April 2013

The Porous Boundary Between Legal and Business Advice, An Empirical Approach

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Graduate Program in Law

A thesis submitted in partial fulfillment of the requirements for the degree in Master of Laws

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THE POROUS BOUNDARY BETWEEN LEGAL AND BUSINESS ADVICE, AN EMPIRICAL APPROACH

(Thesis format: Monograph)

by

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Graduate Program in Law

A thesis submitted in partial fulfillment of the requirements for the degree of Master of Laws

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Abstract

This thesis asked whether corporate lawyers in both private practice and acting as in-house counsel differed in their attitudes toward distinguishing their professional obligations concerning the provision of “business” advice. This research establishes that these two groups of lawyers differ in their attitudes toward the provision of advice in two ways. In connection with providing business advice, in-house counsel more frequently a) feel that “murky lines” exist when distinguishing between legal and business advice and, b) look to ethics codes. This research reflects at its core an unresolved boundary between legal and business advice and provides a resolution to this issue by examining a philosophical approach that gives lawyers a greater opportunity to engage in practical reasoning. It also establishes a framework that can be used to determine whether a particular business communication is categorized as legal or non-legal in nature.

Keywords

Legal Profession, Business Advice, Legal Advice, Legal Ethics, Rules of Professional Responsibility, Survey
Dedication

Acknowledgments

I would like to express my heartfelt gratitude to my supervisor, Professor Margaret Ann Wilkinson, the backbone of this research and of this thesis. Her advice, supervision and crucial contribution minimized the unexpected roadblocks that appeared during the course of my research and which, at times, loomed so large in my mind.

Professor Wilkinson’s personal dedication, support and persistent confidence have made a substantial difference in my scholarship as well as in my life. In various ways, she unselfishly shared of her time, expertise and intelligence. I could not be prouder of my academic roots and hope that I can in turn pass on the research values and the dreams that she has given to me.

I would also like to thank my examiners, Dr. Sara Seck, Dr. Randal Graham, and Dr. Mary Crossan who provided encouraging and constructive feedback. As well, I thank Anna Dolidze for chairing the examining committee.

It is a pleasure to express my wholehearted gratitude to my sister and brother-in-law, Anna and Ian Wolters, for their unrelenting love and kind hospitality during my frequent stays during the commutes between Toronto and London. Thank you for feeding me, staying up late with me, and accommodating my seemingly spontaneous arrivals and departures in the midst of your own busy and demanding lives.

I also thank my parents for setting the example of many important qualities, which have given me a solid foundation with which to meet life and pursue graduate studies. They have taught and shown me much about hard work, persistence and independence.
And importantly, I extend warmest and heartfelt appreciation to Dr. Elizabeth Kirkland, my life-long friend who shares so much with me – including academic passion. Thank you Liz for your unwavering support and encouragement through very dark days.
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Chapter 1 - Distinguishing Legal and Business Advice

(i) Introduction

Business lawyers\(^1\), as a segment of the legal profession, provide legal advice to their clients. This often goes beyond merely identifying the applicable law for a given situation since clients regularly demand that their lawyer outline the course of action they should take. Oftentimes, the lawyer’s advice involves business advice.\(^2\) However, in practice, there is a porous boundary between “legal advice” and “business advice”, making it difficult to characterize the advice as either legal or business in nature.\(^3\) This

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\(^{1}\) For reasons explained below and in the body of this essay, “business lawyers” are also referred to as “corporate lawyers” herein.

\(^{2}\) A survey by Vincent C. Alexander (hereinafter “Alexander”) of lawyers in New York City (concerning the practical effects of the attorney-client privilege in the corporate context) found that 89% of lawyers answered ‘yes’ when asked whether they would characterize any of the advice they give to their corporate clients as ‘business advice’. This study also reports that nearly four out of five corporate executives surveyed answered ‘yes’ to the question of whether they wanted business advice from their lawyers. See, V. C. Alexander, "The Corporate Attorney-Client Privilege: A Study of the Participants," (1988 – 1989) 63 St. John's L. Rev. 191 - 432 (book-length empirical study, discussed further below), cited by the Supreme Court in Swidler & Berlin v. United States, 524 U.S. 399 (1998) at para. 409 (footnote 4). There is also a growing consensus in the literature of a trend toward lawyers increasingly providing a form of business consulting service rather than traditional legal advice and litigation. For example, there is speculation that, in the near future, a lawyer’s value to the client will have two dimensions: i) what she knows about a particular body of law and ii) what she knows about a clients’ industry or substantive concerns. Flowing from this is an issue about whether lawyers have enough training and experience to understand and advise clients about non-legal substantive decisions. See T.D. Morgan, “The Last Days of the American Lawyer” (January 27, 2010), online: SSRN <http://ssrn.com/abstract=1543301>. This paper is based on T. D. Morgan’s, The Vanishing Lawyer: The Ongoing Transformation of the U.S. Legal Profession (Oxford University Press, 2010).

\(^{3}\) Case law makes clear that it is difficult to draw a dividing line between legal advice and business advice. For example see: Wong et. al v. 407527 Ontario Ltd. et. al (1999), 179 D.L.R. (4th) 38, [1999] 125 O.A.C. 101, [1999] CanLII 3788 (ON C.A.), online: http://www.canlii.org/en/on/onca/doc/1999/1999canlii3788/1999canlii3788.html (discussed further below) wherein Laskin J.A. stated “Although ordinarily clients retain lawyers for legal advice and not business advice, on some transactions the two are intermingled and no clear dividing line can be drawn.” Also, see Davey v. Woolley et al (1982) 35 O.R. (2d) 599, (discussed further below) wherein Wilson J.A.
thesis explores that boundary as well as the legal profession’s responsibility concerning the provision of business advice.

Certainly, the provision of a lawyer’s professional services requires competency. It has even been suggested that competence is the profession’s primary ethical obligation. In 1994, the Law Society of Upper Canada (the “Law Society”) formally adopted a "Role Statement", which states in part that the Law Society exists to govern the legal profession in the public interest by ensuring that the people of Ontario are served

(as she then was, later Justice of the Supreme Court of Canada) stated that “…although legal advice and business advice frequently coalesce in a commercial transaction of this kind, I believe that solicitors are generally sensitive to the distinction and view it as an important part of their responsibility to build into the transaction the maximum legal protection they can for their client”.

4 See the Law Society of Upper Canada’s “Rules of Professional Conduct”, namely, rule 2.01 regarding "competence" to which all practicing lawyers in Ontario are subject, Rules of Professional Conduct, The Law Society of Upper Canada, adopted by Convocation June 22, 2000 Amendments Current to January 24, 2013, online: http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147489377&langtype=1033. Formation of the Rules is discussed further below. “Convocation” is the monthly meeting of Law Society benchers, the directors who govern the Society. The Law Society of Upper Canada is governed by a board of directors, who are known as “Benchers”. This board includes lawyers, paralegals and lay persons (non-lawyers and non-paralegals). Benchers gather most months in a meeting called “Convocation” to make policy decisions and to deal with other matters related to the governance of Ontario's paralegals and lawyers. The chair of Convocation and the head of the Law Society is the “Treasurer”. The staff and day-to-day operations of the Law Society of Upper Canada are overseen by the chief executive officer and the senior management team, online: http://www.lsuc.on.ca/with.aspx?id=673.


6 As early as 1907, in an address to the Ontario Bar Association, the Hon. Mr. Justice W.R. Riddell asserted that “[t]he profession of the law – using the word in the collective sense – was originated, it existed, and continues to exist, for the good of the public”, see W.R. Riddell, “The Lawyer” (1907) 27 Can. L. Times 785 at 787.
by lawyers who meet high standards of learning, competence and professional conduct.\(^7\)

In concrete terms, it is the mandate of the Law Society to see that persons seeking admission to the legal profession are competent, and to ensure that lawyers follow proper procedures and behave ethically. In fact, these goals are the justification for its existence.\(^8\)

The Law Society has established the Rules of Professional Conduct (the “Rules”) to ensure that lawyers follow proper procedures when fulfilling their professional services.\(^9\) These rules state that lawyers must be competent in providing legal advice.

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\(^7\) The Law Society of Upper Canada’s “Role Statement”, adopted by Convocation on October 27, 1994 states in part: [The Law Society of Upper Canada exists to govern the legal profession in the public interest by]:

…ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and upholding the independence, integrity and honour of the legal profession, for the purpose of advancing the cause of justice and the rule of law.

This statement was adopted by Convocation, October 27, 1994. See The Law Society of Upper Canada, “The Law Society of Upper Canada Strategic Plan 2000 – 2003” (2000), at 3, online: <www.lsuc.on.ca/media/StrategicPlan.PDF>. The Law Society’s commitment to competence is further demonstrated in the Law Society of Upper Canada’s “Joint Report to Convocation February 25, 2010”. This report concludes that the time has come to introduce a continuing professional development requirement for lawyers in Ontario. The report states that such a requirement is a necessary component of self-regulation and will further demonstrate the Law Society’s commitment to professional competence for lawyers and paralegals. Provided the model chosen is fair, transparent and reasonable the Committee believes that lawyers and paralegals will recognize and accept the requirement as part of their responsibility to the public and to their own maintenance and enhancement of competence. See The Law Society of Upper Canada, “Joint Report to Convocation February 25, 2010” (2010), online: <http://www.lsuc.on.ca/news/b/reports/>.


\(^9\) The Law Society regulates Ontario's legal profession to ensure a competent and ethical Bar. Legislation passed by the Government of Ontario, (the Law Society Act, RSO 1990, c L.8 and regulations made under the act) authorize the Law Society to license Ontario's lawyers and regulate their conduct, competence and capacity. The Law Society’s by-laws (Made under subsections 62 (0.1) and (1) of the Law Society Act) and Rules of Professional Conduct (Adopted by Convocation on June 22, 2000 and in effect: November 1,
These rules do not specifically state whether lawyers must also be competent when they provide business advice. However, in the Commentary to Rule 2.01 "Competence", which is set out in part below, it is noted that while a lawyer's view on non-legal matters such as business, policy, or social implications may be of "real benefit" to a client, the lawyer is obliged to clearly distinguish legal advice from other advice:  

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.  

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2000) both based in the Law Society Act - set out the professional and ethical obligations of all members of the profession. Members failing to meet these obligations are subject to the Society's complaints and discipline process. The discipline process is governed by the Rules of Practice and Procedure (applicable to proceedings before the Law Society Hearing Panel).

Thus, it is implicitly acknowledged by the very existence of this commentary that lawyers do cross the divide between legal and non-legal advice and hence, the question is not whether lawyers should cross the boundary but rather, where to draw the line.

See Law Society of Upper Canada, “Rules of Professional Conduct”, Appendix A online: <http://www.lsuc.on.ca//WorkArea/DownloadAsset.aspx?id=2147489377&langtype=1033>. See commentary to Rule 2.01 “Competence”. Generally, there is no basis for differentiating between the commentaries and the Rules in the disciplinary context – the commentaries can be used in the same way as the Rules in determining whether alleged behaviour tends to bring discredit to the legal profession. See: Law Society of Upper Canada v. Roy Francis Dmello, 2013 ONLSAP 0005, online: <http://www.canlii.org/eliisa/highlight.do?text=commentary+to+rules+of+professional+conduct&language=en&searchTitle=Search+all+CanLII+Databases&path=/en/on/onlsap/doc/2013/2013onlsap5/2013onlsap5.html&searchUrlHash=AAAAAQArY29tbWVuGFeSB0bvBydWxlcYBvZibwcm9mZWNzAW9uYWwY29uZHVjdAAAAAAAABE>
It may be noted that neither “business” nor “business advice” is defined in the Rules.\(^{12}\) This thesis asks whether and how the distinction between business and legal advice is observed by practicing lawyers and to what extent judges demand such a distinction of them. Whether and to what extent either lawyers or judges distinguish between legal and business advice necessarily involves exploration of any distinction in meaning between the two that is being made. Therefore, it was fundamental to this study that meaning not be imposed at the outset of this research.\(^{13}\)

Essentially, Rule 2.01 imposes two obligations on lawyers concerning advice that is business in nature: a) to point out lack of experience or other qualification when providing business advice, and b) to clearly distinguish legal advice from other advice.

Tort law, in particular the law of negligence, is the area of law through which judges most frequently are called upon to help define: a) the obligations of lawyers, and b) what it means for a lawyer to be competent.\(^{14}\) As further explored in Chapter 2, recent case law steps beyond the Rules and the two fold duty as set out in Rule 2.01 to affirm

\(^{12}\) In Chapter 5 herein, some ordinary use definitions of “business” are set out but since there is no guidance about meaning provided to lawyers in the Rules, questions of the meaning understood by lawyers form part of the empirical enquiry that is reported in Chapters 3 and 4.

\(^{13}\) Indeed, the model that comes from this study is developed to be flexible in order not to suggest those kinds of distinctions. Refer to Chapter 5 for further detail.

that lawyers “may well have a duty to give advice on the financial or business aspects of a transaction” (emphasis added).\textsuperscript{15}

If lawyers have, in certain situations, a duty to provide business advice, presumably they are also obligated to ensure that such advice is competent. Clearly, any duty to provide business advice goes beyond what is discussed in the current Rules. Additionally, it is an obvious problem if legal and business advice are sometimes “intermingled and no clear dividing line can be drawn.”\textsuperscript{16}

Not only does litigation completed on the grounds of negligence help define the duties of a lawyer and what it means for a lawyer to be competent, but it also empowers a client whose lawyer is demonstrated to have performed incompetently to pursue and obtain redress.\textsuperscript{17} Thus, tort law encourages lawyers to fulfill their obligation of

\textsuperscript{15} See Wong et. al v. 407527 Ontario Ltd. et. al, supra note 3 at paragraph 46. In Wong et. al v. 407527 Ontario Ltd. et. al, the plaintiff purchasers were looking to buy a commercial property. The real estate market was “white hot”. A real estate agent gave the purchasers a brochure on a 2-storey commercial and residential building, which listed a certain property. The parties entered into an agreement of purchase and sale which contained a representation that the vendor would guarantee the rents of the tenants for the first year. After the agreement of purchase and sale was executed, the purchasers took the agreement to their lawyer to close the deal. Approximately, one year later, some tenants vacated the property; some didn’t pay rent; and others paid with NSF cheques. No security was given to ensure payment of the rents and the purchasers lost money. At trial, the purchaser’s lawyer was found negligent for failing to obtain security for the guarantee of the rents. However, on appeal, the lawyer submitted that he had no duty to negotiate security for the warranty because this was a business matter, not part of a lawyer’s retainer. The Court of Appeal did not accept this submission; rather the court stated that often times business and legal advice are intermingled and \textit{no clear dividing line can be drawn} (emphasis added). Unfortunately, no further guidance was provided on the issue. Laskin J. A. did not rest his concern about the lawyer’s duty to negotiate security on any distinction between business advice and legal advice because he found no basis to attribute the purchaser’s loss to the lawyer’s failure to attempt to negotiate security for the rental income warranty in the first place.

\textsuperscript{16} \textit{Ibid.}

\textsuperscript{17} \textit{Supra} note 14.
competence because it deters lawyers from behaving carelessly.\textsuperscript{18} In this way, tort law has a reinforcing relationship with professional responsibility,\textsuperscript{19} and the public interest.

In addition to compliance with the Rules and avoidance of the professional negligence issues discussed above, there are at least three other important reasons for lawyers to strive to understand the difference(s) between business and legal advice: a) to understand the scope of professional liability insurance coverage, b) to maintain a proper solicitor-client relationship and c) for the protection of legal privilege.

