Preparatory ethics training for future solicitors

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supporting solicitors

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Acknowledgements

Contributors

Kim Economides

Kim Economides has been based at the University of Exeter since 1979 and holds the first (and only) full-time Chair of Legal Ethics in a UK University. In 1993 he drafted the Socio-Legal Studies Association (SLSA) Ethical Statement. He was Education Secretary to the Lord Chancellor's Advisory Committee on Legal Education & Conduct (ACLEC) and managed ACLEC's Legal Education Review (1993-95). He has been external examiner for undergraduate modules and higher degrees in the field of legal ethics and has taught legal ethics to undergraduates in New Zealand (where the subject is mandatory), Australia and Exeter, where he has lectured on ethics and professional responsibility to postgraduates following the Legal Practice Course at Exeter, and to law and theology students following the LLM module in Comparative Legal Professions and the MA in Ethical Theory. From 1998-2008 he was Founding General Editor of the international journal *Legal Ethics* and in 2004 convened the First International Lawyers' Ethics Conference (ILEC 1) that provided a platform for the Law Society's Ethics Education Forum and latest thinking on teaching ethics to lawyers. Since 2004 he has been Chairman of the Hamlyn Trust. He researches widely in the field of legal ethics and currently is collaborating with leading legal ethicists in Australia and the US on a major international project investigating Ethics in Large Law Firms, and recently has published comparative and empirical research on ethical training for and in legal practice. In 2006 he was appointed Specialist Advisor to the Joint Parliamentary Committee on the Draft Legal Services Bill, now the Legal Services Act 2007.

Justine Rogers

Justine Rogers is a DPhil student at the Department of Socio-Legal Studies, University of Oxford. The focus of her thesis is pupillage or, more specifically, the ways in which new members of the Bar are recruited, trained and socialized (including in ethics and professional conduct) in light of the recent professional reforms and political climate. Justine recently conducted research into the teaching methods of legal academics at the University of Oxford. This earned her Associate Practitioner status at the Higher Education Academy. She has since presented her findings at seminars for graduate teaching assistants at the University of Oxford (Faculty of Law and Department of Education). Her previous degrees are an MSc in Educational Research Methodology, University of Oxford and a combined BA (Modern History)/LLB (first class hons) at the University of Macquarie, Sydney.

Foreword

The trust the public places in solicitors is based on many things: a confidence that solicitors can interpret complex documents and explain difficult choices in plain English; a confidence that they will provide this service at a good value; above all, however, it is based on the confidence that solicitors provide not only high quality legal and business advice, but that it is underpinned by the highest ethical standards.

It is newsworthy if a solicitor falls short of these exceptionally high standards precisely because it is so rare. Indeed English and Welsh solicitors are in such demand and are so successful internationally largely due to this almost unrivalled reputation for probity, integrity and independence.

These qualities are equally important to solicitors in local government, government service and commerce and industry. Solicitors in employment bring their high ethical standards to the organisations they work in, providing a moral compass for management and leadership to follow.

The legal profession today is evolving fast. The next decade promises to revolutionise the legal services landscape, and from the Legal Services Act, to consolidation and commoditisation, change is here to stay.

It is vital that ethics continue to be at the very heart of what we do – not least for the future health of the profession, for they help differentiate and distinguish what we do and how we do it from other legal service providers. Yet we will only achieve this if we examine and explore the place of ethics in the profession of today and tomorrow.

I commend this research into the teaching of ethics as part of the preparation for a career in the law. '*Preparatory ethics training for future solicitors*' is a very important, insightful and thought-provoking contribution to this broad debate. It challenges the status quo, raising questions for the whole profession to grapple with – particularly in respect to the prominence, or rather lack, of the training of ethics and the discussions surrounding a legal Hippocratic Oath. I hope it is the catalyst for a wide-ranging debate about how we promote, protect and enhance our ethical values.

Paul Marsh

Law Society President

Executive Summary & Schedule of Recommendations

Aims and Context (section 1)

This project examines the place of ethical training in modern legal education and practice and raises concerns about the potential impact of inadequate training on practice standards across the full range of work carried out by solicitors. The report refers to press reports of unprofessional conduct and notes that other jurisdictions within and beyond the United Kingdom and Europe increasingly require more specific training on professional ethics. Other professions are consciously preparing future lawyers for their ethical responsibilities. The Legal Services Act 2007, meeting consumer needs and striving to make solicitors truly virtuous professionals aware of their wider public duties, as well those owed to their immediate client, all militate in favour of the reform of ethical training.

Delivering Ethics throughout the Educational Continuum (section 2)

- ### Academic Phase (Undergraduate Legal Studies/Conversion Courses)
  The report outlines arguments for and against mandatory teaching of ethics and professional responsibility in undergraduate legal (and other) studies. It sets out various approaches (formal, theoretical, clinical and humanistic) and options for change. If tripartite discussions between TLS/SRA, the Bar and the community of legal scholars fail to reach a consensus in favour of renegotiating the Joint Announcement to include an ACLEC-type 'outcomes statement' covering legal values and the moral context of law, the report advises TLS/SRA unilaterally to require ethical awareness at the point of admission to the vocational stage, following the Australian model.

- ### Vocational Phase (Legal Practice Course)
  The current LPC training and assessment regime, which is in transition, is reviewed from the standpoint of its impact on ethical behaviour. Criticisms are noted and questions raised about the adequacy of the assessment procedures and mechanisms. Other options are set out and the experience of modern medicine highlighted. We advise that some kind of Hippocratic oath be considered and adopted in order to reinforce commitment to core values.

- ### Vocational Phase (Training Contract/Professional Skills Course)
  The place of ethics in workplace based learning and the Professional Skills Course is considered and the report notes that the SRA is reviewing current arrangements. The report surveys recent literature on workplace learning and draws on the experience of postgraduate medical training in specifying outcomes that produce individuals capable of making ethical and strategic judgments. Our advice is to encourage firms to introduce in-house ethics officers that might enhance and deepen workplace learning, a suggestion that also implies investment in 'training the trainers'.

- ### Professional Phase (Post-Qualification Education and Training)
  The report next examines arrangements in place for Continuing Professional Development (CPD) and the approach being considered by the SRA. Our advice is that the Management Course Stage 1 (MC1) be adapted so that it ensures adequate exposure to ethical issues and that the experience of other

legal professions, including judicial training, is used to inform policy with a view to making ethics mandatory in CPD.

- ***Foreign Jurisdiction Route (Qualified Lawyer Transfer Test)***
  With an increasing influx of foreign lawyers and other professional groups seeking to practise law in England & Wales there has to be confidence that these groups understand the ethical context of legal work. The report notes concerns expressed about the adequacy of arrangements now in place and suggests that alternative means of assessment are explored so that rigorous practice standards are maintained across all specialist areas.

Ethical Assessment (section 3)

Assessment of ethics and professional conduct is a highly complex issue that presents challenges at all stages of the educational continuum and in this section the report examines the nature of the problem and available options that may alleviate if not resolve the problem. Drawing on lessons gleaned from medicine, business and management the report signposts relevant methods that could be adapted to the legal field. Our advice is to experiment with certain methods at the various phases and to concentrate on 'training the trainers' and properly supporting the learning environments in order that good practice, once clarified, may be allowed to cascade.

Policy Implementation (section 4)

This part of the report considers briefly the *structural* and *behavioural* factors likely to circumscribe the scope of future policy on ethical training. Our advice is to see ethics as highly relevant to underlying trends and needs shaping modern professionalism that may also expand legal markets as well as intellectual horizons. Change is likely to be accelerated by the Legal Services Act 2007 and it is important at every level to try to anticipate and prepare for risks that may threaten professional standards. We suggest that it would be a prudent investment to support and strengthen the ethical infrastructure of the solicitors' profession and to show leadership in this area. We make a number of suggestions as to how this could be done that involve different levels of investment. Such activity could strengthen the brand of solicitors and position the profession at or near the top of those delivering legal services in the future.

Conclusion (section 5)

Our final point is to emphasise the need for leadership, experimentation and flexibility in order to overcome resistance and introduce reforms in ethical training that do not undermine standards or create instability. Change is perhaps most urgent at the stage of undergraduate legal studies and if leadership is shown here so that ethics becomes more embedded and meaningful in our university law schools we would predict a 'domino-effect' on subsequent ethical training. Law schools hold the potential to revive and reinforce professionalism, while also challenging established understandings of lawyers' ethics, and so can help lay more solid foundations for the ethics and work of future lawyers.

Schedule of Recommendations

1. We recommend TLS take a lead and encourage the SRA to initiate a review to consider the pros and cons of revisiting the content of the Joint Announcement in order to see whether any consensus exists, or could be constructed, to make awareness of and commitment to legal values, and the moral context of law, mandatory in undergraduate law degrees, as originally proposed in the ACLEC Report (1996: 24). We would at this stage advise setting general, flexible guidance and specifying 'outcomes' following consultation with the representatives of the academic community (SLS, ALT, SLSA) and other stakeholders such as the Bar and the Legal Services Board. It may be that the Standing Conference on Legal Education, or a revised Ethics Education Forum 2 specifically dedicated to the question of how best to introduce ethics and professional responsibility in undergraduate legal education could provide a useful platform for this debate.

2. We recommend that the professional bodies should together consider what support might be offered to law schools to assist them to comply with this flexible guidance, as currently is the case with library provision, and in reviewing the process of validating law degrees. In the event that tripartite discussions fail to secure a consensus in favour of changing the Joint Announcement we recommend that TLS encourage the SRA to unilaterally require anyone seeking to proceed to the vocational stage of qualification as a solicitor demonstrate knowledge, understanding and commitment to the core values enunciated in Rule One of the Solicitors Code of Conduct.

3. TLS should encourage SRA to continue to keep under review assessment procedures and mechanisms and whether, in the light of new technology, these should be direct or indirect. TLS needs to be in a position to establish whether the assessment regime is adequate on the LPC (which may involve access to SRA reports and other information).

4. TLS needs to learn more about the types of assessment regimes in the vocational courses of other professions

5. Regular discussion groups, through conferences and other networks, whereby LPC students, law tutors and practitioners (including judges) meet to discuss ethical dilemmas and stories raising moral lessons or parables arising in the context of legal practice.

6. We recommend that TLS directly sets up roundtable discussions between vocational course providers and law teachers responsible for undergraduate legal studies to discuss the optimum division of learning outcomes at their respective phases. In particular, what issues or perspectives need to be covered at the academic phase in order to facilitate subsequent learning? If the academic phase is to remain 'ethics free' then vocational course providers need to make contingency plans to deal with this so that entrants to the profession have a solid ethics foundation.

7. We suggest further investigation of general ethical training in both ancient and modern medicine. In particular we believe lawyers' standards would be raised if, like most doctors, they took some form of Hippocratic Oath, perhaps in the form of a Declaration.

8. We recommend TLS to encourage the SRA to review the PSC to ensure that it underpins earlier training in the light of trainees' experience of the workplace.

9. We recommend TLS to ask the SRA to change the TC appraisal form so that it includes an ethics/professional responsibility section forthwith. Furthermore, it is essential that an ethics assessment is introduced during the workplace based learning phase.

10. Law firms should be encouraged to create, either within a wider role for money laundering and compliance officers or as part of the training function, workplace ethics officers responsible for firm-wide awareness of ethical responsibilities and duties owed to clients, other solicitors, the wider public and society at large. There could also be online resources shared by firms, particularly those that are small or medium-sized, to strengthen and augment in-house training programmes.

11. TLS should consider whether the SRA proposed standards for work-based learning satisfy its view of ethical and professional standards.

12. TLS should follow up with SRA whether and in what ways they used Webb et al's (2004) study to enhance workplace learning, particularly the use of their list of workplace learning activities. Is the SRA mindful of Grant's (2007) warning that outcomes without clear and credible guidance can be counter-productive? We recommend that the SRA issues guidance on the desirable activities and outcomes of workplace learning.

13. We recommend that TLS urge the SRA to set rigorous and stretching outcomes for trainees in terms of ethics and that those assessing whether these outcomes are being met are fully and demonstrably fit to exercise their judgment. TLS should also encourage SRA to consider how, ideally, ethical instructors should be trained and regulated, and how best to establish a national/international resource for ethical instruction and assessment.

14. When considering reviewing ethics instruction during CPD we would advise TLS to ask the SRA to examine further some of the principles, strategies and practical support evidenced in the NSW and Canadian examples cited above.

15. TLS to encourage SRA to consider the adequacy of current arrangements preparing candidates for the QLTT and whether more needs to be done to support ethical awareness through providing ethical guidance online or offering ethical training packs. The priority must be to develop rigorous and efficient assessment mechanisms, for example, EMSQs that can rigorously and accurately assess the depth of understanding of foreign lawyers' professional ethics as understood within UK and European contexts. The TLS should advise the SRA to consider quality standards within specialist fields of legal practice, eg family law, and the specific ethical concerns that may arise within these fields.

16. TLS to consider further what component or components of professionalism it wishes to assess at each stage and therefore which sorts of assessment methods are most suitable. This may involve the use of a multi-sourced, multi-layered assessment approach as illustrated in the 'know-can-do' pyramid.

17. TLS to encourage the use of multiple methods of assessment at the academic and vocational phases, with the broad aim of fostering reflective practice.

18. TLS to review the Webb et al (2004) report, to reconsider the use of (online) portfolios, interviews and critical incident reporting for assessment at TC phase.

19. TLS to consider funding action research or research that investigates the effectiveness of various ethics assessment practices at each stage of training, including case reports (externally-identified as well as selected by the student/trainee), to portfolios and interviews (with and without critical incident reports), to portfolios with multiple contributors.

20. TLS to further consider how best to establish "ethical seminars" where dilemmas and scenarios raising awareness of professional values can be discussed amongst experienced and junior lawyers, and trainees for TC and CPD. Further, TLS to consider how best to encourage sharing of firm-based ethics assessment practices (clearing houses/web resources/ tools for teaching and assessing /content: exercises, case-based examples and stories etc)

21. We advise TLS to follow-up PMETB and other resources referred to in this section in order to invite the SRA to define and promote the ethical assessment that is valid, transparent and positive, and to provide robust training and adequate support to those involved.

22. TLS should follow through the 'open debate' it has started and review the results of its online poll. It should consider ways in which ethics could become more prominent and whether it needs to be doing more work on embedding MacCrate-type fundamental lawyering values throughout the profession. As we have suggested earlier, one way to help solicitors reconnect with their basic professional values may be to review and reinstate an oath/declaration analogous to the medics' Hippocratic Oath.

23. TLS and SRA should be encouraged to consider whether, both as part of risk management and an attempt to expand legal markets, there should be mandatory ethics committees or ethics officers/partners in all law firms responsible for developing firm-wide policy on ethical issues, including training, client care, conflicts etc. TLS to consider supporting the teaching of legal ethics through investing in the work of existing centres (UKCLE) or creating a new centre dedicated to teaching and research on professional legal ethics. Other forms of support that could be investigated are: initiating a student essay competition on the topic of legal ethics (to be published in Legal Ethics). City Solicitors' Educational Trust (CSET) and large law firms to be encouraged to support lectureships, fellowships and scholarships in the field of legal ethics and professional responsibility.

24. TLS to investigate use and value of ethics hotlines, and the institution of an annual prize to be awarded to either an individual or a law firm that makes an outstanding contribution to the field of legal ethics.

Section 1: Introduction

1.1 The Ethical Deficit in Modern Legal Education and Practice

In recent times a growing debate if not consensus has emerged across several jurisdictions surrounding the teaching of ethics to lawyers. Should lawyers be taught ethics and, if so, how and when might this best be done? At least since the Enlightenment, if not in the ancient world where rhetorical and moral argument prevailed, legal education and scholarship have concentrated on the creation of a science of law and the inculcation of skill in the handling of legal rules. This has been done through interpreting the meaning of written rules, problem-solving and handing down the unique trait of "thinking like a lawyer."

Meanwhile, legal training has focused on the production of "good lawyers" by concentrating on developing the technical skills and knowledge, rather than moral values, expected to support modern lawyering. Accordingly, legal rules, whether codified or not, and not ethics, have been at the heart of modern legal education in both the common law and civil law worlds - so much so that the former have effectively eclipsed the latter. Positivism and pragmatism have been the dominant values shaping modern legal education with the result that ethical perspectives have, on the whole, been neglected both in the classroom and legal thought more generally. We describe this situation as an 'ethical deficit' not in order to besmirch the reputation of solicitors but, on the contrary, to strengthen professional integrity by drawing attention to the limitations of current training and the future need to create more head room or 'head space' for ethical thought in both the teaching and practice of law.

It is important not to be too negative, or critical, either for there have been some positive and welcome developments as well. Professional responsibility has become an increasingly prominent theme in Anglo-American legal education over the past two decades. On both sides of the Atlantic there has been growing interest in "the law of lawyering" and an awareness of the need and possibility of teaching ethics to future lawyers (Rhode, 1985, 1995; Economides, 1998, 1999; Nicolson, 2005). Following Watergate, the ethical and public responsibilities of legal professionals in the US has become relatively well established - even if not always well-taught – and efforts have been made to revive and refresh the public role and ideals of the legal profession (Nelson, et al., 1992; Kronman, 1993). In Canada there has also been a growing interest in 'humane professionalism' since the Arthurs Report (1984) and increasing support for mandatory ethics to be taught in Canadian law schools (Downie, 1997; Devlin et al, 2007). Over the past decade in the United Kingdom serious efforts have been made to provide an academic foundation for the study of professional legal ethics (Boon and Levin, 1998, 2008; Nicolson and Webb, 1999; O'Dair, 2001). A small group of university law teachers has been challenging dominant positivistic approaches that for generations have excluded serious academic analysis of lawyers' ethics. The aim of this group has been to try to persuade all stakeholders with an interest in legal education to accept that meaningful ethical discussion can and should feature more prominently in contemporary legal education.

There is now a sense that change in this country is desirable if English and Welsh lawyers are not to be left behind those whom they compete against in an increasingly

global legal services market. A robust ethical reputation and being recognised as trustworthy is vitally important because competition in this global market focuses now not so much on price, but quality (see generally Dezalay and Garth, 1996). Other parts of the United Kingdom and Europe are therefore placing ethics centre stage of reforms modernising the legal profession and there is now a real risk that the training of lawyers in England and Wales will be seen as behind the times if they do not give appropriate consideration to their ethical reputation and conduct[1]. The Law Society of Scotland, in its latest consultation paper on education and training, has not only placed professionalism and ethics at the core of its proposals for the new 'PEAT1' and 'PEAT2' stages of professional education, but has included knowledge of the profession and its ethics in its proposal for the redefined 'Foundation' (academic) stage (see Campbell, et al, 2007; Bone, 2008) and a similar review has also taken place recently in Northern Ireland (see Law Society of Northern Ireland, 2007). Also in November 2007, building on its *Charter of core principles of the European legal profession* put forward a year earlier[2], the CCBE adopted a recommendation on training outcomes for all European lawyers that includes making "future lawyers aware of their professional identity, and of the role of the profession within the administration of justice and in society at large." According to the CCBE:

> It is of fundamental importance for lawyers to have full knowledge and understanding of professional and ethical rules, as expressed in national codes of conduct, as well as in the CCBE cross border code of conduct. They must act in accordance with such rules so that they can fulfil their mission in the public interest. Lawyers should not only comply with such rules but also should be able to develop their own professional identity by applying such rules in their everyday actions. Adherence to the principles and values of the profession allows lawyers to serve, in the best possible way, both the interest of their clients and the public interest in the promotion of justice and the upholding of rule of law at the same time.

> The CCBE believes that the mission of promoting the rule of law can be fulfilled by individual lawyers only if professional rules and principles are used as guidance for day to day activities of lawyers.

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[1] We note with interest that the SRA is currently consulting on conflict and confidentiality in order to come closer to rules that operate elsewhere in the world and this implies that levels of ethical training will also need to be harmonised amongst competing jurisdictions. See further http://www.sra.org.uk/sra/consultations/1649.article

[2] The CCBE core principles were: (a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case; (b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy; (c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; (d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer; (e) loyalty to the client; (f) fair treatment of clients in relation to fees; (g) the lawyer's professional competence; (h) respect towards professional colleagues; (i) respect for the rule of law and the fair administration of justice; and (j) the self-regulation of the legal profession (CCBE, 2006). The recent meeting of the European Bars' Federation (FBE), Stage 2008, held in Torquay in October 2008 took 'The Core Duties of the Lawyer' as the main theme for its Round table discussion and passed a resolution on training in legal ethics for European lawyers.

Future lawyers should not only have regard to the specific technical legal problems with which they are dealing, but should also deal with their tasks in a wider ethical context, taking into account that the functions which lawyers perform are not only for the benefit of their clients but also for society at large. Professional rules must be used as a guide to foster the quality of such legal services.

