

The Character of Continuing Education in Legal Ethics

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I. Introduction

Canadian law societies are gradually moving towards the adoption of mandatory (or quasi-mandatory¹) continuing legal education and, specifically, towards mandatory continuing legal education in legal ethics. The Law Society of British Columbia now requires that lawyers take twelve hours of mandatory Continuing Professional Development each year, two hours of which must relate to “ethics, professional responsibility, client care and relations and practice management;”² this requirement will also be implemented by the Law Society of Saskatchewan commencing in 2010.³ No other law societies have implemented mandatory continuing legal education specifically directed towards legal ethics, although a report of the Law Society of Upper Canada in 2001 suggested that post-call legal education should address “client services, practice management and ethical issues.”⁴

¹ Quasi-mandatory includes those provinces who require that lawyers report activities in legal education, but do not impose sanctions on lawyers who report less than the minimum requirements. The Law Society of Upper Canada, the Law Society of Manitoba and the Law Society of Alberta have such requirements. Quasi-mandatory may over-characterize these initiatives; the Law Society of British Columbia moved to a mandatory requirement in part because about 30% of the Society’s lawyers were not achieving the minimum requirements.

² Law Society of British Columbia, “Report of the Lawyer Education Committee on Continuing Professional Development”, November 6, 2007 (hereinafter LSBC November 2007 Report)

³ Deana Driver, “Mandatory Professional Training Coming to Saskatchewan” *Lawyers’ Weekly* June 27, 2008. <http://www.lawyersweekly.ca/index.php?section=article&articleid=714>

⁴ Law Society of Upper Canada, Professional Development and Competence Committee Report to Convocation, January 24, 2002, Appendix 1, Excerpt from March 2001 Implementing the Law Society’s Competence Mandate: Report and Recommendations, para. 114.

As with all continuing legal education, the stated point of these initiatives is the achievement of lawyer competence.⁵ In the context of education in legal ethics, the specific justification offered by the Law Society of British Columbia is that lack of competence in these areas can have “serious regulatory consequences” and can, as well, “affect the public’s confidence in the conduct of lawyers and in the administration of justice.” Competence in legal ethics is “necessary to ensure both good lawyers and public confidence.”⁶ The Law Society of Upper Canada ties its continuing legal education program to ensuring the maintenance and enhancement of “professional competence and professionalism.”⁷

Embedded in these initiatives appears to be two conceptions of what is meant by legal ethics. The first conception focuses on legal ethics as embodied in regulatory oversight of the legal profession, in the law governing lawyers and the obligations thereby imposed on those practicing law. This conception is reflected in the incorporation of “client services” and “practice management” within the mandated study areas, by the justification for continuing legal education in the “serious regulatory consequences” of lawyers’ ignorance of their ethical responsibilities, and in emphasis on improving lawyer conduct. The second conception focuses on legal ethics as arising from the character and virtues of lawyers, and is reflected in the emphasis on ensuring that lawyers are “good,” “honest” and “professional.”⁸

⁵ *ibid.* para. 112, noting that the support for CLE arises from the “importance that such education plays in assuring competence.”

⁶ LSBC November 2007 Report, p. 9.

⁷ Law Society of Upper Canada, Statement of Minimum Expectations for Professional Development, January 24, 2002.

⁸ As discussed below, “professionalism” initiatives tend to focus on lawyer character as much, if not more than, on lawyer conduct.

If this identification of the two conceptions of legal ethics embedded in these initiatives is correct, then it seems fair to presume that the intention – or hope – of mandating education in legal ethics is to foster the accomplishment of one or both of these conceptions: to increase the likelihood of lawyer compliance with the regulatory norms governing the legal profession and to foster lawyers' character development.

This paper questions the pursuit of these goals through continuing legal education as currently structured in the proposed initiatives of the law societies. First, it argues that any attempt to address ethical issues within the legal profession through fostering character development, or through fostering professionalism when that concept is articulated as a matter of lawyer character, is misplaced. The evidence of behavioural psychology demonstrates that the notion of moral character is in practical terms illusory; the assertion of moral character as an identifiable fact about an individual which predicts that individual's future conduct is empirically doubtful. Given that, education orientated towards the creation or development of character is unlikely to be fruitful.

Second, it argues that continuing legal education directed at ensuring compliance with the regulatory norms governing the legal profession may well be desirable and appropriate, but a generic requirement that lawyers take two hours of instruction in any course related in some way to client services, practice management and/or ethics is unlikely to have much impact on lawyer conduct.