The Lawyers’ Professional Indemnity Company (LawPRO)\textsuperscript{20} provides lawyers with insurance coverage for errors, omissions or negligent acts in a lawyer’s performance of or failure to perform “professional services” for others. The insurance policy\textsuperscript{21} issued defines “professional services”\textsuperscript{22} as generally meaning: “the practice of the Law of

\begin{footnotesize}
\bibitem{18} \textit{Ibid.}
\bibitem{19} \textit{Ibid.}
\bibitem{20} The Lawyers' Professional Indemnity Company (LawPRO) provides professional liability insurance to lawyers in private practice in Ontario. It was incorporated in 1990 by the Law Society of Upper Canada, and has operated independently of the Law Society of Upper Canada since 1995, LawPRO website: \url{http://www.lawpro.ca/AboutLawpro/default.asp}. According to By-law 6 made under subsections 62 (0.1) and (1) of the \textit{Law Society Act RSO 1990 c L.8}, professional liability coverage through LawPRO is mandatory for all practicing lawyers in Ontario, see \url{http://www.lsuc.on.ca/media/bylaw06.pdf}.
\bibitem{22} \textit{Supra} note 21. In the LawPRO Insurance Policy No. 2013-01, “Professional Services” means:

PROFESSIONAL SERVICES means the practice of the Law of Canada, its provinces and territories, and specifically, those services performed, or which ought to have been performed, by or on behalf of an INSURED in such INSURED’S capacity as a LAWYER or member of the law society of a RECIPROCATING JURISDICTION, subject to Part II Special Provision A; and shall include, without restricting the generality of the foregoing, those services for which the INSURED
\end{footnotesize}
Canada, its provinces and territories, and specifically, those services performed, or which ought to have been performed, by or on behalf of the insured in the insured’s capacity as a lawyer”.\textsuperscript{23} Whether “business advice” is included in this definition of “professional services” or whether it is something that “ought to have been performed… in the insured’s capacity as a lawyer” has important consequences with regard to the scope of insurance coverage.

Secondly, in a healthy solicitor-client relationship, evidence points to the need for the client to be informed when his or her lawyer voices a business judgment, rather than a legal opinion. This allows the client to give the lawyer’s advice the appropriate weight.\textsuperscript{24} Similarly, in the event that legal and business advice is mixed, this should also be pointed out to the client so that the client can weigh the lawyer’s advice in context.

\textsuperscript{23} Supra note 21. In the LawPRO Insurance Policy No. 2013-01, “Lawyer” is defined to mean “each person who holds a Class L1 licence pursuant to the by-laws of the Law Society Act, R.S.O. 1990, c.L.8”.

\textsuperscript{24} See Alexander, supra note 2 at 348. This study provides a solid empirical basis for analyzing the assumptions on which the law of privilege is based, albeit in an American context. The study finds that solicitor-client communication is not always restricted to legal matters, and that sometimes business advice is sought and given. In analyzing this finding, Alexander states that the presumption that matters referred to lawyers by corporate clients are \textit{prima facie} for legal services is not justified in the corporate context. Alexander then asks whether corporate lawyers \textit{should} separate business and legal advice. In answering this question, he gives two reasons why the separation is appropriate: a) to allow a client to give the lawyer’s advice the appropriate weight and b) to prevent the loss of privilege for otherwise mixed legal and business communications. See also D.N. Redlich, “Should A Lawyer Cross the Murky Divide? (Nov. 1975) 31 Bus. Law. 478.
Thirdly, while legal advice is protected by solicitor client privilege,\textsuperscript{25} (this will be discussed further in Chapter 2) business advice is not.\textsuperscript{26} Therefore, segregation of legal and business advice by the lawyer is important because it may help to prevent a situation of lost solicitor client privilege for mixed legal and business communications that a court may later characterize as predominantly business in nature.\textsuperscript{27} Unfortunately, the porous boundary existing between business and legal advice makes it difficult to determine when communications between lawyers and their clients will be protected by privilege. Nonetheless, it appears to be is the legal profession’s responsibility to make this distinction. Certainly, it would be unrealistic to expect clients to be able to distinguish business from legal advice; our courts can’t even do it consistently.\textsuperscript{28}


\textsuperscript{26}See \textit{Pritchard v. Ontario (Human Rights Commission)}, [2004] 1 S.C.R. 809, 2004 SCC 31, where Major J., (as he then was, later Justice of the Supreme Court of Canada) wrote: “like corporate lawyers who also may give advice in an executive or non-legal capacity, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege” (emphasis added), discussed \textit{infra} in Chapter Two.

\textsuperscript{27}Supra note 24. Also, see K.B. Mills, “Privilege and the In-House Counsel” (2003) 41 Alta. L. Rev. 79 – 100. Mills states that the mixture of business and legal advice introduces uncertainty into the corporate environment, which, in turn, may have a negative economic effect on the corporation. He gives as an example that, in an increasingly competitive marketplace, the value of a corporation's information can be substantial, and any preventable disclosure of sensitive information could be ruinous to a business whose existence may depend on trade secrets. Therefore, in-house counsel's ability to advise corporate management properly with respect to when communications are privileged, and how this privilege may be maintained, is fundamental to the corporation's success. Since corporate counsel should not expect the corporation or its employees to understand the differences between legal and business advice as viewed by the courts, it is imperative that the lawyer knows the distinction.

\textsuperscript{28}Supra note 3.
This thesis explores whether and how lawyers in Ontario make the distinction between legal and business advice and, given this information, proposes a framework for decision-making, which will help them make such a distinction.

(ii) Structure of the Study

This thesis is divided into six chapters. This first chapter concludes with a historical perspective of the role of lawyers in Canada. It follows the development of the Bar’s occupational autonomy and the profession’s ethical code from the nineteenth century until today. This provides a context in which to understand the dynamics of the lawyer’s role within the legal services marketplace. It is noted that in times past lawyers paid little attention to the distinction between “legal advice” and “business advice” but that recently the situation is different. Increasingly, lawyers appear cautious in this regard, especially in light of their own uncertainty about what is expected of them from their governing body, the profession’s insurer and their clients.

In light of chapter 1’s discussion of the historical changes regarding the provision of legal and business advice, Chapter 2 analyzes how judges view the obligations of lawyers concerning business advice, reviewing three legal perspectives. It explores the current concepts of tort liability in negligence, the related requirements demanded by self-regulation and the law surrounding privilege. Chapter 2 illuminates the challenges that make it difficult for lawyers to articulate the distinction between legal and business

Sources examined include secondary accounts of the histories of law firms and lawyers, as well as primary sources including reported cases, reports of the law societies, and legislation.
advice. On the other hand, one of the findings from this chapter is that the criteria in *Pritchard v. Ontario (Human Rights Commission)*, together with other elements of this research, form a basis for the conclusions in this thesis on how to approach clarity in making such a distinction.

By the end of chapter 2, it is clear that judges, faced with the issue in court, are in need of assistance with regard to making a distinction between a lawyer’s legal and business advice. It is also evident how infrequently judges are called upon to make decisions in this area. Indeed, one focus of this study has been to express the relative lack of judicial decisions in this area. It might be thought that lawyers are usually well able to distinguish between legal and business advice and hence, the courts do not have an opportunity to adjudicate many cases. This study explores the question of whether that is the case by asking lawyers themselves. The findings of the subsequent chapters in this thesis intimate that lawyers do need help in distinguishing between legal and business advice. The focus in this thesis then, lacking clear judicial guidance, turns on the lawyer’s personal endeavor in making that distinction.

Chapter 3 explains the methodology used to survey (attached hereto as Appendix C) Ontario lawyers practicing in the city of Toronto in the areas of corporate or commercial law (hereinafter referred to as “corporate counsel”) for the purpose of

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30 Supra, note 26.

31 The term “corporate counsel” is used throughout this thesis to identify lawyers who self-identify as practicing in any or all of the following areas: business, corporate and commercial. The usage of the term is not intended to imply that such a lawyer’s practice is restricted to advising businesses operating through a corporate form.
determining how lawyers distinguish business from legal advice. The survey includes both lawyers in private practice and those working in-house. The data were collected in response to the challenges outlined in chapters 1 and 2 of this thesis.

Chapter 4 presents the results of the data analysis. The fundamental goals driving the collection of the data were to develop a base of knowledge about lawyers’ understanding and perception of the distinction between legal and business advice and to determine if the current perceptions and understandings of lawyers are consistent with the basic goals and principles of the legal profession’s articulated approach to distinguishing between legal and business advice.

The survey showed that other than with regard to opining on whether “murky lines” exist when distinguishing between legal and business advice, and where lawyers have assistance in making such distinctions, there are no significant differences in attitudes about these issues arising between lawyers in private practice and those practicing in-house. More in-house counsel than lawyers in private practice feel that “murky lines” exist when distinguishing between legal and business advice. More in-house counsel look to ethics codes in connection with providing business advice. But in matters such as: whether they have difficulty distinguishing between legal and business advice, whether they have a duty to provide business advice, what experience they rely upon when providing such advice, what compels and restricts them from providing advice, and how they conceive of business advice, all lawyers take the same approaches. This is explained further in Chapter 4.
It is evident from the results of the survey that, for all lawyers, there is some tension between how they report the ease of making the distinction between legal and business advice and how they report their clarity in making that distinction. Accordingly, it appears that lawyers would benefit from having a foundation for making necessary distinctions but that such a foundation is lacking. This provides the background for the final aspect of this research.

Chapter 5 of this thesis explores the possibility of the potential for merging theory and practice. It begins by describing the work of John Finnis, a noted legal philosopher, and explores whether this body of work may have potential, when taken together with the Supreme Court of Canada’s test in *Pritchard* (mentioned above and explained more fully in Chapter 2), for providing the foundation for lawyers’ ethical decision making in this area. The chapter explains that the fact that there is no prescription available for reconciling any difference between business and legal advice may in fact be appropriate to the exercise of ethical decision-making. Subsequent to establishing that Finnis’ work

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32 For example, as further discussed below in Chapter 4, three quarters of all in-house respondents report that they do not find it difficult to distinguish between legal and business advice (Question 8 of the survey) but an almost equal number report that they find murky lines exist when distinguishing between legal and business advice (Question 11 of the survey). Both in-house respondents and those in private practice reported that they did not have a duty to provide business advice but they also reported a number of circumstances in which they do provide business advice. Tension surrounds an apparent incongruence, namely that lawyers deny that there is a duty to provide business advice and yet offer a number of circumstances in which they do provide such advice. Lawyers in this circumstance, who find they are providing such advice, need to understand whether they are making such a distinction for their own purposes, to comply with the Rules, or to understand the scope of their insurance coverage (this is discussed further in Chapter 4).

33 In addition to scholarly argument that ethical rules can impede moral development, there is also evidence suggesting that ethical codes actually inhibit ethical deliberation by those lawyers who do refer to them for assistance in solving specific problems. For evidence that ethical codes actually inhibit ethical deliberation, see Margaret Ann Wilkinson, Christa Walker & Peter Mercer, “Do Codes of Ethics Actually Shape Legal Practice” (2000) 45 McGill L.J. 645 at p.647 [Wilkinson, “Codes of Ethics”].
has this potential, Chapter 5 concludes this study with an articulation of this author’s three-step test which (a) satisfies the test in *Pritchard*, (b) accords with Finnis’ theories and (c) would appear to meet the needs of the practicing lawyers surveyed in this study.

(iii) **Background to the question of distinguishing legal and business advice: the development of the “corporate law firm”**

This historical perspective of the role of lawyers in Canada interweaves three developments that have led to the present research question: a) organization of the corporate firm,\(^{34}\) b) the Bar’s occupational autonomy and c) the profession’s ethical code. The discussion provides an outline of how lawyers’ roles have changed over time and provides a context in which to understand the dynamics of these roles and where the profession finds itself today.

Carol Wilton broadly outlines how changing economic and social circumstances have given rise to the development of five types of law-firm organizations in Canada. During the golden age of the sole practitioner (1820-80), the profession was dominated

\(^{34}\) The language used within this chapter surrounding the phrase “corporate firm” concerns the development of the “corporate” firm’s organization. Indeed, among the first organizations that needed legal advice during the early evolution of law firms, were business organizations. However, concomitant with the evolution of the law firm was a confusion surrounding the differences between sole proprietorships, corporations and partnerships. Accordingly, what is referred to in this thesis as “corporate” is linked to the entity of a corporation, but is not meant to exclusive to the corporate form. For example, while the corporation emerges to dominate the business environment, the vestige of this nomenclature remains and today it is dominantly used within the business environment. Please note that in this thesis, the term embraces all forms of business ownership, including the not-for-profit structure, which has begun to embrace a business persona.
by small firms comprising one to three lawyers involved in general practice. The age of industrial and finance capitalism (1880-1919) produced larger firms of five or more lawyers doing at least some corporate work. The interwar years (1919-1939) saw the emergence of the corporate firm with ten to twenty lawyers focusing primarily on corporate office practice. Prosperity and the expanded role of government during the two generations after the start of the Second World War (1939-73) contributed to the rise of “giant” corporate firms employing fifty or more lawyers. Developments since the early 1970s have given rise to the advent of corporate “mega-firms” of one hundred or more lawyers.

As law firms started growing, lawyers in Ontario were concurrently trying to establish, formalize and justify the Bar’s occupational autonomy. The Law Society of Upper Canada, the largest of all Canadian law societies, was founded in 1797, almost 20 years before the earliest such association in any other province or territory. Curtis Cole, in his Ph.D. dissertation entitled, "A Learned and Honourable Body".


36 Ibid, pp. 5 and 11-26

37 Ibid, pp. 5 and 18-26

38 Ibid, pp. 5 and 26-34.

39 Ibid, pp. 5 and 34-42.


Professionalization of the Ontario Bar, 1867-1929, analyzes four specific ways in which Ontario lawyers sought to establish and entrench the Bar’s indigenous control over the practice of law. Briefly, the Bar first made a series of concerted attempts to establish a monopoly over the supply of legal services.\(^\text{42}\) Secondly, it made a program of classroom instruction in law mandatory for all law students, and it maintained control over all aspects of legal education.\(^\text{43}\) Thirdly, it succeeded in transferring the authority to maintain professional discipline among lawyers from the courts to its own corporate body, the Law Society of Upper Canada. Finally, in addition to the lawyers’ own governing body, the Law Society of Upper Canada, the members of the Bar established a network of professional organizations. One of these professional organizations was the Ontario Bar Association. The Ontario Bar Association is a branch of the Canadian Bar Association, which early in the twentieth century Canada, first moved towards the adoption of a “Code of Professional Ethics”.\(^\text{44}\)

In “Becoming ‘Ethical’: Lawyers’ Professional Ethics in Early Twentieth Century Canada”, Wesley Pue sketches out the contours of a debate amongst eminent lawyers at the time that the first ethics code was adopted by the Canadian Bar Association as to the desirability of adopting any such code at all.\(^\text{45}\) Pue states that while today it seems to be a matter of common sense that the legal profession should generate, publicize and

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\(^{42}\) Ibid.

\(^{43}\) Ibid.

\(^{44}\) Ibid.

ultimately enforce standards of ethical conduct, it was not always so.\textsuperscript{46} According to Pue, the idea that any professional body should presume to dictate to individual practitioners how they should go about their business is of recent vintage.\textsuperscript{47}

Pue points out that it is important to understand that certain features relating to the organization and structure of the Canadian legal profession in the first quarter of the twentieth Century produced lawyer’s self-conceptions distinct from those that now prevail.\textsuperscript{48} The legal profession of that period differed in at least four essential respects from the form that we take for granted today.\textsuperscript{49} Firstly, the idea of national professional organization was novel then: the Canadian Bar Association had only become successfully established in 1915.\textsuperscript{50} Secondly, provincial law societies generally lacked the powers now assumed to be essential to self-governance (and, hence, lacked the \textit{sine qua non} of modern “professionalism”).\textsuperscript{51} Indeed, it has only been in the last eighty or ninety years that full privileges of self-governance have been conferred upon law societies by the various provincial governments.\textsuperscript{52} The powers in all cases of Canadian professional

\textsuperscript{46} Ibid.

\textsuperscript{47} Ibid at 240.

\textsuperscript{48} \textit{Supra} note 45.

\textsuperscript{49} Ibid.

\textsuperscript{50} Ibid.

\textsuperscript{51} Ibid.