In this regard, for instance, a lawyer should be aware of rules on communication and publicity not only to avoid behaviour incompatible with professional ethics but also to learn how to communicate effectively with the public in order to protect the interest of clients. (CCBE, 2006; 2007: 4).

Civil lawyers within and beyond Europe have for some time been fully aware of the link between 'deontology' (the rules governing professional responsibility in civil law jurisdictions) and professional status (see also Franken, 1995; Raes and Claessens, 2002; Puchalska, 2004), but the ethical dimension has also surfaced in other common law jurisdictions beyond the Anglo-American systems (notably New Zealand, Australia, Canada) that have already introduced, often on a mandatory basis, ethics into their law curricula (see Brooks, 1998; Webb, 2002; Castles, 2001; Noone and Dickson, 2002; Graham, 2004; Devlin, et al., 2007; Puig, 2008). New Zealand and Australian law schools are now playing a leading role in examining the place of ethics in legal education and hosting international conferences that aim to carry these educational debates both further and deeper. It is important to note that this foreign experience is continually being developed and updated. For example, the Council of Australian Law Deans (CALD) passed its 'Coogee Sands' Resolution (March, 2008) adopting standards that include not only 'knowledge and understanding' of 'the principles of ethical conduct and the role and responsibility of lawyers, including, for example, their pro bono obligations' but also 'internalisation of the values that underpin the principles of ethical conduct and professional responsibility' (para 2.3.3). This evolving international experience is instructive and at Annex C we report views of leading teachers of legal ethics who show how initial resistance to reform from staff and students was eventually overcome. It is now almost unthinkable not to have mandatory teaching of ethics in law schools since teaching ethics reinforces the liberal credentials of law as both an academic and professional discipline.

Of course, the debate on the ethical content of legal education touches not just law schools but all stages of the educational continuum relevant to the formation of professional character ranging from the introduction of citizenship (including human rights law) in the national school curriculum, to the undergraduate law degree, through to the vocational stage of legal education and finally continuing professional development (ACLEC, 1996; Webb and Fancourt, 2004; Cranston, 2006: 178-211). It has not only been academic lawyers who have perceived this gap in legal education and, it has to be said, legal practitioners have on the whole shown greater initiative and insight regarding the need to take concrete remedial action. The Law Society (TLS) has demonstrated prescience and leadership in placing this issue firmly on the agenda, and in particular, in commissioning this present report. Senior practitioners have noted that lack of ethics training may undermine legal values (Rose, 2003). In 2004 TLS had the foresight to set up an *Ethics Education Forum* to investigate the need for ethical training and what happens in foreign jurisdictions (Bullock, 2004). By contrast, the majority of English law schools have not given sufficient emphasis to ethical perspectives and risk falling behind the advances being made by their foreign counterparts.

It is important to be clear about what 'legal ethics' properly refers to. For present purposes we adopt a 'cradle to grave' definition of 'legal ethics' that embraces more than mere compliance with rules of professional conduct, the start and end point of most current vocational training. We believe the subject should be studied in context at different levels, and from a range of perspectives, throughout a legal career. It is, we believe, particularly important to recognise the links between different phases, marked by certain *rites de passage*, but at the same time allow for flexibility and experimentation. We broadly agree with the definition advanced by O'Dair (2001: 5; see also Shaffer, 2001) that the study of legal ethics should involve the *critical* examination of:

> the arrangements made by society for the delivery of legal services and in particular of the legal profession, its structures, roles and responsibilities (sometimes termed as macro legal ethics);

> the roles and responsibilities of individual lawyers in the provision of legal services together with the ethical implications of those roles (sometimes termed micro legal ethics); and

> the wider social context, especially the philosophical, economic and sociological context in which lawyers work with a view to identifying and, if possible, resolving the ethical difficulties which face professional lawyers so to enable them to view legal practice as morally defensible and therefore personally satisfying.

This broad definition of legal ethics transcends the limitations of the Code and makes it possible to better prepare lawyers for future practice so that they have the capacity to perceive ethical dilemmas that may call into question professional judgments and possibly threaten professional standards (see further Annex C). Whilst we should not be too rigid about which element is taught at which stage, it would seem preferable if 'macro legal ethics' were tackled in degree courses with the detail of 'micro legal ethics' and the professional code considered subsequently.

Concerns about professional standards would seem to cover the full range of modern corporate and legal practice and highly visible debacles such as Enron appear to be just the tip of the iceberg. Complaints about lawyers remain fairly constant as statistics on complaints illustrate[3]. There is clearly no room for complacency and both the statistical and anecdotal evidence suggest that ethics should be taken more seriously. Current concern about ethical standards is fuelled both by what has happened in the recent past as well as what might happen in the immediate future, particularly following the Legal Services Act 2007. Change toward ethical awareness thus appears to be driven by forces both internal and external to the legal professions and is taking place across several jurisdictions. For example, billing practices have become something of an ethical minefield on both sides of the Atlantic. In the US there is a sizeable literature debating the ethics of billable hours and the dubious practice of "bill padding", while in England and Wales the Legal Services Commission (LSC) has acted to combat alleged fee abuses by legal aid lawyers. In some cases this has led to criminal prosecution. Moreover, there is a growing international genre

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[3] See Annual Report for the Legal Services Ombudsman for England and Wales 2006/2007 accessed at http://www.olso.org/publications/AnnualReports/files/AR2007-english.pdf, pgs 53-55,see also Davies 1996

of stories depicting lawyers' unprofessional conduct - communicated via novels, film and TV - that seems to merge fact with fiction (eg Grisham, 1991; Beasley, 2001; Gilmore, 2005; Gerber, 2007).

It would seem that no branch of the profession is immune from temptation and, with increasing competition in the market for legal services, the increasing risk of cutting ethical corners, especially regarding referrals and conflicts of interests, as seen in some recent miners compensation cases and in the recent Freshfields case (Edmond, 2008). Sole practitioners, on the other hand, have been portrayed as being a high-risk group on the basis of how frequently they feature in disciplinary proceedings, and we have heard similar concerns regarding the quality of immigration work. Discrimination by and against lawyers has also surfaced. This means that regulators and law firm managers need to be alert to underlying trends shaping future practice which may put pressure on ethical standards (Abel, 2008). These trends may include the rapid expansion and gender shifts in the profession (Abel, 1988) and also the quality of life debate with their consequent impact on employment practices and expectations that are together increasing the pressure for reform and change.

Ethics today is no longer purely an individual lawyer's responsibility, but is increasingly recognised as a responsibility shared at several levels within, and now beyond, legal professions. The entity of the law firm – particularly if large and powerful – will be aware of, if not accept, its corporate responsibility as an organization (Economides and O'Leary, 2007), Beyond that, the Legal Services Board as oversight regulator has, under the Legal Services Act 2007, a statutory duty to both monitor and maintain standards[4]. Training and administrative systems, as much as individuals, could in the future become far more of a target for entity regulation and therefore we predict that new structures delivering legal services could be forced to devote more resource to the development of ethical systems. But some lawyers may choose this path anyway since ethics also holds the potential to open up new legal markets in carrying out ethical audits for modern corporations (see Sampford and Blencowe, 1998; Chu, 2008). But there is not only a sound moral - or even a commercial - reason to maintain high standards of work and integrity in the performance of legal work. More pressingly, there is today a clear legal obligation to be ethical. The new 'core duties' set out in rule 1 of the 2007 Code of Conduct further reinforce the need to be aware of, and actually be, ethical.

The broad aim of this research is to assist TLS to formulate an effective educational and assessment strategy that, over the next few years, should strengthen the integrity of future solicitors and better prepare them for the ethical conflicts and dilemmas they will inevitably face in the uncertain legal services market of the future. Consumers and providers of legal services have much to gain by taking this ethics agenda seriously.

1.2 Aim and Context of the Report

The purpose of this report is to assist TLS to develop its own strategy for reforming ethical training as well as to provide the intellectual case in support of such reform.

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[4] We highlight some of the implications of the Legal Services Act 2007 for ethics in section 4 on policy implementation.

As the approved regulator and representative body of solicitors, it is the role and responsibility of TLS to inform and influence the SRA. Many of our recommendations therefore are targeted at not only at the TLS but also, indirectly, at the SRA. In its own analysis of current trends TLS has identified the following as key issues driving change. In so doing it has highlighted a number of areas of concern and at the same time demonstrated its desire to overcome the very threats that could, in the long-run, undermine its collective status and social standing. TLS wishes to guard against such threats and, in so far as it is able, lead the debate on the future of professionalism by seeking to explore the determinants and boundaries of ethical behaviour:

- The ethics of a profession are its defining feature. The legal profession needs to maintain its reputation within England and Wales as the legal service provider of choice and its status in the world-wide market for legal services. In both of these markets the legal profession faces unprecedented competition on a number of fronts. One reason for this increased competition is the liberalisation of some formerly reserved areas of practice and the prospect of legal service provided by non-lawyer owned or managed businesses.

- Ethics has historically been passed on through the close association of more experienced members of the profession with those undertaking training. The exponential growth of the profession has weakened this method of transferring ethical standards and understanding from one generation of solicitors to the next. Further, many members now qualify either through QLTT or through transfer from a European legal profession[5]. These new entrants may have little or no opportunity to work alongside members of the profession and therefore to acquire the specific ethics of the profession in England and Wales[6].

- Currently, comparatively few solicitors are trained within businesses owned by non-solicitors. The SRA is beginning to develop a regulatory regime for Alternative Business Structures (ABS). The introduction of ABSs may provide specific challenges to the training of future members of the profession.

- Since the last review of the pre-admission training of the profession, solicitors have come under unprecedented pressure to become more commercially aware and to respond to consumerist interests within society at large. This has resulted in more complex relationships and contingent regulation. In the face of the SRA's power to publish more disciplinary findings against solicitors, there is an additional incentive to help reduce the number of solicitors who fail to meet their own profession's standards.

- There is no requirement to undertake education in professional ethics at the academic stages of training. Ethics training is currently included in the LPC and during the training contract (the

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[5] For example, in 2006, 15% (1,075) of the admissions to the Roll were from overseas lawyers.

[6] We understand the SRA is currently reviewing the QLTT.

> Professional Skills Course (PSC) delivered during the training contract). This regime remains generally unaltered over the past 15 years despite changes in the legal service marketplace.

- As matters of professional ethics have become more complicated, so many new members of the profession may be increasingly distanced from decision making involving ethical dilemmas.

The question of adapting ethical training to respond to changing markets is not a matter which is affecting only solicitors in the UK. TLS is keen to understand how other legal professions, in the UK and overseas, are responding to similar challenges.

Our brief has been to offer advice, taking into account all phases of the educational continuum, on the following three questions:

- How robust and effective are the current mechanisms for ensuring that new entrants in fact meet the profession's ethical standards of behaviour?

- What other options are there for ensuring that the profession's standards of behaviour are met by new entrants?

- Of those options, which are likely to be most effective?

We have also been asked to consider what changes might be made to education, training and assessment regimes in order to improve the maintenance of ethical behaviour post-qualification. Our report is thus intended to assist TLS to make informed judgments about how, when and in what context professional ethics should be included in professional training and, furthermore, how it should be assessed.

We have concentrated our advice on identifying options for the future rather than describing and evaluating the adequacy of current practice. But from the evidence we present and report, and the concerns to which we have already referred, it is clear that there is a growing consensus in support of change that is now seen as overdue, urgent and necessary. Our aim is to guide policy discussions and, toward this end, we believe normative and comparative analysis is likely to yield more valuable results than detailed description of the status quo. Given that both the LPC and Training Contract - that together currently provide the foundation for development in professional ethics - remain in transition there seemed little point in investing resources describing in detail current provision that we know is unlikely to be ideal and, following the pilot project on work-based learning that will soon get under way, could eventually render the present Training Contract entirely obsolete[7]. Where practicable we offer recommendations to guide and inform future policy.

In carrying out this study our primary aim has been to assist TLS identify promising strategies for future solicitors' training and education, in both the classroom and workplace, that will: (a) reinforce existing good practice and ethical conduct already in place; and (b) lay firmer foundations for future practice through investment in educational strategies designed to produce a "virtuous profession."

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[7] See further http://www.sra.org.uk/students/work-based-learning.page

We make three key assumptions regarding the changing contexts of lawyering, regulation and education, and their interaction, that we feel should be made explicit from the outset:

1. the context of legal work will continue to change (eg LSA 2007) as legal markets evolve and demand professional advisors and problem-solvers able to respond flexibly to new situations and diverse clients from a variety of cultures and backgrounds. In response to these pressures, which may drive prices and standards up or down, and other demographic trends the future composition of the legal profession itself will become increasingly diverse (eg expansion of EU, QLTT) and this in turn will require solicitors with ever higher levels of flexibility and integrity, in order that they may honestly recognise and resolve potential conflicts between individual/private morality and collective/professional responsibility;

2. continued reliance on regulatory (external) strategy alone will be insufficient for this task because legal training currently equips lawyers with the skills to enable them, if they so wish, to evade rules that purport to govern their conduct. An educational (internal) strategy is therefore essential to complement and operate alongside regulation so that solicitors may understand and successfully internalise the core values and obligations of their profession; and

3. reforms should focus on identifying appropriate educational outcomes, curriculum content and methods of delivery/assessment for each stage of the educational continuum (and their interrelationship with regulation) in order to find the optimum combination of regulation and education that, from cradle to grave, will produce 'good lawyers'. It is unlikely that a single approach toward teaching ethics is likely to emerge in the short-term that will suit all educational providers or forms of legal practice and therefore a transitional period should be considered in which experimentation is encouraged with a range of approaches (including virtual learning environments, humanistic and philosophical approaches and clinical legal education) before any one approach, or combination of approaches, is enforced. Assuming quality legal services will be maintained, if not enhanced, through the new regulatory regime established under the LSA 2007, this should create more opportunity to experiment with the delivery of both educational targets and legal services. While we remain open as to what are the most effective curricula and methods of delivery, we assume more must be done to introduce and adapt ethical training to consumer, social and public needs within a highly volatile legal services market.

Section 2: Delivering Ethics throughout the Educational Continuum

The debate on the ethical content of legal education touches all phases of the educational continuum (see generally Twining, 1994; Duncan, 2004) relevant to the formation of professional character. We begin by reviewing the status quo and the arguments for and against the reform of the academic stage of legal education so that in future it includes mandatory training in ethics.

2.1 Academic Phase: Undergraduate Legal Education

In this country the majority of undergraduate law schools persist in doing virtually nothing explicit to assist new entrants to meet the profession's ethical standards of behaviour and, therefore, they are almost totally reliant on what happens at the vocational phase. However, some law schools attempt something by way of teaching moral reasoning in philosophy of law and, indirectly, much has been done implicitly through informal and extra curricula, such as TV, in communicating to law students the essence of lawyering (Sharp, 2002; Robson, 2006).

Nonetheless, over the past two decades the ethics and professional responsibility of lawyers has become an increasingly prominent theme in Anglo-American legal education. On both sides of the Atlantic there has been growing interest in "the law of lawyering" and an awareness of the need and possibility of teaching ethics to future lawyers (O'Dair, 1998; Economides, 1999). These moves have sometimes been in response to some moral scandal, such as Watergate, following which the ethical responsibilities of legal professionals became well-established - even if not necessarily well-taught - in the United States or, as in the United Kingdom, serious efforts were made to provide a foundation for the academic study of professional legal ethics following a national review of legal education (Rhode, 1995; Economides, 1998; Boon, 2002). Over the past decade the United Kingdom has seen a small group of law teachers challenge dominant positivistic approaches that for generations has excluded serious academic analysis of lawyers' ethics (Nicolson, 2005). Edited collections (Cranston, 1995; Parker and Sampford, 1995; Economides, 1998), full-length books (Nicolson and Webb, 1999; Boon and Levin, 1999, 2008; O'Dair, 2001, Griffiths-Baker, 2002), and a new journal, *Legal Ethics*, are supplemented by regular international meetings examining lawyers' ethics (Nelson, 2004). The argument that there is inadequate material to support rigorous academic courses is therefore wearing increasingly thin as today there is a literature steadily growing in size and sophistication to support rigorous academic courses on lawyers' ethics and professional responsibility (eg Parker and Evans, 2007; Boon and Levin, 2008).

The aim of those supporting the introduction of ethics has been to try to persuade all stakeholders to accept that meaningful ethical discussion can and should feature more prominently in contemporary legal education. Some have suggested that for law schools to continue to fail to prepare their students for the ethical dilemmas they will inevitably confront in the early years of practice is tantamount to a failure of their own professional responsibility as teachers (Economides and Webb, 2000). As Hepple (1996: 484) observes:

> The teaching of professional ethics and conduct cannot simply be left to vocational courses or in-service training. Students have to imbibe a sense of the obligations which lawyers owe not simply to their own clients or employers but to society as a whole: in maintaining and improving fundamental democratic values, including the protection of human rights and the defense of individuals against the abuse of public and private power, as well as providing legal services for disadvantaged sections of the population.

The argument that more be done at the academic phase has also received judicial endorsement (Steyn, 1998; Potter, 2001, 2002). Nevertheless, from within academia, which on the whole has tended to ignore the issue, there has been a more ambivalent response.

Those in support of introducing ethics focus on the need to reinforce and support professionalism (Boon, 2002). But arguments are also made on the basis of principle, not mere pragmatism (Downie, 1997; Buckingham, 1996; Esau, 1987). There is also the suggestion that ethics could remedy the bland nature of orthodox legal studies that numbs the legal mind, or if legal education does sharpen the mind, this sadly is often at the price of narrowing it. As Allott (1987:9) opines:

> University legal education could so easily be the paradigm of university education. Law is at the intersection of the ideal and the real, of metaphysics and magic, of the actual and the possible, of ideas and power, of fact and value, of is and ought, of the past and the future, of the individual and the social, of economics and politics. With the power to communicate so much, we choose instead to have the students learn law as if it had the intellectual, spiritual and moral content of knitting patterns

The academic phase thus presents a unique opportunity to develop understanding of the underlying values that should guide and inform legal (and other) practice. Chapman (2002, see also Jones, 2004) advances four main arguments in support of teaching ethics to undergraduate law students, largely founded on the assumption they will enter legal practice: (a) because lawyers play a powerful role in society; (b) in order for lawyers to fulfil their role in the judicial system adequately; (c) because of the difficulty in policing a profession with exclusive possession of highly specialized knowledge; and (d) lawyers need a personal interest in their job satisfaction.

On the other hand, Arthurs (1998) and Wikeley (2004) both make the point that law schools are not just primary schools for legal professions and, quite rightly, question the assumption that all law graduates aim to qualify as lawyers (see also, Olgiati, 1998). According to Wikeley, the compulsory curriculum is already overloaded and it would be quite wrong to disturb the status quo by reopening the Joint Announcement on Qualifying Law Degrees: "The compulsory core of the LLB already limits students' choice of optional subjects, and this proposal [to include Evidence, Company Law and Legal Ethics in the compulsory curriculum] would simply aggravate that problem…In law schools we are in the 'business' – and, sadly, it is a business now – of providing students with a *legal education*, not training" (Wikeley, 2004:24). Wikeley's argument, however, assumes that teaching ethics involves a necessary tension or conflict between academic and professional goals, and this may not be right (Wilkins, 2001). As the debate over plagiarism illustrates, there may in fact be congruence between underlying academic and professional values including that it is vital that both academic and practising lawyers respect truth and demonstrate integrity in the handling of their sources.

Ethics, furthermore, is also of central importance in the academy in the context of research ethics. All lawyers, whatever their provenance and future career path require at least some grounding in ethics and some would go further to require a deeper commitment to legal and/or professional values, perhaps demonstrated through a lawyers' Hippocratic oath (Economides, 2000: 13; Phillips, 2004; Economides and Webb, 2008; Rocca, 2008). Whether this would actually impact on professional conduct is an interesting, and for the time-being open, question (Evans, 2001; Evans and Palermo, 2005 a, b). The point is that today a new vision for the role of the modern law school has emerged that could move us beyond the sterile debate between liberalism and vocationalism by opening up the possibility of law schools actually laying the foundations of moral judgment in legal practice (Burridge and Webb, 2007: 95).

Another assumption that needs to be questioned is that all those entering the profession will have law degrees. The availability of conversion courses opens up lawyering to non-law graduates but conversion courses – even more than the standard law degree – tend to be overcrowded with little available space left for ethical instruction. However, some of these non-law graduates could already have had some exposure to ethical thinking, for example through studying philosophy, bioethics, literature or classics, but the problem remains of how to ensure adequate basic knowledge of ethical perspectives in law and legal analysis. It may be that lessons can be learnt from evolving assessment regime of the QLTT discussed below, where it is essential to guarantee practice standards of foreign lawyers, such that ethical checks may be conducted to ensure that all those commencing the vocational stage have at least some minimal awareness of the importance of ethics in the maintenance of professional standards.