Finally, and perhaps more constructively, the paper suggests ways in which continuing legal education can make a meaningful contribution to the ethics of legal practice in Canada. Like the law societies, it too argues that continuing legal education should be

directed at enhancing individual ethical decision-making and, as well, at attempting to ensure ethical conduct by lawyers. It argues, however, that with respect to individual ethical decision-making, the focus of continuing legal education should not be on lawyer character but should be on continuing what hopefully is begun in legal ethics instruction at law schools, namely helping to improve lawyers' ethical problem solving given the unique challenges which ethical problems – in distinction to legal problems – present. With respect to enhancing ethical conduct by lawyers, the focus should be on identifying what the conduct issues are in the profession, and in particular conduct issues arising from the structure and systems within which lawyers work. Law societies should take action to address those issues, which may include continuing legal education as to what is required; continuing legal education should, though, simply be one component of broader initiatives to improve conduct in the profession.

II. Can Continuing Legal Education Foster Lawyer Character and Professionalism?⁹

There is a strong commitment within the regulation of the legal profession to the notion that ethical and professional conduct is a matter of lawyer character. All Canadian law societies require that applicants to the bar demonstrate good character (or, more accurately, that they be shown not to be of demonstrably bad character) and law societies regularly discipline lawyers whose personal conduct outside of legal practice apparently evidences a want of moral character. Further, the concept of “professionalism,” and professionalism initiatives, tend to incorporate the rhetoric of lawyer virtues, of lawyers doing good, and serving the public, because of the kind of people those lawyers are.

⁹ This section draws on my discussion of the existence of moral character in “Legal Ethics and Regulatory Legitimacy: Regulating Lawyers for Personal Misconduct” forthcoming in *Alternative Perspectives on Lawyers and Legal Ethics* (Routledge).

A clear example of this can be found in the Chief Justice of Ontario's Advisory Committee on Professionalism's paper on the "Elements of Professionalism." In that paper professionalism is identified as built upon "scholarship; integrity; honour; leadership; independence; pride; spirit; collegiality; service; and balanced commercialism."¹⁰ These elements incorporate notions of lawyers' conduct – of professionalism as a matter of how lawyers act – but also strongly incorporate notions of professionalism as something that lawyers have, that they are, that they reflect in their character and virtues. The opening sentence of the paper incorporates this idea, referring to professionalism as something that can be a "personal characteristic."¹¹ It is reinforced in the discussion of integrity, where it is suggested that lawyers are required to exhibit "high standards of character."¹² In reference to honour, the paper notes the circumstances of practice that can challenge a lawyer's "personal and professional character" and references the importance of lawyer "courage." Lawyers are advised that "professional success is about attitudes and about character, and requires energy, drive, initiative, commitment, involvement and – above all – enthusiasm."¹³ Finally, lawyer professionalism is said to require lawyers to adopt an attitude of modified self-interest, in which they legitimately receive financial remuneration for services provided, but in which they adopt service to the interests of others not merely as an incidental component

¹⁰ Chief Justice of Ontario Advisory Committee on Professionalism, Working Group on the Definition of Professionalism, "Elements of Professionalism", October 2001, Revised December 2001 and June 2002, p.

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¹¹ *Ibid.*

¹² *ibid.*, p. 2.

¹³ *Ibid.* p. 6.

of the pursuit of their own interests, but as a “matter of obligation” in which the practice of law is “motivated by service rather than inspired by profit.”¹⁴

Given this emphasis on character in discussion of what it means to be an ethical lawyer, it is not surprising that if law societies pursue continuing legal education, either on a mandatory or quasi-mandatory basis, they would at least hope for some relationship between that education and the fostering of character of those lawyers who receive it. That, by requiring lawyers to be educated in ethics and related topics, the public would be inspired with confidence in those lawyers as “good.”

This hope for the effect of legal education on lawyer character has strong historical roots in the Canadian legal profession. At the beginning of the articulation of a professional identity for Canadian lawyers, legal education was viewed as of central importance in the project of ensuring a profession of men of high standing and character:

The law student's training is not manual training, but is training of the mind, not only in law, but if he wishes to be something more than a mere legal mechanic, he must study logic, history, in particular constitutional history, political science and economics, a certain amount of philosophy and acquire a reasonable familiarity with English literature, and know something at least of the literature of other countries.... The object of law training is to attract young men of high character, and to train them in a manner that they will be trustworthy, honourable and competent in the performance of their legal duties, and will use such influence as they have to maintain and improve but not destroy our Canadian constitutional democracy¹⁵

¹⁴ *Ibid.* pp. 9-10.