\textsuperscript{52} Ibid.
organizations originated in “statute instead of by prescriptive right”.53 Thirdly, in the early twentieth century the forms of professional education and qualification were relatively loose, varying widely from province to province. Finally, the idea of a unified profession had not yet fully taken hold.54 The formal distinctions between barrister and solicitor mattered in the common law provinces, just as that between avocat and notaire mattered (and matters) in Quebec.55

As has been mentioned above, it was the end of the nineteenth century and beginning of the twentieth century, an age of industrial and finance capitalism, which witnessed the rise of the corporate lawyer and the very beginning of the so-called corporate law firm in Canada.56 This rise was rapid. In Canada, corporate lawyers and their firms quickly gained prominence in the business life of the country.

53 Supra note 35 at p.11. For a general history of the Law Society of Upper Canada, supra note 8.

54 Pue, supra note 45

55 Ibid. Canadian lawyers were, after the Great War, acutely aware that “the legal profession in Canada is made up of two distinct professions, with different duties, different responsibilities and liabilities, different history and traditions and subject to different rules.” While most lawyers across the country chose to be admitted to both branches of the legal profession simultaneously this was not necessarily the case. (see C.J.M. Mathers, Legal Ethics (Address to the Manitoba Bar Association, 19 May 1920) [Archive of Western Canadian Legal History, Acc. No. 49.A222] at 5. This paper was also presented at the 1920 meeting of the Canadian Bar Association: (1920) 5 Proceedings of the Can. Bar Assn., 268 at 26.

56 A “corporate lawyer” addresses the practical concerns of his or her clients through the application of legal ideas and precedents. They specialize in matters affecting the creation, operation or dissolution of an organization, including those of a legal corporation. Most corporate lawyers work within the legal department of a business or as part of a corporate law firm. Some specialize in specific areas of business like corporate structure, governance, finance, taxation, insurance, real estate transactions or mergers and acquisitions. Other corporate law sub-specialties include contract drafting and review, legal research and government regulation – also see Marchildon’s first footnote in G.P. Marchildon, “Corporate Lawyers and the Second Industrial Revolution in Canada” (2001) Saskatchewan Law Review 64(1): 99-112.
As in the United States, in Canada these lawyers and their firms were involved in creating, promoting, and financing the large corporate enterprises that would soon dominate the business landscape of the country.\footnote{Ibid.}

Throughout the centuries, lawyers had dealt with, and profited from, the transaction costs of the marketplace. During the eighteenth and nineteenth centuries however, the costs of negotiating contracts and the elaborate precautions taken to ensure compliance with their terms had become an increasing part of the services provided by lawyers.\footnote{Supra note 56 at 102.} In reducing contractual terms to writing that required clear title to the property being transferred, the proper quantity and quality of goods and their timely delivery, and the adequate performance of services, lawyers supplied a facilitating role for business.\footnote{Supra note 56} They also assisted by obtaining judicial remedies for non-performance of contracts – or resisting claims to such remedies on behalf of their clients. But the real change came with the rise of big business during the “second industrial revolution” especially between 1909-1912. During this time the function of most lawyers changed little; in contrast, the role of the few lawyers who chose either to specialize in facilitating the promoters and financiers or who concentrated on servicing newly incorporated enterprises changed dramatically.\footnote{G.P. Marchildon, “The Role of Lawyers in Corporate Promotion and Management: A Canadian Case Study and Theoretical Speculations” (1990) Business and Economic History, 2d ser. 19 at 193-202.}
Marchildon examines some of the historical reasons for the very direct role that Canadian corporate lawyers played during the early twentieth century. He provides two principal reasons for their prominence. The first is that lawyers acted as a bridge between the world of the small business owner-operator and the new hierarchy of professional corporate managers that was only beginning to emerge during what he refers to as the “Laurier boom” (marking the period when Canadian industry and resource development surged ahead during Wilfred Laurier’s years in power as the Prime Minister of Canada between July 11, 1896 –October 6, 1911). The rise of the corporate economy, with its new technologies, its new organizational structures and its need for new methods of security financing, required very different skills than those possessed by then existing business managers. With their newly acquired knowledge of the legal needs of the new enterprises, the more innovative and sophisticated lawyers could, and did, fill the temporary gap. The second reason is that lawyers, particularly those trained in the few law schools of the time, had a definite educational advantage relative to their business contemporaries. With their broader educational background, many lawyers were quick studies when it came to understanding and assimilating the rapid industrial, organizational, and financial changes taking place throughout.61

Marchildon has noted that corporate lawyers not only rose to the pinnacle of the legal profession in the twentieth century (as measured by income and status), they also became prominent members of the Canadian elite. John Porter also demonstrates this in

61 Supra note 56
his analyses of class and power in the 1950s and 1960s.\textsuperscript{62} However, paradoxically, even as their status and economic position was becoming entrenched, corporate lawyers were beginning to move away from direct involvement in the world of business. Since the years of the “Laurier boom”, law and business have become increasingly distinct spheres of activity. In other words, as servicing the needs of corporations became an increasingly significant and specialized part of the legal world, the previously direct role of lawyers in that world shrunk.\textsuperscript{63}

Marchildon states that there are perhaps both demand and supply reasons for this development. The demand for lawyers to play a direct role in business diminished once a large core of professional corporate managers and investment bankers emerged. Moreover, given the overall increase in educational levels in the Canadian population, and with the introduction of new professional programs (including MBA programs following the Second World War, for example), lawyers no longer had a clear educational advantage. Marchildon speculates that lawyers themselves increasingly came to see business arrangements with clients as detrimental to the professional obligation of lawyers to provide objective legal advice to those same clients. He asserts that firms that


\textsuperscript{63} Supra note 56 at 111.
continued their earlier “Laurier boom” practice of direct participation in business began to be looked down on by other firms.  

Another viable explanation for lawyers’ diminishing role in the direct conduct of their clients’ businesses is that the economic organization of the legal profession moved from a club system during the 1950s-1980s, to a competitive system starting from the 1990s and continuing today. Geoffrey Miller in *From Club to Market: The Evolving Role of Business Lawyers* notes that the unusual macroeconomic environment of the mid and late 1990s, exemplified by the stock market bubble, which peaked at the beginning of this twenty-first century, may have contributed to this development. Furthermore, he also notes that a number of changes in the conditions of corporate practice may have collectively contributed to a more competitive environment. Such changes in conditions of corporate practice today compared to that of the 1950s are as follows:

- Barriers to entry to the profession have become less significant and an increase in the supply of lawyers may have translated into enhanced competition at the Bar;
- Non-lawyers, multidisciplinary practices and computers are performing tasks previously monopolized by lawyers;
- Demographic changes have occurred in the profession;

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64 Marchildon acknowledges that these last conclusions may be little more than supposition. See Marchildon’s footnote 47 in “Corporate Lawyers and the Second Industrial Revolution” *supra* note 56.


66 *Ibid.* Note: this is an American Perspective.
• Restraints on mobility are less binding, and there is an increased client portability;
• The loyalty between law firms and their longstanding clients has eroded;
• Developments in clients’ industries have, in and of themselves, have made industries more competitive;
• Law firm demographics and compensation systems have changed; and
• Costs for lawyers (data processing, storage and retrieval) have increased.

These circumstances have created a competitive legal market. The current trends of contracting out legal work and disaggregating legal services by outsourcing legal work will further contribute to the competitive environment. 67

Further, these circumstances that contribute to the current environment in which lawyers find themselves practicing also affect the nature of ethical issues that face those practicing in such an environment. For example, with regard to competition between providers of legal services (which increases the bargaining power of clients vis-a-vis their lawyers), could this be a threat to the lawyer’s independence because of the potential exercise of excessive influence over the lawyer or the lawyer’s excessive reliance on the revenue from a given client? Is there a lack of objectivity because of fear of losing a client? Does this create a problem? As just discussed, it is far from clear that professional autonomy was a notable feature of the practice of corporate law to begin with, 68 but it has become a concern in the present and it is therefore important to understand the profession’s responsibility particularly as it relates to practising corporate

67 Supra note 65 at 49.

68 Supra note 35 at 42.
law now and the ethical requirements required as a consequence thereof. This research therefore, focusses exclusively on corporate lawyers.

Although lawyers’ involvement in the direct business activities fo their clients diminished in the twentieth century, as just discussed, practicing in today’s competitive environment may be a catalyst for corporate lawyers to start acting again in more of a business-advisory role. In fact, this appears to be happening with in-house counsel. For example, in 2006, The Lawyers Weekly reported that the role of in-house counsel has greatly expanded beyond that of simply providing legal advice. The Lawyers Weekly reported that a survey conducted by the Canadian Corporate Counsel Association and the law firm of Davies Ward Phillips & Vineberg LLP found that the majority of in-house counsel do not feel that a “legal role” is the most important one they play within their organization. In fact, almost half felt that an “advisory role” was the most important, and one-third felt a “management role” was paramount. Only twenty-one percent (21%) ranked a “legal role” as the most prominent.69

This is something that was empirically tested through the survey that was administered as part of this research. The results of the survey are reported and analyzed in Chapter 4 of this thesis.

The survey by Vincent C. Alexander of lawyers in New York City (concerning the practical effects of the attorney-client privilege in the corporate context) found that

89% of lawyers answered ‘yes’ when asked whether they would characterize any of the advice they give to their corporate clients as ‘business advice’. 70 Alexander’s study also reported that nearly four out of five corporate executives surveyed answered ‘yes’ to the question of whether they wanted business advice from their lawyers. However, whereas Alexander’s survey seemed to have assumed that business advice is not legal advice, as outlined above, this research explored whether that very question: whether business advice can be legal advice, at least in certain cases.

70 Supra note 2.
Chapter 2 – The Courts and the Obligations of Lawyers

The history of the development of the legal profession in Canada has been discussed. Now, the type of advice that lawyers are currently obliged to provide will be explored. There remains uncertainty surrounding the questions of whether or not a lawyer is obliged to provide non-legal business advice and if so, what the ramifications of that are.

Generally speaking, there are four general sources of duties in law under which lawyers derive obligations to their clients. These are: i) contractual duties, ii) duties in tort, iii) fiduciary duties, and iv) ethical codes. The duties derived from fiduciary obligation are generally not related to this research and hence are given a very limited discussion below in connection with privilege.

(i) The Contractual Duties of Lawyers to their Clients

The most obvious source of a lawyer’s duty to the client is the retainer. Preferably, it is written. However, it may be oral, or it may be inferred from the conduct of the parties. A sample clause in a sample retainer from LawPRO is as follows:

Dear Shoe Company

Re: Selling shoes in Canada and the USA

In accordance with our meeting of April 14, 2012 we have agreed to represent you in connection with your commencing operations as a shoe distribution business in Ontario.
You also informed us that you have a problem concerning collection of accounts receivable from XYZ Inc. but we are not representing you with respect to that problem.\(^{71}\)

Looking at this model retainer raises a number of questions:

- Is opening a bank account within the scope of the retainer? Advising on which bank to use, which Merchant service provider?
- Is advising on an additional authorized signatory within the scope of the retainer?
- Is filing out the agency agreement for customs brokers within the scope?

Thus, it can be seen that even though a lawyer has the opportunity to initially define the terms of the retainer as specifically as the lawyer wants, there is still potential for ambiguity in acting under the retainer in terms of such issues as whether and to what extent the lawyer has been hired to provide non-legal business advice. To that extent this sample retainer would unclear.

(ii) The Lawyer’s Potential Tort Liability in Negligence

A lawyer’s obligation to the client also derives from tort law. Relatively few Canadian cases bear upon the various factors that come into play when one attempts to ascertain the extent of the lawyer’s obligation to a client under tort law.

1979 Case - Enola Apartments Ltd. v. Young,\(^ {72}\) from below
1982 Case - Brumer v. Gunn,\(^ {73}\) from below


\(^{72}\) Enola Apartments Ltd. v. Young (1979), 30 R.P.R. 94 (Ont. H.C.J.),
The Supreme Court of Canada spoke to this area in 1986. In *Central Trust Co. v. Rafuse*[^74], lawyers were retained to provide an opinion to Central Trust on the validity of a mortgage that was the security for a large advance of funds. The mortgage was held to be void for its failure to comply with certain provisions of the Nova Scotia *Companies Act*, resulting in Central Trust’s security being worthless. Central Trust therefore, sued its lawyers on the transaction, Jack P. Rafuse and Franklyn W. Cordon.

Mr. Justice Le Dain, speaking for a unanimous Supreme Court, held that: (1) the common law duty of care is created by a “sufficient relationship of proximity” and is not confined to relationships that arise apart from contract; and (2) the duty of care thus created is independent of contract in that it is not founded on the specific obligations or duties established by the express terms of the contract. Thus the lawyers owed their client a duty beyond the confine of the retainer (the contract) and were liable in negligence to their client.


[^77]: Supra note 74.
The later case of Wong v. 407527 Ontario Limited\textsuperscript{78} concerned a lawyer (Hui), who did not obtain security for a guarantee. On appeal, Hui’s law firm argued that advice regarding negotiating security was “business advice”, and hence, they were not required to provide it to their client, 407527 Ontario Limited. In response, Laskin J.A. (son of the former Chief Justice of Canada) said on behalf of the Court:

I do not, however, rest my concern about Hui’s duty to negotiate security on any distinction between business advice and legal advice. Hui submitted that he had no duty to negotiate security for the warranty because this was a business matter, not part of a lawyer’s retainer. I do not accept this submission. Although ordinarily clients retain lawyers for legal advice not business advice, on some transactions the two are intermingled and no clear dividing line can be drawn.\textsuperscript{79}

In Enola Apartments Ltd. v. Young\textsuperscript{80} the lawyer had knowledge of the previous selling price of a property but did not disclose this to his client, who was then purchasing the same property. The client found out and sued the lawyer. The essence of the claim against the defendant, Young, was that he was negligent as a lawyer. Specifically, it was claimed that he failed in his duty to the client, the plaintiff in this action, for failing to disclose that a sale of the property involved had occurred some months previously in the amount of $56,500.

\textsuperscript{78} Supra note 75.

\textsuperscript{79} Ibid. This appeal concerned the liability of a real estate agent and a lawyer and the lawyer’s law firm for failing to negotiate for their clients, the purchasers of a commercial building. The commercial building was intended to provide security for a warranty on rental income given by the vendor, a numbered Ontario company. The real estate agent drafted the agreement of purchase and sale. After the agreement was signed the lawyer, Henry Hui, was retained to close the transaction. The trial judge found the real estate agent and his employer, as well as the lawyer, Hui, and his law firm Hui, Hune & Wong liable in negligence. With regard to the law firm, the Court of Appeal allowed the appeal of the law firm and dismissed the action against such firm.

\textsuperscript{80} Supra note 72.
In the case before him, Justice Reid dismissed the claim for negligence in part based on his finding that the client was a reasonably sophisticated investor. He found that there was no obligation on the solicitor to investigate or advise the client as to the value of the property in question.

But, he stated that the result would have been different if: “[the lawyer] were aware that the client were relying on him to advise on the value of the investment, that is to advise whether the investment was a prudent or imprudent one or a good or bad one, then that would, in my opinion, set up a duty in him without any explicit request from the client to consider the client’s financial interest.”

Again in the nearly contemporary case of Brumer v. Gunn, the business sophistication of the client mattered. In this case, the lawyer (Gunn) was found negligent for advising an unsophisticated elderly woman (Brumer) to invest all her money in speculative loans.

In this case, Justice Morse said: “I have no doubt that, in the circumstances of this case, the defendant, in tendering investment advice to the plaintiff and in arranging for the investment of her money in a specific venture, namely, in loans to Chariot Cycle, was acting in his professional capacity as a solicitor”. 82

Justice Morse further quoted

81 Supra note 73.
82 Ibid.
... If, however, money is left with the solicitor for an investment in a specific venture, then the solicitor accepts such money in his professional capacity in the course of his duties as practicing solicitor. Today the range of services performed by practicing solicitors are much wider, and therefore the practice of the legal profession now is much more diversified than it was 100 years ago. Practicing solicitors now give advice on such subjects as business opportunities, investment opportunities, tax shelters and other similar commercial matters. To hold that the modern practice of law does not include the services in business or investment fields is to close one's eyes to the realities of this era.\(^{83}\)

These few cases establish that the obligation of a lawyer to consider and advise on a client’s business interests, as well as legal interests, depends largely on the nature of the relationship between the lawyer and the client including, (i) the degree to which the client reasonably relies on the lawyer to provide business advice, and (ii) the sophistication of the client in business matters. Both are relevant factors in ascertaining the extent of the lawyer’s obligation.

