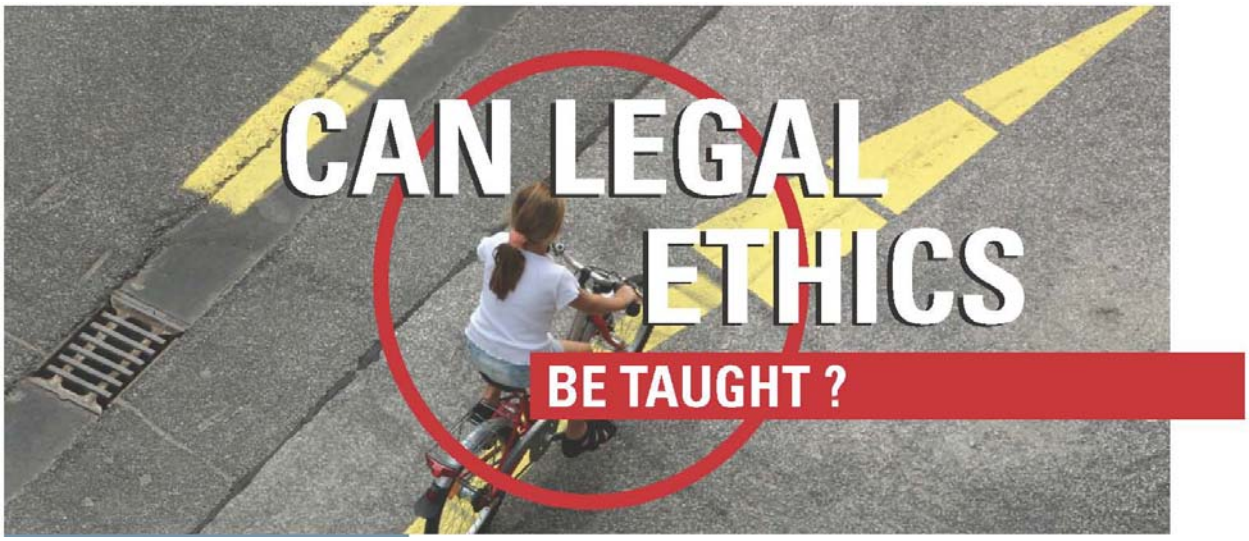
Centre for Professionalism, Ethics and Public Service

Faculty of Law, University of Toronto

Symposium: Can Legal Ethics be Taught?

April 4, 2008



A. Introduction

The Centre for Professionalism, Ethics and Public Service was approved by the law school's Faculty Council in the Spring of 2007. The goal of the Centre is to broaden and deepen our understanding of professionalism, ethics and public service, and the relationship between them. The Centre brings together leading voices from the spheres of academic, practice, judicial and public interest communities, and builds on the expertise within the Faculty of Law at the University of Toronto, the broader University of Toronto community, partner law schools and Universities, the legal profession and the legal community in Ontario. Its aim is forge stronger and more meaningful linkages between the study of law, the practice of law, and the implications of law. The Centre seeks to provide a forum, and to serve as a catalyst for dialogue about the capacities, judgment and actions necessary for effective lawyering. The Centre is committed to encouraging community leadership and public service as essential to becoming a "good" lawyer. More information on the Centre is available at http://www.law.utoronto.ca/programs/cpeps.html

Each year, the Centre will organize a signature symposium on a major topic or theme relating to its mandate. For 2008, the topic selected to inaugurate The Professionalism, Ethics and Public Service (PEPS) Symposium, is "Can Legal Ethics be Taught?"

This topic is meant to provoke discussion on pedagogy and on refining the nature and scope of what we mean by ethics. For some, this may mean trying to teach law students and/or lawyers "how to be good." For others, the focus will be on concrete areas amenable to legal pedagogy, such as a Law Society's Rules of Professional Conduct. The summary of the Symposium below is intended to capture the highlights of the day and provide a point of departure for further discussion and reflection on legal education and legal ethics. The Symposium was generously sponsored by the Law Foundation of Ontario.

The Centre wishes to thank Jane Kidner, Jennifer Tam and Aleatha Cox for their assistance in organizing the Symposium, and Vasuda Sinha for her superb assistance in compiling this summary of the Symposium discussion.

The summary report of the Symposium is organized around the following sessions held on April 4th (a webcast of the sessions is also available at the conference website http://www.law.utoronto.ca/conferences/legalethics.html):

1) Allan Hutchinson (Osgoode), "**Can Legal Ethics be Taught?**"

2) **The Osgoode Experiment – Ethical Lawyering in a Global Community**:
Trudo Lemmens (Toronto) (moderating)
Janet Mosher (Osgoode), Robert Wai (Osgoode), Trevor Farrow (Osgoode), Adam Dodek (Osgoode)

3) **From Public Interest Requirements to Compulsory Legal Ethics**:
Lorne Sossin (Toronto) (moderating)
Richard Devlin (Dalhousie) and Jocelyn Downie (Dalhouse), Janet Leiper (Osgoode), Stephen Pitel (Western)

4) **The View from the Profession**:
Michael Code (Toronto) (moderating)
Avvy Go (Metro Toronto Chinese and Southeast Asian Legal Clinic), Joseph Cheng (Dep't of Justice), Jeremy Fraiberg (Osler), Freya Kristjanson (BLG)

5) **The Future of Legal Ethics Education**:
Brent Cotter (Saskatchewan) (moderating)
Roundtable with Alice Woolley (Calgary), Rand Graham (Western), Janine Benedet (UBC), Paul Paton (Queen's)

B. The Symposium

1) Opening Address: Allan Hutchinson (Osgoode), "Can Legal Ethics be Taught?"

