ensure that the programs are pertinent to the reality of practicing professionals.⁷² This synergistic and dynamic cross-fertilization of experiences, knowledge, and techniques will inevitably generate more realistic and effective pedagogical moments and means.

D) Needs Assessment

This is closely connected with the previous point. Historically, when considering issues of CLE the focus has been on what lawyers think they need or want. This is only part of the analysis. Often lawyers do not know what they do not know, so targeting a needs assessment exclusively at lawyers inevitably only elicits some of the key issues. Thus, needs assessments must be broadened to identify the unknowns. Here community representatives will play a vital role, as will academics and ethics experts. Similarly, the needs assessment process must recognize the heterogeneity of practicing lawyers and must ensure that lawyers’ diverse perspectives are also incorporated into the design process.

⁷² For an example of an initiative of this nature that is already underway see “Lex Mundi Professional Values Project” [materials on file with authors]; thanks to John Claydon, Director of Professional Development, Lex Mundi, for bringing this project to our attention.

E) Focus on Lawyers' Roles and Tasks

In order for ethics issues to be recognized as relevant and significant for lawyers, their development and delivery must be shaped by the legal and factual issues encountered by lawyers on a regular basis. Many of the chestnuts among ethics problems – the Lake Pleasant Bodies case or the Aortic Aneurism case⁷³ – are likely to be seen to be too remote from practitioners' lived realities. It is necessary for the four pillars to carefully design and deliver ethics programs that are of particular relevance to the actual practice of law.

F) Trained Planning Committee and Faculty

Experience with Canadian judges indicates that education programs are most effective when they are conceptualized, developed, designed and delivered by persons who are skilled in substantive knowledge, the pedagogy of adult learning and effective program design.⁷⁴ Ideally, an intensive pre-program workshop to educate the program planners and faculty about the complexities of legal ethics issues is the best way to ensure that the program objectives are embedded throughout the design and delivery process. The involvement of the four pillars in this workshop is essential. The result of such intensive learning pre-programming will be the creation of a sophisticated cohort of legal ethics educators whose talents can be deployed in various contexts on numerous occasions.

G) Highly-Organized Program Management

Ethics education is challenging for many legal educators and professionals because it is unfamiliar and requires the integration of both legal and ethical knowledge and skills. Anxiety about such educational initiatives can be reduced for both faculty and participants by ensuring that the program itself is highly organized – from matters so mundane as colour-coded nametags indicating the composition of breakout groups to pre-circulated detailed agendas with participant and educator profiles to matters as significant as packages of introductory reading materials. The more visibly organized the program, the more relaxed and open to learning the participants.

⁷³ For discussion of these scenarios see Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline*, looseleaf (Toronto: Thomson Canada Limited, 1993) at 2-6 – 2-9.

⁷⁴ See Hackett and Devlin, *supra* note 68 at 192.

H) Adult Learning Principles

Experience with Canadian judges strongly indicates that the use of adult learning techniques can greatly enhance a participant's learning experience.⁷⁵ Lecturing is to be avoided if possible. The aim should be to provide pragmatic, focused and interactive sessions designed to capitalize on lawyers' knowledge, skills and experiences, enlarge their comprehension of the complexity of the ethical issues and principles involved, and prepare them to deploy what they have learned in their day-to-day challenges.

I) Feedback and Evaluation

Protocols and procedures must be developed to ensure that there is ongoing feedback and evaluation. For example, during a program it is vital that the planners from the four "pillars" and the faculty participate in a feedback loop in order to make on-site modifications to a program based on the dynamics and needs of a particular audience. Similarly, at the end of a program, evaluation and feedback from both the participants and all four pillars is essential for improving, developing and recalibrating future ethics education programs.

J) Integration and Sustainability

Ethics programs need to be developed on two fronts. First, it is essential to have stand-alone, in-depth ethics modules that highlight the centrality and challenges of the issues. But ethics issues also need to be mainstreamed. They need to be identified in, and pervasively integrated throughout, all CLE programs, in their conceptualization, design and delivery. Consequently it is important to institutionalize ethics education by structuring all CLE programs so as to incorporate the four pillars. In this way ethics education can be integrated and sustained as a core element of the professional development of all Canadian lawyers.

K) Summary

The foregoing is, obviously, a highly schematic architecture of how a legal ethics education initiative might be imagined.⁷⁶ To the extent that this model has been successfully test driven with Canadian judges,

⁷⁵ *Ibid.* at 195.

⁷⁶ For a discussion of a complementary "value awareness educational strategy" see Evans and Palermo, "Relationships," *supra* note 35 at 135-36.

however, there is room for optimism. The real question is whether there is the political and ethical will to follow this precedent.

7. Conclusion

In 1991, Iacobucci J. of the Supreme Court of Canada, in an inspirational and aspirational speech targeted at the Canadian legal profession, concluded with the following:

Many years ago, a group of workers were busy at a construction site. A passer-by asked them what they were doing. The first worker said, "I'm making \$5.00 a day." The second worker replied, "I'm cutting stone." But the third worker replied: "I'm building a cathedral."

This story reminds us that we must re-discover law as a calling, as rendering high service to our fellow men and women. Again, we challenge you: do you have the courage to build cathedrals and to be proud of it?⁷⁷

We are not so Pollyannaish to believe that as a consequence of mandatory CLEE all lawyers will be miraculously transformed so to embrace the vision of law espoused by Iacobucci, J.. Responsible ethical education is not designed to either program or pressgang lawyers into a particular ethical worldview. What it is designed to do is to build capacity in a core competency – the capacity to be critically reflective about the daily ethical choices we make as lawyers. The leadership of a legal profession – the symbolic leaders, the political leaders, and the bureaucratic leaders – cannot guarantee that every lawyer will always do the right thing. It can, however, is to help create the conditions in which lawyers and law societies themselves can learn how to be reasonably fit for the purpose of the ethical practice and regulation of law. Endorsing, promoting and enforcing mandatory CLEE is a key step in that process.

⁷⁷ Frank Iacobucci, "The Practice of Law: Business and Professionalism" (1991) 49 *The Advocate* 859 at 864.