As mentioned earlier, it is required of lawyers practicing in Ontario that they be insured against negligence.\(^{84}\)

The Lawyers Professional Indemnity Company (the company which provides this insurance, “LawPro”) has had occasion to become involved in the question of whether lawyers may have a duty to provide business advice arising from the tort obligations that

\(^{83}\) Ibid.

\(^{84}\) Lawyers practicing in Canada are not insured against the requirements flowing from self-regulation, or privilege.
were just discussed. In *Palmieri v. Misir*, a lawyer (Misir) was retained to provide legal services and invest money for his client (Palmieri). Misir made some bad investments with Palmieri’s money, lost $5 million and was sued by his client. LawPro, under whom Misir was insured, as required of lawyers, wanted to get out defending Misir and relied on the definition of “professional services” in the policy between Misir and LawPro to say the dispute with Palmieri did not involve professional services provided by Misir and therefore LawPro was not obliged to become involved. But the Court held that it was not reasonable for LawPro to conclude at such an early stage that the plaintiffs’ claim did not arise out of the professional services that Misir was required to perform. In other words, the Court recognized that the lawyer’s professional services may have involved providing investment (business) advice.

(iii) The Requirements of Self-Regulation

In 1978, the Law Society of Upper Canada raised calls for lawyers to be scrupulous in distinguishing between legal advice and non-legal advice to an ethical duty. The rule was first placed in the commentary to Rule 3 of the *Professional Conduct Handbook*. Rule 3 concerned “Advising clients” and stated, “The lawyer must be both honest and candid when advising clients.” At present, the requirement to

\[\text{(iii) The Requirements of Self-Regulation}\]

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\[\text{be both honest and candid when advising clients.” At present, the requirement to}\]

\[\text{85 Supra note 76.}\]

distinguish legal advice from non-legal advice is placed in the commentary to Rule 2.

Rule 2 concerns “Relationship to Clients”.

Essentially, this rule imposes two obligations on lawyers concerning advice that is business in nature:

- to point out lack of experience or other qualification when providing non-legal advice, and
- to clearly distinguish legal advice from other advice.

In the commentary to “Advising Clients” in Rule 3 of the Handbook, which rule stated “The lawyer must be both honest and candid when advising clients.”\(^8^7\) The commentary was couched under a rule regarding honesty in advising clients and read as follows:

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.\(^8^8\)

Nevertheless it seems that, presently, the requirement to distinguish legal advice from non-legal advice is based upon the need for competence. The relevant commentary

\(^8^7\) Ibid.

\(^8^8\) Ibid.
on non-legal matters is now couched in Rule 2.01 of the *Rules of Professional Conduct* (attached hereto as Appendix A). Rule 2 defines “competent lawyer” and includes rules and commentaries on client-related issues such as lawyer competence, conflicts of interest and confidentiality under the broad heading of “Relationship to Clients”. Indeed, competence is the Law Society’s primary ethical endeavor.

When the commentary to the Rules was first included in 1978, reference was made to an epitome from Johnstone & Hopson, which stated that often legal and non-legal issues are intertwined and that the role of the lawyer for a particular client may lead a lawyer to spot problems of which the client is unaware and call them to the client’s attention. Intuitively this relates to “recognizing limitations in one's ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is

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The lawyer’s advice is usually largely based on his conception of relevant legal doctrine and its bearing on the particular factual situation at hand. Anticipated reactions of courts, probative value of evidence, desires and resources of clients, and alternative courses of action are likely to have been considered and referred to. He may indicate his preference and argue persuasively, or pose available alternatives in neutral terms. He makes the law and legal processes meaningful to clients; he explains legal doctrine and practices and their implications; he interprets both doctrine and impact. Often legal and non-legal issues are intertwined. Much turns on whether the client wants a servant, a critic, a sounding board, a neutral evaluator of ideas, reassurance, authority to strengthen his hand. . . The real problem may be one, not of role conflict, but of role definition. The lawyer may spot problems of which the client is unaware and call them to his attention.
appropriately served”, which is but one aspect of the inclusive nature of the definition of competence.  

Consequently, Ontario lawyers have an ethical duty to distinguish legal from “other” advice, but it may be recalled in Wong v. 407527 Ontario Limited, the Court of Appeal stated that often times business and legal advice are intermingled and no clear dividing line can be drawn. Is it possible then, to follow the Law Society rule and to distinguish legal from non-legal advice and point out a lack of qualification for non-legal advice – thus satisfying the lawyer’s professional regulatory requirement - and still be liable in negligence?

Recall that in Brumer v. Gunn, the lawyer was found negligent for advising an unsophisticated elderly woman to invest all her money in a bad investment. If the lawyer in that case had complied with the Law Society’s rules by a) pointing out his lack of experience or other qualification, and b) clearly distinguishing the legal advice from the other advice, would he still have been held liable in negligence? It seems that he likely would because of the lack of sophistication of the client and the client’s reliance upon the lawyer for sound advice.

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91 Supra note 89, at rule 2.01 “competence”.

92 Supra note 75.

93 Supra note 73.
(iv) Solicitor-Client Privilege

Examination of contract, tort and regulatory requirements indicates that there remains uncertainty surrounding questions of whether or not a lawyer is obliged to provide non-legal business advice to clients and if there is such an obligation, or such advice is given although not and obligation, what the ramifications of that are. The law of contract does not always apply, depending upon the terms of the retainer in issue. The case law on negligence is unhelpful because it is conflicting. And while admittedly, the Law Society’s Rules do not appear to be internally conflicting, they require a lawyer to make a distinction between legal and non-legal advice without providing any guidance on how to undertake such a task. The law surrounding solicitor-client privilege, on the other hand, further emphasizes the importance and implications of making a distinction between legal and business advice but does attempt to make the distinction clear. However, as will be demonstrated, this area also needs further development and clarification in law.

Solicitor-client privilege protects communications between a lawyer and client from being disclosed without the permission of the client. The privilege is that of the client and not that of the lawyer. The privilege is rooted in that fundamental necessity of full and frank communication between lawyer and client, which is necessary for the administration of justice.
In *Alfred Crompton Amusement Machines Ltd.*, a case that dealt with privilege regarding in-house counsel communications, Lord Denning accepted that the same rules of privilege apply to in-house counsel, but that only communications made in the capacity of legal advisor are privileged, and not work done in any other capacity. Lord Denning, in his comments in the *Alfred Crompton* case, also points out the importance of distinguishing legal from non-legal advice:

It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction.

Lord Denning is referring here to what we consider today as in-house counsel. However, the statement has broad application to corporate lawyers in private practice that also perform non-legal services. Thus Lord Denning warned that in-house counsel “must be scrupulous to make this distinction”.

To very briefly summarize privilege, without going through all the caselaw in detail, legal advice is protected by solicitor client privilege, while generally business

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95 Ibid.

96 Ibid.

97 See *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 836, where Dickson, J. (later Chief Justice) wrote: “Recent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no
advice is not.\textsuperscript{98} Therefore, identifying legal and business advice by the lawyer and notifying the client is important because it will identify the loss of solicitor client privilege for the business advice to the client.

Under the Rules, as discussed above, it is the lawyer’s responsibility to make this distinction between legal and business advice. Certainly, it would be unrealistic to expect clients to be able to distinguish business from legal advice; as has been shown, the courts can’t even do it consistently.\textsuperscript{99}

Notifying a client of whether or not a communication is privileged or not may be a requirement relating to the lawyer’s fiduciary duty to the client. \textit{Lac Minerals Ltd. v. International Corona Resources Ltd.} [1989] 2 S.C.R. 574 and \textit{Hodginson v. Simms} [1994] 3 S.C.R. 377 help to identify when such “fiduciary obligations” may arise. These two cases suggest that where a relationship has, as its essence, discretion, influence over interests, and inherent vulnerability, a presumption arises to the effect that such party has a fiduciary duty to act in the best interests of the other. The lawyer-client relationship falls in this category. The following is a summary of some of the obligations of a lawyer that arise from the lawyer’s fiduciary duty to the client. A lawyer must:

\begin{itemize}
\item \textsuperscript{98} See \textit{Pritchard v. Ontario (Human Rights Commission)}, [2004] 1 S.C.R. 809, 2004 SCC 31, where Justice Major wrote: “like corporate lawyers who also may give advice in an executive or \textit{non-legal capacity}, where government lawyers give policy advice outside the realm of their legal responsibilities, such advice is not protected by the privilege” (emphasis added).
\item \textsuperscript{99} \textit{Supra} note 3, and discussion above.
\end{itemize}
• Represent his client with undivided loyalty;
• Preserve his or her client’s confidences; and
• Make full disclosure of all relevant and material information relating to his or her client’s interests.\(^{100}\)

The law concerning a lawyer’s fiduciary obligations is intertwined with the rules of ethics contained in the various Law Societies’ Codes of Professional Conduct.\(^{101}\) However, a lawyer may be found in breach of fiduciary duty even though she has not breached a rule of professional conduct. The case of *Stewart v. Canadian Broadcasting Corp.*\(^{102}\) arose out of a lawyer’s (Edward Greenspan) participation as host and narrator on a C.B.C. television program called “The Scales of Justice”. During the television program the lawyer discussed a criminal negligence causing death case in which he had acted as a defence lawyer for Mr. Stewart thirteen years prior. After the program aired, Mr. Stewart sued his former lawyer (and the C.B.C.) for breach of contract and his fiduciary duties. The trial level judge emphasized the positive regulative ideal of a duty of loyalty. He stated that:

- lawyers are in an intense fiduciary relationship with their clients, and the relationship exists beyond the duration of the retainer;
- the fiduciary relationship imposes a positive duty of loyalty;
- loyalty is not dependent on confidentiality; it is a larger, freestanding obligation;
- loyalty arises because of the vulnerability and dependency of clients vis-à-vis the lawyer; and
- loyalty is crucial because the legal profession is an important social institution, and the public needs to have faith and confidence in such institutions.


\(^{101}\) Ibid.

As a result, the judge found that Mr. Greenspan breached the duty of loyalty by favouring his own financial interests, putting his own self-promotion before plaintiff’s interests, and increasing the adverse public effect on Mr. Stewart of the crimes he committed.  

The most useful judicial guide to seeking further clarity in this distinction may well be the comment from the Supreme Court in *Pritchard v. Ontario (Human Rights Commission)* concerning the application of solicitor-client privilege to in-house government lawyers.

In *Pritchard v. Ontario*, Justice Major stressed that that a fact-specific inquiry is needed when distinguishing between a corporate counsel’s legal and non-legal responsibilities. He explained:

Owing to the nature of the work of in-house counsel, often having both legal and non-legal responsibilities, each situation must be assessed on a case-by-case basis to determine if the circumstances were such that the privilege arose. Whether or not the privilege will attach depends on the nature of the relationship, the subject matter of the advice, and the circumstances in which it is sought and rendered (emphasis added) [.]

The language in the Supreme Court Decision, and the results of the survey conducted as part of this research will form the foundation for the author’s proposed

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104 Supra, note 98.
step procedure that can be used by a lawyer to determine whether a particular communication should be categorized as legal or non-legal advice. This, in turn, may help predict whether it will be considered privileged or not. This 3-step procedure is presented in the concluding chapter.

(v) Conclusion

Thus far, it has been established that attempts to distinguish ‘business advice’ from ‘legal advice’ may be misleading because sometimes business advice is legal advice. It has also been established that when a lawyer relies on the retainer to determine the extent of his or her obligation to their client to consider and advise on a client’s business interests, there is potential for ambiguity. The potential for ambiguity in understanding a lawyer’s obligation to provide his or her client with business advice does not resolve under case law generated by lawyers’ alleged tort liability in negligence. The few cases discussed in this chapter ascertain that such obligation depends largely on the nature of the relationship between the lawyer and the client. Relevant factors concerning the nature of the relationship between lawyer and client include the degree to which the client reasonably relies on the lawyer to provide business advice and also the sophistication of the client in business matters.

Furthermore, it has been established that, in certain situations, lawyers may be obliged to provide non-legal advice. An Ontario lawyer’s responsibility under the Rules only requires that where non-legal advice is provided, the lawyer must point it out and point out any lack of training that the lawyer has in respect of the non-legal advice and point out the loss of privilege by the client with respect to business advice.
Chapter 3 - Survey of Corporate Lawyers

(i) Administration of the Survey

One of the premises of this research is that corporate lawyers, as a segment of the legal profession, provide business advice to their clients. Part of this research involves determining how these lawyers distinguish legal from business advice. However, to assume that such lawyers actually do provide business advice, without asking them, would be to ignore the possibility that these lawyers do not perceive themselves as providing such advice. Such possibilities, and other design imperatives led to the construction and distribution of a questionnaire to discover information about legal and business advice in corporate practice.¹⁰⁵

The survey was designed to collect data from individuals most likely to have engaged in providing business advice in the corporate context on a regular basis. Emphasis was therefore placed on seeking the participation of partners and associates in large business law firms,¹⁰⁶ and lawyers in corporations large enough to employ in-house counsel.

¹⁰⁵ The research design and methodology of the survey was influenced by the methodology of a study by Vincent C. Alexander, cited previously, supra note 2. Another influence was the necessary approval for the protocol from the University of Western Ontario’s Non-Medical Research Ethics Board, see Appendix B.

¹⁰⁶ See: J. Heinz & E. Laumann, Chicago Lawyers: The Social Structure of the Bar (Illinois: Northwestern University Press, 1982) at 36-83. Heinz and Laumann’s study shows the correlation between the type of client and size of the law firm. This work concludes that the Bar is divided in two “hemispheres” that correspond to client type: the corporate Bar and the individual Bar. Lawyers in these two hemispheres are so distinct in their training, practice, and socioeconomic characteristics so as to be considered within different professions. Heinz and Laumann surmise that this division of the Bar’s social structure is reflected by a sharp distinction between law firms that serve corporate and individual clients; those that serve corporate clients do not serve individual clients and vice versa. These authors also conclude that lawyers in Chicago who represent large corporations are usually affiliated with firms of 30 or more partners (at 131).
The city of Toronto, Ontario, was an ideal site in which to administer the survey. At or about the time of the survey, Toronto contained the largest concentration in Canada of corporate headquarters.\(^{107}\) Toronto is also domicile of the greatest number of large law firms in Canada.\(^{108}\)

The survey was administered to two distinct populations, namely, corporate lawyers in private practice and corporate lawyers acting as in-house counsel. The in-house counsel segment consisted of any known lawyers in the legal departments of corporations with headquarters in Toronto.

The 2009-2010 Lexpert® CCCA/ACCJE Corporate Counsel Directory and Yearbook\(^ {109}\) assisted in developing the sample.\(^ {110}\) Surveys to corporate counsel were sent to only those companies listed in the 2010/2011 Lexpert CCCA/ACCJE Corporate Counsel Directory and Yearbook, 9th Edition. This edition of the *Corporate Counsel Directory* is a resource that contains company information, business listings and short

\(^{107}\) A. Gainer, & N. Esmail, *Corporate Headquarters in Canada*. The Fraser Institute, 2009, 10-11.


\(^{110}\) It would have been ideal to have obtained the co-operation of the Toronto section of the Canadian Corporate Counsel Association to develop a sample of corporate counsel. In 1988, the National Council of the Canadian Bar Association established the Canadian Corporate Counsel Association (CCCA) to replace its national corporate law section. The provincial sections of the CBA then became CCCA Chapters and proceeded to elect the first CCCA Board of Directors. Today, the relationship between the Canadian Bar Association and the CCCA provides membership in both organizations at no additional cost beyond the CBA membership fee, available: http://www.cancorp counsel.org/EN/About_CCCA/About/Who_We_Are.aspx. Unfortunately the hoped-for cooperation did not manifest itself.
biographies of more than 4,000 Canadian corporate counsel.\textsuperscript{111} The directory is a reference directory for members of the Canadian Corporate Counsel Association (“CCCA”) and a resource to lawyers in a corporate setting.