¹⁵ *Martin v. Law Society of British Columbia* [1950] 3 D.L.R. 173 at 189. For a discussion of the role of “character” in the cultural project of creating a professional identity see: W. Wesley Pue, “Cultural Projects and Structural Transformation in the Canadian Legal Profession” in *Lawyers and Vampires* (Oxford: Hart Publishing, 2003) at 389 (hereinafter “Cultural Projects”).

Legal education was one component, along with standards of admission and professional discipline, that was directed at ensuring that the legal profession was made up of the right sort, men of good character, with the disposition of the professional not the tradesman.

The problem, however, and this is a problem that exists not only in initiatives toward continuing legal education, but in any reliance in professional regulation and norms on the idea of moral character, is that there is significant support for the position that “character” does not exist as an empirically demonstrable phenomenon. For character to be empirically demonstrable requires positing a relationship between who one is and how one acts – that, for example, as suggested by the Chief Justice of Ontario’s Advisory Committee, “character and courage” can be seen in actions such as the “lawyer’s dedicated service to a client’s unpopular or provocative cause.” Character and (the virtue) of courage will lead to that action, and that action can be seen as indicative of the lawyer so acting’s character and courage.

This empirical relationship between character and conduct in general, and as suggested by this example, has two components. First, that character is an identifiable feature of an individual; that through observation of how an individual conducts herself one can draw conclusions about that individual’s character. Thus, if an individual is observed to behave courageously, we can derive that that person has a “courageous” character; she is possessed of the virtue of courage. Second, that character once identified is predictive of behaviour in the future. Thus, the individual identified as having the “courageous” character will predictably behave courageously in the future.

The problem is that both of these components of the relationship between who one is and how one acts are highly doubtful.¹⁶ In fact, the overwhelming evidence of social psychology is that, in general, circumstances are far more predictive of behaviour than is a generalized notion of “character”. While individuals behave with significant temporal stability of behaviour – the person who eats too much at a party today is predictably likely to eat too much at a party tomorrow – they demonstrate little “cross-situational consistency” in their behaviour. A particular behaviour that occurs in a particular context appears from the evidence to say more about the influence of that context than about the character of the person who engaged in it. That is, it likely suggests that other people in that same context will behave in the same way, but it does not, without something more, suggest that that person will behave in the same way if placed in a different context.¹⁷

Two of the most well known experiments demonstrating the situational variability of human conduct are the Princeton theological seminary experiment and the Stanford prison experiment. In the Princeton theological seminary experiment, theology students were told that they were required to make a presentation. As they walked to the presentation they came across an individual in apparent physical distress. The only

¹⁶ For a discussion of the empirical problems associated with the concept of “character” in the context of the good character requirement for law society (bar) admission see Deborah Rhode, “Good Character as Professional Credential” (1985) 94 Yale LJ 491; Alice Woolley, “Tending the Bar: The ‘Good Character’ Requirement for Law Society Admission” (2007) 30 Dal. L.J. 27; Alice Woolley and Jocelyn Stacey, “The Psychology of Good Character” in *Reaffirming Legal Ethics* (Routledge, forthcoming).

¹⁷ See John M. Doris, “Persons, Situations, and Virtue Ethics” (1998) 32(4) *Noûs* 504 (hereinafter “Doris ‘Persons’”); John M. Doris *Lack of Character: Personality and Moral Behavior* (Cambridge University Press, 2002)); Lee Ross & Richard E. Nisbett, *The Person and the Situation* (McGraw-Hill, 1991) ;Philip Zimbardo, *The Lucifer Effect: How Good People Turn Evil* (New York: Random House, 2007); Gilbert Harman “Moral Philosophy meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error”, *Proceedings of the Aristotelian Society*, 99 (1999): 315-31, “The Nonexistence of Character Traits” *Proceedings of the Aristotelian Society*, 100 (2000): 223-226. David Luban has an interesting discussion of the relationship between this social psychology evidence and legal ethics in chapters 7 and 8 of *Ethics and Human Dignity* (New York: Cambridge University Press, 2007); as noted below, Luban is skeptical about pure situationalist approaches.

reliable predictor of the likelihood that students would stop and help the individual was whether the students believed that they were late for the presentation: students who believed that they were late were consistently far less likely to assist than students who believed they had time to spare. Of those students who were in a great hurry 10% stopped to help; of those who were in a moderate hurry 45% stopped to help; and those with no need to hurry stopped to help 63% of the time.¹⁸ Information about students' underlying moral commitments – as might be indicated, for example, by their reasons for attending a theological seminary – were in no way predictive of whether or not they would engage in helping behaviour.