The practical problem for legal educators is to identify available resources and decide which approach, or combination of approaches, is most likely to fit best with the overall curriculum and support long-term educational goals (Parker, 2004; Robertson, 2005). There are debates around timing, whether the subject should be taught in the first-year (Morawetz, 1998; Hamilton, 2001; Henriss-Anderssen, 2002; Tranter, 2004) or whether delivery should pervade the curriculum (Rhode, 1992). It is perhaps worth noting that the legal profession is not alone in considering how best to introduce ethics into the curriculum (Illingworth, 2004). From the latest survey by Chandler and Duncan (2008), 18 law degrees and another 5 mixed degrees and conversion courses offer ethics – the subject is clearly not yet in the mainstream. The majority of these providers offer discrete modules and a minority focus on teaching the subject pervasively. So far as content is concerned, formal sources feature prominently, but social and philosophical context also are present and some effort is thereby made to transcend formal rules. This curriculum is delivered mainly through traditional lecturing methods, though small group workshops and clinical approaches may also be deployed. The following approaches, which of course may be combined, constitute the principal choices available for law teachers.

1. Formal Approaches

An obvious and common starting point for an understanding of ethical standards of the legal profession is to focus on the rules contained in the professional code of conduct. While the code may, as with a constitution, have an educative side effect its primary purpose is regulatory. It tells members in simple straightforward language what they can and cannot do but does not deal with the complexities of why and how they should act in a professional manner. This may or may not be left to supplementary 'guidance'.

At present the professional code forms the basis of formal instruction offered to future lawyers, whether these be trainees from within or qualified lawyers transferring from outside a given jurisdiction. The most common approach aims at ensuring there is an adequate basic knowledge of professional duties in place as well as the capacity to identify relevant rules and issues arising in the context of the lawyer-client relationship. The vocational courses in many jurisdictions (Bullock, 2004) typically focus on the 'micro duties' found in the rules of professional conduct (eg the retainer, fees, conflict of interest, confidentiality, professional negligence, duties to the court, professional undertakings and money laundering), as well as issues of client care, especially in the lawyer-client relationship, and other obligations arising out of

managing accounts and financial services regulation, professional relations with other lawyers and non-lawyers. Increasingly there is also an attempt to move beyond these rules enshrined in the professional code in order to consider 'ethical context' (Simon, 1991, 1998).

Before and after the vocational course, coverage of professional standards remains patchy and inconsistent, and during these courses the approach commonly adopted appears to be dogmatic and uncritical. Lawyers are taught that they must comply with, rather than question or criticise, their code (see Economides, 1999: 407). As Nicolson (2005) has pointed out, professional codes are both important yet insufficient; they have an ambivalent influence in that they may either nurture or detract from the development of the lawyer's professional moral character. In the future we may therefore require a different kind of 'contextual' code if we are to take seriously the task of making lawyers 'moral'. If the code contained aspirational norms and required more of lawyers in terms of 'moral activism' this in turn could transform the teaching of legal ethics and alter the way in which lawyers understand the scope of their professional duties. In other words, as with other constitutions, the level of generality in which the code is drafted determines how much scope there is for purposive interpretation.

While the professional code should not be ignored it is also clear that, in isolation, it offers a limited foundation for an understanding rather than simple knowledge of legal professionalism. Lawyers need to be able to identify and interpret the ethical dilemmas they will confront and to see how best to conduct themselves in practice. There is therefore a further need for some kind of context - whether derived from theory, practice or the humanities – in order to put ethical flesh on legal bones and to expose the latent dilemmas that only really become apparent once it is recognised that rules of conduct contained in the code often collide. At this point external guidance drawing upon human and legal experience is required to assist the process of ethical decision-making. For example, just how far does loyalty to the client extend and what criteria should be used to answer this question?[8]

2. Theoretical Approaches

If the code provides an obvious starting point for studying professional responsibility another point worth making is that, as with theory itself, ethics cannot be avoided and the only real choice left the educator is to decide whether to make the ethical values and theory latent in the curriculum explicit (Menkel-Meadow, 1991). University legal education provides an ideal opportunity to examine underlying theoretical perspectives on professional responsibility and it is now widely appreciated that inculcating professionalism should not be left entirely to the vocational courses and apprenticeship (Nussbaum, 1993).

Ethical theory – whether Kantian, consequentialist, aretaic, postmodern or feminist in outlook – can provide a valuable analytical tool with which to understand and dissect ethical dilemmas within a philosophical context (Gill, 1998; Pojman, 2001; Nicolson and Webb, 1999). On the other hand, theory alone probably will not produce definitive answers to practical problems confronting lawyers in practice and, by

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[8] For a useful discussion of the approaches to client loyalty and discussion of case studies see further Parker and Evans, 2007: 151-181.

opening up endless further choices to consider, could simply confuse and delay practical decision-making. Furthermore, there is no conclusive empirical evidence to suggest that ethics education actually produces 'good lawyers' (Arthurs, 1998; Parker, 2001; Robertson and Tranter, 2006).

3. Clinical Approaches

Although not part of mainstream legal education in the United Kingdom, clinical legal education clearly has considerable potential to offer law students the opportunity to observe, practise and reflect on ethics in action (Webb, 1996; Nicolson, 2008). This approach concentrates on the acquisition of legal skill through the practical application of legal knowledge, and reflection on that experience (Schon, 1995). Experience from the United States is on the whole encouraging and it would appear that exposure to clinical experience may have a profound and lasting impact in terms of establishing not only key skills but also core legal values and ethical commitment amongst future members of the legal profession (MacCrate, 1992; Spaeth et al, 1995); Condlin, 1981). Pro bono initiatives are therefore important not only because they may provide legal services to those who might otherwise not receive them; they also offer valuable opportunities to young lawyers to acquire professional skills and a sense of responsibility that will stay with them for the rest of their careers (Webley, 2000). This could be an important counterweight to the cynicism that pervades much of modern legal education (Economides, 1997). One recent development is not to use live clients but rather to create simulated virtual learning environments through which law students can experience the lawyer-client and other relationships (Le Brun, et al, 2001; Zariski, 2001; McKellar and Maharg, 2005).

4. Humanistic Approaches

Another approach to communicating the nature and essence of professional ethics to future lawyers is draw upon literary sources and other representations of legal work found in popular culture such as film and television (Brooks and Gewirtz, 1996). The broad aim is to teach judgment (Frenkel, 2001), for example by using narrative as a means of developing ethical reasoning. Law students are expected to analyse stories as case studies in which they can recognize and resolve ethical dilemmas found in legal practice. Literature and film may thus provide a kind of laboratory in which to examine professional responsibility (Menkel-Meadow, 2000; Cramton and Koniak, 1996; Webster, 1991; Sharp, 2002; Robson, 2006). These approaches are valuable in that they can expose tensions between professional and personal morality. On the other hand, there is a risk of severe distortion of the reality of the legal process in the interest of providing popular entertainment. These approaches can often be used in conjunction with, or as supplements to, the other formal, theoretical and clinical approaches described above.

Experience in other jurisdictions suggests that there may well be initial resistance, at institutional, scholarly and student levels, but that this can be overcome if there is commitment to change coming from leaders of the profession, both academic and professional (Webb, 2002; Devlin et al, 2007; see further Annex C). In our view the key to overcoming academic resistance is to show how ethics actually reinforces the goals of a liberal legal education by deepening understanding and respect for core legal values whilst at the same time also preparing students for situations they will encounter in the so-called real world. Student resistance (Pipkin, 1976; Paterson,

1995) can also be overcome with imaginative and stimulating modules that avoid rote learning. In the field of accountancy studies we were told of student resistance:

> I feel that students often approach ethics (at first anyway) with a sense of contempt; it's a 'soft' skill, its wishy-washy liberal or even Left wing thinking getting in the way of good business. They're interested in the hard technical knowledge and this is taking up time that could be spent on proper learning. So the challenge is to demonstrate through teaching and learning that the ethical is intertwined with being competent at what you do in its broadest sense – or as I say in my research writing … they need to also learn that being a 'good' professional works in a dynamic multi-layered way and that indeed the professions value people who understand this, not just unthinking acceptors of current technique and corporate practice.

Options

A. Status quo: No change. The situation could be left to market forces but that would mean the majority of law (and other) graduates entering the profession remain ignorant of ethical debate on modern lawyering and unable to perceive or resolve ethical dilemmas. Ethical training at the vocational and subsequent phases would continue to be inadequately supported. However, with imminent changes in the vocational framework (see 2.2 below) that presuppose prior knowledge of ethical and regulatory frameworks, this option becomes increasingly dangerous.

B. Mandatory ethics courses: Ethical awareness and some knowledge of macro- and micro legal ethics perspectives should immediately become a compulsory requirement of all qualifying law degrees. The need is too urgent and, in order to bring us in line with international competitors and overcome institutional and academic inertia, decisive concerted action needs to be taken to embed ethics in the undergraduate law curriculum and conversion courses, the latter raising similar assessment issues surrounding ethics in the QLTT (see 2.5 below) where prior ethical awareness, albeit of a more practical nature, needs to be reliably and efficiently assessed. Ethics, professional responsibility and legal values need to become a 'foundation' subject, either supplanting an existing area or becoming an additional new one. There would appear to be two routes to securing a compulsory place for legal ethics in the undergraduate curriculum, either: a) tripartite discussions to be initiated with the Bar and the community of legal scholars to renegotiate a change in the Joint Announcement on Qualifying Law Degrees requiring ethics and/or professional responsibility to be added as a foundation subject; or b) TLS to encourage SRA unilaterally to prescribe that anyone intending to qualify as a solicitor first must have studied ethics and/or professional responsibility prior to commencement of the vocational stage of training in order to ensure an adequate foundation for ethical training on the LPC and what happens subsequently.

C. Evolutionary approach: TLS might initially focus on and revisit a more modest ACLEC-type 'outcomes' approach, rather than detailed prescription, and thereby sidestep resistance from some academics who could resent *diktat* by the professions. By focusing on flexible guidance and the infrastructure to support ethical training, for example using their political muscle to require law schools to have in place adequate intellectual and material resources to deliver an ethical education, the professional bodies could position themselves as the allies rather than enemies of academic lawyers. There should be further research and an open discussion with

academic leaders to determine what should be the content of this guidance and how it can best be communicated.

Recommendations:

We recommend TLS take a lead and encourage the SRA to initiate a review to consider the pros and cons of revisiting the content of the Joint Announcement in order to see whether any consensus exists, or could be constructed, to make awareness of and commitment to legal values, and the moral context of law, mandatory in undergraduate law degrees, as originally proposed in the ACLEC Report (1996: 24). We would at this stage advise setting general, flexible guidance and specifying 'outcomes' following consultation with the representatives of the academic community (SLS, ALT, SLSA) and other stakeholders such as the Bar and the Legal Services Board. It may be that the Standing Conference on Legal Education, or a revised Ethics Education Forum 2 specifically dedicated to the question of how best to introduce ethics and professional responsibility in undergraduate legal education could provide a useful platform for this debate[9].

We recommend that the professional bodies should together consider what support might be offered to law schools to assist them to comply with this flexible guidance, as currently is the case with library provision, and in reviewing the process of validating law degrees. In the event that tripartite discussions fail to secure a consensus in favour of changing the Joint Announcement we recommend that TLS encourage the SRA to unilaterally require anyone seeking to proceed to the vocational stage of qualification as a solicitor demonstrate knowledge, understanding and commitment to the core values enunciated in Rule One of the Solicitors Code of Conduct.

2.2 Vocational Phase: Legal Practice Course

Current LPC training and assessment regime

In regulatory terms, this phase is now governed by the Written Standards, to be replaced by new LPC outcomes by 2010[10]. Future content will be designed by individual providers who will be given far greater freedom, if they want it, to offer courses that serve different segments of the market provided certain learning outcomes are met. There is the opportunity to strengthen ethical training, but again the opportunity may be missed (Webb, 1998), a risk that may be higher now that the Code of Conduct has also been changed to become less explicit and more

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[9] This would be similar to the approach of the 'Priestly 11' that Australian law schools work with. On 1 April 1992 the Consultative Committee of State and Territorial Law Admitting Authorities of Australia, chaired by Mr Justice Priestly, prescribed eleven 'areas of knowledge' that must be covered by students during their law degrees in order to satisfy the academic requirements for admission. These include civil procedure; evidence and professional conduct; criminal law and procedure; torts; contracts; property (real and personal); equity, administrative law; federal and state constitutional law; and, company law (ALRC 2000). See further Johnstone and Vignendra (2003), Puig (2008) and Annex C.

[10] See further http://www.sra.org.uk/consultations/161.article

outcomes-based. There may be greater need for substantial guidance on the ways in which to meet those outcomes.

It is important to remember that, following the Legal Services Act 2007, standards of legal work throughout the legal services industry will be overseen by the new Legal Services Board that is under a statutory duty to monitor and maintain professional standards. This should imply a less *dirigiste* approach with far greater opportunities for vocational course providers to determine how they can best deliver ethical and other training. At the very least we can hope for, if not predict, greater scope for experimentation.

The current LPC (LPC 1) ethics requirements are that the student should be able to: demonstrate knowledge of and identify the rules of professional conduct and issues of client care in the relationship between solicitor and client. Ethical context is a core area while professional conduct and client care is a pervasive area. The ethical context involves an "Introduction to Professional Conduct & Client Care, including Solicitors' Accounts Rules and Financial Services and Markets Act" [FSMA]. The pervasive elements are professional conduct, client care (Solicitors' Practice Rules) and accounts (Solicitors' Accounts Rules 1998). Students are expected 'to be able to identify and advise the client on matters of Professional Conduct and Ethics' arising both in the compulsory and elective subjects. The following are the key areas to be emphasised:

- **Professional Conduct** (the retainer, fees, conflict of interest, confidentiality, bad professional work and negligence, the solicitor and the court, professional undertakings, money laundering and the Proceeds of Crime Act 2002)
- **Solicitors' Accounts**
- **Business Accounts**
- **Client care**
- **The organisation of the profession**
- **Obtaining work**
- **Professional relations**
- **Financial services**

One LPC-provider we consulted said that the current focus is on professional conduct and "FSMA-type topics". The course teaches "professional conduct in context, that is, within each subject as well as [in] dedicated sessions." "This seems to work", she said, "in that the sort of issues we look at are best thought about whilst looking at the precise tasks and fact patterns that students will see in practice...Of course, some subjects lend themselves to certain subject matter, eg plp [Property Law and Practice] finds it easy to look at solicitors' accounts and undertakings, blp [Business Law and Practice] finds it easier to look at FSMA related topics. There are some common issues to all…LPC students, by the end of the LPC, are able to see the main professional conduct issues and recognise what is expected of them."

In terms of assessment, this tends to be achieved by aggregating the ethical components of skills assessment into a mark or grade for ethics. These are extracted from the main assessment and rendered as a 'competent; or 'not competent' grade. Under the current LPC assessments in all electives and Professional Conduct and

Financial Services Markets Act, take place at the end of the year. The LPC-provider said, "Assessment is in part in the context of other assessment papers, ie undisclosed marks are allocated in a number of subject papers as well as a discrete allocation in a separate paper."

How robust and effective is the current LPC in influencing ethical behaviour?

There is no formal evidence with which to evaluate the effectiveness of the LPC teaching and assessment regime. There are, nonetheless, some indications that the system is not as vigorous as it could be. Indeed, the intention was that the LPC should formally rely on the Professional Skills Course (PSC) to provide pre-qualified solicitors with more advanced courses on Client Care and Communication Skills, Professional Standards and Financial and Business Skills. The central regulatory role for the SRA is to achieve consistency of the learning outcomes and demonstration by candidates of the minimum standards, rather than to ensure that all LPC students have a consistent or equivalent experience. The SRA has stated that it is not their role to help providers lever resources into their courses.

The SRA is keen to promote practices that capture the transactional and practical nature of the course. From the SRA monitoring reports, it is evident that LPC-providers use a range of methods of teaching, including various e-learning initiatives (such as online test-and-feedback activities), as well as both formative (including mock) and summative assessment and feedback (including peer assessment). However, the reports (loosely) suggest that LPC providers are currently not as successful in devising methods of assessment for professional conduct and the FSMA as the SRA would like.

Boon (2002) argues that the vocational course year is an environment potentially inhospitable to deep thought and reflection regarding professional roles and responsibilities because the courses are already long, intensive and relatively expensive to deliver. Furthermore, the competence framework upon which they are based requires that the teaching priority is that the students comply with the letter and spirit of the code.

On the basis of a small number of interviews with LPC tutors, Webb describes the aim of the course on the LPC as being to teach professional conduct (in terms of compliance with the Code) and not ethics. For Webb (1998b) the formal tendency to treat conduct as a knowledge attribute underplays the extent to which 'behaving ethically' should itself be treated as a more complex and skilled process (Fletcher, 2007).

Using Goldsmith and Powles' (1998) term, the current LPC offers a 'replicative model' of instruction; where proficiency is evaluated in technical and strategic terms and an ethical dimension is lacking. The field of focus is confined to the interests of the client, and, secondly, minimalist requirements imposed by the courts and the profession (Fletcher, 2007). As Goldsmith and Powles note:

> Professional education which is uncritically based upon traditional notions of education and skills in all probability no longer fits contemporary circumstances, and is therefore outmoded and objectionable. Pure replication also operates in the interests of a dominant professional group or orthodoxy, entrenching certain attitudes, values and approaches to practice at the expense

of others … It also stifles imaginative thinking about the purpose and methods of professional practice, and about the social responsibility of lawyers (1998: 145).

Another weakness in LPC-delivery that impacts on the teaching of ethics is that tutors become academic experts in their specific area and detached from practice settings. It is particularly important therefore that LPC tutors maintain links with practice so that they are aware of current pressures in the workplace that may threaten ethical standards and do not seek sanctuary and solace in the detached and safe world of ethical theory. Davies (1996) makes a strong argument for the special importance of the LPC phase in the broader scheme of legal education and training: "The Trainee Solicitors Group study into the quality of training contracts suggests that any omissions of important aspects of solicitors training from the LPC, on the assumption that they will be covered in the training contract, may be seriously flawed." "…as long as the LPC stage and the training contract stage are separate each provider can blame the other for gaps in training provision."

We would anticipate that in future throughout the vocational phase, including both during and after the LPC, far greater use will be made of learning logs and online monitoring within the context of Virtual Learning Environments (VLEs)[11]. Much of this monitoring is likely to be carried internally within the law firm rather than externally, and may well supplant existing forms of regulation. This mirrors the trend toward entity regulation (Chambliss, 2001) whereby the regulatory focus shifts from direct controls over the individual to monitoring the organisation's systems for maintaining practice standards.

SRA Reforms: LPC II

The SRA has begun the process of making the LPC more flexible and less prescriptive by enabling electives to be taken separately from the LPC and by allowing individuals with appropriate equivalent qualifications to apply for exemption from relevant parts of the course. The LPC outcomes, which will replace the written standards, will set out the 'irreducible minimum' that all students completing the LPC need to be able demonstrate in order to pass a course. We understand that some LPC providers were authorised to run the LPC in two stages as from September 2008, with remaining authorisations to take place in 2009. The result is that students would be able to start a training contract after successfully completing the compulsory part of the LPC (stage 1).

- Stage 1 covers the three essential practice areas of Business Law and Practice, Property Law and Practice and Litigation, together with the Course Skills, Professional Conduct and Regulation, Taxation and Wills & Administration of Estates
- Stage 2 is made up of three Vocational Electives.

On completion of Stage 1 students should be able to identify and act in accordance with the core duties of professional conduct and professional ethics that are relevant to the course. A successful student should be familiar with the Solicitors' Code of Conduct affecting the conduct of work likely to be encountered by trainees including:

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[11] See further McKellar and Maharg (2005).

(1) the core duties of solicitors under Rule 1; (2) acting only when competent to do so; (3) principles and practices of good client relations, client care and information about cost; (4) conflicts of interest; (5) client confidentiality and disclosure; (6) professional undertakings; (7) the solicitor and the court; and (8) avoiding discrimination and promoting equality and diversity.

Because of its importance in solicitors' vocational training, Professional Conduct and Regulation is the first area to be dealt with in the LPC Outcomes. Professional conduct and ethics are intended to be pervasive, impacting on all aspects of the design, delivery and content of the course. All outcomes for the Core Practice areas (BLP, PLP and Litigation), Course Skills and other aspects of the course should be read against and in the context of the outcomes for Professional Conduct. In particular, the outcomes for Professional Conduct including acting only when competent to do so (point 2), the principles and practices of good client relations and client care (point 3) and avoiding discrimination and promoting equality and diversity (point 8) should be embedded in all relevant substantive and skills aspects of the LPC.

LPC II Assessment Requirements

The SRA has set out the minimum standards for the assessment of students on LPCs, including the Vocational Electives. Each provider must produce a comprehensive learning, teaching and assessment strategy to demonstrate its overall coverage of the course outcomes and compliance with these requirements. The assessment strategy of a provider should:

- reflect its emphasis and coverage of the outcomes,

- set assessments that are primarily transactional in nature,

- use an appropriate variety of supervised assessment methods,

- indicate its policy on the use of permitted materials in assessments, in accordance with specific provisions in the LPC Assessment Requirements, and the impact its policy will have on its design of assessments, and

- anticipate the needs of disabled students and set out how individual needs will be identified and addressed.

