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# *Do Codes of Ethics Actually Shape Legal Practice?*

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**Margaret Ann Wilkinson, Christa Walker & Peter Mercer\***

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In theory, professional codes of conduct are supposed to assist lawyers in choosing the appropriate course of action when they are faced with an ethical dilemma and it is expected that lawyers will, in practice, turn to such codes for guidance. A recent research initiative undertaken by legal scholars at the University of Western Ontario sought to examine the effectiveness of codes of ethics in maintaining standards of behaviour within the legal profession in Ontario by examining the kinds of ethical problems confronting lawyers in that province and the extent to which they were resolved through the use of professional codes.

This article examines the nature of ethical codes in the legal profession and offers an analysis of particular results of the research initiative. The authors conclude that the research demonstrates a lack of reliance on professional codes for the purpose of resolving ethical issues by the majority of lawyers practising in Ontario. Moreover, the study revealed that such codes tend to inhibit ethical deliberation by those lawyers who refer to them for assistance in solving specific problems. The results of the study will, in the authors' opinion, encourage the legal profession in Ontario to re-examine the efficacy of existing codes of professional conduct and the role they should play in shaping lawyers' ethical decision-making.

En théorie, les règles de déontologie professionnelle devraient venir en aide aux avocats qui, faisant face à un dilemme éthique, sont appelés à choisir la décision la plus adéquate. On devrait donc s'attendre à ce qu'en pratique, les avocats fassent appel à ces règles pour leur servir de guide. Une étude récente entreprise par des chercheurs de l'University of Western Ontario a tenté de déterminer l'efficacité des règles de déontologie, à maintenir les critères de conduite professionnelle au sein de la profession juridique ontarienne, en examinant les problèmes éthiques auxquels font face les avocats de cette province, ainsi que la mesure dans laquelle ces problèmes sont résolus à travers l'utilisation des règles de déontologie.

Cet article examine la nature des règles de déontologie dans le cadre de la profession juridique, et analyse certains résultats particuliers de l'étude. Les auteurs concluent que celle-ci démontre la faible utilisation des règles pour la résolution de questions éthiques par la majorité des avocats ontariens. De plus, elle révèle que de telles règles tendent à inhiber la délibération éthique de la part des avocats qui, en fait, les utilisent pour résoudre des problèmes légaux particuliers. Les résultats de cette étude devraient, selon les auteurs, amener la profession juridique ontarienne à réexaminer l'efficacité des règles de déontologie professionnelle et le rôle qu'elles devraient jouer dans le processus décisionnel adopté par les avocats en matière d'éthique.

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## Introduction

### I. The Nature of Ethical Codes

### II. The Study and Research Method

### III. Findings

- A. *To What Extent Did Lawyers Refer to the Ontario Professional Conduct Handbook?*
- B. *What Types of Problems Were Lawyers Facing When They Referred to the Handbook Specifically?*
  - 1. Lawyers Classifying the Problem as Involving Ethics
  - 2. Lawyers Identifying the Problem as Other Than Ethical
  - 3. Did Use of the *Handbook* Replace Ethical Decision-Making?
- C. *What Types of Problems Were Lawyers Facing When They Referred to the Handbook Generally (and Not in Relation to a Specific Problem)?*
  - 1. Lawyers Who Classified Their Problems as Ethical, but Who Only Referred to the *Handbook* in a General Sense, Not in Relation to the Specific Problem Discussed
  - 2. Lawyers Who Referred to the *Handbook* beyond the Context of Their Own Problems, Which They Themselves Identified as Other Than Ethical in Nature

## Conclusion

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## Introduction

In theory, “professional codes are supposed to help lawyers choose among two or more legal courses of conduct” when faced with an ethical issue. Until relatively recently in the history of law as a profession, codes of ethics<sup>2</sup> have not been thought necessary to guide lawyers’ conduct. In the past, lawyers would receive guidance on “how to conduct [themselves] professionally in particular situations” from information “handed down from one generation of lawyers to another through word of mouth, [through] law society dealings in disciplinary matters, remarks from the bench and so on.”<sup>3</sup> It was not until the beginning of the twentieth century that the North American legal profession became interested in adopting formal professional codes of conduct.<sup>4</sup> Generally, codes of professional conduct have been adopted by lawyers, as members of a self-governing profession, in order to preserve public confidence in the profession<sup>5</sup>—and in turn, in its ability to self-govern. Indeed, in the context of a profession, a code of ethics can be defined as “the formal statement of standards which the professional consults to guide his or her behaviour. It represents a statement of the roles professionals ought to assume in specific situations. To that extent, a code is a formalized statement of role morality, a unitary professional ‘conscience’.”<sup>6</sup> As these codes are the formal statement of the ethical standards of the profession of which lawyers are members, one would expect that when faced with a dilemma, lawyers would turn to their professional codes for guidance and that these codes would actually assist lawyers in choosing the appropriate course of action. However, the effectiveness of codes of ethics in maintaining standards of behaviour within the legal profession has been the subject of much debate over the last century.<sup>7</sup>

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<sup>1</sup> F.C. Zacharias, “Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics” (1993) 69 *Notre Dame L. Rev.* 223 at 231.

<sup>2</sup> This article will use the terms “ethical code”, “professional code”, and “code of conduct” as having the same meaning (see W.W. Pue, “‘Becoming Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century” (1991) 20 *Man. L.J.* 227 at 229 where he states that “the terms ‘ethical’ and ‘professional’ are sometimes used interchangeably”).

<sup>3</sup> B. Smith, *Professional Conduct for Canadian Lawyers* (Toronto: Buttersworth, 1989) at 6.

<sup>4</sup> The first canon of ethics was adopted by the American Bar Association in 1904 (see D.L. Rhode, “Why the ABA bothers: A Functional Perspective on Professional Codes” (1981) 59 *Tex. L. Rev.* 689). In Canada, the Canadian Bar Association (“CBA”) published the *Canon of Ethics* in 1920 (see Pue, *supra* note 2 at 255), and in Ontario, the *Professional Conduct Handbook*, *infra* note 10, was not created until 1964 (see D. Robinson, “Ethical Evolution: The Development of the Professional Conduct Handbook of The Law Society of Upper Canada” (1995) 29 *L. Soc. Gaz.* 162).

<sup>5</sup> Robinson, *supra* note 4 at 165, n. 14.

<sup>6</sup> R. E. Loder, “Tighter Rules of Professional Conduct: Saltwater for Thirst” (1987-88) 1 *Ga. J. Leg. Ethics* 311 at 318.

<sup>7</sup> See P. Mercer, M.A. Wilkinson & T. Strong, “The Practice of Ethical Precepts: Dissecting Decision-Making by Lawyers” (1996) 9:1 *Can. J. L. & Jur.* 141 at 141-42 [hereinafter “Ethical Precepts”]; Robinson, *supra* note 4 at 163-66.

Two of the major thrusts of the research initiative entitled "Professionalism or Profit: The Changing Nature of Legal Ethics"<sup>8</sup> were precisely to ask: "To what extent do practitioners turn to [their code of ethics] ... in solving ethical issues?" and "To what extent [does the code] provide the assistance which practitioners seek in solving ethical dilemmas? To what extent [is it] perceived to provide solutions? To what extent [does the code] obviate the necessity for ethical decision-making in favour of acceptance of perceived authority?"<sup>9</sup> The research describes the types of problems confronting lawyers which lead them to seek assistance from codes of ethics. Finally, the study can assist in determining whether revising or amending codes will have any effect on the behaviour of lawyers governed under such codes.

This article presents certain results from that study, analyzing specifically whether lawyers in Ontario consult their ethics code, the *Professional Conduct Handbook*.<sup>10</sup> The analysis indicates that the *Handbook* is not considered to be a useful tool for the majority of practising lawyers in Ontario. Furthermore, the findings demonstrate that the *Handbook* actually inhibited the ethical deliberation of those lawyers who referred to it for assistance in solving their specific problems. These results indicate that the legal profession has serious issues to address regarding the continued use of professional codes as a mechanism for shaping the conduct of lawyers in practice.

## I. The Nature of Ethical Codes

Despite the fact that the modern introduction of ethical codes into the legal profession has been intended to help lawyers resolve ethical issues, not everyone agrees that such codes should be used in the legal profession. The fundamental criticism of professional codes stems from the very definition of what an ethical code is. By definition, ethics involves making moral choices between what is right and wrong. The choice is made by the individual. Codes of conduct operate through external rules,

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<sup>8</sup> This project was initiated in 1993 at the University of Western Ontario by M.A. Wilkinson, P. Mercer, D. Buckingham, and B. Hoffmaster. For a complete description of the project, see "Ethical Precepts", *ibid.* For an empirical paper from the project which describes the presence amongst practitioners of two distinct approaches to the lawyer's role, see M.A. Wilkinson, P. Mercer & T. Strong, "Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer" (1996) 28:2 *Loyola U. Chi. L.J.* 373 [hereinafter "Role of the Lawyer"]. For a further analysis of this role differentiation, see M.A. Wilkinson, C. Walker & P. Mercer, "The Gendering of Roles in the Practice of Law" [in preparation]. For a paper describing the other sources of information used by lawyers in solving their problems in the study, see M.A. Wilkinson, "The Information-Seeking Behaviour of Lawyers" [in submission, hereinafter "Information-Seeking"].

<sup>9</sup> See "Ethical Precepts", *supra* note 7 at 142.

<sup>10</sup> Law Society of Upper Canada, *Professional Conduct Handbook*, 2d ed. (Toronto: Law Society of Upper Canada, 1998) [hereinafter *Handbook*]. The *Handbook* contains the Rules of Professional Conduct.

and as such, contradict "the notion of ethics itself, which presumes that persons are autonomous moral agents."<sup>11</sup>

The argument against ethical codes thus revolves around the idea that ethics are a matter of personal virtue, and that a person cannot be made to be an ethical person through the consultation of external rules.<sup>12</sup> Codes in the United States and England have additionally been criticized as being class-biased. Some authors<sup>13</sup> argue that legal codes of conduct reflect the social position of the drafters by promoting rules which tend to prohibit activities of lower-class lawyers yet permit the activities of the elite lawyers. The extent to which such bias is present in Canadian legal codes is unknown.<sup>14</sup> Ethics, runs this argument, are not something that can be legislated, but are something an individual either has or does not have.<sup>15</sup> This position is echoed by some of the respondents in a recent study about perceptions of practising members of the Law Society of British Columbia ("LSBC") regarding the LSBC's anti-discrimination and anti-sexual harassment rules. As one respondent succinctly stated, "[W]hat you are talking about is an overall attitude and approach to life. You can't legislate that."<sup>16</sup>

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<sup>11</sup> J. Ladd, "The Quest for a Code of Professional Ethics: An Intellectual and Moral Confusion" in G.C. Hazard Jr. & D.L. Rhode, eds., *The Legal Profession: Responsibility and Regulation*, 2d ed. (Westbury, N.Y.: Foundation Press, 1988) 105 at 105; see J. Honsberger, "Legal Rules, Ethical Choices and Professional Conduct" (1987) 21 L. Soc. Gaz. 113, who also argues that codes of conduct are at odds with the basic notion that ethics involves choice, not rules.