In the Stanford prison experiment students were randomly assigned to be “prisoners” or “guards” in a fake prison. After six days the experiment was called off because of the increasingly sadistic and dominating behaviour of the guards, and the obvious distress suffered by the prisoners. Again, the only reliable indicator of behaviour within the experiment was the role the participants had been assigned to play; the apparent character of participants prior to participation was entirely non-predictive of how they would respond.¹⁹

The results of these experiments have been confirmed in numerous other contexts, including experiments indicating that changes in circumstances can materially alter the likelihood of particular conduct taking place.²⁰ For example, a 1972 study demonstrated

¹⁸ Christian Miller, “Social Psychology and Virtue Ethics” (2003) 7 *The Journal of Ethics* 365 at 370.

¹⁹ See Zimbardo note 17 *supra*

²⁰ The point of this experiment is to demonstrate that even minor changes in mood can radically affect conduct. The situation is viewed by writers such as Doris as making the situationalist point, because the mood change, and ultimately the behavioural change, is brought about by a minor change in the situation. Further, and more significantly, a third party observer seeing person A (who found a dime) help pick up papers, while person B (who didn't) rushes by ignoring the papers, is likely to make the error of attributing

that the likelihood of an individual who has left a phone booth helping someone who drops a folder of papers that scatter across the individual's path is materially affected by whether or not, prior to the folder being dropped, the individual found a dime left in the phone. Of the 16 people who found a dime, 14 stopped to help and 2 did not. Of the 25 who did not find a dime only 1 stopped to help while 24 did not.²¹

More seriously, the impact of a change in circumstances was observable in Milgram's famous experiment demonstrating the surprising willingness of participants in an experiment to administer electric shocks to others to the point where those others apparently experienced severe pain and even death. Under the original test, when the participant in the experiment was instructed to administer the electric shocks, some 63% of participants did so to the point where the 'victim' was in severe pain or would die. Under a modified test, where the research subject was joined by an experiment confederate who refused to provide the shocks, compliance dropped radically – to a mere 10%. Less happily, when the research subject was joined by an experiment confederate who participated enthusiastically, compliance jumped to 90%.²²

The import of this evidence should not be overstated. The experiments of social psychologists do not prove that situations determine conduct.²³ After all, in the Princeton theological seminary there were still individuals who helped when they were in a great hurry, and individuals who did not help even when they were not. And there were also

to A a helpful disposition and to B an unhelpful one. That is, the situation affects the behaviour, and is likely to result in the Fundamental Attribution Error (the tendency to assign general cross-situationally consistent character traits to individuals based on single or limited observations of individuals within specific contexts) being made by a third party observer of the behaviour.

²¹ Doris, "Persons", note 17 *supra* at 504.

²² David Luban, note 17 *supra* at 266.

²³ This point is made by David Luban – see note 17, *supra*.

participants in the Milgram experiment who refused to inflict the shocks even with the example of an enthusiastic participant before them. Having said that, the experiments of social psychology do indicate that it is at best a gross oversimplification to assert that there is such a thing as good character, that we can determine which lawyers are possessed of it, and which lawyers are not, and that there is likely to be a meaningful correlation between a lawyer's "character" and how she conducts herself in legal practice. The difference between the lawyer who violates ethical norms, and the lawyer who does not, is, this evidence suggests, statistically far more likely to relate to the circumstances in which that lawyer finds herself than to the kind of person she is.

The evidence of social psychology in this respect is supported by other psychological studies demonstrating the unpredictability of human behaviour even when predictability might be expected. In dangerous offender proceedings in Canada, and in like proceedings in the United States, psychologists make predictions as to whether an individual who has committed a number of violent offences is likely to do so again if released into the general community after completion of his required period of incarceration. One would expect that, if individuals have "character" which will predictably lead to particular types of behaviour, then that character would be identifiable through consideration of a person's past conduct, and through exploration through interviews of that person's values, ideas and attitudes, and from the identification of character in that sense, predictions could be made as to how the individual would behave in the future. To put it more prosaically: when a person has committed a variety of violent criminal offences, and you meet that person and talk to him about his values and beliefs, and about his life experiences, you would think that you would be able to tell,