Professional Conduct and Regulation will be assessed in two ways:

- a discrete assessment which must last for a minimum of two hours and which should normally be taken during the final assessment period of Stage 1 of the course.

- an assessment within each of the three core practice assessments in which at least 5% of the marks must be allocated to Professional Conduct and Regulation.

The marks are not to be aggregated: a student must pass the discrete assessment in Professional Conduct and Regulation in order to pass the subject. The Solicitors' Accounts Rules must be assessed separately under supervised conditions. The assessment must last for a minimum of two hours (including any reading time). No materials are permitted save an unmarked copy of the Solicitors' Accounts Rules.

In theory, this leaves the way in which the professional conduct and ethics is taught and assessed unchanged to a large extent. Nevertheless, a concern raised by one LPC-provider is that teaching professional conduct earlier might have an adverse impact on the amount that students are able to absorb by this relatively early point. She wondered whether teaching and assessment of professional conduct would only take place in that first six months (stage 1). "If this is right, then teaching of professional conduct or ethics will be more important for LLB stage." She suggested that the LLB "tackle the generality at least of the professional conduct requirements." "There is a tendency with the LPC at least, for SRA to put more and more in without thinking through if the depth is thereby lost." This is an important point and highlights the impact of one phase of legal education on another. In order to be able to appreciate ethics at the vocational stage it would appear that something more needs to happen at the academic phase in order to support subsequent learning. If philosophical foundations and the regulatory framework (macro and meso-levels) were covered at the initial phase of legal education this should provide a valuable foundation that facilitates learning, whether discrete or pervasive, at the vocational phase.

What other options and models are available for the LPC?

According to Davies (1996) the teaching of skills purely within the artificial environment of the classroom not only poses the threat of students adopting an uncritical and surface approach to their learning but also means that students are bereft of practical skills, like file management skills, the lack of which seems to account for a significant proportion of client complaints. In order to address these issues he advocates the current one-year LPC plus two years training contract be replaced with a three year integrated apprenticeship. Instead of providing a take it or leave it course, LPC providers would work much more closely with each firm employing trainees in order to tailor a course to fit far more closely the needs of each individual trainee. His argument is that "by means of a close working relationship LPC teachers would gain a practical and ongoing insight into the requirements of practice." Furthermore, "firms would benefit from the overseeing of their training by academics developing an understanding of skills at a more theoretical level."

The major drawback in attempting to implement such a change (ie a more close relationship between LPC and TC phases) is likely to be resistance, or at least inertia, from the current providers in the training sphere. Whilst many firms offering training contracts take training very seriously, the study by Moorhead et al (1994) strongly suggests that some firms see trainee solicitors as relatively cheap fee earners who can best learn by means of a sink or swim approach (see also Economides and Smallcombe, 1991). This latter type of firm is unlikely to welcome scrutiny of its activities by academics, or possibly to release trainees from fee-earning work on a regular basis (Davies, 1996).

> **Recommendations:**
>
> TLS should encourage SRA to continue to keep under review assessment procedures and mechanisms and whether, in the light of new technology, these should be direct or indirect. TLS needs to be in a position to establish whether the assessment regime is adequate on the LPC (which may involve access to SRA reports and other information).
>
> TLS needs to learn more about the types of assessment regimes in the vocational courses of other professions
>
> Regular discussion groups, through conferences and other networks, whereby LPC students, law tutors and practitioners (including judges) meet to discuss ethical dilemmas and stories raising moral lessons or parables arising in the context of legal practice.
>
> Vocational course providers and law teachers responsible for undergraduate legal studies discuss the optimum division of learning outcomes at their respective phases. In particular, what issues or perspectives need to be covered at the academic phase in order to facilitate subsequent learning? If the academic phase is to remain 'ethics free' then vocational course providers need to make contingency plans to deal with this so that entrants to the profession have a solid ethics foundation.

Lessons from medicine

In US medicine, the emphasis is on character or virtue, as distinct from rules and compliance. Virtue ethics also features in UK medicine (Gardiner, 2003) yet is much neglected within legal education which has a natural preference for deontological (duty/right/rule based) or consequentialist approaches, which focus on the consequences of actions, (Nicolson and Webb, 1999). For the education of resident physicians, the Accreditation Council for Graduate Medical Education (ACGME) communicates this message by requiring professionalism as one of six general competencies that must be fostered and assessed in graduate medical education (GME) programs: patient care, medical knowledge, practice-based learning and improvement, interpersonal and communication skills, professionalism, and systems-based practice. The following description of professionalism has been adopted by the ACGME:

Residents must demonstrate a commitment to carrying out professional responsibilities, adherence to ethical principles, and sensitivity to a diverse patient population. Not unlike the 'day 1 outcomes' for solicitors[12], residents are expected to:

- demonstrate respect, compassion, and integrity; a responsiveness to the needs of patients and society that supersedes self-interest;

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[12] See Education and Training Committee's latest formulation of the 'day 1 outcomes' (April 2007) at http://www.sra.org.uk/securedownload/file/229. These outcomes include the ability to: behave professionally and with integrity; identify issues of culture, disability and diversity; respond appropriately and effectively to the above issues in dealings with clients, colleagues and others from a range of social, economic and ethnic backgrounds; and recognise and resolve ethical dilemmas.

> accountability to patients, society, and the profession; and a commitment to excellence and on-going professional development

- demonstrate a commitment to ethical principles pertaining to provision or withholding of clinical care, confidentiality of patient information, informed consent, and business practices

- demonstrate sensitivity and responsiveness to patients' culture, age, gender, and disabilities

There are a number of ideas for ethical training that may be taken from nursing. As Darbyshire (1993: 508) insists, "we must rediscover our passion for and about nursing as a real social force with an ethic of good immovably embedded within it". These include:

- avoiding the limitations of classroom idealism or philosophical abstractness.

- using appropriate role models and the experiences of practising nurses.

- supplementing classroom learning by encouraging contact with 'buddy' nurses and clinical tutors who act as ethical role models (i.e. those who are morally competent) and removed from the influence of those who are morally incompetent or indifferent.

- rethinking underlying philosophy: by considering an overall approach to teaching nursing ethics based on a philosophy grounded in practical rather than abstract views of reality, and one that promotes the learning of applied ethics in nursing contexts.

In our view deeper, more reflective learning would be assisted if there were a stronger commitment to values expected of lawyers upon qualification. At present, there is perhaps too much emphasis on technical skill and knowledge and not enough on 'humane professionalism' and legal values (Arthurs, 1984; Burridge and Webb, 2008). More emphasis needs to be placed on respect for professional values and we need to be alert to the fact that legal education can sometimes undermine value systems (Kubey, 1976; McPhail, 2001; Rathjen, 1976; Raack, 1991). The key to future professional development in the field of ethics (as well as other areas of modern practice) is to both strengthen and deepen channels of communication between trainers and practitioners in order to achieve a genuine 'praxis'. In our view, both ancient and modern medicine has much to contribute to ethical debates surrounding the commitments and responsibilities of modern lawyers. Role models and informal 'buddy' solicitors to complement the training principal might be one idea worth investigating as these seem to work well in nursing and medicine. The recent Exeter Symposium (2008) on "A Hippocratic Oath for Lawyers?" provides a useful starting point for further discussion but we would advise TLS to explore further the advantages of incorporating some kind of formal oath, or preferably a Declaration, at the point of admission to the solicitors' profession[13]. The following Declaration has been proposed as one model that might be adapted by the Junior Lawyers Division (Economides and Webb, 2008:5; see further Rocca, 2008):

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[13] See http://www.law.ex.ac.uk/friends/HippocraticOathforLawyers.shtml. The discussion has been published in Legal Ethics: Exeter Symposium, 2008.

I promise to use my legal knowledge and skill to the best of my ability and, notwithstanding duties owed to clients and the Court, will at all times serve the interests of justice without fear or favour. As a lawyer, I shall work diligently, honestly, with integrity and independence to the highest standards and do my utmost to uphold the core duties of my profession whilst respecting the truth and avoiding unnecessary harm to public and third party interests. I shall uphold the rule of law, the democratic order, human rights, social justice, fair and expeditious process, and work toward the improvement and accessibility of the law, legal institutions and processes.

Recommendation:

We suggest further investigation of general ethical training in both ancient and modern medicine. In particular we believe lawyers' standards would be raised if, like most doctors, they took some form of Hippocratic Oath, perhaps in the form of a Declaration.

2.3 Vocational Phase: Training Contract (and Professional Skills Course)

There is a wide literature that suggests the workplace is an important site rich in learning opportunities (see Webb et al, 2004), as well as a, if not the, central context for adult socialization and ethical development (Winfree et al, 1984; Anderson-Gough et al, 1999). The workplace, which can be seen as a surrogate family, is often where personal, organizational and professional identities and behaviours are incubated. The training contract (TC) and Continuing Professional Development (CPD) phases therefore present significant opportunities, both for ethics instruction and assessment.

The existing training contract training and assessment regime

The Training Contract is the final stage of the process of qualification as a solicitor. The purpose of the Training Contract, as currently stated, is to give trainees supervised experience in legal practice through which they can refine and develop their professional skills. Trainee solicitors gain practical experience in a legal environment such as a solicitor's firm, a local authority or an in-house legal department (Webb et al, 2004).

The main training requirements do not directly address the teaching of professional responsibilities or ethical awareness and conduct in a broad sense. They are skills-based formulations. Client care and practice support has a strong efficiency, market-based emphasis, as distinct from any emphasis on the ethical dimensions of the client relationship, or the impact of those legal services in the wider society. The formal aim is to enable trainees "to work effectively in an efficient practice, they must develop the skills required to manage time, effort and resources."

Nonetheless, in many ways the structure of the TC is designed, at least in principle, to allow for ethical instruction and assessment. Trainees are expected to be closely supervised by a supervisor, receive regular feedback and appraisals from their supervisors, which should include discussions about ethics issues. They are required to maintain a record of their training, which should document any professional

conduct issues that may have arisen. The overall experience is to enable the trainee to understand, amongst other things, "the need to act in accordance with the ethics, etiquette and conventions of the professional advocate."

Further, trainees are allowed paid study-leave to attend courses prescribed by the SRA, such as the Professional Skills Course (PSC). The Professional Skills Course involves 12 hours minimum tuition in Client Care and Professional Standards.

However, if assessment is a potent driver for learning, ethics instruction is clearly not a central element of the TC in practice. In the sample appraisal form provided by the SRA for a trainee's performance and development review, there is no ethics/professional conduct section. Moreover, the PSC does not assess its Client Care and Professional Standards component. Ethics appear to be taught via osmosis, which may not be as justifiable or desirable in the present work and regulatory environments. As one senior solicitor put it, "We don't do it [teach ethics], but our hope is that by espousing the ethical values of our organization, the trainees will pick it up by osmosis because they're in the environment…There is something to be said for articulating it more expressly" (See also Economides and O'Leary, 2007). Another experienced solicitor reinforced the point about the limited impact of current ethics training:

> The only formal ethics training that persons who are training to be solicitors undertake is during (a) the Legal Practice Course and (b) during the training contract as part of the Professional Skills Course. In each case the format and content, which is based upon Professional Conduct and Client Care, will depend upon the provider. My experience (and I have been responsible for first articled clerks and subsequently trainee solicitors for nearly 30 years) is that very few entrants in to the profession have anything but the most rudimentary understanding of ethical issues, or of the need for such understanding in day to day legal practice.

The PSC-provider we consulted confirmed that the current client care and professional standards course is primarily skills-based, covering skills such as communication, interviewing and informing clients, costs, dealing with difficult clients, and avoiding and dealing with complaints on the basis of the Solicitors Code of Conduct (2007). He underlined two weaknesses in the current provision of ethics education. First, he doubted the effectiveness of the pervasive approach at the LPC stage. For him, pervasive tended to mean that it was overlooked. Second, that there is currently no assessment of ethics after the LPC phase. He was sceptical about the SRA's moves towards introducing a multiple choice questions (MCQs) based assessment at the TC phase. He perceived this 'driving test' approach, as he described it, as inadequate since "these questions don't have binary answers." The only way things will change, he argued, is if insurers begin to pressure the firms to be trained in ethics on the basis of risk assessment (poor claims being linked to breaches of the Code of Conduct and/or poor ethical decisions). Echoing Davies (1996), he sees these breaches as also and often a result of practical mismanagement. "Solicitors need to be better at simple things" like paperwork and time management.

> *Recommendations:*
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> We recommend TLS to encourage the SRA to review the PSC to ensure that it underpins earlier training in the light of trainees' experience of the workplace.
>
> We recommend TLS to ask the SRA to change the TC appraisal form so that it includes an ethics/professional responsibility section forthwith. Furthermore, it is essential that an ethics assessment is introduced during the workplace based learning phase.

SRA Reforms

The SRA is in the process of piloting a new framework for work-based learning based on standards individuals are required to have demonstrated when carrying out straightforward/typical work. The standards that seem to be more closely aligned with (positive) ethical competence include:

Integrity
1. Acts in accordance with professional duties, responsibilities and ethics (e.g. the Rules of Professional Conduct)

2. Deals with people in an honest way

3. Maintains client confidentiality

4. Flags up potential/actual ethical dilemmas (e.g. conflict of interest)

Work-based Increment: Gains experience of application of rules, regulations and protocols in practice.

Effective Communication
1. Uses clear, concise and unambiguous language in written and oral communications with clients and colleagues

2. Tailors communication style to suit the purpose of the communication and needs of different clients/recipients

3. Demonstrates sensitivity to social/cultural diversity and/or disability in …

Work-based Increment: Transition from academic communication to professional communication. Tailoring communication to different kinds of clients, colleagues and situations.

Working with Others
1. Shares information with others when appropriate

2. Works co-operatively with colleagues

3. Offers others support when necessary

4. Makes effective use of others' knowledge and skills (eg support staff/colleagues)

5. Treats others with respect

Work-based Increment: Recognises the importance of working together for the success of the firm/organisation rather than being focused purely on own work/success. Learns impact on others of own actions and failings.

Self Awareness and Development

1. Demonstrates an awareness of own professional limitations, knowing when to ask for assistance

2. Reflects on experiences and mistakes and learns from them

3. Works to continuously improve oneself as a professional

Work-based Increment: Gains an understanding of own professional strengths and weaknesses, knows when to ask for support and commits to on-going professional development.

We note that expectations appear to be shifting away from knowledge of rules toward emphasising virtues linked with skill and character. This suggests that ethical training also needs to shift toward developing character traits that respect and empathise with, in various forms, 'the Other'. Of course, these standards accompany others, many of which advance different and perhaps competing priorities, such as client handling, business awareness and workload management.

Theories of workplace based learning

Of central importance is the way in which regulatory bodies perceive the work environments in which solicitors practise and therefore how they conceive of workplace learning. Boud (1998: 22) provides a spectrum for understanding the workplace and the learning that takes place within it. One conception stresses the phenomenon of increasing managerialism and therefore proposes taking much of the learning off site, away from productive performance. This is arguably antithetical to a culture of learning in the firm. Unwin and Fuller (2003: 411) produced a useful table with which to understand varieties of workplace learning. They have produced an expansive-restrictive continuum. Workplaces are positioned at some point on the continuum depending on the features of support given to trainees, how reified their learning experiences are as trainees (apprentices) and how much time is dedicated to their development of their knowledge and skills of reflection. This could be a useful resource for officially evaluating the training practices of law firms.

Another point for consideration is whether the content of ethics instruction needs to be profession- and/or organisation-centred. Which values really matter? Furthermore, it is not clear that the values the profession may seek to endorse and communicate to new trainees are either synonymous with, or stronger than, those values embedded within the culture of the firm (Economides and O'Leary, 2007). We have already noted the important shift toward entity regulation and interestingly this focus seems also to be noted by practitioners. One senior solicitor supported ethics instruction in the form of activities connected to the values of the organisation. She suggested that discussions and debates about the organisation's corporate social responsibility (CSR) - all levels of the firm - would be a more focused way of discussing ethics. She pointed out that when ethics is reduced solely to client care important issues like client choice do not get raised: "How do we deal, for instance,

with the client who wants to clear land in another country?" She felt that solicitors (from trainee to senior partner) needed a formal context to reflect on the complex role of a solicitor: "an officer of the court, with professional duties to colleagues, clients, and regulators…and [arguably] to other communities and countries?" The TLS may have to further investigate the competing pressures and priorities for firms, and then perhaps look towards business ethics for supplementary models for teaching and assessing legal ethics.

Boud's (1998) Australian report as well as that of Webb et al (2004) outline more fully the various conceptions of workplace learning. Boud (1998a; b) focuses on the role of reflection and the importance of non-routine circumstances for stimulating learning. Webb et al (2004: 15-16) include the list of learning activities that the respondents of the Cheatham and Chivers (2001) study found valuable as workplace learning processes. Perhaps TLS needs to inquire into the dissemination of such reports to law firms.

Duff (2004) outlines the steps his department and medical school have taken to "bring professionalism to center stage in the minds of students and residents":

> Professionalism is the first competency listed on the student and resident evaluation form. Presentations on professionalism are an integral part of orientation for first-year students and the White Coat Ceremony for the third-year students. Similar presentations occur during the orientation program for new residents and are part of faculty development workshops. In addition, our department recently adopted an extensive new annual evaluation form devoted solely to an assessment of professional behavior (2004: 1363).

Duff (2004: 1363) emphasises the importance of learning that takes place through observation: "Ultimately, however, the single most effective method of teaching professionalism is modeling of appropriate behavior by faculty members. In truth, trainees learn what they see." This finding is broadly true of pupillage in chambers. Rogers' forthcoming DPhil thesis describes in detail the uniquely influential position that senior members, particularly pupil supervisors, have in shaping the outward behaviour and internalized values of new members of the profession. The sets she visited as part of her study conducted internal ethics courses for their pupils, the most lively being a round the table (practical and theoretical) discussion between pupils, and junior and senior practitioners. The other sets tested pupils with Code-based hypotheticals. On several occasions, the pupil supervisors took time to explain the ethical dimensions or implications of their work to their pupil.

The difficulties of in-house training and supervision have been outlined elsewhere (Webb et al, 2004: 36-35). One senior solicitor noted the essential problem in the context of the solicitors' profession: "Who is the supervisor - we have juniors as de facto, day-to-day supervisors. Could you burden them when they're just starting out? But could you burden partners?" She anticipated that practitioners, particularly senior ones, would be indignant on two grounds (1) the imposition – that you're loading more on them; and (2) the implication that they're not 'good' already. Her recommendation was that it be packaged in terms of Corporate Social Responsibility and the need to make the solicitor brand stronger and more compelling (and not just a Tesco-law / fee-focused service).

Nonetheless, there is some useful literature on the role of organisations in shaping learning and practical ways to foster a healthy environment for learning, reflection

and feedback. Schuck discusses the need for what she terms a 'pedagogy for meaning' and in particular the role of management as 'managers of inquiry' in an information-rich organisational setting: "The beliefs, attitudes, and behaviours of the manager are at the heart of the environment of inquiry. Within a pedagogy for meaning, a manager creates opportunities for learning and becomes an active participant within it…" (1996: 207, in Boud, 1998:23, citation amended).

In their book, *Sculpting the Learning Organisation* (1993) Watkins and Marsick argue that learning occurs at four interdependent levels: individual, team, organisation and society. Taking this into account, they identify the following six 'action imperatives' for the creation of a learning organisation:

- create continuous learning opportunities
- promote inquiry and dialogue
- encourage collaboration and team learning
- establish systems to capture and share learning
- empower people toward a collective vision
- connect the organisation with its environment

The workplace is an important site for holistic learning and developing the whole person, that is, 'rounded' individuals capable of making ethical and strategic judgments (Beckett, 2000; Becket and Hager, 2000). But one important point to emerge from the experience of postgraduate medical education is that having a list of outcomes without clear and credible guidance for firms may mean that the trainees are left without the support they need to 'really' achieve these standards. "Competences alone do not describe professional performance, but deconstruct it" (Grant, 2007: S12). Certain researchers provide a useful set of guidelines for what practitioners need or demand of an effective workplace learning system (Boud et al, 1998:120-122). One of these is 'clear and useful guidance' on how best to carry out their responsibilities, how to improve their existing practice, and how to avoid making mistakes.