<sup>12</sup> Note that ethical codes in the legal profession have also been criticized as being self-serving to the profession. For a discussion on the reasons behind the publication of the CBA's *Canon of Ethics*, see Pue, *supra* note 2. Pue suggests that adoption of the code came in part from a recognition that the trustworthiness of lawyers and their commitment to the collective good was no longer one that was being accepted by the public. A professional code was thus seen as a mechanism which the legal profession could use to justify to the public the special privileges, roles, and income that lawyers enjoyed.

The notion that the promulgation of ethical codes is not simply a statement of charitable goals is common throughout the literature. Rhode, *supra* note 4, argues that ethical codes are used by lawyers to assure themselves of their special status and self-importance. This point was also noted by Pue, *supra* note 2 at 228, who states that there is a "diverse body of literature [that] generally repudiates claims that codes of ethics arise exclusively (or even primarily) from altruistic impulses ... codes of ethics are viewed as self-serving by many authors."

<sup>13</sup> Pue, *supra* note 2; R.L. Abel, "Why does the ABA Promulgate Ethical Rules?" (1981) 59 Tex. L. Rev. 639.

<sup>14</sup> Pue, *ibid.*

<sup>15</sup> D.S. Kleinberger, "Wanted: An Ethos of Personal Responsibility — Why Codes of Ethics and Schools of Law Don't Make for Ethical Lawyers" (1989) 21 Conn. L. Rev. 365 at 370. Kleinberger blames the conventional adversarial approach for the lack of ethical lawyers in today's society. In his view, the adversarial system allows a lawyer to separate a lawyer's morality from the practical results that the lawyer produces. As such, lawyers are not forced to think about the effects of their conduct, and thus become desensitized to ethical issues. In his view, this is why "[p]romulgating detailed codes of ethics cannot reverse the damage." (*Ibid.*) See also P. Worthington, "On Regulating Ethics" (1989) *Canadian Lawyer* 13:9 (Dec. 1989/Jan. 1990) 44.

<sup>16</sup> J. Brockman, "The Use of Self-Regulation to Curb Discrimination and Sexual Harassment in the Legal Profession" (1997) 35 Osgoode Hall L.J. 209 at 218, quoting "Oscar". In a study of 50 male

Ethical codes are thus seen as being unnecessary since the potential for impact on a person's behaviour is minimal. Reed Loder points out that "the influence which any code may have on lawyer attitudes and conduct may be sorely limited, since moral predisposition predates entry into the profession."<sup>17</sup> The same point has been acknowledged by T. Morawetz who states that "codes ... cannot transform the most callous and self-interested operators into lawyers of conscience. At best, codes and training can activate pre-existing inclinations."<sup>18</sup>

Not only have ethical codes been criticized as oxymorons and therefore unnecessary, several scholars have argued that ethical codes can actually have a negative effect on ethical deliberation. Loder argues that ethical rules can impede moral development in various ways. First, rules which create a minimum standard of behaviour deter lawyers from "reaching beyond moral mediocrity"<sup>19</sup> and may "foster undesirable customs and habits."<sup>20</sup> This danger is articulated by one of the respondents in the Brockman study, who stated, "You are dealing with lawyers. You are dealing with people, that if they want to hide a clause or hide a fact, that's what they do for a living."<sup>21</sup> A similar sentiment was echoed by another respondent, who stated, "First of all, nobody ever reads the rules. Secondly, people are always going to be able to find a way around them."<sup>22</sup>

Another way ethical rules can impede moral development is the fact that if lawyers can simply turn to a specific rule when faced with a difficult moral problem, they will be dissuaded "from rational deliberation and from accepting personal responsibility for their actions, two characteristics of moral decision-making."<sup>23</sup> For example, one of the respondents in the Brockman study (who thought that the anti-discrimination rule would be effective) stated, "Lawyers, we like rules, and the rule is there and we have to respect it."<sup>24</sup> Loder argues that by following specific rules, the lawyer is deprived of the opportunity to deliberate and choose the course of action

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lawyers and 50 female lawyers called to the Bar between 1986 and 1990, Brockman found that 73% of the women lawyers sampled and 45% of the men thought that the anti-discrimination rule would not be effective in reducing discrimination (*ibid.* at 239). The same practitioners were much more optimistic about the effectiveness of the anti-sexual harassment rule: only 30% of the women and 24% of the men thought it would be ineffective (*ibid.* at 228).

<sup>17</sup> Loder, *supra*, note 6 at 333. See also G. MacKenzie, "The Valentine's Card in the Operating Room: Codes of Ethics and the Failing Ideals of the Legal Profession" (1995) 33 *Alta. L. Rev.* 859 at 869; S. Tbulmin, "Ethics and Equity: The Tyranny of Principles" (181) *L. Soc. Gaz.* 240 at 244, both of whom argue that ethical rules have only a limited role in influencing behaviour.

<sup>18</sup> T. H. Morawetz, "Lawyers and Conscience" (1989) 21 *Conn. L. Rev.* 383; Zacharias, *supra* note 1 at 386.

<sup>19</sup> Loder, *supra* note 6 at 312.

<sup>20</sup> *Ibid.*

<sup>21</sup> Brockman, *supra* note 16 at 219, quoting "Elizabeth".

<sup>22</sup> *Ibid.*, quoting "Holly".

<sup>23</sup> Loder, *supra* note 6 at 312.

<sup>24</sup> Brockman, *supra* note 16 at 225, quoting "Jack".

that should be taken.<sup>25</sup> Patricia Rizzo sums this point of view up by stating that “[m]orals become reduced to checking the code of professional responsibility; if the code does not prohibit an act, the act is moral.”<sup>26</sup>

Similar points have been made by other authors. Heidi Feldman argues that any code of conduct that purports to regulate lawyers’ conduct through permissive and prohibitive rules discourages practitioners from “sentimental responsiveness, a key feature of good ethical deliberation.”<sup>27</sup> Nancy Lee Firak asserts that professional codes have the effect of insulating lawyers from the ethical consequences of their actions because as long as the lawyers follow the rules, they will not be held responsible for their actions.<sup>28</sup> As stated by one lawyer, “[I]f the code, rules or an opinion sanctions an activity, we separate our own consciences from the behavior, label the behavior ethical and march forward with ... full confidence.”<sup>29</sup>

There are two types of rules of professional conduct: hortatory and regulatory. An hortatory code of ethics attempts to inspire members of the profession to a higher standard by articulating the general principles and underlying goals of the profession. A regulatory code, on the other hand, creates a minimum standard to which members of the profession will be held accountable through the use of rules, whether permissive or prohibitive.

There are advantages and limitations to both types of codes. An hortatory code that articulates the collective goals and general principles of the profession can foster pride and public respect for the profession. However, as Gavin MacKenzie points out, “some issues of professional responsibility are sufficiently complex that it is impractical to expect individual practitioners to resolve them on the basis of general principles.”<sup>30</sup> The failure of a such a code to provide specific guidance to lawyers when faced with everyday issues can be problematic: it can leave the public unprotected and result in practitioners concluding that the code is useless and is something to be ignored.<sup>31</sup> Furthermore, it has been suggested that lawyers are accustomed to applying “black letter” rules to a particular fact situation. Requiring lawyers to determine the appropriate course of action on the basis of aspirational goals may therefore be unrealistic.<sup>32</sup>

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<sup>25</sup> Loder, *supra* note 6 at 312.

<sup>26</sup> P.L. Rizzo, “Morals for Home, Morals for Office: The Double Ethical Life of a Civil Litigator” (1988) 35 *Catholic Lawyer* 79 at 82.

<sup>27</sup> H. Feldman, “Codes and Virtues: Can Good Lawyers be Good Ethical Deliberators” (1996) 69 *S. Cal. L. Rev.* 885. Feldman suggests that a more appropriate method of creating good ethical deliberators would be through the common law.

<sup>28</sup> N.L. Firak, “Ethical Fictions as Ethical Foundations: Justifying Professional Ethics” (1986) 24 *Osgoode Hall L.J.* 35 at 44.

<sup>29</sup> M.M. Jennings, “The Model Rules and The Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative” [1996] *Wis. L. Rev.* 1223 at 1226.

<sup>30</sup> See MacKenzie, *supra* note 17 at 869.

<sup>31</sup> Loder, *supra* note 6 at 312.

<sup>32</sup> MacKenzie, *supra* note 17 at 870.



Codes that are regulatory in nature, on the other hand, have two main advantages: they provide specific guidance in certain situations, and they create a minimum standard or yardstick to which the public can hold members of the profession accountable. However, regulatory codes do have several limitations. First, it is impossible to create a comprehensive code that will cover all situations.<sup>33</sup> Second, the more numerous and more specific the rules get, the less flexibility the lawyer has in choosing a permissible course of action.<sup>34</sup> Third, it is the regulatory ethical code which seems to suffer most from the criticism of codes made by the scholars cited above who argue that the increased specificity created by codifying ethical conduct has a negative impact on ethical deliberation. Finally, codes that concentrate on regulation are perceived to take focus away from the fact that the profession is there to serve the public.<sup>35</sup> Given the low public opinion of the legal profession in recent years,<sup>36</sup> it is thought that reminding both the public and members of the legal profession that one of the goals of the profession is to serve the public is important.<sup>37</sup>

It is apparent from the above discussion that a code that is either wholly hortatory and inspirational or wholly specific and regulatory may be limited in its success. As William Riddell stated, "[A] Code of Legal Ethics, if sufficiently general, is unnecessary—if specific, is dangerous."<sup>38</sup> It is thought to be important that a good professional code function on both levels, in an attempt to strike an appropriate balance among the need to have general principles, the need to provide lawyers with specific guidance, and the need to protect the public by having measurable criteria against which to judge the conduct of lawyers. The question of what constitutes an appropriate balance between these three goals is one that is often discussed in the literature.<sup>39</sup>

The code in force in the jurisdiction of this empirical study, that governing lawyers in the province of Ontario, contains both hortatory and regulatory provisions.<sup>40</sup> Initially, the extent of use of the two types of rules by Ontario lawyers was to form an element of the analysis set out below. However, a review of the data indicated that almost all of the *Handbook* rules to which lawyers referred in this study were regulatory rules, in the sense that the lawyers consulted the commentary to the rules—which invariably forms a regulatory guide for lawyers even when the rule itself is framed in a hortatory manner.<sup>41</sup> It was speculated from a theoretical perspective that the more spe-

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<sup>33</sup> Loder, *supra* note 6.

<sup>34</sup> *Ibid.* at 313; MacKenzie, *supra* note 17 at 871.

<sup>35</sup> MacKenzie, *supra* note 17 at 870.

<sup>36</sup> Jennings, *supra* note 29 at 1225.

<sup>37</sup> MacKenzie, *supra* note 17 at 870.

<sup>38</sup> W. Riddell, "A Code of Legal Ethics" (1919) 55 Can. L.J. 297 at 303.