especially if you were trained in psychology, whether that person would be violent in the future. Yet, again, the overwhelming evidence is that such prediction is not possible, that psychologists who make clinical – i.e., individualized – assessments of violent offenders are able to predict future violence with less accuracy than would be achieved by flipping a coin.²⁴ Predictions of future violence can be made with some accuracy, but only if individual assessment is removed from the equation and, instead, assessments are made based on actuarial assessment of the risk created by an individual falling within certain categories based on: what the person “is” (age, gender, race and personality); what the person “has” (mental disorder, substance abuse); what the person “has done” (prior crime and violence); and what has “been done” to the person (family environment and victimization).²⁵ That is, when the assessment is no longer based on character or on who an offender is, and when it is no longer based on individual assessment of the offender, it can achieve a degree of accuracy.

Again, the significance of this evidence should not be overstated. It may demonstrate no more than the basic theological point that if character exists it is something that can be known to god, but not to man.²⁶ On the other hand, once character becomes invisible, becomes something that we think we can see when in fact we cannot, it becomes a

²⁴ The data with respect to the inaccuracy of clinical predictions of future violence are discussed in Alice Woolley and Jocelyn Stacey, “The Psychology of Good Character” in *Reaffirming Legal Ethics* (Routledge, forthcoming). The two most famous studies of the accuracy of clinical prediction arose as an accident of jurisprudence; as a result of constitutional invalidation of dangerous offender laws in the United States prisoners formerly identified as “dangerous” were released into less secure environments. In the first study, of those offenders previously identified as dangerous, only 20% committed a violent offence. When 121 of those offenders were released into the general community, only 9 committed a violent assault. In the second study, only 14% of the offenders previously labeled as dangerous engaged in “assaultive behavior” after their release.

²⁵ John Monahan, “A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators and Patients” (2006) 92 Virginia L. R. 391 at 414 to 426.

²⁶ Samuel J. Levine, “Playing God: An Essay on Law, Philosophy and American Capital Punishment” (2001), 31 *New Mexico Law Review*

concept of which to be suspicious, a product of the human need to categorize and claim dominion over phenomenon that otherwise appear troublingly random.²⁷

Once the concept of character is dissected in this way, when it can be seen as something that, if it exists at all, is beyond human comprehension, and is not measurable or predictive of human conduct, the problems with relating continuing legal education to the creation of lawyer character become self-evident. Continuing legal education cannot foster lawyer character because it is not clear that character is something that exists, let alone something that can be inculcated in individuals in any way, whether through a course of study or otherwise. And it will fail because the ethical problems that arise in practice are at best only loosely correlated (and may not be correlated at all) to the type of person that a lawyer is. If lawyers are to be more ethical, to act in ways that we would associate with character and courage if character did exist, then it is will be because they are practicing law in circumstances that facilitate that behaviour, not because of the type of people those lawyers are or are perceived to be.

III. Continuing Legal Education and the Avoidance of “Serious Regulatory Consequences”

As noted at the outset, continuing legal education in ethics is also justified based on ensuring proper conduct by lawyers, on helping to avoid the serious regulatory consequences that, presumably, can arise from lawyer ignorance about their regulatory obligations. This focus in continuing legal education obviously does not suffer from the issues just identified with orientating legal education towards development of lawyer character. Its focus is on how lawyers act, not on who they are.

²⁷ A point popularized in Nassim Nicholas Taleb, *Fooled by Randomness: The Hidden Role of Chance in Life and IN the Markets* (New York: Random House, 2004).

Attempts to ensure that lawyers act well, that they do not injure the interests of the public, undermine the functioning of the legal system or take advantage of imperfections in the market for legal services to exploit clients, are appropriate objectives for regulators of the legal profession. However, is mandating two hours of continuing legal education in ethics, with lawyers free to take any course dealing with ethical issues, client relations or practice management, an effective way to achieve this goal?