Branch and Paranjape (2002) provide a compelling rationale as well as a useful guide for using feedback and reflection in clinical settings. These could be tailored to teach professional ethics and conduct. For example, when giving feedback the authors advise teachers to follow the following principles: "work as an ally of the student", "base feedback on observed incidents and on modifiable behaviours", "give feedback in small digestible quantities" and "use language that is non-evaluative and nonjudgmental". Feedback and reflection support professional development in the following ways: "reflection leads to growth of the individual—morally, personally, psychologically, and emotionally, as well as cognitively—whereas feedback tends to promote technical proficiency" (2002: 1186). It would be helpful to have examples of best practice when it comes to ethics appraisals and feedback in the training contract.

One of the key problems likely to surface is that of "training the trainers", an issue that the Bar has already encountered in its advocacy training that has been supported by both the National Institute for Trial Advocacy (NITA)[14] and the Hemple

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[14] See http://www.nita.org/

method imported from Victoria, Australia. There is a clear need for some kind of national institute to guide and develop ethical training for lawyers. The role of such an institute would be, through teaching and research, to create the necessary infrastructure that supports and regulates ethical instruction and in our view this institute should be based in, or attached to, a university law school. Without trained ethical evaluators standards are likely to be inconsistent and subjective and therefore portfolios could be signed-off by the supervising/training partners without having covered adequately the ethical dimension to legal practice. At the heart of this problem is knowing what it means to be a member of the solicitors' profession. Responsibility for safeguarding professional status and ethical reputation lies at many different levels, starting with the individual solicitor moving to senior partners within the firm to the TLS as representative of solicitors, to regulators such as the SRA and Legal Services Board (LSB). Legal educators and scholars also need to assume responsibility for ethical instruction and therefore a national institute to bring together different perspectives and interests is urgently needed.

Recommendations:

Law firms should be encouraged to create within the workplace ethics officers responsible for firm-wide awareness of ethical responsibilities and duties owed to clients, other solicitors, the wider public and society at large. There could also be online resources shared by firms, particularly those that are small or medium-sized, to strengthen and augment in-house training programmes.

TLS should consider whether the SRA proposed standards for work-based learning satisfy its view of ethical and professional standards.

TLS should follow up with SRA whether and in what ways they used Webb et al's (2004) study to enhance workplace learning, particularly the use of their list of workplace learning activities. Is the SRA mindful of Grant's (2007) warning that outcomes without clear and credible guidance can be counter-productive? We recommend that the SRA issues guidance on the desirable activities and outcomes of workplace learning.

We recommend that TLS urge the SRA to set rigorous and stretching outcomes for trainees in terms of ethics and that those assessing whether these outcomes are being met are fully and demonstrably fit to exercise their judgment. TLS should also encourage SRA to consider how, ideally, ethical instructors should be trained and regulated, and how best to establish a national/international resource for ethical instruction and assessment.

2.4 Professional Phase: Post-Qualification Education and Training

Although the Code of Conduct sets outs out both mandatory rules (particularly Rule 1) and non-mandatory guidance, it offers very little in the way of ethics (other than "defining the ethical attributes of a lawyer"). Despite plenty of evidence to the contrary over a long period of time, there appears to be an assumption that all solicitors will be ethical; that they are not is not in itself surprising, but the profession's approach has been to deal with this by way of damage limitation and risk management, putting in place appropriate processes and procedures, to reduce the

risk of rogue solicitors and professional misconduct, rather than addressing the issue at source, and requiring effective ethics training.

All solicitors and registered European lawyers (RELs) in practice in England and Wales are required to undertake continuing professional development (CPD) activities. This CPD phase also appears to represent a shifting of responsibility away from the individual toward the entity or the organisation.

Current requirements are as follows and focus on hourly commitments:

For newly qualified solicitors and RELs:

- one hour for each complete month worked from date of admission/registration to 31 October (Those admitted/registered on 1 November will go straight into their first CPD year.)

For all solicitors and RELs in their first CPD year and in each subsequent year:

- 16 hours
- All solicitors must undertake the Law Society Management Course Stage 1 between the date of admission and the end of the third CPD year. The seven hours that the course attracts count towards the CPD requirement.

At least 25 per cent of the requirement must be met by participating in courses that are offered by providers authorised by the Law Society and which require attendance for one hour or more. The remaining 75 per cent of the CPD requirement, too, may be met by participating in activities as described above. However, it may also be met by undertaking a wide range of other activities, such as coaching and mentoring sessions, work shadowing, research and producing a dissertation. To count towards meeting CPD requirements, the activity should be at an appropriate level and contribute to a solicitor's general professional skill and knowledge, and not merely advance a particular fee-earning matter.

SRA Review

The SRA plans a review of CPD to consider:

- the focus on process and time spent, rather than outcomes
- the small number of CPD hours required each year
- the danger that it could become a tick box exercise bearing little relation to real development needs
- the difficulty of monitoring whether CPD is properly carried out
- how to cater for the variation of career development needs (Fletcher, 2007)

How robust and effective is CPD in influencing ethical behaviour?

The only compulsory CPD course, Management Course Stage 1 (MC1), does not deal directly with professional responsibility and/or ethical awareness and conduct,

yet ethical issues will inevitably arise in the course of managing systems, information and people.

The compulsory seven hours of the MC1 must be based on at least three of the following main topics, covering all of the listed sub-topics:

- Managing finance (Billing and recovering fees; Computerisation; Preparing budgets; Monitoring budgets; Controlling costs; Financial and management information)

- Managing the firm (Administering the office; Identifying opportunities for improvement; Setting up a case management system)

- Managing client relationships (Meeting client specifications and instructions; Assuring quality; Handling complaints; Establishing and agreeing client requirements)

- Managing information (Obtaining and evaluation information; Presenting information and advice; Communicating effectively)

- Managing people (Drawing up job descriptions; Assessing and selecting personnel; Developing teams; Developing individuals; Self-development; Evaluating/improving training and development; Planning work; Allocating work; Setting objectives; Giving feedback; Building a good reporting relationship; Building relationships with members of your team; Building relationships with colleagues)

We suggest that this is a missed opportunity for ethics discussion. Rather than set up a new course we believe that the MC1, which is supposed to finalise the transition to fully qualified solicitor (at 3 years), should be modified so that it has a more robust and relevant ethical content. It is easier to change a pre-existing course than start a new one.

Optional CPD: Furthermore, none of the 102 accredited courses is entitled "professional development" or "ethics" (except the professional skills course). That is not to say, of course, that some courses (ranging from "Accounting" and "Agricultural and Rural Affairs" to "Wills and Probate") do not deal with ethical issues. There is currently an online scenarios-based course run by the Law Society to test the participant's knowledge of the Solicitors' Code of Conduct 2007.

Nevertheless, this form of education is fairly limited in terms of ethics instruction because of both the number of hours-focus, and the narrowness of the course and available methods of delivery. Also, CPD appears to be structurally and physically divorced from the firm where adult ethical socialization takes place.

Typically there is little if any formal ethics or professional conduct training once a solicitor is qualified. As Downie and Devlin (2007) state: "In articling and in the early years of practice, senior lawyers, whether mentors or not, inevitably reproduce normative patterns that encourage emulation." This was confirmed by a recent Australian study by Corbin (2005) who found that graduates maintained a conception of professionalism based on a more traditional model of professionalism – elements of altruism and service to the public, and, more specifically, advice to clients that includes moral and ethical considerations. The experienced practitioners'

perspective, she found, corresponded to the commercialized professionalism paradigm, that is, providing an expert service that allows them to maintain their firm's reputations, particularly within the profession. Thus, although Corbin recognizes the American literature that proposes that law schools ought to bear the responsibility for ensuring that future lawyers are aware that they may be "lulled into self-deception and conformity with group norms in firms", she suggests that perhaps partners ought to be alerted to how influential their firms are and consider more carefully the effects of that influence (Fletcher, 2007).

Given that law is business, firms are likely to ask that any legal ethics training (whether before or after qualification) be rooted in the real world, and not simply be a philosophical debate, and that it be designed to give the lawyer the skill to identify ethical issues and address them.

Lessons from foreign legal professions

Mandatory Continuing Legal Ethics Education (CLEE)

The Council of the Law Society of New South Wales recently resolved to make ethics a compulsory part of Continuing Legal Education requirements, joining the law societies of Queensland, Northern Territory, Western Australia and Victoria. NSW practitioners, like those in Victoria and Queensland, will now be required to undertake one MCLE unit on legal ethics every three consecutive years, with a first compliant date of March 2011.

To assist practitioners in complying with the new requirement, the Law Society of NSW will provide an expanded range of ethics services, including:

- education programs to meet the MCLE requirements – the will include, monthly on-hour presentations;
- presentations specifically for regional Law Societies;
- development of compliance strategies to meet the different education requirements of large, medium and small firms – the Society will be open to respond to initiatives that fulfil the basic requirement for ethics education but in ways that are particularly suited to the various segments of the profession;
- collaboration with legal practices on in-house programs for ethics education;
- development of special projects and presentations on issues affecting particular groups of practitioners – these can be arranged in consultation with the Law Society's Ethics section (Monaghan, 2007).

Most US jurisdictions require mandatory ongoing legal ethics education, although they range in the number of requisite hours per year or fixed period. (See http://www.bvresources.com/conferences.asp?f=bvrmealeysclebystate#California).

A recent paper by Downie and Devlin, Canadian scholars, argues that Continuing Legal Ethics Education (CLEE) should be mandatory on the basis that it can help lawyers become "reasonably fit for the purpose" of practising law in the public interest. "What it is designed to do is to build capacity in a core competency – the

capacity to be critically reflective about the daily choices we make as lawyers"
(2007:35).

The authors outline the various arguments in favour of CLEE (of principle,
consequentialist, from authority, by analogy) before identifying and addressing
possible objections to mandatory CLEE. The objections are either 'normative' (e.g.
infringe lawyer autonomy) or 'pragmatic' (e.g., based on cost, redundancy, futility,
naïveté) and, again, Downie and Devlin propose strategies to overcome "ethical
indolence" (2007: 23),

including persuasion (rational argument), facilitation (appropriate learning
methodologies, good teaching materials, suitably qualified personnel, networks of
support) and compulsion (indirect – peer pressure/shaming and direct – government
intervention). The authors have loosely transposed the principles underlying the
judicial education for judges in Canada, in particular the "Social Context Education
Programme, Phases I and II" to serve as a model for an effective and realistic system
of CLEE:

- *Leadership* (support from leaders in the legal profession: public
  endorsements, design and delivery, costs)

- *Local Relevance* (tailored to the areas of emphasis of the
  audience members)

- *Multiple Pillars* (number of stakeholders in legal ethics education:
  consumers, regulators, academics, practitioners)

- *Needs Assessment* (identify the unknown needs)

- *Focus on Lawyers' Roles and Tasks* (legal and factual issues
  encountered by lawyers on a regular basis)

- *Trained Planning Committee and Faculty* (conceptualized,
  developed, designed and developed by skilled persons)

- *Highly Organized Programme Management* (to render participants
  more relaxed and open to learning)

- *Adult Learning Principles* (prepare participants to deploy ethical
  issues and principles in their day to day challenges)

- *Feedback and Evaluation* (for improving programmes)

- *Integration* (stand-alone as well as pervasive throughout all CLE
  programmes).

Recommendation:

When considering the reform of ethics instruction during CPD we would advise TLS
to ask the SRA to examine further some of the principles, strategies and practical
support evidenced in the NSW and Canadian examples cited above.

2.5 Foreign Jurisdiction Route: Qualified Lawyer Transfer Test (QLTT)

The current QLTT training and assessment regime

Of all possible routes to entry, the QLTT is unique in that lawyers from eligible jurisdictions are able to secure admission without undertaking the LPC or a period of work based learning under a training contract (although there may be requirements for a period of practice prior to admission) (Fletcher, 2007). Transferring into the solicitors' profession is becoming more commonplace, with 25% of new admissions in 2002-03 transferred from overseas, the Bar, FILEX, justices' clerks or other routes (Bullock, 2004:4). This year there are likely to be even more entrants to the profession through QLTT than through the domestic route because the easy entry route is being widely advertised overseas alongside notification that new proposals are being developed which will make entry more difficult[15]. In 2007 the monthly average of QLTT applications received was 209. From January 2008 this increased to a monthly average of over 400 applications, and by June 2008 the figure already exceeded the total number of QLTT applications received in the whole of 2007. This trend excludes a peak of 1488 applications received in August 2008, which was attributable to revised guidance taking effect on 1 September.

Those wishing to transfer are required to pass three heads of the QLTT but, under current proposals, in order to sit the QLTT no prior practical experience is required (presumably to allow US lawyers entry here immediately after their admission in the USA). Head III is Professional Conduct and Accounts. It is a two-hour test, and the topics suggested by the Society in the QLTT specification are not compulsory or exhaustive, rather they are intended to serve as guidance.

One QLTT provider, Mr Rees, described its current ethical content to us in the following terms:

> The QLTT Test Specification, issued by the SRA, does not specifically refer to instruction in ethics and, apart from the section of Head III on Professional Conduct, ethics do not feature as an intrinsic subject, although references to, and questions involving an application of, the Code of Conduct are integrated into the Study Guides and may appear in the Tests themselves…OXILP offers no unitary "course" as such, but rather a selection of Study Guides, Tuition Courses and shorter Revision courses, all of which are entirely voluntary to candidates and which candidates may decline to use, or use in a variety of combinations as they see fit. Whilst Professional Conduct only represents approximately one third of the marks available in one particular Head (Head III), and there are four Heads in total, it should be remembered that Head III is the Head which the majority of candidates are required to sit.

In terms of the content of these courses, it follows a 'replication model' or code-based model, one that is designed to satisfy the requirements of the assessment (an examination). This illustrates the important point that assessment is, in many ways, the driver of content. Mr Rees explained:

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[15] See further http://www.sra.org.uk/solicitors/qltt.page

The Professional Conduct parts of the Head III Revision and Tuition courses are based on the Solicitors Code of Conduct 2007, and there is little reference in them to any other sources. Comparative references are occasionally made to the old Guide to the Professional Conduct of Solicitors… [Because of numbers] the teaching is generally carried out in traditional lecture format. With smaller numbers, there is a greater degree of interactivity amongst delegates. All our teaching involves the use of PowerPoint slides and handouts. There is a focus on examination technique and frequent use is made of sample Test papers. Specifically in relation to Head III, considerable use is made of examples from practice, the main focus of the teaching being on Rules 1 to 4 of the Code of Conduct. The approach is very practical, and geared towards preparing the candidates to succeed in the QLTT Test(s)…Head III is assessed through Multiple Choice Questions (MCQs), involving an element of negative marking.

How robust and effective is the QLTT in influencing ethical behaviour?

There is no easy way to answer this question. Nonetheless, there are aspects of the course and assessment that resonate with some of the weaknesses found in other phases. It is a course that is designed to teach and test code-based replication. According to Mr Rees:

Multiple Choice Questions (MCQs) have their limitations in this context as, for example, a candidate is not required to put forward his/her suggested answer to a given problem, but to choose from a number of possible answers. Furthermore, not every ethical problem has a clear-cut answer, so sufficient detail has to be included in the scenarios and the questions, so that candidates are not hypothecating. However, MCQs are particularly well suited to the other subjects covered by Head III, namely Solicitors Accounts and Money Laundering.

While MCQs may have the advantage of being quick, efficient and easy to administer they may not always offer reliable assessment. We would suggest investigating Extended Matching Sets Questions (EMSQs) that may overcome some of the problems identified by Rees and are better suited to problem solving (see further, Wood, 2003).

Recommendation:

TLS to encourage SRA to consider the adequacy of current arrangements preparing candidates for the QLTT and whether more needs to be done to support ethical awareness through providing ethical guidance online or offering ethical training packs[16]. The priority must be to develop rigorous and efficient assessment mechanisms, for example, EMSQs that can rigorously and accurately assess the depth of understanding of foreign lawyers' professional ethics as understood within UK and European contexts. The TLS should advise the SRA to consider quality standards within specialist fields of legal practice, eg family law, and the specific ethical concerns that may arise within these fields.

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[16] We note that the SRA is currently consulting on the QLTT:
http://www.sra.org.uk/solicitors/qltt.page

Section 3: The Challenge of Ethical Assessment

In this section we review the nature of the problem and various options available for ethical assessment of professionalism. Testing presents a difficulty for those committed to introducing ethics into the curriculum. One of our informants challenged the basic assumption that ethics are amenable to assessment: "One cannot assess ethics, only whether the student has learned how to explore a complex situation and how to use different perspectives to come to a round and acceptable agreement with or judgement in exchange with the interests of the parties involved." Nevertheless, all of us at some point or other will get lost in a moral maze, confront an ethical dilemma or have to take a tough decision that contradicts our basic principles. So how, and against what criteria, do we judge how well any of us responds to such challenges?

Evaluating professional conduct

Testing knowledge of rules of professional conduct is relatively easy and perhaps no different from how we might assess knowledge of any other branch of the law. But when it comes to assessing the ethical or moral decision-making involved in the practical application of professional values there may very well not be just one clear set of rules to follow, indeed there may be no rules at all to follow, and much will depend on what guiding principles we choose to take as our starting point for analysis. More pragmatically, the goals we wish to achieve may well influence - if not determine - our choice of principle. This problem is not new and it has long been accepted that the evaluation of attitudes and behaviour is notoriously difficult, if not impossible. It would be as well to remember this complexity when considering whether and how lawyers' professional ethics might best be assessed (Surdyk, 2003; Illingworth, 2004).

Surdyk (2003: 157) neatly sums up the way in which the difficulties of evaluating professional conduct reflect the complex nature of professionalism itself:

> Some knowledge components of professionalism lend themselves more readily than others to use of objective assessment tools. For instance, various quantitative measures are frequently used to test cognitive grasp of components such as ethical principles, advance directives, informed consent, and business ethics. Likewise, efforts exist to assess skill acquisition in some components of professionalism, such as applied ethical reasoning. Other components, however, such as altruism, respect, and integrity, are seemingly less amenable to objective assessment because of their subjective nature. Part of the problem is a lack of familiarity with qualitative assessments as credible and valid evaluation tools that can be used to gain insight into professional behaviours or the lack thereof.

Another problem with assessing professionalism is no matter what it assesses, this will always be subject to the norms of the wider professional environment:

> Values are learned and, unfortunately, sometimes unlearned during the course of medical education, which relies heavily on the role modelling of faculty and attending physicians. Authentic assessments are difficult to develop in environments in which inauthentic behaviour is all too often the norm rather than the exception (2003: 157).

Finally, definitions of professional values vary according to the work status of the member of the profession, and his or her educational background.

> Brownell and Cote demonstrate how terms associated with professionalism are defined according to the educational status of house staff [2001, cited by Surdyk, 2003: 158]. Osborn [2000, cited by Surdyk, 2003: 158] describes how professional values espoused in institutional and program policies were seemingly disregarded and subsequently challenged by medical students with decidedly different life experiences and expectations than the formulators of the policies (2003: 158).

Indeed, one of our informants noted that students vary in their background, ability and interest and this can present challenges for assessment as well as curriculum design:

> Assessment is more challenging than the instruction. Students vary considerably in their interest in medical ethics and one challenge is to bring on board those who have low initial interest. Some students like the opportunity to think about the complex issues in ethics and tolerate the lack of definitive answers to many of the issues. Other students like to come away from a seminar with particular clear facts. Keeping the interest of both types of student is a challenge that we approach through combining the more factual law content with the more diffuse ethics content.

In what follows we aim to highlight current views of assessment in the academic, vocational and professional phases, drawing on experience found in other countries and other professions. Our bibliography highlights further reading.

Current views of ethics assessment

As has been suggested, the proposition that ethics should and could be assessed is contestable. One influential Canadian scholar argues that few law schools and legal academics would accept that students should be tested for ethical "competence" since "a course in legal ethics – like a course in, say, real estate or labour law – requires only that students study the syllabus, not that they believe in it" (Arthurs, 1998). Goldsmith and Powles caution against the danger of reducing the full range and moral significance of legal practice to a set of technical competences. They suggest that ethical competence is more than simply observable compliant behaviour according to some set of minimal prohibitions and standards of performance; it also includes dispositions that are affectively as well as cognitively based. As a result, the capacity to understand, as well as to analyse situations and to apply certain legal strategies in a technically competent manner are both vital to the ethical character of legal practice (Fletcher, 2007). For them "conceptions of professional responsibility need to be developed in ways that exceed, even disrupt, mainstream approaches to ethical instruction" (Goldsmith and Powles, 1998:140).

Similarly Castles (2001) warns that if legal ethics is taught without a coherent philosophical basis, and with an emphasis only on practical ethical problem solving, students are unlikely to see that legal ethics is anything more than a gloss on the substantive law. Castles argues that ethics should be taught as a pervasive set of values that underpin the practice of law, and as an integral part of learning the law as a social phenomenon. Students must be presented with the opportunity to confront many facets of ethical decision-making (cited by Johnstone & Vignaendra, 2003:

122-3). In short, these scholars remind us that any assessment has to be aligned to learning (ethics) objectives.