Professor Allan Hutchinson set the tone of the Symposium by declaring it to be "not only an embarrassment, but a disgrace." The purpose of Professor Hutchinson's statement was not to deny the value of teaching legal ethics, but to lament the status quo, in which legal ethics does not constitute a universally standard component of law school curricula. He added that the lack of legal ethics in law schools spoke a silent message to students about the lack of value accorded to ethics in legal pedagogy. According to Professor Hutchinson, the question "can legal ethics be taught?" is misplaced, as the more relevant question is "how do we go about teaching it?" He then framed the rest of his talk around sub-questions intended to facilitate his answer to the central question.

Why teach legal ethics? Professor Hutchinson voiced disagreement with the oft-heard argument that law schools are not the proper forum for teaching ethics or that teaching professionalism constitutes an implicit endorsement of the *status quo* of the profession. He argued that since 90 per cent of law students do practice law in some fashion it is incumbent on law schools to ensure their students do not venture into practice without any understanding of what it means to be a 'professional'. He added that teaching students to be ethical lawyers does not preclude law schools from doing such teaching critically.

What do we teach? This question, Professor Hutchinson asserted, constitutes the very core of the debate on the place of legal ethics in law schools. The debate is rooted in tension between the argument that teaching legal ethics means ensuring students have an understanding of the rules that form the lawyer's code of conduct and teaching students how to embody and articulate the characteristics of an ethical lawyer. Because there is no guarantee that a lawyer who knows the rules of ethical conduct will practice ethically the real challenge is to foster a profession that instils in its students an understanding of the responsibilities that come from law being a communal trust.

Who should do the teaching and when should it occur? While Professor Hutchinson described these as two discrete questions, he discussed them in a manner to suggest they are aptly mentioned together. Professor Hutchinson began his discussion of these questions by stating that law students are generally both young and professionally immature, and that these characteristics are strategically useful in the context of teaching professional ethics. Individuals who have not yet fully developed their own ideas as to what it means to be an ethical lawyer are still open to external influence in their development of "ethical thinking," The success of this project, however, is contingent on ensuring that legal ethics begins to be taught within the first few weeks of law school itself. Professor Hutchinson added that not only should ethics start being taught early in a law student's career, it is a subject that should never stop being taught. Ethical lawyering is a matter of attitude manifested in day-to-day activities and thus should always be within the realm of a lawyer's conscious.

While he emphasized the importance of ethics begin taught as early as possible in law school, Professor Hutchinson acknowledged the apparent practical problem that arises when law professors, who are mostly academics who teach law, are faced with the task of teaching students

about how to deal with ethical problems in the world of legal practice. This problem, however, is overcome when legal ethics is conceived not as a matter of teaching future lawyers the rules of ethical lawyering but of law professors realising that their own ethical responsibilities to the profession require them to help their students develop their personal understandings of ethics.

1. The Osgoode Experiment – Ethical Lawyering in a Global Community: Trudo Lemmens (Toronto) (moderating) Janet Mosher (Osgoode), Robert Wai (Osgoode), Trevor Farrow (Osgoode), Adam Dodek (Osgoode/Centre for Professionalism, Ethics and Public Service Fellow)

Janet Mosher began by outlining the history of the "ethical lawyering" program at Osgoode. Early discussions on the most recent Osgoode strategic plan focussed on the question of how to better integrate both ethics and International Comparative and Transnational Law (ICT) into the curriculum. Thus emerged a program that aimed to teach students about what it means to be an ethical lawyer in a global society.

The organizers of the first year curriculum reform project sought to create a program that veered away from teaching ethics as rules-based or legal practice ad adversarial dispute resolution. Thus, they decided on a broad-based ethics program designed to help students learn about the profession and the collective responsibility of lawyers to the public interest. Additionally, the Osgoode program aims to facilitate student understanding of the wide spectrum of activities that practitioners are involved in and how ethical obligations should be considered in light of that spectrum.

A noteworthy component of the ethics program is the requirement that students fulfill a 40 hour public interest placement. Professor Mosher emphasised that the purpose of the public interest requirement was not to impose a pro bono ethic onto students, but rather to get them to begin thinking about the public dimensions of all lawyering. Thus, while the program requires students to perform 40 hours of uncompensated law-related work, involvement in a broad range of activities and organizations falls within the definition of "public interest".

According to Professor Mosher, the ultimate purpose of the Osgoode Ethical Lawyering program is to provide students with the conceptual tools to engage in deliberative judgment about their responsibilities as members of the profession.