<sup>39</sup> See Loder, *supra* note 6; MacKenzie, *supra* note 17; Morawetz, *supra* note 18; Zacharias, *supra* note 1; Feldman, *supra* note 27; and N.J. Moore, "The Usefulness of Ethical Codes" (1989) 1 Ann. Surv. Am. L. 7.

<sup>40</sup> For examples of hortatory rules, see Rules 1, 11, 12, 13, 14 of the *Handbook*, *supra* note 10. For examples of regulatory rules, see Rules 2, 3, 5, 7, and 9 of the *Handbook*.

<sup>41</sup> See Robinson, *supra* note 4 at 170.

cific and regulatory the rule, the less independent the ethical decision-making of lawyers would need to be. However, in the data, the fact that a lawyer referred to a regulatory, rather than an hortatory, rule turned out not to predict whether or not the *Handbook* resolved the issues for the lawyer, nor did it predict whether or not the lawyer engaged in independent ethical deliberation. Therefore, this element of the analysis is not discussed further below.

The essence of the argument against having a code of ethics for legal professionals is that adherence to specific rules of conduct precludes moral development. This article will look not only at whether lawyers in Ontario use their code of conduct to solve their most pressing problems but also, if they do refer to the *Handbook*, how they use it, including which rules are consulted. The article therefore provides empirical evidence on whether, because of reliance on their ethical codes, lawyers are not exercising any independent ethical judgment, or whether, despite the existence of ethical codes, there is still evidence of independent ethical decision-making by lawyers.<sup>42</sup>

## II. The Study and Research Method

The study involved interviewing 180 lawyers in Ontario. It was conducted in four centres, each a different size: one small centre,<sup>43</sup> one medium-sized centre, one large centre, and one metropolitan centre. A sampling strategy was designed to mirror the proportion of practitioners practising in private firms of various sizes in Ontario.<sup>44</sup> In addition to the 150 private practitioners approached, 30 corporate counsel in the metropolitan centre were asked to participate because the corporate counsel in the province were overwhelmingly found to be practising in that size of city.<sup>45</sup> Each lawyer participated in an interview with a law student research assistant which lasted between thirty and forty-five minutes. At the interview, the lawyers were asked about decision-making in the context of a problem involved in their practice, a problem which they themselves identified.<sup>46</sup> They were not specifically asked to discuss "ethical" problems, even though the overall thrust of the research involved ethics. This was a deliberate strategy choice on the part of the researchers and marked a departure from the kinds of studies previously done on professional ethics, such as those conducted amongst Canadian family doctors.<sup>47</sup> This approach was necessary given the breadth of

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<sup>42</sup> See the discussion in Part III, below.

<sup>43</sup> A truly small centre (under 10,000) had been included in the pre-test but the reluctance of the lawyers in that centre to discuss their situations convinced the researchers to only include slightly larger centres in the final study (see "Ethical Precepts", *supra* note 7 at 149).

<sup>44</sup> "Ethical Precepts", *ibid.* at 150. The Law Society of Upper Canada ("LSUC") supported and assisted this research initiative.

<sup>45</sup> *Ibid.* at 151. The CBA also supported and assisted this research.

<sup>46</sup> This is known as the "critical incident" or "anecdote" approach (see R. Harris, "The Information Needs of Battered Women" (1988) 28 R.Q. 62; P. Dewdney & C.S. Ross, "Flying a Light Aircraft: Reference Service Evaluation From a User's Viewpoint" (1994) 34:2 R.Q. 217).

<sup>47</sup> These studies use the "vignette" approach, where subjects are given a prepared scenario and asked for their comments (see R.J. Christie, C.B. Hoffmaster & M.A. Stewart, "Ethical Decision

the research questions posed above. For example, the researchers were interested in the use of the *Handbook* by members of the profession, whether that use fell within the practitioner's own conception of use in the context of an ethical problem, or whether that use fell outside that conception. As another example, the researchers did not want to bias the practitioners' reactions to the study by anticipating an "ethical" component to the problems which beset their practices.

After reviewing their interviews, which had been transcribed and from which any text referring to the identity of the participating lawyers had been deleted, 86% of participants allowed their interviews to be included in the database for analysis.<sup>48</sup> Of these 154 participating lawyers, 25 were corporate counsel. Of the 129 private practitioners, 22% were sole practitioners, 43% partners, 17% employees, and 18% associates.<sup>49</sup> Chi-square tests were performed and indicated that the corporate counsel did not differ significantly from their colleagues in private practice in terms of demographics.<sup>50</sup> This finding reinforces the generalizability of the findings from the interviews sampled to all practitioners in the province. In addition, although the sample of private practitioners was not stratified according to gender in any way, female practitioners represented 27% of those whose interviews were included for analysis in the study and this corresponds directly to the overall proportion of female practitioners in Ontario, found in 1990 to be 23% and in 1996 to be 29%.<sup>51</sup>

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Making by Canadian Family Physicians" (1987) 137 Can. Med. Assoc. J. 891; R.J. Christie *et al.*, "Ethical Decision-Making by British General Practitioners" (1989) 39 J. Royal Coll. Gen. Pract. 448; C.B. Hoffmaster, M.A. Stewart & R.J. Christie, "Ethical Decision Making by Family Doctors in Canada, Britain, and the United States" (1991) 33 Soc. Sci. Med. 647. For other studies using the same type of approach, see S. Daicoff, "Ethical Decisionmaking by Attorneys: An Empirical Study" (1996) 48:2 Fla. L. Rev. 197; P. Dewdney & R.M. Harris, "Community Information Needs: The Case of Wife Assault" (1992) 14 L.L.S.R. 5; D.B. Parker, S. Swope & B.N. Baker, *Ethical Conflicts in Information and Computer Science, Technology and Business* (Wellesley, Mass.: QED Information Sciences, 1990).

<sup>48</sup> Note that the response rate information given in "Ethical Precepts", *supra* note 7, was provisional since the consent process had not then been completed (see *ibid.* at 154 and at 155 (Diagram 3)). The final figures are now available and were excerpted for the first analytical article published from the project (see "Role of the Lawyer", *supra* note 8 at 416 (Figure 8)).

<sup>49</sup> While the private counsel were intentionally proportionately sampled from across the range of firm sizes, 15 corporate counsel were found to be predominantly practising with between 2 and 8 other lawyers, a setting characterized as medium-sized in the sampling strategy for the private practitioners. Of the remaining corporate counsel, 3 were the sole lawyers in their workplace, 2 worked in settings of between 9 and 30 practitioners, and 2 in settings of over 30 practitioners (information on this variable was missing for 3 of the corporate counsel participants).

<sup>50</sup> The distribution of the ages of both the private practitioners and the corporate counsel was relatively evenly split around the age of forty.

<sup>51</sup> Numbers courtesy of the LSUC. The authors would like to thank the LSUC for its assistance and contribution to this article

### III. Findings<sup>52</sup>

#### A. *To What Extent Did Lawyers Refer to the Ontario Professional Conduct Handbook?*

Only 16% of the respondents mentioned the *Handbook* during their interviews.<sup>53</sup> To determine the reasons why the lawyers mentioned the *Handbook* in their interviews, it was necessary to examine in detail each transcript in which the *Handbook* was mentioned. The goals behind this analysis were threefold. The first objective was to discover what types of problems lawyers who referred to the *Handbook* thought they had.<sup>54</sup> It was expected that the lawyers who referred to the *Handbook* in relation to a specific problem would have described their situation as an ethical problem or dilemma, while those who only referred to the *Handbook* generally would have been describing non-ethical situations given that if the lawyer had been faced with an ethical problem, he or she would likely have felt it necessary to refer to the rules of conduct specifically. The second objective behind looking at the specific language used by the lawyer was to determine whether the lawyer considered the *Handbook* to be a useful tool in resolving the issue. The final objective was to determine whether the language used by each lawyer supports the assertion that ethical codes preclude ethical decision-making. In making the determination of whether the lawyer engaged in ethical decision-making, the researchers looked for language that suggested the lawyer had made an internal decision between right and wrong, as opposed to language that suggested the lawyer made the decision *solely* through the consultation of these external rules. It is important to note in this connection that this analysis is based solely upon the available evidence of the transcripts. It is possible that the language the lawyers used during their interviews did not mirror their actual deliberations when faced with the problems they described. However, the interviews were carefully designed to try to encapsulate the lawyers' own experiences and thought processes.<sup>55</sup>

The transcripts from the twenty-five interviews during which the *Handbook* was mentioned are categorized in Table #1. Eleven of these lawyers mentioned the *Handbook* in relation to the specific problem that they presented in their interview. The

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<sup>52</sup> All references to statements made by lawyers participating in the study are taken from the transcripts of the confidential interviews held in various centres throughout Ontario. These are currently archived at the Faculty of Law, University of Western Ontario.

<sup>53</sup> A chi-square test was done to see if there was any significant difference in the use of the *Handbook* depending upon the gender of the respondents. There was no significant difference. Subsequent chi-square tests were run to determine whether the numbers of those referring to the *Handbook* varied significantly depending upon the size of centre and firm size in which the respondent practised, and again there were no significant differences.

<sup>54</sup> Of course, there may be another way to characterize the problem than the way the lawyer has characterized it. However, since the focus of this analysis is on how lawyers perceive the *Handbook* and the problems they face in practice, this article will only focus on what type of situation the lawyer thought he or she was confronting.

<sup>55</sup> See "Ethical Precepts", *supra* note 7 at 152.

*Handbook* actually resolved the issue for six of these eleven lawyers. Two of these lawyers found that the *Handbook* was helpful in resolving the issue, although not determinative, while three of these eleven lawyers specifically stated that the *Handbook* was not helpful in resolving their specific issue.

Fourteen lawyers mentioned the *Handbook* generally in the course of their interviews, although not as part of the direct discussion regarding the resolution of the problem situations they had presented. Of these fourteen, eleven discussed the *Handbook* as being helpful in terms of defining their obligations and duties towards their clients. The other three lawyers specifically referred to the *Handbook* as not being of assistance in resolving issues that come up in practice. When those lawyers who specifically mentioned the *Handbook* in terms of ethical problems encountered by them and those who made a general reference to it, outside the context of their specific problems, are taken together, nineteen of the twenty-five who mentioned the *Handbook* had found it to be helpful in some context. While this tends to illustrate a positive role for the *Handbook*, it must be remembered that when the entire data set is taken into account, the study actually indicates that only 5% (8/154) of the lawyers in the study found the *Handbook* to be useful in resolving a specific ethical issue.

### Table #1: Breakdown of *Handbook* Transcripts

#### Lawyers Who Mentioned the *Handbook* in Relation to Their Specific Problem:

Actually Resolved the Issue	Was Helpful in Resolving the Issue	Not Helpful in Resolving the Issue	Total
6	2	3	11

#### Lawyers Who Mentioned the *Handbook* Generally (Not in Connection With Their Specific Problem)

<i>Handbook</i> Considered Helpful	<i>Handbook</i> Not Considered Helpful	Total
11	3	14

#### B. What Types of Problems Were Lawyers Facing When They Referred to the *Handbook* Specifically?

Results from the data sample indicate that seven of the eleven lawyers who referred to the *Handbook* in relation to a specific situation classified the situation as having some ethical component. Six of the seven classified the situation as primarily ethical while the seventh classified her problem as primarily strategic, with some ethical considerations.