Johnstone & Vignaendra (2003) have produced an extensive report for the Australian Universities teaching Committee entitled, Learning Outcomes and Curriculum Development in Law. Their study synthesises many of the challenges that beset ethics teaching and assessment and demonstrates that Australian law schools, for instance, have yet to achieve consensus about the nature and desirability of legal ethics instruction, let alone to find the final solutions to the challenges of ethics assessment. Taken from their report (2003: 122-3):

> Le Brun (2001) recently surveyed Australian teachers of legal ethics and professional responsibility and found that some Australian law schools introducing ethics and professional responsibility subjects into the law curriculum appear to be relatively uncommitted to their development, success and implementation; not all law schools offer as much legal ethics and professional responsibility teaching as some law teachers think appropriate, and that Australian law schools have not adopted the teaching and learning innovations in ethics and professional responsibility that have been developed in the United States. She also raises some important issues for future work on the teaching of ethics and professional responsibility, such as:
>
> - how law schools can integrate and embed ethics and professional responsibility and lawyering skills into the undergraduate curriculum;
> - how student learning in this area can best be assessed; and
> - what work being undertaken in other disciplines (particularly Philosophy and Applied Ethics) might be of interest to law teachers.

Current views on and approaches to ethics assessment at the academic phase

Assessment methods at the academic phase will remain subject to university regulation and constrained by audit mechanisms geared up to traditional modes of assessment (eg three hour examinations, coursework or a combination of both).

However, in terms of practical approaches to assessment at the academic phase, written examination is certainly not the sole option. As Johnstone & Vignaendra put it for the Australian context, "the view of assessment in the traditional model of law teaching – a single end of year written examination after 'teaching' was completed – no longer dominates law schools as much as it did in the past" (2003: 363)[17]. Their report describes assessment models using student-led classes and group work (2003: 374). Clinical approaches, virtual learning environments (VLEs), and other forms of assessment, including reflective learning logs, group work and work based experience are all beginning to feature in the undergraduate curriculum. These more

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[17] For discussions of diverse assessment methods in undergraduate education, see Hinett and Bone, 2002 and Sergienko, 2001.

flexible methods need to be considered (Le Brun, 2001) and of particular interest is web-based assessment (Zairiski, 2001).

The use of portfolios and interviews for assessment has been highlighted elsewhere as an effective and worthwhile approach and Gordon's (2003) study looked at the assessment of students' personal and professional development (PPD) in relation to professionalism using portfolios and interviews. "The Faculty of Medicine at the University of Sydney sought an assessment method that would demonstrate the value of reflection in attaining PPD, provide feedback and encourage students to take responsibility for setting and achieving high standards of performance." The results show very high student and staff satisfaction with the experience. Some 76% of students agreed that they could see opportunities to modify their approach in some ways as result of this exercise. The fact that the portfolio and interview are the only summative assessments in the first year emphasises the importance that the Faculty places on PPD.

The use of portfolios and other forms of teaching and assessment encourage the use of reflective practice in legal education and training. Hinett (2002) has produced a resource for integrating reflective practice into teaching and the legal curriculum. Examples include in legal clinic, work experience option, reflective diaries on a BVC conference skills course, reflective journals and essays on an LLM course, reflection using a virtual chat room and in law teaching more generally.

In this way, the current developments in legal ethics assessment at the academic phase seem to support a range of methods with the overall objective of fostering reflective practice.

Current views on and approaches to ethics assessment in the workplace

The TFRG's own consultants (Webb et al, 2004) expressed reservations about reliance on written assessment in the Training Contract stages and proposed that any final assessment of ethical competence, probably in the form of the portfolio, should be incorporated within a proposed final assessment interview by external assessors. Furthermore, in such an interview, candidates should additionally be asked to respond to a number of hypothetical questions testing their understanding of conduct issues.

They supported the use of portfolio provided it contained certain features: evidence on which assessment decisions can be based; critical analysis (reflection), a clear structure and an explicit link from the evidence and claim to the learning outcomes/assessment criteria. Their report outlines several useful ways of making portfolio assessment more familiar, manageable and supported.

Webb et al recommend the abolition of the PSC to be replaced with a professional development obligation that would include a proportion devoted specifically to training in professional conduct and ethics. A senior solicitor agreed that the PSC is too "front load and cram" when it comes to professional conduct and ethics. Duncan (2004) also includes some evidence that the PSC is perceived as ineffective, irrelevant and a disruption. This does not mean necessarily, however, that the PSC could not be a worthwhile supplement to on-site ethics instruction.

The Webb et al (2004) report provides extensive recommendations about the nature of a workplace portfolio. They point out several pitfalls as well as desirable practice

and overall come to favour the use of a combined portfolio and Critical Incident assessment:

> The assessment of ethics was seen by respondents as a somewhat problematic feature of the portfolio. It is in the nature of a self-reported assessment that if an ethical issue has been missed or is not recorded then it is gone and cannot be assessed. It is impossible through a conventional portfolio to assess the ability to identify ethical issues, which is of course a necessary feature of competence. This problem is partly addressed by combining the portfolio with the Critical Incident assessment. This is a tape-recorded simulation requiring a limited number of utterances by the candidate. Ethical issues are deliberately inserted into it. This method is restricted by the response time limit of 30 seconds and as a recorded simulation it cannot permit a series of exchanges necessary for the exploration of many ethical issues. The live interview and advocacy assessment in the Magistrates Court Qualification is seen as a much fuller opportunity to explore ethical understanding.

This method also overcomes some of the ethical and legal issues of client confidentiality that may be breached or threatened by using real cases as the primary material for assessment.

Their report also emphasizes the need to 'train the trainers' or to make the supervisors more adept at recognizing ethical and legal issues, and therefore at assessing their trainees.

> Skilled supervision is also a major factor in generating reflection on such issues. Both assessors remarked that they were surprised how often supervisors missed ethical and legal issues. There was a general view that supervision needed to be much more informed. One suggestion was the use of scenarios to prompt discussion between supervisor and supervisee.

Johnson (2005) draws attention to the Scottish experience of piloting a summative test of trainees' abilities by means of a *Test of Professional Competence* (TPC), which focuses on legal skills, professional conduct and ethics. The examination element of the TPC project was abandoned in favour of a system of notification of quarterly performance reviews (see also Bone, 2008).

One senior solicitor said, "My preference would be for [ethics education] to be pervasive throughout the training contract and CPD, whereby practitioners are asked to demonstrate that they're aware of ethical issues and that they have the sound principles to deal with them." She said that seminar-based debates and case-studies would not be difficult to integrate in large firms. It may, she said, be more difficult for smaller firms and perhaps these seminars could be made commercial so that smaller firms could pay to attend them.

As with the academic phase, there is not yet a single, tested form of ethics assessment, but the literature suggests that the structured portfolio, interview and critical incident reporting seem to be favourable. The senior solicitor we spoke to provides a worthwhile suggestion for the use of seminar-based debates and case studies to create a more pervasive and reflective ethics culture.

Lessons from Medicine, Business and Management

Although ethics assessment may be difficult it is still important to include a robust assessment component to ethical training in modern medicine. As Wong and Cheung (2003: 5) explain, "Since assessment is a strong motivator for learning and the mode of assessment influences learning behaviour, assessment in ethics is essential in any medical curriculum with an ethics course."

A useful way of conceptualising ethics assessment is the 'Know–Can–Do' learning pyramid. A version of this has been produced by Campbell et al (2007) in the diagram below (figure 1)[18].
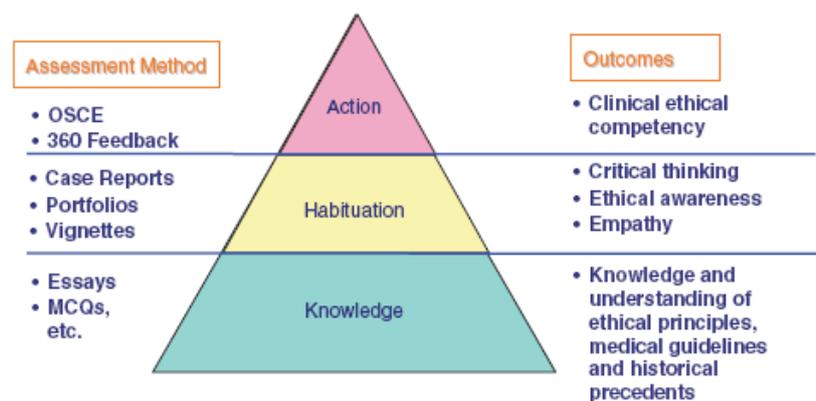
Figure 1. Learning outcomes and matching methods of assessment in key areas of medical ethics education.

Wong and Cheung (2003) go on to explain the different levels of learning and assessment:

> The bottom of the pyramid, the 'know' level, refers to the knowledge of theories, concepts and principles in medical ethics. This is essentially the cognitive component of medical ethics education. The 'can' or habituation level in the middle refers to the students' ability to select and apply what they have learned from the 'know' level. Usually students are assessed in a controlled and observed setting with a standardized stimulus such as a real or simulated patient. This level pertains to the possession of application skills. At the top, the 'do' or action level refers to one's behaviour in a clinical setting when not under scrutiny, and refers to attitudes and performance in actual practice, which arguably is the most relevant outcome of ethics education.

The point of the pyramid is to represent the increased complexity in teaching and assessment outcomes as one moves up levels in the hierarchy. Campbell et al (2007) would add: "All three of these levels are what we need to be aiming for. At times, we can see the impact of the irresponsible behaviour of medical students on their careers later on. From that point of view, clearly, knowledge is not enough. Knowledge is needed for habituation, to shape the mould within which a student

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[18] Permission was kindly granted by Professor Campbell to reproduce their diagram, which was adapted from Miller, G.E. (1990) "The assessment of clinical skills/ competence/ performance" 65 *Academic Medicine* S 63-7.

behaves so that there emerges action of a kind that is clinically appropriate and effective" (2007: 432).

The diagram also outlines common forms of assessment for each level. Assessment at the 'know' level may include the written case report. Again, Wong and Cheung (2003: 6) note, "[s]tudents are then expected to perform some or all of these tasks: identify ethical issues, consider courses of action and select what they consider an appropriate action and then justify this decision. In this process, students can demonstrate their ethical sensitivity, their knowledge of the ethical analytical framework, their skills of analysis, reasoning and reflection." Myser et al (1995) propose the format of a written case report, based on a case identified by the student. Since the student is responsible for identifying an ethically problematic case, this has the advantage of being student-centred, and may encourage reflection and enhance ethical sensitivity (Wong and Cheung, 2003: 6).

Assessment at the 'can' level will be different. As Wong and Cheung (2003: 6) note, "to assess medical students' competence in selecting and applying knowledge in clinical practice requires a performance-based assessment." They describe the Objective Structured Clinical Examination (OSCE) as the most widely adopted method at this level. Campbell et al have included it at the higher level. "An OSCE typically involves a student interacting with a standardized (or a real) patient depicting a clinical scenario within a fixed period of time (Collins and Harden, 1998). The student's performance is marked according to whether or not the student exhibits certain behaviours listed on a checklist." Other appropriate assessment methods may involve face-to-face, formal evaluation sessions - these have significantly improved the detection of unprofessional behavior in both clerkship settings (Hemmer, 2000) - or role-play with subsequent review of simulated clinical cases (Duff, 2004).

According to Wong and Cheung, the 'do' level refers to how medical students or doctors actually behave in practice when interacting with patients (2003: 6). Because of the difficulties of assessing at this level, assessment has been more usually implemented as part of ongoing formative assessment and professional development, rather than as summative assessment. They argue that:

It is possible, however, to test the ability of the students to perform in the 'real world' and to come to a judgment about the students' ethical behaviour by studying them and keeping a record of this behaviour over a period of time. One promising tool that has been developed for this purpose is the use of portfolios (Friedman Ben David et al., 2001). Portfolios can be produced containing the evidence necessary to assess the range of learning outcomes expected including the student's ethical attitudes and professionalism. In the portfolio assessment adopted by Dundee Medical School, the ability of a student to practise "with appropriate attitudes, ethical understanding and understanding of legal responsibilities" is an outcome that is explicitly identified for assessment (Davis et al., 2001). A strength of this approach is that the evidence about the students' attitudes comes from a wide range of sources and is documented in the portfolios. This may include the ratings and views of clinicians, members of the multidisciplinary team (for example nurses) and patients. It also includes the students' own commentaries on the patients they have seen and their reflection on them.

The assessment of attitudes may also be in the form of satisfaction questionnaires, which are widely used in other settings. Newble (1983) proposed an interesting and

innovative assessment method, based on the critical incident technique first developed by Flanagan (1954). The procedure involves evaluators describing or writing down the most critical incident they have encountered concerning the performances of individuals who are to be assessed (Wong and Cheung, 2003: 7; see also Economides and Smallcombe, 1991, Annex 3).

Other methods, also found in the literature on modern management, include three-hundred-sixty–degree evaluations (Duff, 2004) that are used to solicit feedback from patients, co-workers, peers, and instructors, and may be effective in identifying deficiencies in professionalism. Peer and self assessments are another favoured method because the traits do not present themselves as stable characteristics and are often exhibited in contexts other than those directly observed or supervised by faculty (Ginsburg et al, 2000, cited by Surdyk, 2003: 157).

Another proposal involves humanism ''connoisseurs'' being employed to qualitatively evaluate medical trainees' professionalism and humanism (Misch, 2002). Such connoisseurs would possess expert knowledge, training, and experience in the interpersonal aspects of the art of medicine, allowing them to deconstruct concepts such as empathy, compassion, integrity, and respect into their respective key elements while evaluating physicians' behaviors as an integrated, cohesive whole. Through the use of a rich descriptive vocabulary, humanism connoisseurs would provide valid formative and summative feedback regarding competency in medical professionalism and humanism. In the process, they would serve to counteract the relative marginalization of professionalism and humanism in the informal and lived curricula of medical trainees.

More detailed sources to make assessment measures more valid and robust

Stern (2006) outlines the value and importance of measuring professionalism to detect deviant behaviour, provide formative feedback and reward those physicians who are the most altruistic, humanistic and compassionate. His book provides examples of recently developed methods for describing even subtle professional behaviours: standardised clinical encounters, assessment of moral reasoning evaluations, surveys to assess individuals and institutions, measuring specific elements (empathy, teamwork and lifelong learning), critical incident reports, peer assessment, the use of the portfolio, the use of assessment for selecting applicants, and for accreditation. The main problem is determining whether those observations and measurements are representative of how the person (and the institution) will behave in all situations – one needs, he argues, triangulation (multiple settings, multiple observers). Stern identifies the characteristics of effective assessment: realistic context, a situation that involves conflict (i.e. choices between equally worthy values), evaluation of reasoning strategies rather than only the "correct" resolution. On top of this, transparency and symmetry (all levels are evaluated using the same methods) are important (2006: 8-9). He provides a useful set of criteria for designing assessment of professionalism (2006: 11).

The UK Postgraduate Medical Education and Training Board (PMETB) has laid down nine principles that all assessment systems for postgraduate medical education must meet. It argues that workplace based assessment (WBA) is under utilised. WBA, it argues, has high validity because of its authenticity of assessing actual performance

(2005). Assessment is seen as "a potent driver for learning" (2005: 6). One should assess what one sees as important, not just what is easiest to assess.

In terms of assessment methods, the PMETB approves a "basket" of methods for different contexts, including direct observation, multi-source feedback, trainer's report, research, critical incident (significant event) review, video assessment, and case-based discussion. "Because of the complexity of assessing medical proficiency in areas such as "probity" and "professionalism", the assessment strategy must also be flexible enough to capture and assess opportunistic evidence as it arises." Assessment methods must map to the intended learning outcomes. The American Board of Dermatology has drawn up a table to connect its competencies, with required skills, examples and potential evaluation methods (see: http://www.abderm.org/residency/table.htm).

The PMETB supports all evidence for assessment being incorporated into a portfolio (with room for reflection) and an end point summative review, much like the one endorsed by Webb et al (2004), so long as "the synthesis of the evidence and the process of judging is made explicit" (PMETB, 2004a, cited in 2005: 8). It stipulates that assessment methods should include some patient involvement. It could be difficult to translate this fully to the solicitors' context since what the patient represents (the client, court, community, business, social world) is contestable.

Nonetheless, the PMETB report could in our view serve as a useful framework to guide future development in the area of workplace based assessment for solicitors, including integration, evidence-based, positive standards (not just 'lack of negative evidence'), transparency, relevant feedback, recruitment of assessors and lay input (2005: 10-12). It outlines areas for improvement in the current model, including the need to develop and validate assessment tools, to define roles and responsibilities of people involved in the training, to train assessors and to support the system with adequate funding (2005: 14-15). It provides a suggested WBA quality assurance check-list (see appendix 1 of the 2005 report) as well as a Personal Development Plan (for trainees before meeting with an educational supervisor) (appendix 4).

The *Ethics Teaching Highlighted in Contextualised Scenarios* (ETHICS) project (http://www.prs.heacademy.ac.uk/projects/ethics/index.html) is currently exploring ethical assessment across different professional contexts. The project claims that assessment methods should be objective, consistent, transparent and appropriate to the specific needs of the subject-area being assessed. The broad aims of the ETHICS project are:

- To help the student find fulfilment in their future career by helping them to make choices that they can live with, and by reducing the emotional and psychological stress caused by moral indecision and confusion;
- To ensure that the student acts in a way that serves the best interests of society in general and their service-users in particular; and
- To ensure that the student acts in a way that serves the best interests of their chosen profession.

The challenge to teach well includes developing curriculum content as well as instructional methods. Tools such as the electronic clearinghouse initiated by the

American Society for Bioethics and Medical Humanities (ASBH) have been highlighted by Surdyk (2003: 158) as providing "an excellent source for locating and building on ethics curricula currently used in teaching hospitals across the country. In addition to its role as a resource for content and activities, the clearinghouse will provide a framework from which consensus principles of ethics education can be drawn."

There is some literature on conceptual frameworks and instruments with which to assess the ethical performance of organizational members (Gatewood and Carroll, 1991) and managers' moral reasoning (Weber, 1990) that may be useful for CPD. Certain scholars argue that legal educationalists need to take more seriously the impact of business and business ethics on lawyers' practice and ethics, and that much could be leant about professional ethics through storytelling (Economides and O'Leary, 2007; Mescher, 2007).

By way of conclusion, we note the observation of Campbell et al (2007: 431) that emphasises the underlying connections linkages between medicine and other liberal professions and disciplines:

> Firstly, there is now a wide acceptance that medical ethics has to be multi-disciplinary and multi-professional. It cannot be the business of one particular academic discipline or the concern of any single profession. Secondly, it should be academically rigorous, and taught in a manner that is clearly related to research, as the other academic subjects in the medical curriculum must be. Thirdly, it ought to be fully integrated into the medical curriculum both horizontally and vertically so that there is a seamless transition between whatever is being taught at that time and the ethical issues. Ethics should not be regarded as an add-on or after-thought to the main business of medical education. A number of bodies have recognized this, including the General Medical Council in the UK which in its 1993 report on *Tomorrow's Doctors* and its subsequent reports has emphasized the importance of including ethics in the curriculum (GMC 1993).

A Final Note on Validity and Reliability

The primary difficulty with ethical assessment is validity – the degree to which a measurement instrument truly measures what it is supposed to measure. It is concerned with whether the right things are being assessed, in the right way, and with a positive influence of learning. Consistency of assessment or reliability is also a factor. While the validity and reliability of ethics assessment are contestable and while there is not as yet a 'gold standard' (Goldie, 2000), Hamdorf and Hall (2001) provide a compelling argument for not using these as reasons not to go forward with ethics assessment: "It is generally agreed that it is better to measure uncertainly the significant than to measure reliably and validly the trivial" (cited by Wong and Cheung, 2003: 7).

Recommendations:

TLS to consider further what component or components of professionalism it wishes to assess at each stage and therefore which sorts of assessment methods are most suitable. This may involve the use of a multi-sourced, multi-layered assessment approach as illustrated in the 'know-can-do' pyramid.

TLS to encourage the use of multiple methods of assessment at the academic and vocational phases, with the broad aim of fostering reflective practice.

TLS to review the Webb et al (2004) report, to reconsider the use of (online) portfolios, interviews and critical incident reporting for TC phase.

TLS to consider funding action research or research that investigates the effectiveness of various ethics assessment practices at each phase of training, including case reports (externally-identified as well as selected by the trainee), to portfolios and interviews (with and without critical incident reports), to portfolios with multiple contributors.

TLS to further consider how best to establish "ethical seminars" where dilemmas and scenarios raising awareness of professional values can be discussed amongst experienced and junior lawyers, and trainees for TC and CPD. Further, TLS to consider how best to encourage sharing of firm-based ethics assessment practices (clearing houses/web resources/ tools for teaching and assessing /content: exercises, case-based examples and stories etc).

We advise TLS to follow-up PMETB and other resources referred to in this section in order to invite the SRA to define and promote the ethical assessment that is valid, transparent and positive, and to provide robust training and adequate support to those involved.