The CCCA states that its members are lawyers engaged in practice in corporations, business enterprises, associations, institutions, not-for-profit organizations, government and regulatory boards and agencies, Crown corporations, and regional or municipal corporations. It also welcomes associate members from law firms whose support and expertise enrich its educational programs and events.\textsuperscript{112} While the survey for Corporate Counsel was sent only to those lawyers listed in the 2010/2011 Lexpert CCCA/ACCJE Corporate Counsel Directory and Yearbook, the submission by a lawyer of a listing to the directory is both voluntary and free. Accordingly, it is difficult to more clearly define the demographic of this population because no further information is provided with regard to the lawyers who submit profiles.

The second group of subjects comprised lawyers (either partners or associates) in large Toronto law firms (ten or more partners) who represented on their websites that they were part of a corporate practice group in corporate or commercial law.


\textsuperscript{112} The Canadian Corporate Counsel Association “About the CCCA”, online: \url{http://www.ccca-accje.org/En/about/main/default.aspx}. 
Respondents for both target groups were selected pursuant to a two-stage random sampling technique. Firstly, all eligible lawyers for each population were scrutinized according to the field of law they practice and, in the case of firms, for the lawyer’s status as associate or partner.  

The second stage consisted of the selection of appropriate individuals as prospective respondents within each organization. In the in-house counsel survey, this person was always the head of the legal department of the particular corporation. In the large law firms, the names of potential respondents within each firm were listed in random order.

On September 29, 2011, the first wave of emails was sent to lawyers in private practice. The email asked these lawyers to complete an online survey. Each email contained The University of Western Ontario’s letterhead, as well as a link to the Survey Monkey website where the survey was hosted. A three-month window of opportunity was granted for the survey to be completed online.

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113 See R. L. Nelson, “Ideology, Practice & Professional Autonomy: Social Values and Client Relationships in the Large Firm” (1984-1985) 37 Stan. L. Rev. 503, which suggests that there are significant differences by field of law and partnership status when reporting the opportunity to give non-legal advice and that the field of litigation presents lawyers with fewer opportunities for giving non-legal advice.

114 The head of the legal department of each corporation was easily ascertainable.

115 Multiple respondents within a given firm were permitted, as the target information did not involve the firms, only the individual lawyer.
On the date on which the first tranche of emails was sent, an email was received from one respondent, which stated: “I expect that you will not get too many responses to your email. If you’d like to give me a call, I can explain why and suggest another approach.” Indeed, as this correspondence predicted, not one completed survey was received after waiting three months.

It is difficult to know how many questionnaires reached the eyes of the first tranche of intended respondents and how many people had the opportunity to decide whether or not to respond. Given the high volume of “junk mail” in electronic mail these days, it is not unlikely that many persons deleted the email without ever reading it. However, the aforementioned email is confirmation that at least one person did receive and read the email and hence, it is likely that at least some other people did also receive and read the email.

The one respondent who was kind enough to invite a call explained that lawyers are not comfortable responding “out of the blue”. This lawyer stated that, from his personal experience, he believed it would be best to approach firms and through them, “get people to buy-into the survey”.116 Thereafter, this researcher sought assistance from five different large Toronto law firms and requested their support and assistance to

116 This is consistent with what Y. Baruch and B.C. Holtom find in “Survey Response Rate Levels and Trends in Organizational Research”(2008) Human Relations 61(8) 1139-1160 at 1157, where they state that they believe that when researchers learn to collaborate actively with leaders to study their organization, the researchers will also gain insight into the contextual factors that will increase the probability of obtaining a high response rate from the individuals within that organization. Many of those inhibiting factors are beyond the control of the researcher; thus, without the assistance of managers, response rates can be negatively affected, resulting in potentially biased data.
administer the survey to a selection of each firm’s lawyers. It was explained to each firm that the lawyers from each had been selected as target respondents based on area of practice and years of experience and that all responses would remain anonymous. However, not one firm was willing to provide assistance or support. This reluctance of the firms to contribute to academic scholarship is best explained in the words of a member of one of the firms:

… We are not interested in participating in the survey. We make it a point not to discuss how we practice law, other than in our own marketing materials and other publicity that has been approved by the firm.

Therefore, the decision was made to send the questionnaire to individual lawyers via regular post. The mail survey was an attractive alternative to the original Survey Monkey approach for gathering data from this well-defined population. The mail survey was expected to also provide good quality data. For studying sensitive topics, mail surveys often have been found to be less subject to 'desirability bias' -- i.e., the tendency of some respondents to give favorable answers about themselves.117

Accordingly, questionnaire in 2-page format (attached hereto as Appendix D) was mailed to a selection of lawyers who were members of the Law Society of Upper Canada as of March 1, 2012 and who resided in the province of Ontario and were in one of the two target groups: a) lawyers who worked in private practice and b) lawyers who worked

117 The Institute for Social Research (York University), “Survey Research at ISR”, online: http://www.math.yorku.ca/ISR/survey.htm#.
as in-house counsel. The questionnaires were mailed during March and April 2012, and the last questionnaire response was received in September 2012.

(ii) Design of the Survey Instrument

The questionnaire was designed to survey whether lawyers characterize any of the advice they provide to their clients as “business advice”. The questionnaire asks questions to determine related issues such as: i) what do lawyers perceive as contributing to their own competency concerning business advice, ii) whether lawyers understand the boundary of their own competence, and iii) whether lawyers rely on codes of ethics when providing their professional services.

The survey instrument contained a combination of forced-response and open-ended questions and was designed to obtain both quantitative and qualitative data. It attempted to uncover the types of situations in which lawyers think they are required to provide business advice. Secondly, it sought to reveal lawyers’ views on their own competency and ethical requirements in those situations by asking them to self-report concerning these matters.

The objective in examining competence was not be to measure competence per se; rather it was to discover whether lawyers understand the requirement and boundary of their own competence in providing professional services to their clients. Furthermore, it sought to uncover whether practicing lawyers consider codes and rules to be the essential factor when making an authentic judgment about the ethical requirements involved in
providing business advice, or whether they use autonomous ethical reasoning\textsuperscript{118} which recognizes that rules and codes are constraints placed on the decision-maker.\textsuperscript{119} Previous work has supported the view that Canadian lawyers see their roles as “being warranted by factors which lie behind or apart from the sources of the models in legal literature or in ethical codes.”\textsuperscript{120} However, this is not to say that lawyers have not been shown to be concerned with the tensions of specific solicitor-client relationships and their overall obligations to society in previous research, for indeed they have been so shown.\textsuperscript{121}

This questionnaire sought to determine whether lawyers feel obligated to provide business advice.\textsuperscript{122} For example, it asks if when making a decision to provide or not provide business advice as part of their professional services, do lawyers rely on expertise from their own experience, or do they look to ethical codes for guidance? Do they think


\textsuperscript{119} For an excellent discussion, which explores a model describing how lawyers make ethical decisions in their practices, see S.G. Kupfer, “Authentic Legal Practices” (1996) Geo. J. of Legal Ethics 33.

\textsuperscript{120} See M. A. Wilkinson, P. Mercer & T. Strong, \textit{Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer}, (1996) 28 Loy. U. Chi. L.J. 373, 410 (none of the lawyers in the study mentioned either the relevant literature or any ethical code of conduct in their decision making, see footnote 192).


\textsuperscript{122} In the original design of the survey a supplemental question sought to determine the lawyers perceptions of relative client demand for business advice (rather than their obligation). However, the respondents did not answer the question (question 6) properly. They did not indicate the demand for category in terms of percentage of their workload, and hence the results were not sufficiently accurate for analysis. This question was eliminated from the analysis and is not further reported in this research.
that they have a duty to provide business advice, either due to their professional obligation or because of any legal obligation through contract via their retainer, case law or otherwise? As previously mentioned, research by Margaret Ann Wilkinson, Christa Walker and Peter Mercer\textsuperscript{123} found that the ethical codes of the profession are not considered by members of the legal profession as either relevant or binding in solving most of their dilemmas. Their research program found that lawyers viewed their roles, whether as counselors or as hired guns, as being warranted by factors which lie behind or apart from the sources of the models in legal literature or in ethical codes.\textsuperscript{124} For example, although expertise is a fundamental element in the notion of professionalism, participants stated that their expertise required them to act in a counseling capacity, rather than acknowledging that their professional obligations compelled their action \textit{per se}.\textsuperscript{125}

While earlier work has suggested that lawyers of a more senior vintage might not have been accustomed to looking at codes of ethics when making a decision to provide or not provide business advice as part of their professional services - because the Law Society of Upper Canada did not even produce its first \textit{Professional Conduct Handbook} (the \textit{“Handbook”}) until 1964\textsuperscript{126} - this was not the expectation of this research being conducted nearly 50 years after the first Handbook. However, it was not until 1978 that

\textsuperscript{123} \textit{Ibid.}

\textsuperscript{124} \textit{Supra} note 120.

\textsuperscript{125} \textit{Supra} note 124 at 411.

the duty of a lawyer to clearly distinguish his legal advice from non-legal advice was made explicit as discussed earlier.

Lastly, the survey involves determining what concerns lawyers the most when they provide business advice. It seeks to find out whether lawyers are primarily concerned about their competency when providing business advice, the distinction between legal and business advice, and whether they are concerned about other issues. For example, are lawyers more concerned about maintaining solicitor-client privilege for advice that is “business” in nature, or acting within the scope of their professional indemnity insurance policy?

(iii) Response to the Survey

Forty-one (41) questionnaires were returned for lawyers in private practice, comprising a response rate of 16% (N=256).127 Thirty-eight (38) questionnaires were returned for lawyers serving as in-house counsel, comprising a response rate of 18% (N=211).128, 129 A mail survey achieves a lower response rate than other methods of distribution.130 Given the challenges to the original email and online distribution of the

127 256 surveys were sent to lawyers in private practice (n=256).

128 211 surveys were sent to lawyers acting as corporate counsel (n=211).

129 15 surveys from the corporate counsel group were returned because the addressee had either moved or was no longer working at the addressed place of employment.

questionnaire that were encountered and discussed above, this rate of response to the mailed questionnaire is robust.

It has been reported that when a single mailing that incorporates no incentives is made to a sample of the general community, the surveyor can expect no better than a 20% response rate.\(^\text{131}\) This is consistent with the response rate achieved here.

Other similar studies that did not face the same distribution challenges as this study have achieved similar response rates. For example, Joan Brockman reports an overall 29% response rate to a 1990 questionnaire she mailed to all lawyers who were members of the Law Society of British Columbia.\(^\text{132}\) In her subsequent studies, Brockman obtained greater response rates. However, she was also able to include a covering letter signed by the then current Secretary of the governing Law Society.\(^\text{133}\)

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\(^{131}\) Supra note 130 at 15.


\(^{133}\) See J. Brockman, “Bias in the Legal Profession: Perceptions and Experiences”, (1992) 30 Alta L. Rev. 747, see also: J. Brockman, “Leaving the Practice of Law” The Wherefores and the Whys”, (1994) 32 Alta L. Rev. 116. See also F.M. Kay in “Crossroads to Innovation and Diversity: The Careers of Women Lawyers In Quebec” (2002) 47 McGill L.J. 699 at 713 (“Crossroads to Innovation”). This study offers insight into typical response rates for surveys of legal professionals. Dr. Kay reported that her own study achieved a response rate of 60% for a 1999 survey she sent to members of the Barreau du Quebec. However, she acknowledges that this response rate is significantly higher than that obtained through most surveys of professionals, where response rates of 30%-50% are more typical. See F.M. Kay – “The Careers of Women Lawyers in Quebec” (2001-2002) 47 McGill L.J. 713 at 78; J. Brockman, “Gender Bias in the Legal Profession: A Survey of Members of the Law Society of British Columbia” (1992) 17 Queen’s L.J. 91 at 100; K. Robson & J.E. Wallace, “Gendered Inequalities in Earnings; a study of Canadian Lawyers” (2001) 38 Canadian Review of Sociology and Anthropology 75 at 82; J.E. Wallace, “Corporatist Control and Organizational Commitment among Professionals: The Case of Lawyers Working in Law Firms”
Very few lawyers who responded were called to the Bar before 1978, when, as mentioned above, the duty of a lawyer to distinguish legal advice from non-legal advice was made explicit. In private practice, only 7 of 41 lawyers (17%) were called to the Bar before 1980 (and only 1 before 1971!); in-house, only 4 (11%). These numbers are too small to analyze in terms of differences in actions, attitudes, and use of codes, compared to those called later and, in any event, all lawyers currently in practice, no matter their year of call, have the same obligations.

Importantly, the study design contemplated equal groups of lawyers in private practice and in-house. And those proportions of respondents to this survey are indeed roughly equal: 52% (41) in private practice and 48% (38) in-house.

(1995) 73 Social Forces 822. In the Crossroads to Innovation study, one thousand lawyers were mailed a 28-page booklet questionnaire. Each questionnaire was accompanied by a letter of introduction from the Chair of the Women in the Legal Profession Committee at the Barreau du Quebec. Also, lawyers in the original random sample were sent a postcard reminder after two weeks. A follow-up letter of encouragement was sent to non-respondents after one month, and a follow-up postcard reminder after another two weeks. The study acknowledges that these follow-up efforts served to enhance the response rate.
Chapter 4 - Survey Results

(i) Results Related to Respondents’ Actions

The results of the survey will be summarized according to three categories: a) how respondents act in their practices and b) the respondents’ attitudes surrounding the giving of advice and c) the respondents use of ethical codes.134

How respondents act in their practices is revealed in includes questions 3, 7, 9, and 4(a)-(c) from the survey, which is attached hereto as Appendix D. In their responses to question 3 the respondents indicated whether they provide business advice or not. The responses to question 7 are reported next because whether a lawyer’s clients send copies of business correspondence will support whether the lawyer’s practice has non-legal aspects. The responses to question 9 provide evidence about whether lawyers have consciously refrained from providing business advice. Finally, the responses to questions 4(a)-(c) provide evidence about the circumstances in which lawyers do consciously provide business advice.

The respondents’ attitudes toward their legal practices are revealed in their answers to questions 4(d), 5, 8 and 10 from the survey, which is attached hereto as Appendix D. The responses to question 4(d) show what the lawyers who articulate they have given business advice believe are their grounds. The lawyers’ responses to question 5 help explicate, for those lawyers who do knowingly give business advice, whether they believe they are under a duty to do so. The lawyers’ responses to questions 8 and 11

134 Refer to Appendix D for a quantitative summary of various survey questions.
provide important evidence of their attitudes surrounding the nature and extent of both legal and business advice.

The respondents reported *use of ethical codes* is revealed in questions 10 and 4(f). These responses establish whether the respondents look to ethics codes and also whether they feel that the *Rules* speak to lawyers about providing business advice.

In each of the three categories of questions, it was important to establish whether the responses of those in private practice differed from the response of those lawyers acting as in-house counsel. Accordingly, for every question, a chi-square analysis was performed. In terms of actions of the lawyers, no significant differences were found between the two groups (as will be seen). In terms of the lawyers’ attitudes, however, there was a significant difference found between in-house and private practice lawyers over their agreement that there are “murky lines” between business and legal advice (see question 11 below). Similarly, pertaining to the lawyers’ use of ethical codes, a significant difference was found between the two groups of lawyers in terms of the codes to which they refer in connection with giving business advice (question 4(f)).

**Nature of Non-Legal Duties (Question 3)**

Question 3(a) provided an opportunity for respondents to give a brief description of the nature of the types of non-legal duties that they perform and hence, provided insight into how they define “non-legal duties”. As may be seen in “Table 1: Nature of Non-Legal Duties”, there were no significant differences found between the groups of in-house counsel and those in private practice on this question.
The activities defined as “non-legal duties” by both sets of respondents included the following:

- Working on committee, administrative and business matters
- Marketing
- Recruitment and Human Resources
- Educating and Mentoring Junior Lawyers
- Strategic Deal analysis
- Pro Bono work (1 lawyer)
- Communications
- Providing Notary Services for Employees
- Industry relations
- Risk Management and Compliance

It may be noted that the first four items on the list are duties which would not engage a lawyer in direct communication with clients and therefore could not be related to the giving of advice, either business or legal advice. Five of the categories mentioned as ‘non-legal’ duties do involve interactions with clients: strategic deal analysis, pro bono work, providing notarial services, industry relations, and risk management and compliance.