There are good reasons to think it will not be. Continuing legal education in general has been criticized from a variety of perspectives. It has not been shown that it has any impact on lawyer competence in the areas taught.²⁸ As suggested by Gavin Mackenzie, lawyer incompetence arises not from ignorance of the law but from disorganization, poor communication and a lack of institutional support:

The most common competency problems are caused not by lawyers' failure to keep current in the law — the most frequent subject of continuing education programs — but rather by inadequate office systems and sloppy work habits, resulting in such problems as missed limitation periods, botched title searches, and failures to communicate appropriately with clients.²⁹

Similarly, in the particular context of legal ethics, and as noted by Harry Arthurs, ethical misconduct by lawyers also does not usually arise from lawyer ignorance about what is required of them:

Unethical behaviour seldom results from lack of knowledge about what is right or wrong: most serious 'ethical' breaches involve theft or fraud or some other criminal conduct. Rather, such behaviour results from

²⁸ The Law Society of British Columbia acknowledged this issue in the "Preliminary Report of the Lawyer Education Task Force on Mandatory Continuing Professional Development". See also Lisa A. Grigg, "The Mandatory Continuing Legal Education Debate: Is it Improving Lawyer competence or Just Busy Work" (1998) 12 *BYU J. Pub. L.* 417; D. Franklin Arey, "Competent Appellate Advocacy and Continuing Legal Education: Fitting the Mans to the End" (2000) 2 *J. App. Prac. & Process* 27.

²⁹ Gavin Mackenzie, "Regulating Lawyer Competence and Quality of Service" (2008) 45(5) *Alta. L. Rev.* 143 at 147.

structural influences within the profession or the larger society which shape the conduct of lawyers in particular circumstances.³⁰

In other words, both generally and in the context of legal ethics, the problem is not so much with what lawyers know, as with their ability to translate that knowledge into action given the circumstances in which they practice.

In addition, and with respect to the particular approach of allowing lawyers to select their own courses, it needs to be noted that legal education in the context of ethics does not have the same positive incentive structure as operate in other areas of law. A lawyer practicing in the area of real estate, for example, is likely to have some awareness of the legal developments about which it would be helpful for her to have more knowledge. She is also, for commercial reasons, likely to be incented to choose to obtain that knowledge when satisfying a continuing legal education requirement; it is in her interests to be as well positioned as possible to provide accurate and effective advice to her clients. It would be irrational for her to choose to avoid the acquisition of relevant and useful information to her practice in the 10 hours she is required to allot to continuing legal education. By contrast, lawyers, like law students, may not be aware of ethical issues arising with how they conduct their practice and may be actively disincented from learning that ways in which they practice may contravene the norms said to govern the legal profession, given that ethical practice is not necessarily profitable practice. A lawyer choosing between a course in client relations directed at fulfilling the duty properly noted by the Chief Justice's Advisory committee of advising a "client [to] refrain from actions that may be in the client's self-interest but which subvert the

³⁰ Harry Arthurs, "Why Canadian Law Schools Do not Teach Legal Ethics" in K. Economides (ed) *Ethical Challenges to Legal Education and Conduct* (Oxford: Hart Publishing, 1998) 105 at 107.

administration of justice” and a course in client relations directed at conducting client relations so as to maximize the future profitability of those relations, will have a greater incentive to take the latter course than the former.

Finally, the general effectiveness of ethics education has been questioned. Harry Arthurs suggests that there “is in fact no demonstrated connection between instruction in legal ethics and ethical behaviour” adding that

30 years of intermittent teaching in this field have made me a skeptic, though not yet a cynic. My most disconcerting experience involved a student who was exposed to an ethical problem inserted in an early edition of my labour law casebook. 20 years on, my ex-student was disciplined, *inter alia*, for what the problem had specifically identified as a form of unethical advocacy.³¹

These points provide some reason for pessimism about the likelihood that initiatives such as those undertaken by the Law Society of British Columbia and the Law Society of Saskatchewan will make any difference to the ethical conduct of lawyers. At best they will provide two hours of information to a lawyer about her ethical obligations with little reason to believe that having done so will make much difference to the lawyer’s likelihood of fulfilling those obligations in the future. The lawyer will gain knowledge, but will not necessarily be better positioned to put that knowledge into action. The two hours of education received by that lawyer will do no harm, but it is not obvious that they will do any good. At worst this form of continuing legal education will provide opportunities for lawyers to reinforce the aspects of their practices that are ethically

³¹ Arthurs note 30 at 107 and footnote 30.

problematic, reinforcing conduct placing the interests of the lawyer, and perhaps the lawyer's client, ahead of those of the legal system itself.

If these initiatives do make any difference to lawyer conduct it is likely to be indirectly – because they contribute to a slightly modified professional culture, a sense that compliance with ethical norms is important, and not to be taken lightly. They are equivalent to the confederate in the Milgram experiment who resists the instruction to administer the electric shock – a slight shift in the environment that may help increase the likelihood of good decision making by lawyers. This is a good thing, and may in itself be sufficient to justify continuing with these objectives. The question is, though, can we do better? Can continuing legal education be a useful tool for fostering ethical conduct by Canadian lawyers?