**Table #2: Summary of Information from Lawyers Who Mentioned the *Handbook* in Relation to a Specific Problem**

Type of Problem	Lawyer	Issue Resolved by <i>Handbook</i>	Evidence of Ethical Deliberation
<b>Ethical Components</b>	98	No	No
	134	Yes	No
	135	Yes	No
	136	No	Yes
	140	No	Yes
	144	Yes	No
	143	Helpful but not resolved	No
<b>No Ethical Components</b>	139	No	Yes
	154	Yes	No
	141	Yes	No
	147	Yes	No

### 1. Lawyers Classifying the Problem as Involving Ethics

#### *Lawyer #98*

Lawyer 98 was acting for a client in a litigation matter when he became suspicious that the client was pursuing the litigation for improper purposes. For Lawyer 98, this clearly raised ethical issues. He stated: “[T]he first thing we did was to consult within the firm as to what our obligations were, to consider the ethical ramifications of proceeding if what we thought was the case was in fact the case.” In considering his ethical obligations, he referred to the *Handbook*: “[W]e felt immediately that you have an ethical responsibility not to participate in, and not to assist a client to potentially commit a tort, the tort of abuse of process. ... It is not appropriate under the rules of professional conduct and we won’t do it. And I think it is quite a specific rule in that regard.”<sup>56</sup> However, the issue was not resolved by the *Handbook* alone. Lawyer 98 stated that he consulted senior lawyers in the firm because it was “valuable to obtain the views of more senior people” before making ethical decisions. The decision was made to confront the client. The client’s explanation satisfied the lawyer that the impression he had formed was not the correct one. Hence, Lawyer 98’s response is an example of the *Handbook* providing assistance to a lawyer in determining the boundaries of appropriate conduct.

<sup>56</sup> The rule Lawyer 98 is referring to is Rule 10, commentary 2(a) of the *Handbook*, *supra* note 10 at 29, which states:

The lawyer must not, for example ... abuse the process of the tribunal by instituting or prosecuting proceedings which, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of injuring the other party.

*Lawyer #134*

Lawyer 134's firm was acting for a company that produced hardware. Two senior officers had left and entered into competition with the company. The officers were subject to a restrictive covenant preventing them from doing so. The lawyer was instructed to commence an action to get an injunction against the officers for violating the covenant and to seek damages. As part of the process, he was instructed to write a letter to the distributor of the product produced by the senior officers to let the distributor know that there was an ongoing lawsuit in Ontario and that the senior officers were subject to a restrictive covenant. The lawyer for the distributor responded by saying that if that letter was published he would sue Lawyer 134's firm. In the words of Lawyer 134: "The decision that we had to make was — are we going to continue to act for this client in these circumstances and are we going to report ourselves to the Law Society? Do you respond aggressively back to the other lawyer or do you ignore it and hope it goes away?" Lawyer 134 clearly viewed the decision of whether to report the incident to his client and the Law Society as an ethical problem. He stated that the obligation to report himself to the client and to the law society came from the Rules of Professional Conduct: "[Y]ou're dealing with integrity in advising the clients. You have to tell your client about it, and you're ethically bound to advise the Law Society if there's ever a potential claim against you. You're supposed to advise the Law Society — its ethical, it's being honest."<sup>57</sup> For Lawyer 134, the issue of whether or not to inform the client seems to have been resolved by this section of the *Handbook*. He explained:

[T]he instant I got the letter saying [I] might be sued, I wrote to my client explaining to him what the ramifications of that were. I told him that I had to report myself to the Law Society, I told him that if the lawsuit was launched that we might have to remove ourselves from the record and they should be getting alternative counsel.

The issue of how to respond to the lawyer for the distributor, however, was viewed more as a tactical problem. Lawyer 134 stated: "So the decision sort of was made that you know, we're going to try and answer his concerns now and hope that it goes away. That was the tactic that we took."

Lawyer 134's response to the above situation supports the assumption that lawyers faced with ethical problems consult the *Handbook* and the assumption that the *Handbook* assists lawyers in resolving difficult issues. Furthermore, Lawyer 134's

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<sup>57</sup> The lawyer here is referring to Rule 3 and Rule 5 of the *Handbook*, *supra* note 10. Rule 3 discusses the lawyer's duty to "be both honest and candid when advising clients" (*ibid.* at 7). Specifically, commentary 10 of this rule requires lawyers to inform the client promptly of any errors the lawyer might have made in connection with a matter related to the client. Rule 5, commentary 15 discusses a lawyer's duties once the lawyer has become aware that an error or omission might have occurred. Under this commentary, the lawyer is required to immediately advise the client of the error that has occurred and must also notify the lawyer's professional indemnity company of the facts of the situation.

words also tend to support the argument that codes obviate the need for independent ethical decision-making. His decision to inform his client and the Law Society was governed by the *Handbook*—the *Handbook* sets out what an ethical lawyer is supposed to do in a particular situation and he followed this advice precisely. There was no evidence in the transcript that Lawyer 134 had engaged in any independent thought.

### *Lawyer #135*

Lawyer 135 was working on a file where there was one plaintiff and there were about eight or nine defendants. She was acting for one of the defendants, a municipality. The problem with the file was that the plaintiff's lawyer had decided to start a "paper war" and Lawyer 135 felt that the lawyer for the plaintiff was not acting in his client's best interest. She suggested:

I think he is making a case out of something that is not there. ... The lawsuit has been going on for at least [period of time] and I am sure that this lawyer has billed far in excess of [sum of money] for what he has done so far, because this lawyer comes from a law firm that likes to paper everybody to death. So I think the client, the plaintiff client, will find itself in a situation where they have spent so much money in it so far, that they can't really get out of it. They feel they should be getting something, and I think this lawyer is bleeding the client, and encouraging them to continue the lawsuit when there is really no claim. ... I think his client is being led down the garden path.

Lawyer 135 characterized the situation as an ethical problem. In her view however, the issue of what to do was resolved by the *Handbook*. She explained: "A client is free to choose whatever lawyer they want to have represent them. And the basic rules in the code of conduct say that as a lawyer I cannot contact the plaintiff individually and say I think you are getting bad advice, perhaps you should get a second opinion."<sup>58</sup> As with Lawyer 134, Lawyer 135's response provides support for the assumption that lawyers faced with ethical problems consult the code and suggests that codes decrease the occurrence of ethical decision-making. When deciding whether or not to contact the other client, Lawyer 135 simply referred to the appropriate rule, without giving thought to whether any other considerations were involved.<sup>59</sup>

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<sup>58</sup> Lawyer 135 is referring to Rule 14, commentary 7 of the *Handbook*, *supra* note 10 at 46, which states: "The lawyer should not communicate upon or attempt to negotiate or compromise a matter directly with any person who is represented by a lawyer except through or with the consent of that lawyer".

<sup>59</sup> In this situation, Lawyer 135 might have considered whether she was obliged to report opposing counsel to the Law Society. Under Rule 13, commentary 1 of the *Handbook*, *supra* note 10 at 43, a lawyer has an obligation "to report to the Society any instance involving a breach of these Rules." Some might view the opposing lawyer's conduct of encouraging the client to continue a lawsuit to which there is no real claim as a breach of Rule 3, commentary 1 (lawyer must clearly disclose what the lawyer honestly thinks about the merits and probable results) and of Rule 10, commentary 5 (the lawyer should discourage the client from bringing unmeritorious proceedings).



**Lawyer #136**

Lawyer 136's firm had been providing advice to the shareholder of a major real estate developer. The firm also acted for a number of banks. The banks wanted the firm to act for them in connection with the restructuring of the real estate developer's finances. Lawyer 136 appeared to recognize this as an ethical problem. He stated that "[c]learly, we're on opposite sides of the table, that's a clear conflict of interest." The issue was resolved by obtaining the consent of all parties. When asked where his definition of conflict of interest came from, the lawyer stated that it was "defined by common sense, by law society rules and by the courts. And our own ethics." However, when further queried about whether he consulted the *Handbook* to determine the legal definition of conflict of interest, Lawyer 136 replied that it was not necessary to do so since "you just sort of know ... when you are going to have a conflict."

As with the interviews discussed above, Lawyer 136's response provides support for the assumption that lawyers faced with ethical issues consult the *Handbook*. However, his response indicates that he did not consider the *Handbook* to be helpful in this situation because the conflict was so obvious. His statement that "you just sort of know" suggests that the decision between what is right and wrong was an internal one, a response that lends itself to the argument that ethics are internal to the individual and cannot be regulated by external codes.

**Lawyer #140**

A competitor of a major client of Lawyer 140's firm approached the firm and asked it to represent it in a matter that would not involve a conflict with the major client. The lawyer's firm was very interested in the type of work that the competitor was offering, and there was also a potential for a long-lasting business relationship. The lawyer clearly regarded this as an ethical dilemma—one of weighing the law against his personal ethics. He explained:

The most recent difficult [decision] was trying to decide on an ethical basis whether we would disclose to a very major client what he would regard as a conflict of interest, but which wasn't, i.e. a business conflict. We had been asked to represent one of his competitors and we were quite sure that he would feel that was inappropriate. It is not legally wrong. There is no conflict of interest *per se* under the rules. ... It was a professional/ethical decision.

When asked why he felt that the existing client had to know, Lawyer 140 replied:

[T]he basis of the professional relationship is full trust and confidence. And if that client felt that we were holding out on him something that we would believe that he might find material, that could break down that relationship. If in doubt you disclose, that's the rule we follow in this office. There are other law firms who are very happy to use the so-called "Chinese Wall". The Law Society has specifically pronounced that the Chinese Wall is not an acceptable concept to resolve conflicts in law firms in Ontario. But [the other law firms] continue to do so, which I consider shocking and I wish the Law Society would enforce it, because the result is that these people are keeping the clients, notwithstanding the conflicts, ours not even being a true conflict, it was a business conflict, to the detriment of those who are behaving ethically. ... The relationship with a client is based on mutual trust and confidence ... and you [just] can't ...

have a proper professional relationship without full disclosure ... you have an overriding obligation to make full disclosure because you are in a fiduciary relationship. Even though it harms you, which in this case it obviously did.

In determining whether the situation was a legal conflict, Lawyer 140 consulted the *Handbook*. He described the decision-making process as follows:

So he and I discussed it and he tried to find some way where we could justify doing this, and as I said we could, legally; there was no breach of the Law Society rules, we just felt that it was inappropriate. That [the client] had to know, even though we were pretty sure that the client would say, "No, I don't want that competitor in our office."

The comments made by Lawyer 140 are significant because they illustrate that it is possible for lawyers to engage in ethical deliberation, despite the existence of a professional code. In this situation, the lawyer had imposed his own personal ethics of what the lawyer-client relationship entails in addition to the obligations set out in the *Handbook*.