Robert Wai's presentation focussed on the connection between ICT and ethics. He began by stating that while many other individuals assume that legal ethics is a topic suitable to teaching in law schools, the question of "why teach legal ethics" remains a serious one to him.

In light of his caution regarding the legitimacy of teaching legal ethics, Professor Wai broached the question of why he became involved in the Osgoode ethics program. He offered two answers to this question, one related to the organization of the program itself and the second of a more academic perspective.

A significant appeal of the program for Professor Wai derives from the broad understanding of ethics that it adopts. In seeking to get students to understand ethical obligations of lawyers as they are manifest throughout a wide spectrum of activities, the program embraces an understanding of the politics of law.

Robert Wai also discussed the program's focus on ICT and globalization. This focus allows students to be presented with cases that ground ethical problems in a wide range of scenarios. ICT and globalization present especially complex and realistic ethical problems that create a heightened awareness of the practical relevance of applied and theoretical ethics. According to Robert Wai, this approach to teaching legal ethics is particularly useful in the context of Canada's social pluralism.

The core of **Adam Dodek**'s presentation revolved around the content and substance of the course. He began by explaining the decision by Osgoode to use the term "ethical lawyering". This decision had two major motivations. First, "ethical lawyering" is a phrase that is largely free of any existing normative implications, which allowed the course designers freedom to infuse it with meaning. Additionally, "ethical lawyering" connotes a largely practical subject matter; this corresponds with one purpose of the course, which was to spark an ongoing moral conversation about the practical implications of being a lawyer in Canada in the 21st century.

Professor Dodek explained that the course is divided into three modules. In the first week of their first term, students are encouraged to engage in discussions about what they think it means to be a lawyer. It is believed that by exposing students to different understandings of the purpose of lawyering, students will begin to develop an understanding of the various ethical frameworks that combine to define the meaning of "ethical lawyering". Professor Dodek explained that during this first week the discussion revolved around professionalism, public interest and access to justice and the collective and individual responsibilities of lawyers in each of these areas.

The second and third modules of the course take place in the first two weeks of the January term. It is only at this time that students are introduced to the notion of ethical lawyering in the context of ICT. Finally, during the third module students are made to think about what it means to be an ethical corporate lawyer.

The purpose of dividing the course between the first and second semesters is to allow students accumulate some basic substantive understanding of the law prior to being asked to think and comment on their ethical obligations. Thus, in the first module, before any real exposure to legal doctrine students are asked to contemplate the duties of an ethical lawyer vis-à-vis their own motivations for becoming lawyers. It is only after having acquires a semester's worth of substantive legal knowledge are students asked to begin to demonstrate their understanding of their ethical obligations vis-à-vis their understanding of the law itself.

Trevor Farrow's discussion centred on the pedagogical approach of the course. He indicated that the greatest challenge of the course was to package it in a way that would make sense to students. He explained the structure, format, materials and evaluation methods used for the course.

The course was presented to students in two parts. The first part consisted of a week of discussion in the first term of first year while the second part consisted of 2 weeks at the beginning of the January term. One of the particularly noteworthy aspects of the course was the variety of delivery formats used. Students were presented with information in a large lecture setting, large groups consisting of 75 students, small groups consisting of 24 students for

braining storming sessions related to case studies, even smaller informal groups consisting of 6 students for the "informal lawyering" groups and a variety of assigned readings.

The materials distributed to the students consisted of a wide range of written articles of both a popular and academic variety.

Finally, embracing the open minded pedagogical approach of the rest of the course, evaluations were completed through a variety of different tasks and assignments.

Question and Answer Session:

The first comment from the audience came from Lorne Sossin who spoke of the challenge of trying to create a standardized experience when the same course is being taught by professors with different academic backgrounds and expertise.

Sue Gratton asked about the connection between the legal ethics program and the structure of the general first year curriculum. She wondered to what extent the course designed to specifically move away from the traditional form of legal pedagogy. On this point the panel noted that the course structure was determined with reference to what would be the best means of helping first year students connect the instruction they received on ethical lawyering with the content of the rest of the first year curriculum.

Brent Cotter prefaced his question with reference to his observation of the decline in enthusiasm for law school that occurs between first and third year. He asked if the Osgoode program helped retain the enthusiasm of law students for law and how might this be worked into other courses. As the course has only just completed its first year, the panel lacked quantifiable evidence of the effect of the program on student attitudes towards law school. However, it was noted that many students were excited by the ability to gain practical legal experience while in law school.

Noah Aiken-Klar from PBSC inquired as to how the program could serve as a bridge between curriculum and extra-curricular law activities. The panel noted that existing extra-curricular activities available through Osgoode were already incorporated into the program; for instance, PBSC placements and legal clinic work constituted activities that were eligible to fulfill the 40 hour public-interest requirement.

The first session came to a close with a comment from John Law who observed that an ongoing challenge for the program will be to secure the continued dedication of sufficient resources to ensure that the collegial mentality remains.