There was no significant difference between the populations in how they view their non-legal duties. Both groups under study identified working on committees, administrative and business matters as the dominant non-legal activities performed. Other non-legal duties comprised an assortment of varied tasks.

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135 Since these categories are derived from open-ended responses, it is difficult to say whether ‘communications’ would relate to communications relating to the firm or to the clients, and hence it is difficult to say whether advice is involved, either business or legal.

136 To the extent that notarial services are provided to employees, then in respect of those employees, such employees would be clients from a professional perspective.
It should be noted that no lawyer specified any activity that would be considered business advice as a non-legal duty unless one conceives of risk management and compliance as business advice. Potentially, risk management and compliance may be qualified as business advice. Otherwise, it does not appear that these lawyers consider ‘business advice’ as a non-legal activity.

These lawyers appear to view the distinction between “legal advice” and “business advice” as “business” versus “legal”, rather than a distinction of “legal” versus “non-legal”. Otherwise, these lawyers would have included “business advice” in their “non-legal” activities. In Chapter 5, this author will propose an approach to looking at this legal versus non-legal distinction, which allows for business advice to qualify as both legal and non-legal.

Table 1: Nature of Non-Legal Duties

Chi-square value: 0.35; df=1

<table>
<thead>
<tr>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work on committee, administrative, and business matters</td>
<td>26 (27)</td>
<td>17 (16)</td>
</tr>
<tr>
<td>All other non-legal activities</td>
<td>28 (27)</td>
<td>14 (15)</td>
</tr>
<tr>
<td>Totals</td>
<td>54</td>
<td>31</td>
</tr>
</tbody>
</table>
Purpose of Correspondence (Question 7)

Question seven asked the respondent lawyers whether their clients send them copies of their business correspondence or memorandums without a specific request or legal advice being required. Question seven then asked those lawyers who answered in the affirmative, what the purpose of their client was in doing so. As may be seen in “Table 2: Purpose of Correspondence” there were no significant differences found between the in-house counsel and those in private practice on this question. The absolute data for both groups of lawyers is graphed below and depicted in Figure 1.

Table 2: Purpose of Correspondence

Chi-square value: 1.14; df=2

<table>
<thead>
<tr>
<th></th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Keep me informed and solicit my counsel</td>
<td>18 (16)</td>
<td>15 (17)</td>
<td>33</td>
</tr>
<tr>
<td>All other purposes</td>
<td>14 (16)</td>
<td>20 (18)</td>
<td>34</td>
</tr>
<tr>
<td>Totals</td>
<td>32</td>
<td>35</td>
<td>67</td>
</tr>
</tbody>
</table>
Of those lawyers who did receive copies of business correspondence or memorandums from their clients without a specific request or legal advice being required, only one respondent specified that the purpose for doing so was to create privilege. The lawyers specified unique reasons why their clients sent them this type of correspondence. For example, the unique reasons that the lawyers gave are as follows:

- Liability management
- Suggesting a tactical approach
- Counsel is part of management team
- Counsel is part of legal team
- Second opinion
• Create privilege

With the exception of the creation of privilege in the list above, each of these additional reasons implies that from the lawyers’ perspective, the underlying rationale for a client sending such correspondence is for the purpose of receiving that lawyer’s advice.

The explanations given by these lawyers are similar to those in the Alexander study. The Alexander study found three reasons for sending of business correspondence. The three reasons mentioned most frequently overall, in descending order, were: (1) to inform the lawyer of developments in particular matters as to which legal assistance previously had been provided or was currently being sought; (2) to obtain the lawyer’s comments on any legal problems the lawyer may perceive and (3) to keep the lawyer informed about general corporate business.138

Any lawyer who is a member of the management team is intimately involved in the business affairs of such client. It seems logical to assume that a client would seek direct advice from someone so involved in the business affairs of the company. This is supported by the Alexander study, which reports that most executives come into contact with in-house counsel most frequently.139

137 Alexander study supra note 2 at 344.

138 Ibid.

139 Alexander Study, supra note 2 at p.349.
Withholding Business Advice (Question 9)

This question asked whether the respondent lawyers had ever refrained from providing their clients with business advice, and if they had, what their reason was for doing so. This question was helpful to determine whether lawyers are primarily concerned about a) their competency when providing business advice, b) the distinction between legal and business advice or, c) other issues. For example, lawyers could be concerned with maintaining solicitor-client privilege for advice that is business in nature, or about acting within the scope of their professional indemnity insurance policy.

The table below entitled “Table 3: Withholding Business Advice” shows that there were no significant differences found between the in-house counsel and those in private practice on this question. The absolute data for both groups of lawyers is graphed below in Figure 2.

One major reason for the lawyers’ withholding of business advice is concern associated with competency and lack of knowledge. Other reasons included lack of demand by their clients and appropriateness of advice.

The absence of responses to this question was also interesting. For example, no one reported that they chose to refrain from providing business advice because of concern about maintaining solicitor-client privilege. Neither did anyone mention that they were concerned about acting within the scope of their professional indemnity insurance policy.
Accordingly, it seems that the lens through which these lawyers view business advice is consistent with the LSUC’s Rules of Professional Conduct, where the foundational principle underlying the giving of business advice has to do with competency.

Regardless of the source from which these lawyers attribute the duty to provide business advice, they view their restriction in providing it primarily from a competency perspective.

Table 3: Withholding Business Advice

Chi-square value: 1.14; df=2

<table>
<thead>
<tr>
<th>Reason</th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not appropriate</td>
<td>8 (7)</td>
<td>5 (6)</td>
<td>13</td>
</tr>
<tr>
<td>Not in position to give advice due to lack of knowledge</td>
<td>14 (16)</td>
<td>17 (15)</td>
<td>31</td>
</tr>
<tr>
<td>All other Reasons</td>
<td>10 (9)</td>
<td>8 (9)</td>
<td>18</td>
</tr>
<tr>
<td>Totals</td>
<td>32</td>
<td>30</td>
<td>77</td>
</tr>
</tbody>
</table>
Circumstances in which Business Advice is Provided (Question 4(a)-(c))

Question four asked the respondent lawyers about the circumstances under which they provide business advice. In response to part (a) of this question, the respondents first stated that they do all provide "business advice" (question 4(a)). This includes 23 lawyers who reported that they do not perform non-legal duties for their firm. This reinforces the finding that these lawyers’ attitudes surrounding business advice is siloed. When these lawyers conceptualize business advice, they do not report such advice as a “non-legal” duty. When asked in question 4(b) about how often they give business
advice, most lawyers said “occasionally”, fewer said frequently and very few said that they rarely provide business advice.

Question 4(c) was an open question, asking under what circumstances lawyers usually give business advice. As may be seen in “Table 5: Circumstances in which Business Advice is Provided” there were no significant differences found between the in-house counsel and those in private practice on this question regarding the occasions on which lawyers provided business advice. The absolute data, that is, the actual responses that make up the “all other circumstances”, is shown in Figure 3, for both groups of lawyers. The category “client requires help with assessing options as to how to proceed (legal and business combined)” is also shown in Figure 3.

Both groups under study strongly reported that the circumstances under which they provide business advice pertains to the situation where their client requires help with assessing options on how to proceed. There were additional sets of circumstances in which business advice was given, namely: a) team cross-functional meeting and b) participation in business discussion on the management team (question 4(c)).

When lawyers provide business advice, they seek to explicitly segregate the business advice from the legal advice based on the following descending frequency: always, frequently, occasionally, rarely and never (question 4(e)).
Table 5: Circumstances in which Business Advice is Provided

Chi-square value: 1.88; df=1

<table>
<thead>
<tr>
<th></th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client requires help with assessing options as to how to proceed (legal and business combined)</td>
<td>27 (24)</td>
<td>18 (21)</td>
<td>45</td>
</tr>
<tr>
<td>All other circumstances</td>
<td>21 (24)</td>
<td>25 (22)</td>
<td>46</td>
</tr>
<tr>
<td>Totals</td>
<td>48</td>
<td>43</td>
<td>91</td>
</tr>
</tbody>
</table>

Figure 3: Circumstances of Business Advice
(ii) Respondents’ Attitudes

Grounds Relied Upon When Providing Advice (Question 4(d))

Having established the circumstances under which both sets of lawyers provide business advice to their clients, the grounds upon which they rely when providing such advice may be established. As may be seen in “Table 6: Grounds Relied Upon”, there were no significant differences found between the in-house counsel and those in private practice on this question.

The grounds that lawyers rely on when providing business advice are similar for both sets of respondents. They rely on experience, self-study, continuing education, formal training and third parties.

Table 6: Grounds Relied Upon

Chi-square value: 7.85; df=5

<table>
<thead>
<tr>
<th></th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Experience gained within law practice</td>
<td>41 (36)</td>
<td>33 (38)</td>
<td>74</td>
</tr>
<tr>
<td>Self Study</td>
<td>15 (16)</td>
<td>18 (17)</td>
<td>33</td>
</tr>
<tr>
<td>Continuing Education</td>
<td>8 (13)</td>
<td>19 (14)</td>
<td>27</td>
</tr>
<tr>
<td>Experience Outside Law Practice</td>
<td>25</td>
<td>19</td>
<td>44</td>
</tr>
<tr>
<td>---------------------------------</td>
<td>----</td>
<td>----</td>
<td>----</td>
</tr>
<tr>
<td></td>
<td>(21)</td>
<td>(23)</td>
<td></td>
</tr>
<tr>
<td>Reliance on Third Party</td>
<td>6</td>
<td>11</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>(8 )</td>
<td>(9 )</td>
<td></td>
</tr>
<tr>
<td>Formal Training (courses, degrees)</td>
<td>12</td>
<td>14</td>
<td>26</td>
</tr>
<tr>
<td></td>
<td>(13)</td>
<td>(13)</td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>107</td>
<td>114</td>
<td>221</td>
</tr>
</tbody>
</table>

**Is there a duty to provide business advice? (Question 5)**

This question examined whether lawyers think that they have a duty to provide business advice, either due to their professional obligations or because of any legal obligation through contract via their retainer, case law or otherwise.

If the responses establish that the respondents believe that there is a duty to provide clients with business advice, then the source of such obligation may be examined. For example, the follow-up questions in 5(a) (i), (ii), and (iii) will reveal the source of the perceived obligation, possibly a contractual relationship with the client, professional obligation(s) and other personal views.

Both populations were similar in their belief as to whether or not they have a duty to provide business advice. As may be seen in “Table 7: Duty to Provide Business Advice”, there were no significant differences found between the in-house counsel and those in private practice on this question. The majority of respondents felt that they did
not have a duty to provide business advice. However, concurrently the most answered question in the whole survey was about the circumstances in which they do provide business advice.\textsuperscript{140} The incongruence between these two attitudes is strange because the latter observation seems to imply that there are circumstances in which lawyers do provide business advice and hence, must feel some duty to do so. However, when asked more directly, as shown in Table 8, those same lawyers deny that such a duty exists.

It is important to comment on the context in which this observation is made. For example, the legal profession is structured in such a way that providing any advice puts lawyers in a liability situation. When lawyers provide the very service for which they are trained, they automatically expose themselves to liability. Accordingly, it seems almost implicit that lawyers would be reluctant to provide advice without some duty to do so. There is an apparent incongruence here, namely that these lawyers deny that there is a duty to provide business advice and yet offer a number of circumstances in which they do provide such advice.

From the data, it appears that oftentimes business advice is provided in combination with legal advice and that this is as a result of client demand. On the other hand, many lawyers refrain from providing a client with business advice because of concerns associated with lack of knowledge\textsuperscript{141}.

\textsuperscript{140} Refer to Appendix E.

\textsuperscript{141} Refer to question 9.
To summarize, there were many circumstances in which the respondents provided business advice. However, the majority of the lawyers under study did not feel that they had a duty to provide business advice. Furthermore, the most cited reason given for refraining from providing a client with business advice was due to concerns around lack of knowledge. So, even though most lawyers did not feel that they had a duty to provide business advice, they did report providing such advice. Accordingly, they need to understand how to make the distinction between legal and business advice for their own purposes, to comply with the Rules and to understand the scope of their insurance coverage.

**Table 7: Duty to Provide Business Advice**

Chi-square value: 0.09; df=1

<table>
<thead>
<tr>
<th></th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>11 (12)</td>
<td>11 (10)</td>
<td>22</td>
</tr>
<tr>
<td>No (and “no opinion”)</td>
<td>29 (28)</td>
<td>25 (26)</td>
<td>54</td>
</tr>
<tr>
<td>Totals</td>
<td>40</td>
<td>36</td>
<td>76</td>
</tr>
</tbody>
</table>

The respondent lawyers who thought that they had a duty to provide business advice advanced various explanations about the underlying source of that duty (refer to Table 8). The cell sizes in Table 8 are too small to permit the chi-square test for statistical significance. Nonetheless, Table 8 provides an interesting tabulation of the raw data.
Interestingly, for such respondents as did feel there is a duty to provide business advice, they expressed that such duty arose because of a contract with their client and they also reported that the duty arose because of professional obligations. The responses were additive, meaning that they felt both contract and professional obligation contribute to a duty to provide business advice.

This is quite important because it seems to imply that those respondents felt that there was more than one source of duty to provide business advice. The respondents did not solely express from where the duty derived. Rather, they articulated an additional duty toward the same goal.

### Table 8: Duty to Provide Business Advice, Combined Answers

<table>
<thead>
<tr>
<th>Combined answers to question 5(a)(i), (ii), (ii) a, &amp; (iii)</th>
<th>Private Practice</th>
<th>In-house Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) Duty arises from contract with client</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>(ii) Duty arises from professional obligation</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>(ii)(a)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LSUC Rules of Professional Conduct</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>General obligation to help your client and work in their best interest</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Part of job as in-house counsel</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Being a good legal advisor requires taking into account business implications</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>(iii)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>As part of providing experience and judgement in the context of providing advice</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>Depends on the circumstances</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>
Ideally, the interaction of these two duties requires a framework, which allows for flexibility in order to reconcile any conflicting demands of the duty between these two perceived sources. Chapter five of this thesis provides such a framework.

**Difficulty in Distinguishing Business Advice from Legal Advice (Question 8)**

As may be seen in “Table 9: Difficulty in Distinguishing Business Advice from Legal Advice”, there were no significant differences found between the in-house counsel and those in private practice on this question. Three quarters of all respondents stated that they did not have difficulty distinguishing between legal and business advice.

**Table 9: Difficulty in Distinguishing Business Advice from Legal Advice**

Chi-square value: 1.57, df=1

<table>
<thead>
<tr>
<th></th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>8 (10)</td>
<td>11 (9)</td>
<td>19</td>
</tr>
<tr>
<td>No</td>
<td>34 (32)</td>
<td>24 (26)</td>
<td>58</td>
</tr>
<tr>
<td>Totals</td>
<td>42</td>
<td>35</td>
<td>77</td>
</tr>
</tbody>
</table>

**Do “Murky Lines” Exist? (Question 11(a) and (b))**

This question asked the respondents whether they find that “murky lines” exist when they try to distinguish legal advice from business advice. The respondents were
divided into two categories, those who believed that murky lines exist, and those that did not. Each group provided reasons for why they thought murky lines existed or not.

**Table 4: Murky Lines**

Chi-square value: 6.66; df=1

<table>
<thead>
<tr>
<th></th>
<th>Private Practice</th>
<th>In-house Counsel</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes (murky lines exist)</td>
<td>15 (20)</td>
<td>21 (16)</td>
<td>36</td>
</tr>
<tr>
<td>No (murky lines do not exist)</td>
<td>22 (17)</td>
<td>8 (13)</td>
<td>30</td>
</tr>
<tr>
<td>Totals</td>
<td>37</td>
<td>29</td>
<td>66</td>
</tr>
</tbody>
</table>

The absolute results for responses to this question are set out in table 4 above and the figures below. The inferential chi-square tests on these data indicate that there is a significant difference between lawyers in private practice and in-house counsel with regard to whether they feel that murky lines exist or not.