Section 4: Policy Implementation

In this section we briefly examine the policy context within which recommendations and strategies may be further developed and implemented. The options for change described or signposted in our previous section must be considered against the backcloth of a changing environment for legal service provision. Ethics do not exist in isolation and will need to be rooted firmly in the culture of the work place. Our aim has been to make recommendations based on lessons that emerge both from within and beyond the legal profession. In so doing we should like to assist TLS position itself so that proposals for the ethical training of solicitors make them not merely 'fit for purpose', but rather equip them to be amongst the most highly respected, advanced and morally fittest of modern professionals found anywhere.

In approaching this ambitious goal we suggest there are two quite separate agendas that can de defined according to whether the underlying obstacles are seen as essentially *structural* or *behavioural*. Should one concentrate more on modifying the behaviour of systems or people? In any event, proposals for change will need to take account of the common principles of 'Better Regulation' (Mandelkern Report, 2001: 9-10) and focus far more on the management of law firms (Mayson, 2007; Empson, 2007: 186) and the collegial culture they create and support (Lazega, 2001). TLS may be able to do certain things to stimulate awareness and debate of ethical issues, but it is also important to recognise there are limitations. Those managing law firms, and individuals working within them, must also assume responsibility for future ethical agendas. In our view a wide-ranging debate on professional values is long overdue and we very much welcome the current initiative of TLS to launch its campaign on "Markets, Justice and Legal Ethics":http://www.lawsociety.org.uk/newsandevents/news/majorcampaigns/view=newsarticle.law?CAMPAIGNSID=383533.

As former Law Society President Andrew Holroyd notes:

> With each generation, our profession has always been ready to meet new challenges while remaining true to our core values. In this period of ABSs, global markets and the increasing importance of corporate citizenship we must refresh our thinking once more to present a positive, confident vision for the future of our profession. That is what this campaign is all about.

Recommendation:

TLS should follow through the 'open debate' it has started and review the results of its online poll. It should consider ways in which ethics could become more prominent and whether it needs to be doing more work on embedding MacCrate-type fundamental lawyering values throughout the profession. As we have suggested earlier, one way to help solicitors reconnect with their basic professional values may be to review and reinstate an oath/declaration analogous to the medics' Hippocratic Oath.

Structural factors

Global markets and corporate citizenship, as Andrew Holroyd observes, present fresh challenges to ethical conduct. More immediately the LSA 2007 will have major

implications for the future scope and nature of legal work, particularly with the introduction of Legal Disciplinary Practices (LDPs) and Alternative Business Structures (ABSs), not all of which can be predicted with accuracy (Webb, 2005). But there may also be a danger in exaggerating the impact of this legislation and, as with the Courts and Legal Services Act 1990, not all fears about the demise of professionalism and threats to secure markets are likely to be realized (Abel, 2003). It is clear, however, that the issue of non-lawyer management of nascent legal structures, permitting novel inter and intra professional relationships, will need to be monitored and managed carefully if ethical standards are to be maintained. And it is important that the new regulatory framework embraces educational objectives (Levin, 2006).

Further there are also other trends likely to impact on future ethical standards that TLS should also plan for. First, the gender shift in the profession has created a different profile within the profession and this is already shaping both training and cultural change within law firms. Ethical responsibilities may well be defined and realised through an 'ethics of care' (Gilligan, 1993) and feminist legal ethics more generally could, and some would say should, play a far more prominent role in defining the character, clients and duties of professional legal work (Rhode, 1998). Whether ethics should feature more prominently in decisions regarding career choice (Hutchinson, 1998) or law firm policy on client selection, are issues that need to be debated in both the classroom and boardroom.

Also relevant is the 'quality of life' debate and the expectations new entrants now have concerning their working lives and how work fits in with the rest of their lives. There is an interesting literature challenging the alienation, exploitation and inhumane structures that sometimes govern legal lives and attempt to find salvation for the 'legal soul' (Litowitz, 2006; Sells, 1994). From a pure business standpoint there may also be an argument that law firms should develop expertise in conducting 'ethics audits' for other organisations thereby introducing new income streams (Sampford and Blencowe, 1998; Chu, 2008). Law firms need to design and implement 'ethical infrastructures' that do not merely comply with formal policies but actually modify and improve lawyer conduct (Chambliss and Wilkins, 2003; Parker et al, 2008).

Recommendation:

TLS and SRA should be encouraged to consider whether, both as part of risk management and an attempt to expand legal markets, there should be mandatory ethics committees or ethics officers/partners in all law firms responsible for developing firm-wide policy on ethical issues, including training, client care, conflicts etc.

Behavioural factors

Whatever the underlying structures or environments within which legal work takes place it is clear that more work could be done to increase the motivation to be ethical. How can this be achieved? In our view TLS needs to focus on the issue of 'ethical leadership' (Knights and O'Leary, 2006) and invest in strategies that will create a transformational shift in organisational culture and behaviour (see also Center for Ethical Leadership: http://www.ethicalleadership.org/). This needs to happen at many levels, including within law schools, law firms and within the professional bodies

themselves. The common underlying issue that needs to be addressed is the nature and meaning of professionalism (Vischer, 2005).

Within law schools there will need to be investment in training and support programmes to develop a cadre of ethics teachers able to deliver desired learning outcomes for subsequent ethical instruction. The *United Kingdom Centre for Legal Education* (UKCLE) has an important role to play here and is already doing valuable work on 'training the trainers' that could help shift opinion so that ethics become more pervasive and mainstream within the undergraduate law curriculum. There should also be an 'ethics curriculum network' to discuss ideas for advancing ethics instruction in law schools, as currently happens in Canada where some 15-20 law teachers from across Canada meet regularly to exchange views and experiences on ethics teaching.

Recommendation:

TLS to consider supporting the teaching of legal ethics through investing in the work of existing centres (UKCLE) or creating a new centre dedicated to teaching and research on professional legal ethics. Other forms of support that could be investigated are: initiating a student essay competition on the topic of legal ethics (to be published in *Legal Ethics*). City Solicitors' Educational Trust (CSET) and large law firms to be encouraged to support lectureships, fellowships and scholarships in the field of legal ethics and professional responsibility.

After graduation, or the initial phase of qualification, and during the early years of practice, ethics is learnt in the workplace, it would appear often through the medium of storytelling (Economides and O'Leary, 2007). More might be done to encourage and motivate good behaviour, and to provide support where lawyers find themselves confused or unclear as to which ethical path to follow. Ethics consultants might be brought into a firm to advise on ethical policies and to do an ethics audit. In our view training needs to prepare for these situations but also far more support could be given, for example through hotlines and national prizes. Though it is important to recognise limitations, as stated in a recent case before the Solicitors Disciplinary Tribunal:

> The Tribunal considers that it is incumbent upon solicitors to have proper regard for the principles which lie behind the written rules or codes of conduct and not to seek justification for their actions by dissecting the letter of such rules. Because the rules are in place to protect the public, a solicitor has always to bear those fundamental principles in mind when applying the letter of the rules to his own situation

The *Law Society's Gazette* offers a column providing advice on ethical dilemmas and hotlines are available to the SRA's Ethics Guidance team but, as noted by the Solicitors Disciplinary Tribunal:

> …...it is not the job of the ethics department to confirm that a complex commercial arrangement does not breach any of the rules relating to professional practice or does not amount to conduct unbefitting a solicitor. The Respondents would be expected to rely on their own judgment including seeking advice elsewhere had they deemed it appropriate

Finally, prizes may have a role in stimulating good conduct. In the field of business ethics there is a prestigious annual ethics prize available, the *Botwinick Prize for Business Ethics*:

http://www.unilever.com/Images/sp_Botwinick_Prize_in_Business_Ethics_2007_tcm 13-112567.pdf

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Recommendation:

TLS to investigate use and value of ethics hotlines, and the institution of an annual prize to be awarded to either an individual or a law firm that makes an outstanding contribution to the field of legal ethics.

Section 5: Conclusion

The primary lesson to emerge from other professions and jurisdictions is that the key to effecting a shift in attitude toward ethics in either educational programmes or the work place is leadership. Reforms will be resisted and excuses, based on fear, 'unripe time' or sheer apathy, that support the status quo can be expected. But if the political and moral will exists change can and will come about.

Gordon (2005:30-31) has noted the fact that law schools are sources of "revived professionalism" and it is important to start the process of refreshing the ethics of the profession here. The evidence from abroad suggests that there will be academic apathy if not resistance toward ethical instruction but this can be overcome so that ethics is successfully embedded in the curriculum. The direct and obvious path of making ethics mandatory has certain attractions but there are also risks. Our advice is to reopen the *Joint Statement on Qualifying Law Degrees*, but only after the ground has been well prepared.

At subsequent phases of legal education more needs to be done to deepen ethical instruction and make it more critical and imaginative. The solutions here also require persuasion and debate. The current LPC, and the vocational stage more generally, offer increased flexibility that means there is both freedom and opportunity to experiment. Ironically, many providers prefer to be told what to teach and yearn not for freedom but a *dirigiste* approach that secures equality of treatment for all and predictability of standards. Our suggestion is to continue to guarantee minimum standards but, wherever possible, encourage diversity of provision. We think different modes of delivering and assessing ethics need to be evaluated in different legal contexts before prescribing any one model. Knowledge of the rules of conduct will of course remain important but this knowledge increasingly will need to be supplemented by other skills and professional attitudes that we suspect may be specific to particular legal specialisms. For example, ADR challenges traditional adversarial ethics and we shall need to conceive of new forms of ethics for new forms of legal work such as mediation (Boon, et al, 2007). Also vital is the lawyer's commitment to justice and professional values, particularly at a time when these commitments risk being displaced by commercial values. As Greenwood (2007: 195) notes, "The professions are highly privileged. It is time, once again, to scrutinize more carefully the forces determining the relative priorities which lawyers give to professional and commercial values and to consider whose interests they serve. In other words, *cui bono*?"

Section 6: Select Bibliography

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Section 7: Annexes

Annex A: Survey of Ethics Teaching

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Nigel Duncan (n.j.duncan@city.ac.uk)

Report for Kim Economides 16/02/2008

We surveyed all UK Law Schools plus a non-random selection of colleagues teaching in other jurisdictions. Those respondents who expressed a willingness to participate further were then asked questions designed to elicit a more qualitative response.

This report will focus on the results returned from UK Law Schools in respect of the first survey, and then refer to selected responses regardless of jurisdiction.

1. Current ethics teaching in UK Law Schools

We received 32 responses from UK Law schools, a modest proportion of the whole. We make no claims that the findings reported below are in any way representative. It seems to us likely that most of those who chose to respond are likely to include a significant majority with an active interest in the teaching of ethics. We would speculate that these findings are closer to the majority of those law schools actively teaching ethics than a representative sample of all law schools.

How widely is ethics taught?

Of those 32 responses, the programmes on which ethics were taught were as follows:

Not at all	7
LLB	18
Mixed degree	3
LLM	11
PGDip	2
LPC	7
BVC	3
Other	5

Discrete or pervasive teaching?

We asked whether ethics was taught in discrete modules, or pervasively. The results clearly showed that while pervasive teaching was common on the professional programmes, it was relatively rare on academic programmes.

LLB:	discrete modules:	13
	pervasively:	5

```
LLM:   discrete modules:   10
       pervasively:         1
LPC:   discrete modules:
       pervasively:         6
BVC:   discrete modules:   1
       pervasively:         2
```

Course content

We asked what content was addressed. This data does not disaggregate degree and professional courses.

```
Formal sources           23
Social context           20
Philosophical context    17
All three                14
Formal/social             5
Formal/philosophical      2
Formal alone              2
Philosophical alone       1
Other                     5
```

N=25

'Other' content included:

> 'Student personal morality'
> Personal qualities and moral frameworks
> University Ethics Policy & Guidelines
> Practical and comparative problem-solving
> Reference to other professional and practical contexts
> Reflection in clinical units, including thinking about ethics

Learning Methods

We also asked what learning methods were used. This data does not disaggregate degree and professional courses.

Method	No	% (teaching ethics)
Lecture	21	84%
Problem-solving scenarios	22	88%
Small group workshops	17	68%
Clinic supervision discussions	7	28%
Clinic seminars	7	28%
Other	6	24%

N=25

2. Qualitative responses

What are our desired learning outcomes?

> 'Motivate students to use their legal skills to ensure justice.'

> 'identify their own deeply-held ethical priorities and … acquire the courage to apply them.'

> 'coherent self-view as lawyers … make their own moral choices'

> 'learn about the ethical demands of the legal profession and examine how these demands impact on their own moral standards and reasoning.'

> 'An ability to question and assess, rather than accept uncritically, professional rules.'

> 'An alternative way to look at legal rules and their operation and set them in a wider context.'

One respondent explored the need to have a clear idea of what we mean when we refer to 'teaching legal ethics'.

> 'Teaching ethics poses important challenges for law teachers including the questions of what we aim to achieve (knowledge, problem-solving skills, moral character or commitment, analysis of cultural economic, philosophical, political, psychological or sociological dimensions of legal work, etc.), how we achieve our goals, whether and how we measure the progress of our students towards them. Given the potential for a huge variety in goals, methods and assessment regimes, when law teachers discuss "teaching legal ethics" it becomes important to clarify what we do and what we aim to achieve, to avoid unnecessary disputes generated by what "teaching legal ethics" means.'

Undergraduate teaching?

There were diverse views as to whether ethics should be taught at the undergraduate stage:

> 'I think professional ethics should become mandatory at ug level within the UK'

> '… there is not much teaching of legal ethics at undergraduate level which is a really undesirable situation.'

> 'Except so far as professional ethics impinges on the substantive law (as for example in relation to breach of confidence) or on aspects of procedure taught on papers within the degree programme, they seem to me to be best taught by the professions at the professional stage.'

A majority was in favour and this was confirmed by audiences at conferences (although these were, of course, self-selected).

Pervasive teaching or discrete modules?

The majority view is that a pervasive approach is desirable supported by (ideally two) discrete modules. The practical difficulties of achieving this were also recognised. When asked how it might be achieved responses included:

'The more collegial and consultative the teaching environment, the easier all this is to achieve: ethics professors can take nature lead and offer help, may be harder for junior professors to initiate, so faculty policy or culture may support; if roadblocks appear or persist, administration should become involved in politic manner to encourage faculty cooperation.' (USA)

'Teaching in general, and hence teaching ethics in particular, would have to be far more important and rewarded and respected in academe. As long as scholarship is the only coin of the realm, that can't happen.' (UK)

'Persistent faculty dialog may produce incremental change.' (USA)

'Have a course but also get each teacher in every course to do at least one problem on integrating ethics and to think about ethical messages they send on a daily basis.' (USA)

'Acquiring political power in the law school, directly or through others, is the only ultimately effective method.'(Australia)

'All modules should address ethical dimensions of the law or legal practice where appropriate. There should also be a specific legal ethics module which will look at moral reasoning, morality of the law, some theoretical commentators, formal rules of ethics (e.g. codes of conduct), professional ethos and aspirations etc. Ideally this should also be taught in conjunction with a clinical component which includes actual (or simulated) legal practice.' (UK)

Content and method

The following quote is not representative but comes from a respondent with experience of the approach proposed.

'There is a real struggle to ensure students move beyond the formal professional conduct rules and see the link (and tension) between these rules and the lawyer's own ethical commitments and broader philosophical theories. Students need to have some training in moral reasoning and see ethics in the context of legal and other professions otherwise it becomes either mechanistic or abstract. The key is to bring the theory and the practice together in a clinical environment but with a class based component and teaching resources that require students to grapple with the underlying moral questions.' (UK)

Other respondents indicated a number of approaches to avoid:

'I find the lecture method very discouraging. I can't think of a worse way to facilitate learning about ethics. Problem-solving scenarios are a little better; but the best methods by far are experiential.' (UK)

'Memorization of abstract rules, removed from conflicting pressures of practice, does not constitute learning about ethics.' (USA)

'Ethics should not be taught in large classes!' (USA)

And some to adopt:

the cost/time-effective method, in my view, combines small-group workshops using problem-solving scenarios, because these engage people and to a degree forces them to take simulated responsibility for the consequences of their decisions. Such ownership is the only way to ethical growth and retention of learning

'… main delivery ought to be clinical discussions and clinical seminars.'

However, there were perceived problems of live clinic work:

'They may well limit how radical a solution can be advanced (for insurance and professional conduct reasons).'

One respondent proposed a solution:

'A few introductory lectures are helpful but the main delivery ought to be clinical discussions and clinical seminars. Ideally students will be required to build on their live client experience by undertaking analysis and reflection of ethical issues and taking the discussion further and adding rigour and consistency through the use of hypothetical extensions to the real life experience and by structured and semi structured seminar type discussions with a requirement for advance preparation. It must get beyond the students' personal feelings about a case and thus must involve more rigorous analysis and critique of the ethical considerations.'

A further solution proposed was:

'Seminar teaching linked to clinic involvement, because of the need for an overview of academic discussions of ethics combined with the benefit of student investment in the outcomes of actual moral dilemmas.'

Overall, there was very little dissent from the view that active, experiential learning methods of one sort or another were the most effective in achieving learning. These may include live clinical work, supported with seminar discussions; realistic simulated activities; work with realistic problems, etc.

3. Results of Group Work at LILAC Conference, Warwick University, 3 January 2008

Having presented some of the results above we asked our participants to break into four groups and adopt either a 'pervasive' or 'discrete module' approach and brainstorm methods of making the chosen method work effectively. The results are shown below, taken from flip charts drawn up by the groups.

GROUP 1.   PERVASIVE

- Lectures, tutorials and assessments.

- Morals v Code of Conduct.

- Hypotheticals and clinic work.

- Whilst pervasive, not pervading into every subject for teaching purposes (ethics does pervade into every area of law).

- Initially at entry (degree) level, what are lawyers? Hired guns? Approach to take?

- Look at the bigger picture first of all rather than labelling something as 'ethics'.

- Raising the awareness of students of ethical issues including society ethics.

- What ought to happen?

GROUP 2.   PERVASIVE

- Get teams to brainstorm.

- Identify common themes.

- Leads into common Intro section.

- Tracking:
  - Content
  - Approaches – content
    - Social
    - Philosophical/theory

- Teaching Methods

  eg, rules → scenario

    cf: scenario → ["PBL"]

    [clinic]   [clinic]

  - Ensuring "courage".

- Assessment

  ….?!

- Persuading:
  - Colleagues
  - Regulatory authorities.

GROUP 3.   THE THIRD WAY 'BOTH'

Discrete – Content.

- Why are rules/ethics there?
- Rules of Professional Conduct – theory/practice.
- Professionalism   = 'Courage' to make decisions.
                     = 'Responsibilisation'
- Diploma (6 Tutorials)
    - Attitude – Content - Application
        - Attitude (reflective) and Outcomes.

Pervasive.

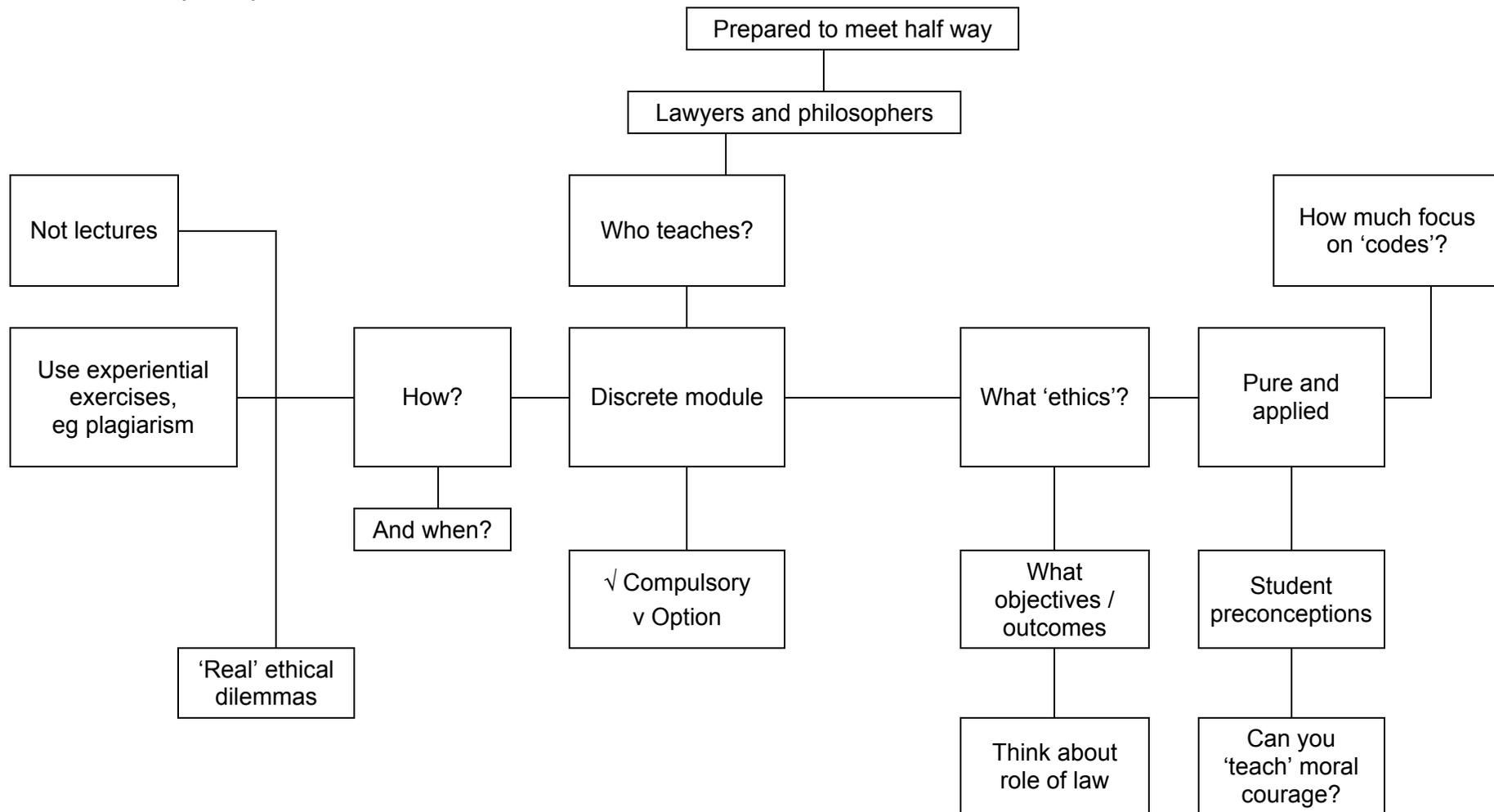- Diploma – Skills [or Clinic Module (pervades)

Learning Activities,

- Judiciary, lawyers – students reflect.
- Scenarios – 'Real-Life'.