#### **Lawyer #144**

A licensee and licensor both wanted Lawyer 144 to represent them on the same patent deal. In deciding whether to represent both sides, Lawyer 144 stated that her primary concern was whether to do so would violate the *Handbook*. She explained: "I guess paramount was my liability problem, conflict problem and whether or not it was in fact contrary to the conflict of interest rules of the Law Society." After consulting the conflict rules,<sup>60</sup> she decided that she would represent both parties:

[We] looked at all the Law Society rules and everything, and it was decided it could be done provided we did certain things ... you have to advise them of the conflict of interest, you have to get their permission to proceed. You have to tell them that you can't act for either party without it, you have to tell everybody everything essentially. There's nothing confidential ... So nobody is kept in the dark. ... And I guess after discussing it with some people and when I felt comfortable that it wasn't contrary to the Law Society, if I laid out certain terms and everybody agreed to those terms, then I could proceed and I certainly did that.

In addition to her concern about whether the situation would violate the conflict of interest rules, Lawyer 144 also had ethical concerns about her ability to remain completely neutral:

You have to decide, you know, how much do I put in that would represent either party's interest. It has to be fairly neutral for either side... you can't give pros and cons, you just sort of take a very neutral approach, which I find very difficult to do. ... I don't want the finger being pointed at me as doing something that wasn't appropriate, when in fact I tried my best to be as neutral as possible.

Lawyer 144's concern that she remain neutral throughout the proceedings was so strong that she intimated that she would probably not adopt such a similar position in

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<sup>60</sup> Lawyer 144 is referring to Rule 5 of the *Handbook*, *supra* note 10 at 11.

the future. She noted: “[E]ven though we followed the guidelines, we did everything we were supposed to do, and everybody’s on side, and everybody agreed, I’m not sure if I’d do it again, just because I think it adds an extra level of stress and it also makes you really think really hard about what you do.”

Lawyer 144’s comments are important for the following reason. Her words provide support for the theory that not only do professional codes reduce ethical decision-making but they also send the message that, as long as lawyers follow the rules, they will not be held responsible for their actions.<sup>61</sup> Lawyer 144 stated, “[We] looked at the Law Society rules and everything, and it was decided it could be done.” At this point in time there was no further ethical deliberation: the rules allowed the conduct therefore the conduct could be engaged in. However, in the process of simply following the rules of disclosure, Lawyer 144 became aware that there was more involved than simply following the rules. She stated: “Even though we followed the guidelines, we did everything that we were supposed to do... I’m not sure if I’d do it again.” This may suggest that even where a lawyer simply complies with the rules of conduct, he or she can become aware that there are more than just rules to be considered, and in a similar situation in the future, the lawyer will be much more inclined to engage in ethical deliberation before simply following the rules.

### *Lawyer #143*

Lawyer 143 considered her problem to be primarily strategic, with ethical overtones. A client wanted her to bring a motion to dismiss the action against the client without giving notice to the other two defendants. A successful motion would have benefitted the client, but Lawyer 143 thought that bringing the motion without notice might have been considered unethical or in contravention of the Rules of Professional Conduct. She observed that it was

... one example of decision-making where you had to consider your obligations as a lawyer as well as your obligations to the client ... If we proceeded ... , the best thing we could do for our client ... [was to] get a dismissal right away. But because we have a duty to the court and to fellow counsel, that might be seen as sharp practice ... That is something that is referred to in the Rules of Professional Conduct, where you do something that is a little questionable. It is not forthright, it’s sneaky, and generally not desirable.<sup>62</sup>

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<sup>61</sup> See previous discussion in Part I, above.

<sup>62</sup> Here, the conflicting rules that Lawyer 143 is referring to are Rules 10 and 14 of the *Handbook*, *supra* note 10 at 29, 45. Rule 10, commentary 2, *ibid.* at 29 [emphasis added], provides (*inter alia*):

The lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client’s case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law.

Rule 14, commentary 4, *ibid.* at 45 [emphasis added], provides (*inter alia*):

She stated that while it would have been in the best interests of her client to bring the motion right away in the sense that it would have been a little bit easier, "in the end there would be no substantial gain for the client that could not be remedied at a subsequent motion." This was weighed against the negative consequences of bringing a motion:

You have to understand when you appear before judges on a regular basis, you want the judge to trust what you are saying. If they think you have done something sneaky in the past, something deemed to be a little sneaky, it will affect your ability to appear before the judge on behalf of other clients and get a fair adjudication.

For Lawyer 143, this was primarily a strategic problem. She stated:

Often we have to decide on a strategy, how we are going to do something, what tactics we are going to use, putting aside the law, what procedures we should be using. Often you have two or three different courses of action available to you to achieve one result. You have to determine which is the most appropriate. So you just consider all the facts of each individual case.

When asked how she would classify this particular problem she replied:

Procedural, the best way to get to the end result, and then there are some ethical considerations. The ethical consideration was primarily, was this a sharp practice? Were we trying to, not deceive the court, but do something designed to, sneaky. Sneaky and questionable, that's all. I think under the Rules of Professional Conduct considered sharp practice, conduct unbecoming a solicitor, that sort of thing.

Again, this interview supports the assumption that lawyers consult the *Handbook* when ethical considerations are involved. In this situation, Lawyer 143 found the *Handbook* helpful in resolving the issue in the sense that it defined sharp practice, however, it did not dispose of the matter completely. Rather, the issue was resolved by doing a risk assessment of which outcome would be more beneficial to the client and the firm's reputation.

## 2. Lawyers Identifying the Problem as Other Than Ethical

Two of the remaining four lawyers who mentioned the *Handbook* in connection with their specific problems classified their situations as dilemmas without specifically identifying any ethical components (Lawyers 139 & 154). Two lawyers failed to classify the situation with which they were faced (Lawyers 141 and 147).

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The lawyer should avoid sharp practice, and should not take advantage of *or act without fair warning* upon slips, irregularities or mistakes on the part of the other lawyers not going to the merits or *involving the sacrifice of the client's rights*.

### Lawyer #139

The problem Lawyer 139 faced was that two of his clients wanted him to act for them in the same real-estate deal. There was a potential for possible conflict, so he decided to act for the client of longer standing. Although he does not say so specifically, he seems to have viewed the problem as a dilemma. He stated: "I think that one of the most important things that a practitioner has to learn to do is to say 'no'. ... I said 'no' to acting for somebody ... and that was a good clean decision. ... One of the dilemmas that people get into often is they don't know how to say 'no'." While Lawyer 139 did make a vague reference to the *Handbook* during his interview in stating that "I did the clean, correct, proper thing which you're supposed to do according to the edicts of the Law Society,"<sup>63</sup> it appears that he resolved the issue on his own without consulting the *Handbook*. In response to a question inquiring whether he consulted any other persons or documentary sources in making his decision, he replied that "I reflected only on myself and made my own conclusions. ... I made my own judgment."

As with the previous interview, Lawyer 139's response suggests first that lawyers do not necessarily consult the *Handbook* when faced with ethical issues and second, that ethics involve the individual making choices between what is right and wrong.

### Lawyer #154

Lawyer 154 was an immigration lawyer who had been visited by a refugee who was trying to remain in Canada. After the first interview, Lawyer 154 went to the library to do some research on his client's country. While researching, he discovered that portions of personal information that the client had submitted had been directly lifted from government documents at the research centre. Lawyer 154 viewed the problem of what to do with his discovery as a dilemma. He explains:

These are the types of decisions that lawyers normally have to make; these professional responsibility-type decisions as to, can you put forward a false story. Obviously not. Do you advocate your client's position as closely as possible to the story they want to put forward? You have to decide, do you just send them on to another lawyer because you can't put forward this position? Do you confront them with the position and allow them to recant and come back with another story, and then go forward with that story? Or, I guess the most extreme position would be, do you report them to Immigration. That [is] basically the dilemma you [are] faced with in that type of situation. ... That was the dilemma I was in.

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<sup>63</sup> Lawyer 139 here is referring to Rule 5, commentary 5 of the *Handbook*, *ibid.* at 12, which provides (*inter alia*) that

if a conflict develops which cannot be resolved, the lawyer cannot continue to act for both [parties] ... and may have to withdraw completely. If one of such clients is a person ... for whom the lawyer acts regularly, this fact should be revealed to the other or others with a recommendation that they obtain independent representation.

For Lawyer 154, the dilemma was resolved by the rules set out in the *Handbook*. Reporting his client to Immigration was rejected because of his professional obligation of confidentiality.<sup>64</sup> Putting forward the story given by the client was not an option because it is not allowed under the Rules of Professional Conduct.<sup>65</sup> For Lawyer 154, "that was the end of the dilemma. ... I think the rules of professional responsibility fit the situation perfectly." The only option permissible under the rules was to confront his client with the truth. When his client refused to admit that the story had been made up, Lawyer 154 informed the client that he could no longer represent him.

The reasoning set out by Lawyer 154 first supports the assumption that the *Handbook* is helpful to those who refer to it, and second, tends to support the notion that professional codes preclude rational and ethical deliberation; upon deciding that the *Handbook* rules applied to the situation, there was no need for Lawyer 154 to consider the matter further.

### **Lawyer #141**

It will be recalled that two lawyers, Lawyer 141 and Lawyer 147, did not use language during their interviews which classified the situation which they were describing. Indeed, Lawyer 141's interview was unique in that he refused to discuss a situation in which he had to make a difficult decision with respect to client matters. He did not say during the interview whether he viewed this situation as an ethical problem or dilemma. His refusal to participate was based on Rule 4 of the *Handbook*:

[A]nd I referred you to Rule 4 of our Rules of Professional Conduct, which of course, govern my relationship with the Law Society of Upper Canada. And Rule 4 states, "[T]he lawyer has a duty to hold in strict confidence all information concerning the affairs of the client acquired in the course of the professional relationship, and should not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so." That's the general rule, and then under the commentary and guiding principles there's [*sic*] special cautions given, under commentary 7, that "the lawyer should avoid indiscrete conversations about a client's affairs, even about such things although the client is not named or otherwise identified." And the concern there is if this information is overheard or recounted by third parties, they may be able to identify the matter being discussed and [this] could result in prejudice to the client or embarrassment to the client. And it states, moreover, the respect of the listener for lawyers in the legal profession will probably be lessened. So in my opinion, even though your questions were apparently generic in the sense that the location of this interview wouldn't be disclosed, or the client names deleted, [in] my opinion the disclosure of that information, of

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<sup>64</sup> This is Rule 4 of the *Handbook*, *ibid.* at 9.

<sup>65</sup> Lawyer W is referring to Rule 10, commentary 2(e) of the *Handbook*, *ibid.* at 29 which states:

The lawyer must not ... knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud, crime or illegal conduct.

the facts, might identify the client, and that would bring the profession into disrepute. And I refuse to be recounting any of those fact situations, because I felt that it offended this rule and the spirit of the rule.

However, the rule was not the sole basis for refusing to participate. He stated that even if the Practice Advisory told him specifically that it was all right to participate in the study, he still would not be involved because he would not "a) put my client in the position, in my mind, of offending the spirit of this rule; and b) put myself personally in jeopardy of having to face discipline proceedings of the law society." This concern over personal liability, according to Lawyer 141, stemmed from the fact that the Practice Advisory is simply an advisory service, and that, notwithstanding his compliance with the guidance given by the service, the Disciplinary Committee could still reach a finding that he breached the rule.