Both groups provided reasons for why they thought murky lines did or did not exist. These responses are grouped into the categories listed below in Tables 4A and 4B.

These data are all the more important because they are generated from open-ended responses generated by the subjects themselves. It is important to note that the dominant opinion about why murky lines exist for many lawyers is that legal issues have business implications. More than seventy-five percent of those who felt murky lines
existed felt that the murkiness existed because legal issues have business implications.\textsuperscript{142}

Indeed, of those who did provide further information about why murky lines existed in their minds, only one gave any other answer and it was an answer that must by definition be unique to a lawyer in a in-house counsel position.

Table 4A: Murky Lines Exist

<table>
<thead>
<tr>
<th>Category A Respondents (Murky Lines Exist)</th>
<th>Private Practice</th>
<th>In-house Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>As the employee of the organization and its legal counsel lines get blurred</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Legal issues have business implications</td>
<td>9</td>
<td>22</td>
</tr>
<tr>
<td>No answer provided</td>
<td>6</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 4B: No Murky Lines Exist

<table>
<thead>
<tr>
<th>Category B Respondents (No Murky Lines Exist)</th>
<th>Private Practice</th>
<th>In-house Counsel</th>
</tr>
</thead>
<tbody>
<tr>
<td>It is clear what is a legal issue and what is not</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Limit business advice to recommendations relating to available business options</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Legal analysis is one input in deciding a course of action</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>Fell into category A or no answer provided</td>
<td>10</td>
<td>2</td>
</tr>
</tbody>
</table>

\textsuperscript{142} These five words were taken from at least one answer and other similar language was coded by the researcher at the same time.
Figure 4: Murky Lines Exist, Private Practice

Category A Respondents (Murky Lines Exist): Private Practice

- Legal issues have business implications therefore not easy to distinguish (60%)
- No answer provided (40%)
Figure 5: No Murky Lines Exist, Private Practice

Category B Respondents (No Murky Lines Exist): Private Practice

- It is clear what is a legal issue and what is not: 27%
- Limit business advice to recommendations relating to available business options: 5%
- Legal analysis is one input in deciding a course of action: 23%
- No answer provided: 45%

Figure 6: Murky Lines Exist, Corporate Counsel

Category A Respondents (Murky Lines Exists): Corporate Counsel

- As the employee of the organization and its legal counsel lines get blurred: 4%
- Legal issues have business implications therefore not easy to distinguish: 88%
- No answer provided: 8%
There was a noticeable and significant difference in the way in which the two groups of respondents, those in private practice and the in-house counsel, answered this question. The large majority of in-house counsel (71%) felt that lines could get blurred or that legal issues have business implications and are therefore not easy to distinguish. On the other hand, only 28% of lawyers in private practice felt that murky lines exist. The rest of the lawyers in private practice did not answer or they felt that there were no murky lines.
(iii) Respondents Use of Ethical Codes

Do the Law Society’s *Rules of Professional Conduct* speak to Lawyers regarding business advice? (Question 10)

The majority of respondents stated that the *Rules* do “speak” to lawyers regarding business advice (approximately 75%). Only 3 of 27 private practice respondents, and 5 of 24 in-house counsel respondents were able to identify any specific rule. Clearly, the *Rules* are not regularly referenced with regard to their guidance on business advice.

Do Lawyers Look to Ethical Codes in Connection with Giving Business Advice? (Question 4(f)).

Margaret Ann Wilkinson, Christa Walker and Peter Mercer\(^\text{143}\) report that lawyers are not actually looking to the Rules to solve ethical dilemmas. Professor Wilkinson’s team found that the ethical codes of the profession are not considerer by members of the legal profession as either relevant or binding in solving most of their dilemmas. The research program, found that lawyers viewed their roles, as being warranted by factors,

\(^{143}\) *Testing Theory and Debunking Stereotypes: Lawyers’ Views on the Practice of Law*, supra note 121.
which lie behind or apart from the sources of the models in legal literature or in ethical
codes.\textsuperscript{144}

When asked directly in this research survey (question 4(f)) whether they looked at
any ethical codes in providing business advice, the majority of the lawyers under study
reported that they do not look to any ethical codes in connection with providing business
advice to their clients. As may be seen in Table 10, there was a significant difference
found between the responses of the in-house counsel and those of lawyers in private
practice.

Although the majority of the lawyers under study reported that they do not look to
any ethical codes in connection with providing business advice to their clients, some did.
In-house counsel reported looking to ethical codes, however they define them, more than
lawyers in private practice. Interestingly, only two lawyers referenced either the
Canadian Bar Association (CBA) or the Law Society of Upper Canada (LSUC)
guidelines. The other sources were “corporate policies”, “client’s interest” and “honest
advice”. Of note, is that corporate policies are referred to as ethical guidelines more than
are the LSUC \textit{Rules}. The finding warrants further research.

\textsuperscript{144} Mentor, Mercenary or Melding: An Empirical Inquiry into the Role of the Lawyer”, \textit{supra} note 120.
Table 10: Guidance from Ethical Codes

Chi-square value: 12.1; df=1

<table>
<thead>
<tr>
<th>Answers to question 4(f)</th>
<th>In-house Counsel</th>
<th>Private Practice</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>13 (7)</td>
<td>3 (9)</td>
<td>16</td>
</tr>
<tr>
<td>No</td>
<td>17 (23)</td>
<td>36 (30)</td>
<td>53</td>
</tr>
<tr>
<td>Totals</td>
<td>30</td>
<td>39</td>
<td>69</td>
</tr>
</tbody>
</table>

(iii) Conclusions from Survey Data

It is a key finding from this research that in two parts of this questionnaire there was a significant difference between the private practice lawyers and the in-house counsel lawyers. It is also important to note however, as a key outcome of this survey, that all lawyers, regardless of work circumstances, generally approach the issues of ethical and professional responsibility in similar ways. The two exceptions to a common treatment of by all lawyers of ethical and professional responsibility that this research establishes is: a) that lawyers in private practice are not as willing to admit that “murky lines” exist when distinguishing legal advice from business advice as those practicing in-house are, and b) practitioners in private practice look to ethical codes less frequently in providing business advice than do those practicing in-house.
It was central to this research to study both lawyers in private practice and in-house counsel and to design the study such that the two groups could be compared. Prior to this study, it was unknown whether the actions, attitudes and use of ethical codes of these groups of lawyers were the same or different because no study had examined this issue.

Although in-house counsel had a much greater tendency to find that there were murky lines when they tried to distinguish legal and business advice, they did not differ in their assessment of their abilities to make the distinction. It seems reasonable to infer that this may be because all lawyers have experience in segregating the two types of advice. In considering the areas in which they are common and different, it may be observed that it is possible to reconcile the two. Although lawyers in corporate practice saw more murky lines between legal and business advice, this research establishes that they also more frequently refer to ethical codes. Because they are able and willing to refer to ethical codes to help them with the murkiness that they perceive, it is therefore understandable that in the end, both the in-house counsel who perceive a problem and have a ready resource for guidance and the private practitioners who do not see any ambiguity and therefore don’t need to refer to that resource, see themselves as able to easily distinguish between legal and business advice.

This survey and canvass of primary legal sources establishes unequivocally that the boundaries between the giving of legal advice and the giving of business advice are difficult to articulate for the courts, the rule-makers, and those who need to interpret the Rules in light of the demands of practice. Nonetheless, the necessity of understanding the
limitations of the lawyer’s ability to give business advice is demonstrably a reality for those in corporate practice, whether in private practice or in-house. And yet, this data also shows that those practicing in-house recognize the challenge of distinguishing between business and legal advice more readily and seek guidance from ethics codes more readily than those in private practice.

The fact that lawyers in private practice and in-house lawyers differ in their approaches in respect of the giving of business advice may or may not be important in terms of the responsibility of the LSUC to safeguard the public interest. As long as a lawyer’s conduct is in compliance with the Rules, it is not necessary to show that that lawyer derives his or her conduct by immediate reference to those rules. This argument will be further explored in the next chapter.
(i) **Introducing Practical Reasonableness**

In “Natural Law and Natural Rights”\(^{145}\), John Finnis, a noted legal philosopher begins his thinking with the proposition that we need, for the sake of the common good to be law abiding. The question is how, in a given situation, to reconcile duties imposed on us by law that appear to be conflicting. It is the case that such “conflicts” according to Finnis must be reconcilable by establishing priorities of obligation according to the extent to which the rules at issue focus on the common good. A lawyer’s obligation in terms of professional conduct if specific rules appear to conflict can according to Finnis be reconciled by prioritizing those most closely targeted to the achievement of the common good. In the findings of this survey of Ontario lawyers, this research has established that though they have an obligation, which requires ethical decision-making, a majority of lawyers do not refer to Rules established by the LSUC. Finnis’ theory, however, allows for ethical decision –making under which lawyers need not discharge their obligations solely by adherence to the Rules. As will be established in this chapter, the LSUC’s institutional approach (employing both oaths and Rules) to elucidation and enforcement of the lawyers’ individual professional obligation fits both the data from the survey and Finnis’ theory.

In his theory, Finnis moves beyond asking whether every legal rule and legal solution is settled by appealing exclusively to positive sources of law such as statute, precedent, and custom. Instead, the natural law project, as he understands it, is to determine what the requirements of “practical reasonableness” really are, so as to afford a rational basis for the activities of legislators, judges and citizens. In other words, his theory is not concerned with categorical labeling, but with understanding what is required for law to provide reason for action.

In this light, Finnis’ legal theory may be applicable as a tool that the legal profession can develop to use in answering questions relating to its governance. More specifically, Finnis’ theory is useful in critically assessing whether practical reasonableness underpins Canadian legal ethics, as applied by the Canadian legal profession’s largest self-governing body, namely, the Law Society of Upper Canada (“LSUC”).

Finnis’ theory includes a concept of the public interest (as will be discussed below). For the purposes of this thesis, I will look at two ways in which the LSUC endeavours to act in the public interest. Indeed, the LSUC is structured entirely to support its public interest mandate. Firstly, the LSUC requires a personal commitment (in

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146 *Ibid* at 290.


148 *Supra* note 8.
the form of two oaths) from its members to act in the public interest. Secondly, on an institutional level, it provides the profession with *Rules of Professional Conduct* (the “Rules”). It will continue by examining how the two oaths (one required and one optional) taken together with the LSUC’s Rules fulfill the requirements of Finnis’ “practical reasonableness” for the legal profession.

This chapter will begin by describing how the structure of the LSUC supports its public interest mandate and in turn, serves justice and the common good. It will continue by examining how the two oaths and the Rules fulfill the requirements of Finnis’ practical reasonableness. It will then establish that while there is no prescription for reconciling any difference between legal and business advice, this may in fact be appropriate to the exercise of ethical decision-making. The chapter will then conclude by introducing a proposed framework with which to navigate the porous boundary between legal and business advice and that accords with Finnis’ theory and appears to meet the needs of the practicing lawyers surveyed in this study.

(ii) The Institutional Framework of the Law Society of Upper Canada

Under the *Law Society Act*¹⁴⁹ (the “Act”) the LSUC is entrusted with, amongst other things, licensing Ontario's lawyers and regulating their conduct, competence and

¹⁴⁹ *Law Society Act, supra* note 9.
Accordingly, the legal profession relies upon the LSUC to regulate Ontario’s lawyers to ensure an ethical and competent Bar.

Due to the fact that the LSUC is governed almost entirely by its lawyer-members, the legal profession is largely self-regulated. However, the LSUC does have public representation and hence, it is more correctly referred to as self-governing with public representation.

Participation by the community in the governance of the LSUC sanctions this governance style. As well, the community’s endorsement involves two other aspects.

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151 Eighty percent of the board of directors governing the LSUC is made up of lawyers, see online: The Law Society of Upper Canada “Benchers” (2013) online: <http://www.lsuc.on.ca/with.aspx?id=1136>.

152 Entrusting the regulation of the legal profession, and particularly its disciplinary function, to the profession itself affirms that the government poses no threat to the independence of the Bar. Justice Estey in a unanimous 1982 judgment of the Supreme Court of Canada, states the following:

> The independence of the Bar from the State in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the State must, so far as by human ingenuity it can be do designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the State, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally.


153 In fact, the LSUC was one of the first professional bodies in Ontario to officially include public representation in its governing body. Online: The Law Society of Upper Canada “Benchers” supra note 150.

154 H. W. Arthurs, “Counsel, Clients and Community” (1973) 11 Osgoode Hall L. J. 437 at 444. [Arthurs, “Counsel, Clients”].
Firstly, it facilitates the monopoly by lawyers over certain kinds of work. Secondly, it allows the LSUC to control the education, admission and discipline of its members.\footnote{Ibid at 444.}

According to the Act, it is the LSUC’s legislated function to ensure that “all persons who practice law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide”.\footnote{See, \textit{Law Society Act, supra} note 9. Note that the LSUC must also ensure that the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practice law in Ontario and persons who provide legal services in Ontario.} The Act also specifies and sets out that the LSUC must have regard to the following five principles as it fulfills its legislated function. The LSUC must:

(i) maintain and advance the cause of justice and the rule of law;

(ii) act so as to facilitate access to justice for the people of Ontario;

(iii) protect the public interest;

(iv) act in a timely, open and efficient manner; and

(v) have regard to the standards of learning and professional competence and conduct for licensees, including the restrictions on who may provide particular legal services.\footnote{\textit{Law Society Act, supra} note 9.}
Perhaps the most obvious ethical principle on this list, which the LSUC espouses and applies in carrying out its functions, is its mandate to act in the “public interest”.\(^{158}\) It is important to understand that the profession has a legal obligation to act in an ethical manner toward the public by virtue of the fact that the government has delegated such a duty to the profession through legislation.

Understandably, the justification for any professional monopoly must be the protection of the public against the potential harm of reliance on incompetent service rendered by unregulated lay practitioners, and hence, must be in the “public interest”.\(^{159}\) Such a reading is consistent with Supreme Court of Canada jurisprudence. For example, in *Pearlman v. Manitoba Law Society Judicial Committee*,\(^{160}\) the Supreme Court of Canada held that “… the self-governing status of the professions and of the legal profession in particular, was created in the public interest.”

The Law Society’s constitutional emphasis on the principles of acting in the public interest establishes it as an organization, which meets the threshold requirement for following through with activity consistent with Finnis’ “practical reasonableness”. It would be unjust if the profession used its profit and power to restrict the availability of

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\(^{159}\) H. W. Arthurs, “Counsel, Clients and Community” *supra* 154.

\(^{160}\) *Pearlman, supra* note 152 at 887 (as per Iacobucci J.).
legal services, or to prevent the working of a competitive market system that encouraged the access to such services, more widely and less expensively, than would otherwise be possible.\textsuperscript{161}

(iii) **How the Law Society of Upper Canada serves Justice and the Common Good**

While protecting and acting in the public interest are requirements of justice, what is required in order to protect and act in the public interest must be identifiable by an individual in order to guide that individual to appropriate action. Some argue that any action can be in the public interest as long as it benefits some of the population but harms none. However, others argue that an action must benefit every single member of society in order to be truly in the public interest.\textsuperscript{162}

The LSUC does not attempt to relieve the vagueness of the concept of public interest by defining it. However, in Rule 4 of the Rules, there is reference to a distinction between public interest and a client’s interest, and also between public interest and a lawyer’s interest.\textsuperscript{163} Interestingly, in this reference, there is no distinction pointing

\textsuperscript{161}See generally, Finnis, “Natural Law” *supra* note 145 at 172.


\textsuperscript{163}See Rule 4.06(2) *Rules of Professional Conduct, supra* note 4.
toward a public versus a private interest. Nor can one assume that a client’s interest is private. Clearly a client’s interest may be either public or private in nature or a mixture of the two (e.g., governmental agency, private corporation or a public-private partnership) and hence, the LSUC’s use of the term in this context does not guide one in understanding its use of the phrase “public interest”.