IV. Constructing effective continuing legal education

In addressing any ethical issue in the legal profession a central question is: given the nature of the problem or issue, what regulatory mechanism or body can best address it? Michael Trebilcock has argued, for example, that to the extent there is a problem with lawyer competency, the two most effective regulatory mechanisms for addressing that problem are standard setting – providing specific guidance as to what constitutes competent legal advice in a particular context – and regulatory discipline. As he notes, consumers are not fundamentally concerned with competence “inputs” – with how much education or training or knowledge a lawyer has – they are concerned with competence “outputs” – the quality of service actually provided.³²

³² Michael J. Trebilcock, “Regulating the Market for Legal Services” (2008) 45(5) Alta. L. Rev. 215.

If this is correct, then the specific question to be asked here is, simply, what role can or should continuing legal education in ethics play in regulating lawyer conduct? What problems can it address effectively? In what manner will it best do so? The answers to those questions extend beyond the scope of this paper. However, through considering what ethics education and continuing legal education can do well, and using that to suggest how continuing legal education could be structured to build on its strengths, and address the weaknesses previously indicated, a preliminary response can be given.

While, as earlier noted, the effectiveness of ethics teaching has been questioned by Harry Arthurs and others, the significance of these criticisms should be tempered. After all, there is no positive evidence that ethics teaching – or continuing legal education for that matter – is ineffective, beyond the general observation that given the nature of the problems for which lawyers have been disciplined increased knowledge may not be helpful. This is a reason for not placing undue emphasis on continuing legal education, but it is not a reason to abandon altogether exploration of its value. Further, there is reason to believe that legal ethics education is effective at some things. It has been shown, for example, that students perform better at moral reasoning tests after taking a course in legal ethics than they do before.³³ In addition, ethical reasoning and problem solving are not profoundly different from legal reasoning and problem solving. The essential elements of ethical problem solving – moral sensitivity, moral judgment,

³³ Steven Hartwell, “Promoting Moral Development Through Experiential Teaching,” 1 *Clinical L. Rev.* 505. Hartwell gave his students Kohlberg moral reasoning tests prior and subsequent to his course, and found an improvement in outcome after the course. In general education improves outcomes in Kohlberg tests: Richard O’Dair, “Recent Developments in the Teaching of Legal Ethics – A U.K. Perspective” in *Ethical Challenges*, *supra* note 30 p. 152 at 163.

motivation and courage – correlate to the elements of legal problem solving,³⁴ and when surveyed, lawyers view legal reasoning as something taught effectively in law schools.³⁵

In addition, continuing legal education has been shown to have a positive impact on the competency of medical services when that education is directed towards specific problems in how physicians practice.³⁶ This involves identifying specific ways in which practices should change, and using education as a tool to bring about those changes. The education is, in this sense, a secondary regulatory response, the first being the identification of the practice problem that continuing legal education can help to address.

These points lead to a few suggestions for how continuing legal education could be an effective part of facilitating ethical conduct in legal practice. Most importantly, the most significant part of designing a continuing legal education program is not that lawyers be required to take continuing legal education (although that is important, especially given the documented low participation rates in British Columbia) but rather that attention be paid to the content of the continuing legal education lawyers are taking. The mere passing on of general knowledge about, for example, conflict of interest rules, is unlikely to make any material difference to how lawyers conduct themselves. Moreover, as noted previously, there is reason to be skeptical about whether lawyers will choose a course of study effective or appropriate for the regulatory goals that continuing legal education is designed to achieve.

³⁴ Alice Woolley and Sara Bagg, “*Ethics Teaching in Law School*” (2007) 1 CLEAR 85 at 100-105.

³⁵ Bryant G. Garth & Joanne Martin, “Law Schools and the Construction of Competence” (1993) 43 J. Legal Educ. 469.

³⁶ Trebilcock, note **Error! Bookmark not defined.** at 223-224.

In terms of that content, continuing legal education should be directed at two things: developing and fostering ethical decision-making by individual lawyers, and helping to address issues identified in lawyer conduct as leading to poor outcomes for clients or the public. These relate to the objectives for continuing legal education identified by the Canadian law societies, but with a slight shift in focus, both in terms of those objectives and in terms of how to accomplish them.