Initially, it appears that Lawyer 141 may have been superimposing his own ethical views in addition to those of the code. However, in explaining why he was refusing to participate, he did not refer to any ethical concerns. In fact, his refusal was based on the fact that he did not believe the Practice Advisory had interpreted Rule 4 of the *Handbook* in an appropriate way. Viewed in this light, Lawyer 141 was simply following the edicts set out in the *Handbook*, and as such, his response lends further support to the argument that codes have the effect of precluding moral development.

#### *Lawyer #147*

Lawyer 147's firm was representing a client who began to suggest that the firm was improperly handling the matter and that the firm was conspiring with the other side. The firm and Lawyer 147 tried to reassure the client that her best interests were being looked after. However, the client reached the point where she was ranting and accusing the firm of all sorts of things. The firm made a quick decision to drop the client. When asked what factors the firm and the lawyer considered when making this decision, the lawyer replied: "We considered the solicitor-client relationship and the fact that she was questioning that relationship. And the duty to our client to provide the best service we could. But we also considered the fact that if there is no trust in that relationship, then how could we fulfill our obligations?" Lawyer 147 felt that the basis of the solicitor-client relationship was one of the rules of good conduct which is "that a lawyer will provide the service to his or her client as they need it."<sup>66</sup> It was the lawyer's feeling that because the client did not trust in their abilities, they could not represent the client or provide the best possible service to the client. As such, the firm had no other choice but to cease representing the client. There was no evidence as to how Lawyer 147 herself viewed the problem with which she was faced.

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<sup>66</sup> It is unclear to which rule the lawyer is referring. Presumably, she is referring to Rule 10 of the *Handbook*, *ibid.* at 29, which requires a lawyer to represent the client to the best of his or her ability. It is interesting to note that there is no rule which specifically requires a lawyer to drop a client in this situation. The lawyer's firm in this case made the decision that because they couldn't satisfy this positive rule, they could no longer represent the client.

### 3. Did Use of the *Handbook* Replace Ethical Decision-Making?

The majority of these eleven lawyers who discussed the *Handbook* in relationship to their specific problems stated either that the *Handbook* had resolved the issue for them or that it was helpful in resolving the issue (Lawyers 98, 134, 135, 140, 141, 144, 147, and 154). This endorsement of the utility of the code occurred both in cases where the practitioners had identified their problem as having an ethical component (Lawyers 98, 134, 135, 140 and 144) and in situations where the lawyers had not identified their problems as ethical (Lawyers 141, 147, and 154). Six of these seven lawyers actually implied that the *Handbook* did in fact obviate the necessity of ethical deliberation (Lawyers 134, 135, 141, 144, 147, and 154). Moreover, not all the lawyers who used the *Handbook* to address problems which they identified as ethical found it helpful in the resolution of those problem (Lawyers 136, 140, and 143).

#### **C. What Types of Problems Were Lawyers Facing When They Referred to the *Handbook* Generally (and Not in Relation to a Specific Problem)?**

As discussed earlier, it would be logical to assume that, since the *Handbook* is specifically designated as a source of ethical guidance for lawyers in Ontario, lawyers who did not refer to the *Handbook* in relation to a specific problem would have classified their situations as something other than ethical. However, our findings did not support this expectation (see Table 3). Seven of these fourteen lawyers classified their situations as ethical. The remaining lawyers classified their situations as strategic problems or dilemmas. While none of these lawyers referred to the *Handbook* in relation to their specific problems, eleven of these lawyers did state that the *Handbook* was helpful in the general sense of defining a lawyer's obligation to the client. Six of these fourteen interviews provide support for the assertion that ethics are internal to the individual and cannot be regulated by external rules.



**Table #3: Summary of Information from Lawyers Who did not Refer to the Handbook in Relation to a Specific Problem<sup>67</sup>**

Type of Problem	Lawyer	Evidence of Ethical Deliberation
<b>Ethical Components</b>	115	Yes
	137	Yes
	145	Yes
	148	Yes
	149	Yes
	151	Yes
	152	No
<b>No Ethical Components</b>	132	No
	133	No
	138	No
	142	No
	146	No
	150	No
	153	No

1. Lawyers Who Classified Their Problems as Ethical, but Who Only Referred to the *Handbook* in a General Sense, Not in Relation to the Specific Problem Discussed

**Lawyer #115**

Lawyer 115 was an in-house lawyer for an organization. Several allegations of sexual abuse were made against members of the organization. The ethical dilemma he was faced with was that the client was ignoring the recommendations the lawyer had made in regards to these members. He stated:

[I] saw the potential for other people to be at risk because of the decision that was being made, and was and continue to be greatly concerned because of that. I also had to realize in myself that the opportunity — people accuse corporate counsel of being the conscience of corporations or at least trying to be — and the opportunity to be in that position would be sacrificed if I walked away because of the ethical dispute that was taking place. It's hard to assess when something is serious enough that you have to say, "I can't work here any more."... So the personal, ethical considerations created the dilemma of, "knowing what I know, what am I going to do about it?"

In deciding how to resolve the dilemma, Lawyer 115 mentioned the *Handbook* but did not use it to resolve the issue. He stated:

<sup>67</sup> This table gives the same information as Table #2 except that it does not contain the "Issue Resolved by *Handbook*" column. This column was not needed in this table since these lawyers, in referring to the *Handbook*, were not using it to solve a specific problem.

Looking at the Rules of Conduct for the Law Society of Upper Canada, and before completing my law degree, looking at the Rules of Conduct recommended by the Canadian Bar Association, it was my personal conviction that practising law on the basis of my Christian convictions and the ethical principles I find in scripture was a higher standard that was being asked of me than either the Bar Association or the Law Society. ... [M]y first obligation is to God. And that provides me with certain ethical hurdles that come into play even before I start thinking what does the Law Society have to say, or what does the law have to say.

However, he did say that the rules were helpful, in that they “reminded [him] of [his] obligation to [his] client, and [his] obligation to society.”

In deciding what to do, Lawyer 115 consulted his wife and several other lawyers. He resolved the matter by writing a letter that said: “[T]hese are the recommendations that had been made, this is the decision that you have made, and that’s contrary to my recommendation. I think that you’re making the wrong decision and I want this letter placed on the file with everything else pertaining to this matter.” According to Lawyer 115, this position did not put him in violation of his ethical obligations to God or the Rules of Conduct because he stood up for what he believed in and backed up his position in writing. His response provides further evidence that not all lawyers faced with ethical issues consult the *Handbook*.

#### **Lawyer #137**

As in-house counsel, Lawyer 137 was responsible for minimizing the legal liability of the company. The company was about to release a new product into the marketplace and Lawyer 137 was concerned with the safety of the customers and potential liability of the company. The difficulty for him was deciding how far to push the company (his employer) so that he discharged his duty to advise his client and at the same time did not compromise his employment. In his words, this was an ethical dilemma:

But what do you do as a lawyer if you tell them what you think the legal standard is, and what the risks are, and what the potential liability is, and they make a decision that accepts liability, and you think that’s an unreasonable risk to the corporation? Therein lies the dilemma that a lawyer has, because who do you talk to? ... The president is the guy that probably hired you. And the president views you as an employee. And if you want to be strategic employee, he views you as the person who’d better be on his team, or your day’s going to be ruined.

The ethical considerations involved preventing injury to the customers. In deciding how to deal with this situation, the lawyer stated that he referred to his own “internal compass”:

Well, you have regard to what your own beliefs of right and wrong are. And what you owe to other people. Then you have regard to what the law says. And then you have regard to what your profession says. ... [And then] you talk to anybody whose judgment you trust to tell you whether or not they think your internal compass is on point. The first thing you want is affirmation that “am I nuts to be concerned with this, or is this a legitimate thing to be concerned about?” ... And ultimately, once I am satisfied that the “corporation” has been advised, and I’ve given the best advice I could give ... then [the company] has the opportunity to go wrong.

For Lawyer 137, being satisfied meant going to a business level in the corporation where he was satisfied that the corporation knew of all the risks of exposure associated with releasing the product. Although the lawyer did not refer specifically to the *Handbook* in relation to his ethical dilemma, he did express the opinion that the *Handbook* is useful in defining the lawyer's responsibility to his client.<sup>68</sup>

This response of Lawyer 137 is interesting for two reasons. First, it again confirms that not all lawyers who are faced with ethical problems turn to the *Handbook* for assistance. Secondly, his response supports the view that ethical behaviour originates with the individual, not from the consultation of an external set of rules.

#### *Lawyer #145*

While researching an immigration case, Lawyer 145 called what he thought was the human rights organization for a certain country. In fact, the organization was a government front. The phone call could have potentially put his client and his client's family in serious jeopardy. In Lawyer 145's words, he was in an "ethical jam"—he had to protect his client's interests and his own. He informed the client of his error immediately:

Then I just called up the client. ... Basically resolved it by explaining to the client their rights, whatever happened as a result of this that I would have to take responsibility, they had a right to call the Law Society if they thought I made a mistake. They had the right to seek other counsel to determine whether I had made a mistake. On a personal level I told them I would fly any family members out that they thought were in jeopardy.

The lawyer also talked of the conflicting duties involved in continuing to represent the client. He stated: "The exact conflict is that to discharge my duty to my client properly I have to advocate fearlessly, energetically, all that stuff. In doing that I should be hammering away at the increased risk I might have caused myself." In deciding how to respond to the situation, Lawyer 145 did not refer to the *Handbook* but rather discussed the situation with colleagues: "[G]enerally with refugee problems, if I have an ethical dilemma I talk to somebody inside and I generally talk to one of the two or three sort of 'Deans of the profession' in the town." However, he did state that the code was helpful in that it defined the lawyer's duty to his or her client as the primary obligation of the lawyer.

Lawyer 145's classification of this problem as an ethical dilemma provides further evidence that not all lawyers faced with ethical issues consult the *Handbook*. Interestingly enough however, Lawyer 145's actions of informing his client immediately conform exactly with Rule 3 of the *Handbook*. Commentary 10 under this rule requires the "lawyer to inform the client promptly when the lawyer discovers that a mistake, which is or may be damaging to the client and which cannot be rectified"

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<sup>68</sup> Presumably, Lawyer 137 is mainly referring to Rule 10 of the *Handbook*, *supra* note 10 at 29, which requires a lawyer to represent the client to the best of his or her ability.

and that the lawyer “should recommend that the client obtain legal advice elsewhere as to any rights the client may have arising from such a mistake.”<sup>69</sup>

### **Lawyer #148**

Lawyer 148 was general counsel for a corporation, and was also an officer of the corporation as well. The president of the company, who was also the majority shareholder, wanted the lawyer to do something that would probably not be as beneficial to the minority shareholders. Lawyer 148 states that he was in a conflict-of-interest position:

The problem arises that there is a conflict of interest, and you have to be cautious and careful of your role involved in this process, and be sure that you protect the corporation, which is your employer, yourself, protect the controlling shareholder, himself, because he’s also relying upon you as counselor ... You always have to be very conscious of what your duties and responsibilities are to the corporation and employees.