2. From Public Interest Requirements to Compulsory Legal Ethics: Lorne Sossin (Toronto) (moderating) Richard Devlin (Dalhousie) and Jocelyn Downie (Dalhousie), Janet Leiper (Osgoode), Stephen Pitel (Western)

Janet Leiper spoke about the public interest component of the Osgoode ethics program. In accordance with the program, it is now a graduation requirement for students to complete forty hours of public interest work. Following the completion of the work students are also required to

write a reflective paper/evaluation of their experience. Additionally, students are combined in small discussion groups the purpose of which is to facilitate conversation about their respective experiences.

To fulfil the public interested requirement, the work a student chooses to do must meet three criteria: it must be uncompensated, public interest related and law related. Janet Leiper noted that while a number of already established placements exist that would allow a student to fulfill the requirement students have the option of seeking out placement opportunities on their own. Here Janet Leiper noted that there was no ideological underpinning to what constituted 'public interest' work. As such, the content of the work itself was irrelevant to fulfilling the public interest component as long as the work was, broadly speaking, related to the public interest; placements in areas such as access to justice, law reform, legal aid, public legal education, etc. are all eligible for fulfilling the public interest requirement.

Janet Leiper also acknowledged the importance of faculty involvement with the program. This involvement makes it is possible for students to engage in faculty research projects as a means of fulfilling their public interest requirement. Faculty also play an important role vis-à-vis the normative aspects of the ethics program because they are critical to expanding existing conceptions of 'ethics' and 'the public interest' and to further broaden the scope of the program.

Janet Leiper also spoke of her experience interacting with US law schools that have programs similar to the Osgoode program. She noted that the US schools that have had such programs in place for a while now were quite willing to share their knowledge and materials with Osgoode. She also mentioned that Osgoode's decision to immerse students in ethical education from the beginning of the legal education has become the envy of peer institutions in the U.S.

Stephen Pitel began his presentation by stating that the measure of success of the symposium will be whether or not the audience leaves ready to actually convince others in the legal world of the need for a change to the *status quo.*

Moving on to the question of whether law schools should make ethics education compulsory, Professor Pitel offered an unequivocally affirmative answer. The majority of Professor Pitel's presentation revolved around two questions: 1) why should legal ethics education be compulsory, and 2) what issues and challenges are raised by a mandatory ethics course.

Professor Pitel offered five answers to the question of why ethics education should be mandatory. First, he argued that it is unreasonable to suggest that ethics is any less fundamental an area of study than existing mandatory courses such as 'torts' or 'contracts'. Surely it is as important to have law students who are familiar with the basics of ethical lawyering as it is to have law students familiar with the basic principles of contract law. Second, Professor Pitel disputed the idea that ethics can be taught implicitly through all the other required courses in law school. In light of existing evidence that makes clear that the wide variety of instructors used to teach core courses already results in students with vastly disparate experiences, there is no guarantee that students would receive a consistent or reasonable amount of ethics education if it was conveyed to them only through other courses. The position of the regulators vis-à-vis ethics education was the starting point for Professor Pitel's third argument. He argued that in light of a context where the regulator has affirmed the need for a mandatory ethics education but is in the

process of extrication itself from the role of providing such education, it is reasonable for law schools to fill the existing gap in ethics education. Fourth, Professor Pitel suggested that employers are likely keen to start receiving students who have a basic understanding of their ethical obligations. He acknowledged that this was a weaker argument, at least without supporting data from firms. Finally, Professor Pitel argued that mandating the necessity of legal ethics within law school curricula is likely to help foster the critical mass necessary to create a proper scholarly community in the field.

Professor Pitel also identified five issues and challenges that would arise from the mandatory teaching of ethics in law schools. One important question raised is where in the curriculum a legal ethics course should be inserted. Echoing the opinions of many of the other speakers at the Symposium, Professor Pitel argued it is preferable to insert an ethics course into the first year curriculum. On the point of the forum of an ethics course he suggested that there is no reason to assume ethics are better taught or learned in a small group environment. Related to this issue is the question of whether an ethics program should be modeled on the same format as regular law school courses. On this question Professor Pitel pointed to the different approaches adopted by Osgoode and Western to illustrate his belief that any number of formats may be used to teach, and that while different formats may accomplish different things, no single format should be assumed to be 'the best' way of teaching ethics. Also important, he indicated, is the manner of evaluation. Professor Pitel cautioned against grading an ethics course on a pass/fail scale. To evaluate a student's performance in legal ethics on a different scale than how other coursework is evaluated is to implicitly send a signal that ethics education is not worthy of equal effort on the part of students or faculty.

Finally, Professor Pitel spoke to the role of the instructors of an ethics course. To ensure students are instilled with a proper understanding of the responsibilities and duties of a professional, the individuals from whom they are learning these qualities must seek to embody and exemplify them. As such, instructors of legal ethics have a responsibility to model the kind of behaviour—e.g. civility, courtesy, professionalism etc.—that a legal ethics course is meant to foster in students.