As previously argued, fostering ethical decision-making by individual lawyers will not meaningfully occur by efforts to improve lawyer “character.” Rather, fostering ethical decision-making requires building on what should be happening in law schools, namely, teaching ethical reasoning as a skill, one strongly correlated to legal reasoning but distinct in some important ways, which create unique challenges for getting those decisions right. Ethical reasoning is similar to legal reasoning in requiring the empathy and analysis to identify problems, to bring to bear relevant information and principles to facts and the ability to decide what to do given all the relevant considerations.³⁷ But it is different from legal reasoning in being less constrained as to the information and principles that are applicable, and in being subject to different pressures because fundamentally a decision about the lawyer’s own course of action and conduct, as opposed to being advice to a third party as to how to act.³⁸ Effective legal ethics teaching encourages the ability to identify ethical issues when they arise, to be able to think properly about how to resolve those issues, and to be motivated and emboldened to do so appropriately.

³⁷ Woolley and Bagg, note 34 at 101-102.

³⁸ *Ibid.* at 103-104.

Continuing legal education should aim at building on these processes, and not simply at providing practitioners with updates on developments in the provincial codes of conduct or case law. The emphasis should be on problem solving, on the processes of reasoning through ethical challenges. This can – and should – include the imparting of information about what principles and guidelines are applicable to the resolution of different ethical problems, but it should not stop at that point. It should also look at the factors that may undermine ethical decision-making by lawyers such as, for example, the tendency towards reduction in cognitive dissonance that can mean that individuals will often continue with courses of action that lead to unethical results rather than admit that, previously, they had made a mistake.³⁹ Continuing legal education could also usefully be orientated to issues with ethical problem solving more likely to arise in later years, or after a period of time in practice, that are perhaps less significant at the earlier educational stage of the law student:

One way or another, teaching legal ethics has to be part of lifelong learning (an “*éducation permanente*”) and continuing professional development. One issue typically important for later years of the curriculum is to support the students’ moral awareness against the tendency to silence moral dilemmas by conceptualizing them in purely technical-legal terms.⁴⁰

In addition to teaching legal reasoning, the content of continuing legal education should, as suggested by the example of effective continuing legal education in the medical context, be orientated towards specific ethical problems that have arisen in the profession in general, or in segments of the profession in particular. For example, in the Code of

³⁹ This is a phenomenon discussed extensively by David Luban in conjunction with the Milgram experiment in *Legal Ethics and Human Dignity*, note 17, chapter 7.

⁴⁰ Leny de Groot-van Leeuwen “Lawyers’ Moral Reasoning and Professional Conduct, in Practice and in Education” in *Ethical Challenges* p. 237 at 250.

Conduct of the Law Society of Alberta, Chapter 6, dealing with conflicts of interest, has a “Memorandum re Multiple Representation” which addresses in particular issues arising from multiple representation of a builder and the builder’s mortgage lender. If, as this Memorandum suggests, there were particular challenges with multiple representation, or with applying the rules on multiple representation, in that context, then an appropriate continuing legal education initiative would be to require lawyers practicing in construction and real estate to take their continuing legal education courses on this issue. This approach would have the dual benefit of being effective as education while also focusing regulatory attention on the ethical issues arising in the profession, which could then be approached from a variety of perspectives, whether with respect to continuing legal education, standard development (as recommended by Trebilcock), modifications to codes of conduct or practice directives.

In this respect regulators should in addition consider the extent to which circumstances and systems, as opposed to failures by individual lawyers, contribute to problems arising in legal practice. If, as noted by Mackenzie, ethical problems such as missed limitation periods arise from inadequate office systems, then regulators should consider the introduction of regulatory requirements, such as mandated limitation systems in all law offices,⁴¹ and use continuing legal education as part of the implementation of those systems. Again, these initiatives are worthwhile in their own right; continuing legal education can simply be a means through which to ensure they are accomplished effectively.

⁴¹ This is, I believe, required by the Law Society of Alberta, for example.

V. Conclusion

Continuing legal education may well have an important role to play in fostering ethical behaviour in Canadian lawyers. Continuing legal education will not affect lawyer character, and certainly will not affect lawyer behaviour through improving lawyer character. In order to affect lawyer conduct in positive ways, continuing legal education needs to take a more precise direction. The focus of regulators should be on the content of that education, on orientating it towards what continuing legal education should be able to do effectively, building on the moral development begun in law school and fostering specific initiatives to address ethical issues arising in practice.