When asked whether he classified this as a legal or ethical issue, he responded:

It’s both. The conflict arises out of legal obligations. The response to it is many times an ethical one as well as upholding legal rights. And the role of counsel is very much an ethical one, and you have to be well aware of your responsibilities to differing persons. And the utmost responsibility to fulfill your responsibility to either one of them. And not to shirk your duties to one in favour of another.

In response to the question of the source of his ethical obligation, Lawyer 148 stated that while the code of conduct is helpful in generally defining what is ethical, his “own experience is more a feeling of what [he] know[s] is right, and what [he] know[s] is not right.”

Again, this interview provides additional evidence that not all lawyers faced with ethical issues consult the code, and that ethical behaviour comes from the individual.

### **Lawyer #149<sup>70</sup>**

Lawyer 149 had a client who had given birth to a child with major health problems. The child had been placed with foster parents since birth. The foster parents brought an application to obtain custody of the child. In Lawyer 149’s view, the foster parents were in a much better position to care for the child than her client. Although the lawyer stated that she would have pursued the wishes of her client even if she herself did not agree with them, she was faced with the issue of whether to challenge her client, and if so, how much. She stated the issue as:

... [w]hether or not I was making the right decision in trying to educate my client about what she was looking at in the future; should she pursue the instructions which she originally gave me? That was my hard decision to make, do I

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<sup>69</sup> *Handbook, ibid.* at 8.

<sup>70</sup> Lawyer 149’s response is discussed in more detail in an earlier article that examines the role of the lawyer (see “Role of the Lawyer”, *supra* note 8).

accept it and just say blindly "let's go ahead and litigate this," or do I try and inform her? And my decision was to inform her, at least then it would be an informed decision.

In deciding whether she should counsel her client or simply advocate her client's wishes, Lawyer 149 did not refer to the *Handbook* for any guidance. Instead, she made the decision by considering personal characteristics of the client—she looked at whether her client had the ability, both financially and emotionally, to care for the child. When asked whether there were any ethical considerations involved, she replied,

We have a code of professional conduct that indicates that we are to behave in a certain manner and that we are to take our client's instructions and act accordingly. I guess the ethical dilemma is, do you move yourself from being the counsel for the mother, to being an advocate for the child? That is something that you have to be very careful of. I think you can look at both of those until such time as the client gives you very clear instructions. Then you have to move away from that joint experience into one where you say well I am advocate of the mother.

Thus, Lawyer 149 seems to view the *Handbook* as helpful in a general sense because it requires lawyers to follow their client's wishes. However, it is not helpful in a specific sense because lawyers must still determine at what point they should cease counselling and begin advocating their client's wishes.

#### *Lawyer #151*

Lawyer 151 was faced with a situation where a major client of the firm had asked him to relay something to the other side that was not true. The request was made during the course of a phone conversation, making it necessary for the lawyer to give a response immediately. The decision was further complicated by the fact that the lawyer was new to the firm, and that after first refusing the client's request, the client began to threaten him. In the lawyer's words, he was faced with an ethical problem:

I think I was only out two years. I thought, boy, you know, where are my duties now? And evaluating them on the spur of the moment was very difficult in the sense that I have this ethics problem faced with and it is something to be dealt with. It's not like something, well, "Let me think about it and get back to you." It's something that you have got to deal with right at the spur of the moment and it's not something that somebody is going to prepare you for either. ... And I said to him, I said to this particular client, I couldn't do what he had asked me to do. ... And I can tell you that he was quite upset with me. He even insinuated that he would deal with other firms.

In deciding how to respond to the client's request, Lawyer 151 went with his "gut instinct". He stated: "It was like, is this right or wrong? It's improper, it's wrong, therefore, do not do it. ... I think when it comes down to that, you have got to look at it and say, 'Make a decision. Make a decision as to what is proper and what is not.'" Although Lawyer 151 did not refer to the *Handbook* in relation to the issue raised, he did express his opinion on the usefulness of the code when he was asked by the interviewer whether he ever consulted the *Handbook* for guidance. His response was as follows:

Honestly, no. Really [I] do not. ... You have this, you are either ethical or you are not. The rules, I think, are put down because people step over the line and I think we as lawyers have to point out, well, that you stepped over the line and should not have. Where do the rules of practice come from? The people. It is prevalent now that people step over the line given a choice, that there is quite a number that will do it, so now we have to define those lines and say, "Here it is—step over it and you are going to get your hand slapped or get disbarred," whatever the outcome is. I would hope that we were different. I would hope that we were more of a, that we would just deal with situations with integrity ..., [but] integrity is just inside, either you have it or you don't.

Clearly, Lawyer 151 is of the view that the *Handbook* cannot make lawyers ethical. In his opinion, the only useful purpose it serves is as a means of disciplining lawyers who step over the line. The actions of this lawyer support the argument that lawyers cannot be made to be ethical persons through the consultation of external rules.<sup>71</sup> Lawyer 151 made his decision not by consulting external rules, but by looking within himself to determine "what is right and what is wrong". As already discussed, this is consistent with the notion of ethics itself.

#### **Lawyer #152**

Lawyer 152 was counsel for a non-profit organization that worked with challenged persons. Two of the persons being cared for became involved in criminal proceedings—one as victim, one as aggressor. The lawyer had to decide how to advise the organization so that no conflict of interest would be created. He classified the situation as an ethical dilemma:

I have to assure, first of all that they comply with their legislation. Second, that they act in a morally and ethically fair manner. Thirdly, that they appear to act in a fair manner so that they cannot be accused of conflict of interest. ... And that is the type of situation that, particularly a lawyer who practises in the field that I do finds that you have an ethical dilemma to resolve because you are always trying to be alive to possibilities of conflict of interests.

The lawyer resolved the conflict by recommending that the organization make all relevant resources available to both individuals, make full disclosure to both parties, and remove itself from any aspect of the investigation. Although Lawyer 152 did not refer to the *Handbook* in relation to this specific problem, he was asked whether he thought the code reflected the realities of practice. He stated:

Overall it does. The Rules of Professional Conduct are never irrelevant except in the context that they are simply not applicable to the facts in the individual case. ... So they can be irrelevant in one sense but they are never irrelevant to the general. The Code of Professional Conduct, in some cases I think, is inadequate but that is the function of not being able to provide in any code for all situations which can arise in the course of human conduct. ... And in fact I think the Law Society itself has in a way inferred and agreed with the inadequacy of the Code by having a Practice Advisory Committee and you can call up a prac-

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<sup>71</sup> See previous discussion in Part I, above.

itioner and ask for advice or guidance in ethical dilemmas. Because, like I say, there is an infinite variety of situations that present themselves to a practising lawyer and you cannot have a comprehensive code to deal with all of them.

Lawyer 152's response illustrates that he was aware of the difficulty of balancing hortatory and regulatory provisions in a code of conduct. His answer seems to suggest that the Law Society has struck this balance as best as can be expected.

## 2. Lawyers Who Referred to the *Handbook* beyond the Context of Their Own Problems, Which They Themselves Identified as Other Than Ethical in Nature

### *Lawyer #132*

The problem described by Lawyer 132 was that his client was charged with two criminal offences. On the day of the trial, the Crown proposed that if his client pleaded guilty to one of the charges, then the Crown would drop the other charge and would agree that the client had already served sufficient time in custody. Lawyer 132 felt that if it went to trial, his client would probably be found not guilty of the charge. However, if his client was found guilty he would have a "failing to comply with bail" and/or a "escaping lawful custody" conviction, which would make it much harder for his client to get bail in the future. He and his client decided that even though the Crown's offer would allow the client to walk out that day, they would go to trial. Incidentally, Lawyer 132 indicated that he knew that his client was guilty of both offences, but that the Crown would probably not be able to prove it.

Lawyer 132 seemed to view the situation as a strategy or risk-assessment problem. When asked about the factors involved in making his decision, he stated:

[Y]ou really have to weigh what you feel to be the strengths and weaknesses of the client's case, who the judge is, how good the Crown is, whether or not you think the police officers who will be testifying will be good witnesses or bad witnesses, how strong a case you think the Crown has. ... the pros and cons of pleading guilty or saying no and going to trial.

The lawyer was further questioned on whether there were any ethical factors involved, and particularly whether the lawyer had any concerns about getting his client acquitted on a charge that he knew his client had committed. With respect to the ethical considerations, the lawyer responded, "The only part that ethics would come to play in it would be that you wouldn't want to persuade a client to plead guilty to something that he or she wasn't guilty of." In terms of getting a guilty client acquitted, the lawyer stated that he had no concerns whatsoever since "it is up to the State ... to prove that anybody is guilty" and that "you're obliged, as a lawyer, if you know that your client can beat a charge ... to represent him or her and proceed to trial." When asked what the source of

this obligation was, the lawyer referred to the *Handbook* in these terms, "In the Law Society Act it says something about representing your client as best you can."<sup>72</sup>

The words of Lawyer 132 do not suggest that he viewed this situation as an ethical problem or dilemma. Rather, he seems to view the situation as one where you balance the different factors involved to choose which course of action will likely be most beneficial to the client.

### ***Lawyer #133***

Lawyer 133 worked for a company who owned certain business property. One of the company's tenants was trying to cease business operations when they had signed on for a lease for a longer period of time. Lawyer 133 was faced with the issue of whether to ask the court for a mandatory injunction that would prevent the tenant from ceasing business operations but that had a very slim chance of succeeding, as opposed to not doing anything and letting the tenant get away with breaching the lease. In his words: "You're damned if you do, damned if you don't in a case like this because if you don't pursue it you send out a message that the landlord isn't going to pursue these sorts of things. You do sue and you run the risk of setting a very bad precedent." When asked whether there were any ethical considerations with respect to this specific decision, the lawyer responded that there had been no ethics involved, just pure risk assessment. Based on his assessment, Lawyer 133 decided to pursue the mandatory injunction. He did not refer to the *Handbook* in relation to the specific problem discussed. However, when asked about the types of strategies that he uses in practice, he stated that he would "draw the line at doing anything unethical." When asked where his definition of "unethical" came from, he replied: "The Law Society's code of conduct is one, certainly and probably as good as any. I guess beyond that the practice and understanding that is developing in the profession."

### ***Lawyer #138***

Lawyer 138 was representing a defendant who had been charged with a crime. His client had a valid legal defence, although if he were put on the stand, the jury would probably react very negatively to his client. If he pleaded guilty, the term of incarceration would likely be ninety days intermittent or between six and eight months reformatory time, with a recommendation for early temporary absence. If his client was convicted at trial, the jail time would be between two and four years. Lawyer 138 stated he was faced with a dilemma:

My dilemma is that from a purely legal point of view, the case is possibly winnable. Not probably winnable but possibly winnable. And possibly winnable from a criminal point of view is not a bad situation to be in. To recommend to my client that we defend the case turns this into purely a lawyer's case and if I lose my client pays an undue penalty. The type of dilemma simply put is, do I recommend to a client that has a defence, a defensible position that he enter a

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<sup>72</sup> The lawyer here is referring to Rule 10 of the *Handbook*, *supra* note 10 at 29, which requires a lawyer to represent the client to the best of his or her ability.



plea of guilty because of the high risk of outrageous results from an unsuccessful defence?