The remaining members of this panel**, Richard Devlin** and **Jocelyn Downie**, gave a combined presentation in which they highlighted relevant aspects of a forthcoming paper they are co-authoring. Their presentation covered four main topics pertaining to the central argument of their paper: members of the Bar should be required to engage in Continuing Legal Ethics Education (CLEE).

Their argument for CLEE stems from the clear and palpable concerns regarding the conduct of current members of the Bar. While there is no data available that allows quantification of existing public concern regarding the ethics of lawyers, anecdotal evidence indicates that it is a matter of significant public concern. Additionally, such concern seems justified in light of leniency that tends to be demonstrated by professional disciplinary panels. Further cause for concern arises from the fact that the majority of lawyers who face disciplinary action are practitioners in sole and small firms who are not connected to established legal social networks. These concerns culminate to form the apparently accurate perception that an unwritten rule of loyalty to the profession causes the lawyers who sit on disciplinary panels to protect their peers rather than protecting the public from bad lawyers.

The second topic of the presentation addressed the question of why it is useful to pursue mandatory CLEE. The first point made was that such CLEE breeds professionalism, because universal awareness of the standards of appropriate conduct constitutes a constitutive characteristic of a profession in general. Second, CLEE was characterised as a duty stemming from the role lawyers as *de facto* public trustees. Because lawyers have power and influence over their clients, and the profession as a whole holds significant social and political power and influence, it is incumbent on lawyers to be consistently reminded to exercise such power and influence responsibly and in the public interest. Thirdly, it was argued that CLEE actually holds beneficial consequences for individual lawyers and the profession as a whole. One component of ethical lawyering is being familiar with applicable rules and codes of conduct. As such, legal ethics serves as a practice tool because it can help a lawyer with a practice problem make the 'correct' decision'. Additionally, publicizing that mandatory CLE forms part of a lawyer's professional obligations will surely help improve the public perception of lawyers. The fourth argument under this category was made by analogy. Mandatory CLE already forms a component of the acknowledged responsibility of lawyers; lawyers are expected to continuously ensure the currency of the knowledge in their fields of practice. To the extent that ethical lawyering pertains to each and every lawyer, no matter his/her areas of practice, it is only reasonable that all lawyers be required to keep up to date with their ethical obligations. Additionally, this perspective can already be witnessed in other established professions that require their members to keep updating their knowledge of their ethical obligations. The fifth argument made here related not to the actual status quo, but derived from a social development the presenters hope to see. It was the presenters' hope and belief that soon institutions and individuals will begin themselves call for mandatory CLEE.

In the third segment, the presenters identified, and sought to refute, a number of arguments that may be raised against their call for mandatory CLEE. The basic normative argument identified was that lawyers are rational agents who should be free to choose whether or not they wish to improve their ethical knowledge. In response to this objection Professor Devlin offered two lines of analysis. First, he highlighted the fact that the law does not afford absolute respect to the autonomy of lawyers; indeed, lawyers constitute a regulated profession and therefore are not completely autonomous. Second, he began with a definition of autonomy as the capacity for self-determination. He argued that self-determination is best achieved when one's decisions are made in light of all available and applicable information. From this perspective, he argued, CLEE actually enhances a lawyer's capacity for ethical self-determination.

Four practical arguments against mandatory CLEE were also identified. First, it was noted that legal ethics education is costly; it takes resources to administer, and it costs individual lawyers in the form of forsaken billable hours. Four counter-arguments were identified to refute this objection. Professor Devlin argued that the cost of ethics education is reasonably characterised as a mere cost of doing business. Additionally he suggested that the actual cost of mandatory CLEE may not be as high as anticipated. Furthermore, he argued that whatever the real cost of such education, it can be offset through subsidization by individual law societies. Finally, he argued that, in fact, the knowledge accrued through CLEE might actually create an 'ethical premium' thereby increasing the market value of lawyers' services.

A second, practical objection to CLEE is that it would be redundant insofar as practicing lawyers may already have knowledge or awareness of the ethics taught. Professor Devlin acknowledged

the potential for such redundancy, but argued that the quality of legal ethics education under the *status quo* is so questionable that redundancy is not a probability.

The futility of the endeavour was the third objection cited to the argument for mandatory CLEE. The basic argument from this perspective is that some lawyers will always be bad lawyers, irrespective of the amount of ethics training they receive. Professor Devlin acknowledged that there will always be some bad lawyers. He then noted that the premise of the argument was not that mandatory CLEE is sufficient for ensuring a universally ethical profession, but rather that it constitutes a necessary step in the question for achieving as ethical a profession as possible.

The fourth objection to their argument identified by the presenters is that legal ethics are born of the idealist tradition; thus, those who argue in their favour demonstrate a naïveté regarding the reality of the profession. To this objection, Professor Devlin responded that there is nothing inherently antithetical about idealism and materialism. That is, even if ethics originally derive from the idealist tradition, there is no reason to assume they cannot materially improve the ethical articulation of the profession.