PERVASIVE

- Individual Modules (areas of law) own discrete inclusion of ethics.
    - Recognise different standpoints.
- Problem-Solving
    - Case studies
- Clinics – pro bono
- Reflective/experiential logs.

GROUP 4.   (VERY) DISCRETE MODEL

```
                                    ┌──────────────────────────┐
                                    │ Prepared to meet half way │
                                    └──────────────────────────┘
                                                 │
                                    ┌──────────────────────────┐
                                    │  Lawyers and philosophers │
                                    └──────────────────────────┘
                                                 │
   ┌──────────────┐                  ┌──────────────────┐              ┌─────────────────┐
   │ Not lectures │                  │   Who teaches?   │              │  How much focus │
   └──────────────┘                  └──────────────────┘              │  on 'codes'?    │
                                                 │                      └─────────────────┘
┌──────────────────┐   ┌─────────┐   ┌──────────────────┐   ┌──────────────┐   ┌────────────┐
│ Use experiential │   │  How?   │   │ Discrete module  │   │ What 'ethics'? │ │ Pure and   │
│ exercises,       │───│         │───│                  │───│              │───│ applied    │
│ eg plagiarism    │   └─────────┘   └──────────────────┘   └──────────────┘   └────────────┘
└──────────────────┘        │                 │                     │                 │
                      ┌───────────┐   ┌──────────────┐      ┌──────────────┐   ┌──────────────┐
                      │ And when? │   │ √ Compulsory │      │   What       │   │  Student     │
                      └───────────┘   │   v Option   │      │ objectives / │   │preconceptions│
   ┌──────────────┐                   └──────────────┘      │  outcomes    │   └──────────────┘
   │ 'Real' ethical│                                         └──────────────┘          │
   │   dilemmas    │                                                │           ┌──────────────┐
   └──────────────┘                                         ┌──────────────┐    │  Can you     │
                                                            │ Think about  │    │ 'teach' moral│
                                                            │ role of law  │    │  courage?    │
                                                            └──────────────┘    └──────────────┘
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Annex B: Questionnaire for Ethics Educationalists

Preparatory Ethics Training for Future Solicitors: A Law Society Consultancy

Kim Economides and Justine Rogers

Questions for Ethics Educationalists

Please type answers in the boxes and return by email to Justine Rogers justine.rogers@wolfson.ox.ac.uk by Friday 8 February 2008

1. What is the structure and brief content of your ethics instruction? What proportion of the course is concerned with the code of professional conduct?

2. What definition(s) and theoretical approach(es) of ethics is/are used to inform your course?

3. What methods of teaching are used to teach ethics?

4. What, in your opinion, is 'best practice' for ethics teaching?

5. What methods of assessment are used in your course?

6. What is 'best practice' for assessing ethics?

7. Do you formally evaluate your course? How do you get a sense of its effectiveness?

8. Are there any particular problem areas or challenges for ethics instruction in your field? Please describe.

9. Have you used any literature or other source material (eg film) to inform your current practice? If so, what?

10. Are there any ideal models of ethics training and assessment in your field? Please provide examples as well as references if possible.

11. Any further comments?

Thank you. We appreciate your time and thoughts

Annex C: Ethics in the Law Curriculum – Experience of Mandatory Courses in Australia, New Zealand & Canada

Legal ethicists who teach mandatory legal ethics courses on law degrees in Australia, New Zealand and Canada were asked to comment on their teaching experiences and the value of such courses:

Australia

"Ethics is not compulsory to be awarded an Australian LLB, but the subject is required for students who intend to apply for admission to practice after completion. Although only about half of Australian law graduates practice law, most prefer to be able to do so if they later wish to do so and therefore take an ethics subject, in order to keep their options open. Experience of this 'compulsory' ethics content in the undergraduate law degree is mixed. In law schools where Deans have embraced the concept seriously and engaged effective teachers who believe in the discipline and its necessary complexity, student appreciation of ethical subtlety has in my opinion improved. The best examples are, in my view, evident in those law schools where legal ethics education is intermingled with and enriched by so called live-client clinical experience. In other schools where Deans are less connected to practice environments or more positivist in their orientation, ethics teachers are often teaching with similar limitations and I think it fair to say, their graduates reflect this. However, it's not an immoveable feast. Deans and teachers change and as yet there are no national standards for Australian law schools that prescribe the detail in teaching professionalism, though that is set to change in the next year or so, at the instigation of the Council of Australian Law Deans. Certainly, I could not endorse a legal educational environment where no prescribed ethics teaching occurs - in this day and age and having regard to the repetitive national/international ethical scandals that beset the profession, that would be considerably less than best practice, in my opinion."

(Dr Adrian Evans, currently Co-Chair of the International Bar Association, Professional Ethics Committee, Associate Professor & Convenor, Legal Practice Programs, Faculty of Law, Monash University, Melbourne, Victoria, Australia)

"Having taught undergraduate legal ethics in Queensland and Victoria, I see the main benefit as the exposure of all law graduates to the ethical issues that they will face in legal practice, and the extent of the obligations which professional conduct rules place upon them. To that extent, they enter the legal profession better informed and in a better position to question some practices that they may encounter."

(Dr Linda Haller, Senior Lecturer, Law School, University of Melbourne, Victoria, Australia)

"In my own teaching and in the way I tried to set up the courses for the new LLB I have always tried to let applied legal ethics set the teaching agenda. Within that framework I teach students the basics of professional conduct law that they would need to know to understand what their legal obligations are as lawyers, and enough for them to be able to critique current professional conduct law. It is however very easy to feel pushed into teaching more and more law so that it takes over more. My main objective is to teach them enough about both professional conduct law and different theories or rationales for lawyers' ethical role in society and enough about

how lawyers work in practice for them to be able to work out for themselves how to make moral judgments in legal practice that incorporate their own passions and values. I do this by using quite long, detailed case studies based on real cases extensively in both teaching and assessment. I have written about this approach to teaching legal ethics and its rationale in: C. Parker, "What do they learn when they learn legal ethics?" *Legal Education Review*, 12 (1 & 2), 2001, 175-205. I have published the basic framework I use for teaching the main approaches to applied legal ethics in: C. Parker, "A critical morality for Australian lawyers and law students" *Monash University Law Review*, 30(1), 2004, 49-74. Adrian Evans and I have used this framework and approach in our book for teaching and discussing legal ethics, *Inside Lawyers' Ethics* (Cambridge, 2007). One of its main features is that it publishes many of the real-life case studies I've developed in my teaching over the years. All of these materials have been well received and well used by other legal ethics teachers around Australia."

(Christine Parker, Associate Professor and Reader, Law School, University of Melbourne, Victoria, Australia)

"Ethics had long been required in Queensland for admission to practise as either a barrister or a solicitor. (Queensland's profession was divided at the point of admission to 2004, and since then, despite common admission, has been divided at the point of certification.) For that reason, compulsory ethics courses had been conducted by the Barristers Board, the Solicitors Board and the University of Queensland from the 1930s, although none of these were thought worthy of receiving academic credit for the LLB. Although already compulsory for admission as a barrister or solicitor, the adoption in 1995 of the Uniform Admission Rules ('the Priestley 11') (which included the 'professional conduct' area of knowledge) brought ethics into the law school mainstream. This allowed the inclusion of ethics courses in the LLB from 1997, and the postgraduate JD from its beginning in 1998. A feature of these courses has not only been the inclusion of the legal material on lawyers' conduct (including professional conduct rules and trust account management), but also applied moral theory and the requirement, through coursework and assessment, that students begin to refine a moral framework for legal practice. In Queensland, this broader approach to ethics is only taken at the University of Queensland and Griffith University, although I am also developing it through the new curriculum at Southern Queensland. It is naturally difficult to assess the effect these courses have had on students after completion of the course, graduation and entry to legal practice. To our knowledge (and in Queensland all of these matters are reported), only one student to have graduated having completed one of these courses (and there have been 250 every year) has received any form of discipline or official sanction for misconduct: *Milu v Smith* [2004] QSC 27 (http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/qld/QSC/2004/27.html). But, as much as we would like to, we can't read too much into this. Also, any cohort of students will have those who do the work just to pass the course, and those who develop a greater enthusiasm for the material. However, when compared with experience in other courses, it is possible to say the following:

1. All students who pass leave the course more knowledgeable about the legal profession; its professional and regulatory structures; its history and traditions; and its conduct rules and governing law as well as the purposes they serve. The base knowledge these students have about the profession and professionalism, compared with pre-1997 students, is marked. As a matter of bare utility, employers (especially in the larger

firms) have commented that these graduates are much better prepared for the profession and its demands than pre-1997 students were.

2. As happens in other areas, the reading, analysis and debate of disciplinary cases attune students' ethical understanding in ways that were not possible before. Through classroom exchange, they have a forum for developing better ideas of professional moral consensus that would not, for instance, be available in even medium sized practices. They are also alerted to areas of higher ethical risk (eg, in Queensland, paying bills from trust) and how, in similar conditions, they can approach these questions ethically and in accordance with legal practice requirements.

3. There is a significant group of students every year who engage enthusiastically in the opportunity to refine a moral framework for legal practice. They are not limited in the framework they are allowed to adopt, although the coursework introduces applied theories of liberalism, moral activism, care and virtue.

    Although, again, I would not like to exaggerate the claims for this aspect of the course, it is the only opportunity given to lawyers-to-be to develop some moral justification or rationale for legal practice. It is one, I *am* prepared to say, that has offered comfort to students who view the looming moral challenges of practising law with some trepidation. For instance (from assignment responses), roughly 40-50% every year settle on a liberal framework and, as a result, largely endorse the professional conduct rules they will practise under. Equally, this means that they do not leave the course without being capable of articulating moral reasons for their conduct rules and being able to place their professional aspirations within a positive moral perspective. Again, no pre-1997 students were given this opportunity, and are significantly less likely to have the moral resources to be able to address ethical questions in legal practice or, for that matter, to identify a moral foundation of the practice of law."[19]

    (Reid Mortensen, Professor of Law, School of Law, University of Southern Queensland, Toowoomba, Queensland 4350, Australia)

"The teaching of ethics in the undergraduate degree is recognised as a vital component of the Australian law degree. Ethics is a way of introducing students to the 'law of lawyering' but also, importantly, preparing them for the ethical tensions they are bound to face in practice. In Australia the debate is not about whether ethics should be included in the undergraduate degree but rather about how we can better provide that component for our students. As a result there are significant calls to increase the profile of ethics within the degree and embed it more thoroughly within other subjects in the curriculum. A recent Australian Law Reform Commission Discussion Paper on 'Client Legal Privilege and Federal Investigatory Bodies' has endorsed the Australian commitment to ethics teaching. It states that 'education and

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[19] Although I'm now at the University of Southern Queensland for the beginning of a new law school, all comments relate to the University of Queensland, where I introduced and had oversight of all courses in relation to lawyers' ethics between 1997 and 2007

training clearly play a critical role in shaping legal culture. A healthy professional culture is "one that...takes ethical concerns seriously"'.[20]

(Suzanne Le Mire, Lecturer, School of Law, The University of Adelaide, Adelaide 5005, Australia)

New Zealand

"The Law School at Waikato has offered a fourth year option on Legal Ethics and Professional Responsibility since its inception, though it was not put on every year, as our final year offerings are selected on a rotation basis. We also included elements in our first year Legal Method and Legal Systems courses. This reflected our emphasis on skills and values as well as substantive black letter law knowledge. Legal Ethics is now a 4th year compulsory course, and that is appropriate. It needs to be at this level so that students can see the practical effects of ethical issues on the substantive areas of law (and they need to already know about fiduciaries, negligence etc). It needs to be compulsory because otherwise the reckless or complacent – the very people who need to be brought up short to confront (and reflect on) the ethical issues that will inevitably arise in practice - will bypass it. Firms expect law schools to produce graduates with the ability to spot a breach of contract and suggest a remedy; equally, they are entitled to expect us to produce graduates who are primed to spot a conflict of interest and avoid it. As an opportunity for a little self-reflection, it is all the more important that Legal Ethics be included in the 3-year (or shorter!) English LLB where there is greater focus on learning technical black letter law than in the New Zealand four-year programme. I find there is greater engagement by the students than in other compulsory law courses."

(Ken Mackinnon, Associate Professor, School of Law, University of Waikato, Hamilton, New Zealand)

"I receive a lot of feedback from students that in the Ethics class for the first time, and sometimes only time during their studies, they had to confront a number of ethical difficulties/dilemmas lawyers face in practice. I have had students say (and I am not sure if this is a benefit or a detriment!) that after doing the Ethics course they realise they could not cope with various aspects of practice and have decided that they no longer want to practice law! Whereas students may or may not ever practice in the area of environmental law or international law or in any of the subject areas of the courses they chose to study at university, they will all have to be cognizant of their professional responsibilities each and every day that they are a lawyer. It is important, therefore, that every student has a working knowledge of their professional responsibilities. This knowledge is not something that should be left just for them to pick up by chance in practice. Their very first ethical dilemma may present itself to them when, for example, in their first week as a junior lawyer, their supervisor asks them to shred a document because it may be discoverable. Ideally a discussion of the relevant ethical considerations should be incorporated into every single course. That, unfortunately, is not realistic, given the amount of material that teachers attempt/are required to cover in their courses. A compulsory ethics course, therefore, ensures that students at least get introduced to their professional responsibilities

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[20] ALRC, Client Legal Privilege and Federal Investigatory Bodies, Commonwealth of Australia (2007) p 415, (footnotes omitted).

before they leave law school. Once they are in practice they are unlikely to have the same luxury of time to think through ethical dilemmas they may confront, in such depth. The down side of making the Ethics course (and I would prefer it to be called the Professional Responsibility course) compulsory, is that the compulsory aspect devalues the course in the student's eyes. It becomes another requirement they have to fulfil like "Property Law", at a stage when they are able to choose their other courses. How could we overcome the resentment this engenders in the students? In part by not teaching it in a large class of up to 150 students which sends the message that the Faculty devalues the course also. Our usual cap for courses at this level is a maximum of 80 students. This is a resource issue. Ethics should be treated at least in the same way as the other courses at that level ie capped at 80 per class. It is arguable that Ethics should be taught in even smaller classes, given the content of the course and the need to give the students the opportunity to work with the material in quite a personal way."

(Virginia Grainer, Senior Lecturer, Faculty of Law, Victoria University of Wellington, New Zealand)

"Legal Ethics has been compulsory for admission to the profession in New Zealand for less than ten years. When first introduced, there was a lot of hostility towards it on the part of both lecturers and students. It didn't take long for this attitude to change. One lecturer who was not enthusiastic about the course changed his mind after seeing the "law of lawyering" type material, which he thought would be extremely useful for students to know. I teach Legal Ethics, and soon after its introduction I surveyed the students at the beginning of the class (mixed feelings) at towards the end of the semester (more than half acknowledging its usefulness and agreeing that it should be compulsory).

Our course includes both a philosophical/decision-making/nature of lawyering section and the "law of lawyering" type material focusing on the Rules of Professional Conduct, the law on conflicts of interest, the lawyer's duties to the client, the conduct of litigation, and a few minor topics. There is a tutorial programme allowing for small group discussions of problems complementing lectures. The undergraduate curriculum is the only viable place to teach Legal Ethics in New Zealand, as the only other alternative is a short practical skills course that students complete prior to admission, but it can be done over the Internet with only minor face-to-face contact, and the tight schedule does not allow for significant ethics content. People disparaging Legal Ethics as a compulsory subject here often say that it won't stop the people who have no morals from breaking the law. But that isn't what it is designed to do -- my aim is to prevent a lawyer who would otherwise be clueless from blundering into major problems. I also want my students to reflect on what it means to be a lawyer, and think about how they should conduct their professional lives."

(Selene Mize, Senior Lecturer in Law, University of Otago, Dunedin, New Zealand)

"In terms of benefits, they are obviously more intangible. However, I might venture some comments:

- A greater awareness of (new) lawyers of the wider professional obligations which exist in legal practice;

- A greater preparedness for dealing with ethical problems in practice;

- A sensitivity to what an ethical problem looks like and an ability to discuss the nature of the problem with others and if needed seek advice;

- The development of a corpus of scholarly and practitioner focussed writings on professional and ethical issues to which practitioners can have recourse;

- The building of capacity within academia and the profession on professional matters to which lawyers and the professional body can have recourse.

I hope that this is of some help. Incidentally – it does not appear to have made lawyers more honest. It is also worth noting that students are very accepting (now) of the change and would find it strange indeed if it were suggested it should be removed from the compulsory curriculum."

(Duncan Webb, Professor of Law, School of Law, University of Canterbury, Christchurch, New Zealand)

Canada

"Law schools always have taught ethics in the curriculum. Sadly, it is often been by their silence on the issue. However, the recent turn towards full-blown courses on legal ethics can only be a plus -- students can gain a sustained and critical account of what it means to be a professional and develop a more informed sense of not only what is ethical, but also how to confront ethical dilemmas. Whether integrated into other courses or taught as a stand-alone course, legal ethics courses, preferably in the first-year, are a sine qua non for a serious and progressive legal education."

(Allan C. Hutchinson, Distinguished Research Professor, Osgoode Hall Law School, York University, Toronto, Canada)

"At the University of Western Ontario we teach legal ethics as a mandatory course in the first year of law school. It is delivered in one large section to all 175 first-year students, through a series of lectures that last a whole term. It might be a little misleading to refer to us as having introduced ethics into the undergraduate curriculum, particularly given the fact that we're going "American Style", now, and abolishing the LLB in favour of the JD (and therefore joining the ranks of graduate faculties). Nevertheless, I think our experience might be useful to you. My own view, based on no empirical evidence at all, is that introducing a mandatory course in ethics has reinforced students' understanding of other elements of the curriculum. Because legal ethics is one of the only courses that focuses on "the person regulated" rather than on a particular area of law, it's the one course in which students are able to see multiple types of law interacting. For example: most breaches of legal ethics constitute torts (particularly when non-clients are harmed) and breaches of contract (where clients are harmed). They are regulated through a quasi-criminal regulatory regime based on a deterrence model. So students see the interaction of quasi-criminal law, tort and contract law, often all through an examination of a single ethical breach. Because the breaching party is a lawyer, students are keenly interested in the cases. It seems to me that this can only enhance their understanding of each of the underlying areas of law, and therefore enhance their understanding of law in general. Of course, they also get to think critically about ethical issues, which is the whole point of the course. One mercenary

benefit of the course is that it has attracted the interest of funding agencies (although none of this attention has actually led to dollars in the bank, thus far). The only downsides I can see are these: the course must be staffed (which can be a bit of a pain when the school's ethicist goes on sabbatical), and will typically be staffed by a brand new faculty member (since so few of the senior members have ever studied ethics). And if you follow our model (with a mandatory course), you will markedly increase student workloads (which will give rise to a certain amount of disgruntlement). These are minor downsides, as far as I am concerned."

(Randal Graham, Associate Professor, Faculty of Law, University of Western Ontario, Canada)