In deciding whether to plead guilty or go to trial, the lawyer did not refer to the *Handbook* but made his decision based on a cost-benefit analysis. The factors considered when making a recommendation to his client were: "The significant probability of conviction, the significant probability of major interference with his life including his career as a result of a conviction at the trial; and what can be done to minimize those results and how far they can be minimized." After a consideration of these factors and discussion with his client, it was decided that the client would plead guilty. In Lawyer 138's view, there were no ethical issues raised by this fact scenario. His comment about the *Handbook* was that it defines the lawyer's professional obligation to represent his client's best interests.<sup>73</sup>

#### *Lawyer #142*

Lawyer 142 was acting for both co-tenants where one co-tenant was mortgaging his interest in the land. Although the firm got permission from the co-tenants to act for both, there was an issue of whether a conflict had arisen which would require the firm to withdraw from representing both clients. The lawyer found out that there was a side-agreement in the loan document that would affect the interest of the co-tenant who was not mortgaging his interest in the land. The issue to be decided was whether this represented a sufficient conflict such that the firm would have to step down. The conflict problem was resolved by discussing the issue with other partners in the firm. The final decision was to disclose the side agreement to the co-tenant and leave it up to him to make the decision. The co-tenant decided to continue to let the firm act for him.

When asked whether he had any general reflections on the whether the conflict rules were either too strict or too lax, the lawyer replied:

No. I don't think it can be any stricter and make it realistic because economically people have to have situations where a party acts for both sides, and that's to the client's benefit. They surely can't make them laxer because then there would be no direction. It's a difficult one ..., but there's nothing the Law Society can do about that except maybe go through fact situations.

#### *Lawyer 146*

Lawyer 146's firm had just won an action against the majority shareholders of a corporation. The client died without having paid his legal fees. The opposition then served notice that they would be appealing the decision (which meant that the judgment would not be paid until the appeal was heard). The problem was that the firm's client had left his widow with nothing except for the money owing under the judgment. Lawyer 146 had to decide whether to continue to represent the widow even though his firm would not be able to get paid for three to four years. Although the lawyer did not specifically state what type of problem he viewed this as, it seemed to be somewhat of a

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<sup>73</sup> As with Lawyer 137, Lawyer 138 seems to be referring to rule 10 of the *Handbook*, *ibid.* at 29.

risk-assessment analysis in the sense that the firm had decided that it would continue to represent the widow if it could set up a mortgage on the client's estate property. The *Handbook* was only mentioned in the sense that Lawyer 146 did not feel that the other side had breached the rules, although he thought they might be coming close to doing so.

### **Lawyer #150**

Lawyer 150 was faced with a decision about whether to settle a case or take the matter to trial. Lawyer 150 viewed this as a risk-assessment problem such that it was the lawyer's job to weigh the various factors involved and then give advice to the client about what the appropriate course of action would be. According to Lawyer 150, the factors that should be examined are:

[Y]our probability of success at trial, how much better you might do there as opposed to what the offer that's been made to is. But even then another factor of costs is involved. ... In the legal profession, it's always a matter of weighing the costs of doing various things. So if you think you could, yes you could go to trial and there's a chance you might get another \$5000, but it's going to cost you \$5000 to go to trial in any event, [so] there isn't a lot of point. So you look at the client's wishes, obviously, and the strengths and weaknesses of your case, and the likelihood of success at trial, the costs that are going to be involved, both financial and sort of, taxing on your client.

The issue had not been decided at the time of the interview. Lawyer 150 did not seem to find the *Handbook* helpful because she was not sufficiently familiar with it. When asked where the lawyer's obligation to the client comes from, her response was: "There's a code of ethics for lawyers; I don't know whether that's specifically printed in there or not. ... I don't know if it's written down anywhere, I'm sure it's somewhere."

### **Lawyer #153**

Lawyer 153 was faced with the issue of deciding what strategy to employ with respect to a motion. Specifically, he had to decide whether to convert the motion to a summary-judgment motion which has a different test for the admissibility of evidence, or to stick with the original motion (which was a motion for a determination of law). The lawyer discussed the issue with some colleagues, did some research, reviewed the evidence and decided to continue with the original motion but to be prepared with additional evidence. The *Handbook* was not mentioned in relation to this specific problem but the lawyer did say that when he is faced with a potentially unethical situation he refers to the rules.

## Conclusion

The results of this article indicate the following:

1. The majority of participants in this study did not use the *Handbook* as a means of solving problems.<sup>74</sup> Moreover, the data indicate that even among those who mentioned the *Handbook* during their interview, not all lawyers who classified their situation as an ethical problem or dilemma consulted the *Handbook*.

2. For those lawyers who did refer to the *Handbook*, the majority found it to be useful in one of two ways. Either the *Handbook* was seen as a useful tool for resolving the specific issue before the lawyer, or it was seen as useful in the sense that it defined in a general way the lawyer's obligation to his or her client.

3. Finally, a number of the lawyers who referred to the code in relation to a specific problem actually viewed the *Handbook* as resolving the issue before them. These lawyers showed no evidence of engaging in any ethical decision-making.

These findings are important for several reasons. First, they indicate that the *Handbook* is not seen as a useful tool to the majority of practising lawyers. The fact that only 16% of lawyers in the study referred to the *Handbook* during their interviews clearly indicates that most lawyers are solving their problems through other means (when only the lawyers who referred to the code in relation to the particular issue are included, this percentage drops to 7%).<sup>75</sup> On its own, this finding may simply suggest that most lawyers do not encounter ethical problems in practice and therefore find it unnecessary to refer to the *Handbook*. However, this article has clearly demonstrated that this is not the case. Almost half of the lawyers discussed above classified their situation as an ethical problem or dilemma.

These conclusions go towards answering the final research question of this article—would revision or amendments to the *Handbook* have any effect on the behaviour of lawyers? If lawyers are solving their problems, ethical or otherwise, in the same sort of way that they were before the *Handbook* came into existence, then the usefulness of the code to the entire profession is called into question. How can the code, or any proposed revisions or amendments to it, possibly affect the behaviour of lawyers when most lawyers do not even refer to it?

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<sup>74</sup> In "Legal Ethics: Why Aristotle Might be Helpful" J. Soc. Philo. [forthcoming in 2001], author Michael Milde (who worked with these researchers) suggests that the reason more lawyers do not consult the *Handbook* is that in resolving ethical issues, lawyers adopt the Aristotelian model of "virtue ethics" or the "good man".

<sup>75</sup> See "Information-Seeking", *supra* note 8. In this paper, Wilkinson uses the transcripts from this project to draw some conclusions about what information sources lawyers are using to facilitate their decision making process. Her findings may suggest that the conduct and opinion of colleagues exert a greater influence on a lawyer's professional behaviour than does the existence of formal information sources like codes.

Secondly, the findings of this study are important in that they support the contention that the *Handbook* is useful to the majority of lawyers who refer to it. However, whether this is a desirable result is questionable. Of the eleven lawyers who referred to the *Handbook* in relation to a specific problem, six of the lawyers actually viewed the *Handbook* as providing a solution to the problem.<sup>76</sup> Through an examination of the specific wording used by these lawyers, it was clear that the code had the effect of eliminating the necessity for ethical deliberation, and in some cases also insulated these lawyers from taking personal responsibility for their actions. For each lawyer, the issue of what to do was decided by the *Handbook*. As Lawyer 154 stated, "that was the end of the dilemma ... I think the rules of professional responsibility fit the situation perfectly." The lawyers did not seem to consider the consequences of their actions on the parties involved or engage in any independent thought. The *Handbook* dictated what was to be done, therefore no further steps needed to be taken.<sup>77</sup>

On the other hand, several lawyers demonstrated that they were capable of engaging in ethical deliberation irrespective of the existence of the code.<sup>78</sup> These lawyers made their decisions not by consulting external rules, but by looking within themselves to determine the appropriate course of action. The results of the two different approaches are summarized in the following table.

**Table #4: The Use Made of the *Handbook* by Those in the Study Who Referred to It**

	Ethical Deliberation	No Ethical Deliberation
<b>Referred to <i>Handbook</i> in Relation to a Specific Problem</b>	136, 139, 140  (3)	134, 135, 141, 143, 144, 147, 154  (8)
<b>Did Not refer to <i>Handbook</i> in Relation to a Specific Problem</b>	115, 137, 145, 148, 149, 151  (6)	132, 133, 138, 142, 146 150, 152, 153  (8)
<b>Did Not refer to the <i>Handbook</i> at All</b>	8 <sup>79</sup>	121

<sup>76</sup> These lawyers are Lawyers 134, 135, 141, 144, 147, and 154.

<sup>77</sup> The fact that a majority of the lawyers who referred to the code simply followed the rules set out therein may be an indication that the *Handbook* has not struck an appropriate balance between hortatory and regulatory provisions (see Ladd, *supra* note 11 at 22 and accompanying text). Perhaps by adding provisions more inspirational in nature, the lawyers would be more likely to engage in independent thought before simply applying the appropriate rule.

<sup>78</sup> These are Lawyers 136, 137, 139, 140, 145, 148, 149 and 151.

<sup>79</sup> The research team also analyzed all the transcripts in which the lawyers did *not* refer to the *Handbook*. The results of this analysis revealed evidence of ethical deliberation in only 8 of these 129 transcripts. A discussion of these transcripts has been omitted herein because these transcripts were not the focus of this paper.

The net effect of these results is that the lawyers who did not consult the *Handbook* arguably behaved more ethically more often than those who did refer to the *Handbook*.<sup>80</sup> Whether or not this is a desirable result depends on whether the profession intends the code to assist lawyers in ethical decision-making, or whether the code is intended to obviate the necessity of ethical deliberation.

To conclude, the results of this study indicate that the legal profession has some important issues to address. It must be decided whether it is worthwhile to keep a code which so few lawyers use. If this question is answered in the affirmative, then it must be decided what role the *Handbook* is to play. Is it to operate so that it assists lawyers in the ethical decision-making process, or is it to operate so that it makes it unnecessary for lawyers to engage in ethical deliberation? Is it desirable for a profession that is supposed to protect the public to be relieved of the necessity of ethical deliberation? While these issues are beyond the scope of this paper, the results of this paper may prove helpful in their consideration.

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<sup>80</sup> Unfortunately, the cell sizes in the table are too small to allow for generalization through the use of chi-square analysis. However, recently the research team compared the problems identified by these lawyers with the categories of problems with which the Law Society deals on an ongoing basis. The range of problems raised by the lawyers is not in any way atypical and, indeed, reflects fairly closely the breakdown of problem areas raised by lawyers in calls to the Law Society's Advisory Service in the same time period. Practice administration was involved in 68% of all calls to the Law Society and in 60% of all cases in this study. Substantive questions of law were involved in the remaining 32% of calls to the advisory service and in 40% of our transcripts. The research team is indebted to then law student Paul Holmes for the comparative analysis of the Law Society data. As well, see the previous discussion regarding generalizability of the results of this research in Part II, above. Generalizing these findings from our study to the general population of lawyers is thus not inappropriate.