In the fourth segment of the presentation Professor Downie identified three means of overcoming popular resistance to mandatory CLEE. First, sceptics or objectors should be persuaded to change their minds through reasoned explanations of the scope and purpose of mandatory CLEE. Second, efforts should be made to facilitate the implementation of mandatory CLEE by making it easier to teach by providing better materials and methodologies. Additionally, it should not be assumed that only the narrow constituency of law professors are qualified to teach legal ethics. Rather, to the extent that legal ethics constitutes a component of both legal practice and ethics in general, practitioners and philosophers may be well qualified instructors.

Where ‘persuasion’ and ‘facilitation’ fail, Professor Downie offered ‘compulsion’ as a useful method of overcoming resistance. Indirect compulsion can be achieved through peer pressure and public embarrassment of individuals and institutions that object to mandatory CLEE. Additionally direct compulsion may be achieved by threatening the profession with the removal of its-self regulatory privileges.

Question and Answer Session

The first commentator from the audience suggested that an additional objection to mandatory CLEE would manifest in the form of ideological resistance

Bencher Heather Ross added a comment with regard to the issue of encouraging law firms to require CLEE. She noted that the reality is that 95 per cent of law firms are comprised of sole practitioners and that 99.9 per cent of lawyers who undergo disciplinary prosecution by the Law Society are sole practitioners. She suggested that these numbers indicate the need for mandatory CLEE, because the majority of practitioners would not have access to CLEE absent institutional delivery systems for it.

With regard to the ‘public interest’ requirement of the Osgoode Program, Professor Paul Paton asked about what support or resistance was received from the administration and alumni on the issue of starting the initiative. Janet Leiper indicated that while alumni were not rally targeted

with regard to the program, to the extent that the Program was born of a recognised need for changing the first-year curriculum, the administration at Osgoode was quite supportive.

3. The View from the Profession: Michael Code (Toronto) (moderating), Avvy Go (Metro Toronto Chinese and Southeast Asian Legal Clinic), Joseph Cheng (Dep't of Justice), Jeremy Fraiberg (Osler), Freya Kristjanson (BLG)

The tenor of the third session was informal and conversational. Each panellist began by offering a brief statement highlighting how legal ethics are manifested in his/her particular area of practice. The rest of the presentation consisted of conversation between the panellists and the audience with regard to three questions posed by the Professor Code.

Representing the civil litigation Bar was **Freya Kristjanson** who briefly spoke of the day-to-day ethical challenges that arise in the lives of civil litigators. Such challenges include how to answer questions from clients with regard to their conduct during the course of a litigation or how to react when one accidentally receives privileged communication from opposing counsel. Ms. Kristjanson indicated that she considers her ethical obligations in such scenarios to be moulded by her standpoint as a partner in a large law firm. Thus, she believes that her conduct as a litigator should be guided not only by the codified rules of professionalism but also by her duties to her firm and to the junior lawyers for whom she is expected to set an example.

Avvy Go addressed the panel as a representative of practitioners at legal clinics or who practice poverty law. She argues that ethics is about thinking within the terms of a particular value system. She was thus somewhat sceptical about whether legal ethics as manifested in the particular consciousness of good lawyers can be taught to all lawyers. From Go's perspective, 'legal ethics' refers to a lawyer's responsibility to fulfill his/her duties of collective responsibility to society. This approach is particularly relevant in the setting of a legal clinic because the clients represented by legal clinics constitute some of the most vulnerable members of society and are thus especially vulnerable to unethical conduct on the part of lawyers.

Jeremy Fraiberg offered his perspective on the practical ethical obligations of solicitors. He began by observing that the primary ethical challenges in most solicitors' practices arise from conflicts of interest between both existing and potential clients. He touched directly on how the *Neil* and *Strother* cases have refined the duty of loyalty and the onerous obligations imposed thereunder.

Joseph Cheng spoke to the ethical obligations of a public Crown lawyer. He argued that given that Crown lawyers are representatives of government as well as being officers of the court, they are often expected to adhere to rigorously high standards of professional conduct. Such obligations become particularly relevant in the context of vulnerable or unrepresented opponents etc.

The first discussion question for the panel was if legal ethics should be regarded as a problem solving tool or as a broad set of values and beliefs that influence the operation of law. The answers of the panellists revealed a general consensus that legal ethics served both purposes. Jeremy Fraiberg pointed how the Rules of Professional Conduct are often used as problem-solving tools in the business law context. Professor Code added that the idea of ethics as a broad

set of values and beliefs assists in the administration of justice. On this point Avvy Go suggested the dual application of legal ethics should not be regarded as independent of each other. When using rules of ethical conduct in addressing discrete ethical problems it is important to be guided by the broader purpose and meaning of those rules. Absent an understanding of such meaning and purpose it is unlikely that teaching the rules only will improve the administration of justice or access to justice.

At this point in the discussion, a law student in the audience commented that students are likely keen to accept a course on rules of ethical conduct because it is easily interpreted as a course on 'how to be a good lawyer'. The student suggested, however, that students will tend to resist a program designed to acquaint them with a particular ethical paradigm, as it would be interpreted by them as a means of teaching them how to be good people.

The student comment was followed by interesting comments from Alice Woolley. First, she argued that the purpose of teaching ethics is not to indoctrinate students with any particular ethical paradigm. Rather, she considers teaching legal ethics as a means of getting students to rethink what they perceive their values to be. She then added, however, that we should be wary of overestimating the importance of law school in framing a lawyer's approach to ethics. She noted that law school constitutes a small moment in a lawyer's legal career; therefore, while it is certainly an influential period, there are limits to the influence that the content of ethical education in law school can have on an individual's understanding of ethical lawyering.

Professor Code then presented the panel with its second discussion question: Who is responsible for legal ethics? According to Freya Kristjanson, the decision of how to fulfill one's perception of a lawyer's ethical duties is ultimately a matter of personal responsibility. She added, however, that law schools play a role in forming individual perceptions of ethical duties. Professor Farrow's opinion also placed similar responsibility on lawyers to determine and exercise the scope of their ethical obligations. He stated that it is not the role of law schools to offer value judgments regarding the ethical aptitude of different kinds of lawyers (e.g. solicitors, human rights lawyers etc.). Rather, he argued, the purpose in law schools teaching ethics is to help all law students think about what it means to practice ethically within their chosen fields of practice. Jeremy Fraiberg added that law schools have a responsibility to teach their students the basic principles of ethical lawyering. Bencher Heather Ross concurred and added that the regulator itself has a responsibility to teach ethics, as familiarity with the rules and principles of ethical lawyering is a means of saving individual professional careers.

In response to a general question about the nature of the observed deficiencies in ethical education under the status quo, Professor Code noted the decline of civility in the courtroom as one of the significant symptoms of a lack of proper ethical and professional education. Justice Paul Perrell concurred with this opinion. He also suggested that a decline in mentorship within the profession.

Professor Code used Justice Perrell's comments on mentorship to segue into the panel's third discussion point, which was on mentorship as a means used by the senior bar to foster professionalism and ethics in its junior ranks. Such an approach to mentorship no longer seems to exist and the profession seems to have adopted a tiered structure wherein the most junior members of the bar have little direct contact with senior counsel. The opportunity to learn how

to be a good lawyer by watching good lawyers in action does not exist as it used to, thereby depriving junior lawyers of a significant channel of professional education. Professor John Law commented that the mentorship system should not be assumed to hold the answers to the future of professionalism and ethics because of the biases built into it. The system generally results in the brightest and most capable students—those who are less vulnerable to the pressures that tend to result in unethical conduct—being paired with the most capable and ethical practitioners, while the weakest students—those who are more likely to fall prey to ethically questionable conduct—get paired with the most ethically questionable lawyers. Related to this issue, U of T law student Akash Khokhar raised the point that there should be means in place to protect students from bad mentorship.

4. The Future of Legal Ethics Education: Brent Cotter (Saskatchewan) (moderating), Roundtable with Alice Woolley (Calgary), Rand Graham (Western), Janine Benedet (UBC), Paul Paton (Queen's)

Professor **Alice Woolley** began her presentation by noting the relative lack of attention that has been paid to legal ethics in Canada historically, and the welcome change that has been brought by the past few years with increased academic interest in the topic. She suggested that predicting the future path which that interest will take is difficult, because legal ethics can be conceived in a variety of ways. She set out three possibilities. First, that legal ethics is a matter of state regulation of an economic activity. The rules of conduct exist to correct imperfections in the market for legal services. Second, legal ethics constitutes the articulation, application and theoretically rigorous interpretation of various legal doctrines relevant to the practice of law. It is an area of doctrinal interest, like contracts or torts. Third, legal ethics articulates what constitutes "right action" in the practice of law, what at a fundamental level constitutes the morality of lawyering. Professor Woolley suggested that as legal ethics develops as a discipline in Canada all three of these avenues may be pursued, and that the shape that will take is unclear. However, she suggested that it will be important to consider the possibility for consideration of them in conjunction with each other, as well as disjunctively.

Professor **Rand Graham**'s introductory comments were comprised of his hopes for the future of legal ethics, much of which were rooted in his central contention that the ambiguity inherent the term as currently used needs to be resolved. He sees this ambiguity as the product of the tension between the public perception of the meaning of legal ethics—a means of inculcating lawyers who abide by a code of conduct—and the fact that the academics charged with the responsibility of teaching ethics in aw schools tend to lack the practical legal experience necessary for equipping students with proper and adequate ethical knowledge.

Professor Graham's hopes for the future of legal ethics included hope that as legal ethics gains consistent meaning and content, it will stop being used by law schools as a catchphrase for political and economic gain. Theories of legal ethics and ethical policies as manifested in codes of conduct can certainly be studied and taught, but it is misleading for law schools to advertise themselves in a manner that equates their own ethicism or ethical value with the content of their ethics programs or the number and quality of their ethics scholars.

Janine Benedet prefaced her ideas on the future of legal ethics with a discussion of the 'failures' she perceived occurred in the firs year of UBC's 'Law in Context' course. She argued that the future of legal ethics lies in making students understanding their own ethical obligations within the context of student life. She noted that this is a particularly challenging task in light of the growing consumer mentality of students. Students see themselves as buyers in the market for legal education, resulting in an ethic of entitlement vis-à-vis the processes and outcomes of their educational experiences.

Professor Benedet also spoke to the tensions that exist between law schools, the profession and the regulatory. She argued that the hiring cycles of firms are greatly influential on student behaviour and that this influence should be harnessed by the firms, the law schools and the regulator in order to promote ethical education among students.

Paul Paton's opening remarks focussed on the role of the regulator in ensuring the ethical conduct of the profession. As the regulator provides the forum for professional discipline and the enforcement of ethics, it plays a critical role in the articulation of legal ethics in the profession itself. Professor Paton argued that this role imposes a responsibility for ethical education onto the regulator. Abrogating this responsibility to the law schools is not an advisable course of action, as it is not reasonable to assume that academic ethical education will ensure professionally competent students. Professor Paton highlighted the particular importance of the regulator's role in ethical education in the context of the decline of legal self-regulation around the world. He argued that the loss of self-regulation in certain jurisdictions is the direct result of the perception that disciplinary mechanisms were being used by lawyers to protect their peers rather than to actually discipline lawyers who had breached the public trust.

Professor Cotter structured the rest of the Panel around discussions of three questions

- First, what is the future of legal ethics instruction?;
- Second, how will changes in the demography of society and the profession influence legal ethics?; and
- Third, will the scope of self-regulation diminish or disappear and, if so, would the component of legal ethics related to the duties that arise from self regulation also disappear?

According to Professor Paton, the future of ethics instructions requires a change in the mindset with which we approach ethics. It must be regarded as a lifelong journey and not simply as a discrete topic of instruction or education. He added that as the profession evolves, so must our understanding of what constitutes ethical lawyering. In the context of a change in the business of law, legal ethics must also become more flexible and adaptive to changing delivery models of legal services.

Professor Benedet emphasised that legal ethics instruction in the future needs to demonstrate understanding of the fact that bad lawyers are as much a part of the profession as good lawyers; the purpose of legal ethics is not merely discipline those who stray from the path of ethical conduct, but to help achieve a universally ethical profession. She added that demographic changes should not be regarded as a barrier to ensuring uniform ethical standards throughout the

profession. Rather, the normalization of diversity within the profession should be regarded as a means for expanding our understanding of ethical conduct beyond its historical confines.

Professor Graham argued that the future of legal ethics lies in a system of instruction that forces students to continuously debate and rethink the moral claims that underlie accepted understanding of the profession.

Professor Woolley suggested that the future of legal ethics instruction as a doctrine of legal education in general will likely continue along its current path. She argued, however, that changes in social demography create an impetus for incorporating new values and norms into legal ethics. From this perspective, ethical lawyering is not merely about ensuring that individual lawyers adhere to the rules of professional conduct but also about fostering a community of lawyers that understand how their profession ought to operate in a diverse society.

With regard to Dena Cotter's third question, regarding the potential effect of the demise of self-regulation, Professor Devlin argued that even if lawyers lose their right to be completely self-regulatory, lawyers will nonetheless surely continue to contribute to the regulatory process. As such, the decline of self-regulation should not be assumed to obviate the importance of education in the ethical duties that arise from self-regulation.

On the question of the future of legal ethics education, Professor Sossin noted the possibility that may become increasingly influenced by the demand side of the market for legal services. That is, rather than the result of internal professional pressure, it is possible that the content of legal ethics instruction will begin to be framed by clients demands for ethically knowledgeable and competent counsel.

Conclusion: Moving Forward

The Symposium raised a number of themes to watch in the coming months. These include:

- The varying ways in which public service, pro bono and public interest requirements are being tied to legal ethics and professionalism programs in legal education. Is Osgoode's Public Interest Requirement a harbinger of the trend to come?;

- The Law Society's examination of accrediting law schools. Will this process result in requiring education in ethics and professionalism at all Ontario law schools, and if so, to what extent may this lead law schools to reconsider their own autonomy in relation to designing and delivering legal education?;

- The Law Society proposed move away from its "skills and professionalism" portion of the Bar Admission process raises the issue of where legal education in ethics is most important and most effective. The consensus at the Symposium was clearly that there is no "best" or "only" time for legal ethics to be taught; rather, there was significant support for a "lifelong learning" continuum in legal ethics. What remains less clear, is whether this learning should be mandatory or voluntary, whether it should be experiential or classroom based, and who is best placed to deliver such programming.

- Finally, it is clear that there remains some dissonance between how legal ethics is understood in the law school context and how it is understood in the profession. Some see legal ethics as how the rules of professional conduct apply in the context of legal practice; for others, legal ethics is the lens through which the relationship between the legal profession and the market, or the profession and the public interest, is best understood. The recent regulation of paralegals in Ontario and longstanding self regulation by notaries in B.C and Quebec all suggest the profession's claim to regulate legal ethics itself may be contested. However understood, it is clear that no single understanding of legal ethics will suffice in capturing the pluralism of legal education. It is equally clear that too few opportunities exist for these varying perspectives to be raised and explored. It is hoped that this Symposium will contribute to this ongoing dialogue.