Nonetheless, what is implicit in the term “public interest”, as such term is used by the LSUC throughout the whole of the Rules, By-laws, and in other publications, and as judicially considered, is that the well-being of each member of the public, together with the public as a whole, must be considered and favored at all times by those responsible for coordinating the LSUC. For example, in a report by the LSUC’s Working Group on the Lawyers’ Oath of Office, it was stated that the principles by which we promise ethical conducts in our Oath of Office, namely, honour, good faith, integrity, honesty, fairness, courtesy and civility, are owed, all of them, to everyone – clients, tribunals, other lawyers, paralegals and the public.

Appropriately then, we can see that the LSUC has sketched an outline of public interest as “a set of conditions which enables” the people of Ontario “to attain for


165 Supra note 160.

themselves reasonable objectives” in their community.\textsuperscript{167} Applied to the legal profession, “reasonable objectives” may be understood as those conditions necessary for the functioning of an independent and competent Bar, which is one necessary component for the functioning of a civil society. McIntyre J., in \textit{Andrews v. Law Society of British Columbia},\textsuperscript{168} said quite clearly that, as officers of the court, lawyers are part of the administration of justice:

It is incontestable that the legal profession plays a very significant – in fact, a fundamentally important – role in the administration of justice, both in the criminal and the civil law. I would not attempt to answer the question arising from the judgments below as to whether the function of the profession may be termed judicial or quasi-judicial, but I would observe that in the absence of an independent legal profession, skilled and qualified to play its part in the administration of justice and the judicial process, the whole legal system would be in a parlous state. In the performance of what may be called his private function, that is, in advising on legal matters and in representing clients before the courts and other tribunals, the lawyer is accorded great powers not permitted to other professionals. . . . By any standard, these powers and duties are vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community.

Thus, we can conceptualize the LSUC’s use of the phrase “public interest” as a justified meaning of the “common good”. And, as will be subsequently shown, that justice is in its general sense a practical willingness to “favour and foster the common good of one’s

\textsuperscript{167}Finnis uses the following sense of common good commonly and it is “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and/or negatively) in a community”, See Finnis, “Natural Law” \textit{supra} note 145 at 155.

communities”, and that the theory of justice is “the theory of what is required for that common good.”

As previously mentioned, the LSUC suggests that the promotion of the community’s common good involves the promotion of the good of each member. Skepticism about this assertion has fed argument that acting in the common good may limit acting for one’s own good. St. Thomas Aquinas (“Aquinas”) makes two adequate replies to such objection. He states that (a) one’s own good cannot be realized apart from the common good of one’s family of civitas; and that (b) one is simply a part of a household and a state, and it makes no sense to consider one’s own good in isolation from the good of those groups; parts cannot do well save in relationship to a relevant whole, and a part incongruent with its whole is morally low-grade. In other words, Aquinas states that both personal and group factors must be considered in this deliberation. Therefore, we see that in promoting the public interest (common good), as defined above, a lawyer’s duties arise for his own wellbeing and for the public’s

\[\text{\[169\]}\text{Fennis, “Natural Law”, supra note 145 at 165.}\]

\[\text{\[170\]Class Discussion, John Finnis to Western Law Students (24 March 2010).}\]

\[\text{\[171\]Aquinas is referred to in Finnis’ work and hence, important to discuss in relation thereto.}\]

\[\text{\[172\]John Finnis, } \textit{Aquinas, Moral, Political and Legal Theory} \text{ (Oxford: Oxford University Press, 1998) at 121.}\]
wellbeing. Accordingly, we can understand the public interest more fully if it is conceived of as having an interdependent relationship with private interests.\textsuperscript{173}

Interestingly, although the LSUC is obliged to protect the “public interest” in carrying out its functions (as legislated in the Act), this principle is otherwise not given any preferential treatment in the legislation. As briefly mentioned above, there is nothing in the Act to suggest that facilitating access to justice for the people of Ontario, or any of the other legislated functions are any less important than protecting the public interest. In fact, all of the legislated functions may be understood as constituting part of the public interest as a whole.

The LSUC has itself reflected this view through its adoption of a Role Statement, which broadly encompasses all these functions. Such role statement, as adopted by Convocation on October 27, 1994, sets out the mandate of the LSUC. This directive of the LSUC is not to act as a trade union or lobby group for its members,\textsuperscript{174} but to:

Govern the legal profession in the public interest by,

- Ensuring that the people of Ontario are served by lawyers who meet high standards of learning, competence and professional conduct; and


• Upholding the independence, integrity and honour of the legal profession, for
the purpose of advancing the cause of justice and the rule of law. 175

In 1999, shortly after the role statement was adopted, Justice Abella endorsed it in
an address to the Law Society Benchers, when she said:

[t]here are three basic values which merge in a good lawyer: a commitment to
competence, which is about skills; a commitment to ethics, which is about
decency; and a commitment to professionalism, which transfuses the public
interest into the other two values…

The Law Society was exactly accurate when it said in its 1994 Role Statement that the
legal profession exists in the public interest to advance the cause of justice and the rule of
law. 176

Therefore, there seem to be two senses of the meaning of “public interest”, as
such term is used by the government and by the LSUC with reference to its function and
mandate. In one sense, the LSUC must protect the public interest when fulfilling its
functions to ensure that all persons who practice law in Ontario meet standards of
learning, professional competence and professional conduct that are appropriate for the


176 “Professionalism Revisited” (14 October 1999), online: Ontario Courts
http://www.ontariocourts.on.ca/court_of_appeal/speeches/professionalism.htm, as cited in David M.
at 287.
legal services they provide. In this way, the LSUC is upholding the “public good”. The public good does not comprise all elements of the common good for the people of Ontario; rather, it is only that aspect of the common good which involves inter-personal dealings as states of affairs and forms of conduct which “(i) involve or relate to persons other than the acting person and (ii) would be judged by persons of just character to be just, or as the case may be, unjust”. This stands in contrast to private and individualized good, which is the aspect of the common good, which relates to the acting person.

The second sense of the meaning of “public interest” as such phrase is used by the LSUC in its mandate, conforms more fully to the idea that the “common good” is the “good of the individuals whose benefit is their right because it is required of those others in justice” and “justice” is, in its general sense, “always a practical willingness to favour and foster the common good of one’s communities”.

Using this second sense of the meaning of public interest, this chapter establishes what controls the LSUC exerts which require of those in the legal profession that they act in the public interest. What the LSUC should require of its lawyers, according to Finnis, depends on what responsibilities the profession has, whether because of the profession’s

177 Law Society Act, supra note: 9 ss. 4.1 & 4.2.


180 Ibid at 165.
own voluntary commitments, or because of receipt of benefits from the public, or by virtue of the dependence of the public on the profession.\textsuperscript{181} This is really the concept of “practical reasonableness” as presented by Finnis, namely, “reasonableness in deciding, in adopting commitments, in choosing and executing projects, and in general in acting”\textsuperscript{182} and more fully defined:

\begin{quote}
the integral directiveness of all the practical principles, which directs one not only towards one’s own fulfillment, but also to a set of wider wholes of which my fulfillment is in each case a constituent part: the common good of human fulfillment as such, and the common good of every community, group and friendship that can be integrated into human fulfillment.\textsuperscript{183}
\end{quote}

(iv) The Profession’s Responsibility Arising from the Two Oaths

While it is outside the scope of this chapter to assess all of the profession’s responsibilities, two items in particular will be discussed. The discussion will begin with the lawyer’s personal oath of professional allegiance, which arises out of a lawyer’s voluntary commitment to uphold ethical principles of the profession. Thereafter, the discussion will turn to the institutional Rules, which arise from the profession’s monopoly over legal services and the public’s reliance on the profession to facilitate justice.\textsuperscript{184} Examining the profession’s responsibility arising out of the oath and the Rules

\begin{footnotes}
\item\textsuperscript{181}\textit{Ibid} at 175.
\item\textsuperscript{182}\textit{Ibid} at 12.
\item\textsuperscript{183} Supra note 172 at 118.
\item\textsuperscript{184} Finnis, “Natural Law”, supra note 145 at 175.
\end{footnotes}
illuminates what is required of the members of the profession on a personal level and from the profession itself on an institutional level, when acting in the public interest.

The LSUC is a necessary administrative body that endeavours to keep its individual members accountable to upholding a higher standard of professionalism. Certainly, it is a matter of justice to the public that the legal profession’s governing body requires the oath. Moreover, many of a lawyer’s professional responsibilities are also prescribed in substantive and procedural law. However, this fact should not detract from our thinking about any inherent responsibility that members possess regardless of these responsibilities; a lawyer is also guided by personal conscience and the approval or disapproval of colleagues.

As mentioned before, while the LSUC incurs its responsibility from granted authority by the province, the individual members of the LSUC incur their responsibility as members, by way of a promise. For example, the required oath for

185 The Government of Ontario passed legislation granting authority to the Law Society of Upper Canada. For example, see the Law Society Act, R.S.O., 1990, c. L.8 and Regulations made thereunder. The Law Society Act authorizes the LSUC to educate and admit lawyers to the Ontario Bar. It also authorizes the LSUC to regulate their members’ conduct, competence and capacity.

186 See By-law 4, s 21(1), made under subsections 62 (0.1) and (1) of the Law Society Act, R.S.O. 1990, c. L.8, online: The Law Society of Upper Canada <http://www.lsuc.on.ca/media/bylaw4.pdf>.

187 In Ontario, the ceremony of the call to the Bar includes the administration by a judge of a required oath and, if the person so wishes, an optional Oath of Allegiance. See By-law 4, s.21, Made under subsections 62 (0.1) and (1) of the Law Society Act, R.S.O. 1990, c. L.8 The required oath for a lawyer is as follows:

“I accept the honour and privilege, duty and responsibility of practicing law as a barrister and solicitor in the Province of Ontario. I shall protect and defend the rights and interests of such persons as may employ me. I shall conduct all cases faithfully and to the best of my ability. I shall not refuse causes of complaint reasonably founded, nor shall I promote suits upon
an applicant for the issuance of a Lawyer’s license in Ontario creates an obligation for the applicant to “observe and uphold the ethical standards that govern [the] profession.”

Interestingly, this component, being a promise of professional fidelity, is a recent addition to the oath. Notwithstanding this, for more than 1100 years, since recorded frivolous pretences. I shall not pervert the law to favour or prejudice any one, but in all things I shall conduct myself honestly and with integrity and civility. I shall seek to ensure access to justice and access to legal services. I shall seek to Improve the administration of justice. I shall champion the rule of law and safeguard the rights and freedoms of all persons. I shall strictly observe and uphold the ethical standards that govern my profession. All this I do swear or affirm to observe and perform to the best of my knowledge and ability.”

Online: The Law Society of Upper Canada, Oaths as approved at May 28, 2009 Convocation <http://www.lsuac.on.ca/media/convmay09_approved_oath.pdf>.

By-law 4, s.21, Made under subsections 62 (0.1) and (1) of the Law Society Act, R.S.O. 1990, c. L.8. Note that the current oath is an updated and consolidated version of the previous Barristers and Solicitors oaths. The previous oaths were as follows: LSUC Barristers Oath:

“You are called to the Degree of Barrister-at-law to protect and defend the rights and interest of such citizens as may employ you. You shall conduct all cases faithfully and to the best of your ability. You shall neglect no one’s interest nor seek to destroy anyone’s property. You shall not be guilty of champerty or maintenance. You shall not refuse causes of complaint reasonably funded, not shall you promote suits upon frivolous pretences. You shall not pervert the law to favour or prejudice anyone, but in all things shall conduct yourself truly and with integrity. In fine, the Queen’s interest and the interest of citizens you shall uphold and maintain according to the constitution and law of this Province. All this you do swear to observe and perform to the best of our knowledge and ability. So help you God.”

The LSUC’s Solicitor’s Oath was as follows:

You also do sincerely promise and swear that you will truly and honestly conduct yourself in the practice of a solicitor according to the best of your knowledge and ability. So help you God.


This component of the oath was approved in 2009, see generally, online: The Law Society of Upper Canada, <http://www.lsuac.on.ca/media/convmay09_pdc.pdf>. Note that the earliest oaths on record are attorney oaths from the early nineteenth century. Traditionally, the call to the Bar involved three oaths: an oath of allegiance, a barrister’s oath and a solicitor’s oath. In the early 1800s, the three oaths were considered as one and later were distinguished from one another. The oaths changed significantly around 1833, especially the oath of allegiance due to changing political values. See “Report to Convocation”, Report (20 September 2000) at 10 online: The Law Society of Upper Canada <http://www.lsuac.on.ca/media/convsept00admissions.pdf> [LSUC Report, “Sept. 2000”].
history of the lawyer’s oath of office, there has always been a recurring theme of access to timely, affordable justice, and the provision of pro bono services; to ensure that justice is available to all regardless of wealth, oppression or poverty. 190

The oath mostly relies on its moral force for its effectiveness and it is not a legal obligation per se. In one sense, the moral obligation subsists apart from, or in absence of, the law. 191 Understandably, the oath is uttered signifying the undertaking of an obligation, in a context in which no one is inclined to criticize a lawyer for non-performance. Indeed, one may view the oath as a formality of the profession. Nonetheless, it is important to keep in mind that the essence of the oath is to endeavor to do what is right without being told what is right.

The LSUC may in fact criticize a lawyer for non-performance of the oath. For instance, if a lawyer does not uphold the ethical standards of the profession and, for example, breaches or induces a breach of the Rules, he may be considered to have engaged in “professional misconduct”. 192 Perhaps the most serious order that a Hearing Panel has the authority to make in this regard is to revoke a member’s membership in the Society. 193

190 Ross, “Working Group Paper”, supra note 166 at paras. 11-12 and 33.

191 Finnis, “Natural Law” supra note 145 at 320.

192 “Professional misconduct” is conduct in a lawyer’s professional capacity that tends to bring discredit upon the legal profession, see Law Society of Upper Canada, Rules of Professional Conduct, supra note 4 Rule 1.02.

193 This is authorized under section 35 of the Law Society Act, R.S.O. 1990 c. L.8.
Nonetheless, why does this oath bind? The LSUC provides several considerations, which may assist in reviewing the oath, namely: (i) the definition of an oath, (ii) its social significance, (iii) its meaning as a professional symbol, and (iv) its relevance to the profession’s values.\(^{194}\)

With regard to its social significance, the Law Society considers the oath as a public statement confirming the individual’s *intention* to the community. This seems to be the strongest of the LSUC’s reasons for binding one who takes such an oath. It provides evidence of one’s consent to belong to the community of lawyers called to the Bar in Ontario.

However, from Finnis’ perspective, consent is an unnecessary component to create this obligation. Regardless of our affirming the oath, such duties pre-exist. On Finnis’ view, the law’s authority is grounded in its capacity to coordinate action for the common good; if a certain end is to be secured, then certain means are necessary.\(^{195}\)

As a professional symbol, the LSUC considers the oath to bind the individual to abide by the values, rules, and conduct of a professional body. It also finds that the oath is an important symbolic differentiation of professions from occupations. In this symbolism, the Law Society intends the oath to capture, in an overarching way, the heart

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of the profession’s values. In fact, the oath is even considered as a condensed code of legal ethics, and in 2008 a submission by the Working Group on the Lawyers’ Oath of Office reported that:

It is of the highest importance that the lawyer’s oath of office should be so framed as to indicate the duties and responsibilities of those who take it. In short, the lawyer’s oath should be a condensed code of legal ethics. This is what it was in England and France and in America from the beginning.

We have tried to capture in the new draft Oath of Office, the essential principles of our code of ethics, the principles that guide and inform our profession. And so, the overarching principles by which we promise ethical conduct in our Oath of Office are:

Honour, good faith, integrity, honesty, fairness, courtesy and civility and we owe these duties, all of them, to everyone – clients, tribunals, other lawyers, paralegals and the public.

Nevertheless, while these considerations may have been helpful to the LSUC when they formulated a new consolidated oath, such considerations do not provide any rationale for our understanding of why such a promise is binding, other than the explicit consent offered by the oath. As mentioned above, lawyers have a moral obligation to follow the


Rules. But does this obligation have a life apart from the moral obligation to serve the common good?  

Finnis analyzes promissory obligation in terms of the necessity, given certain facts, of determinate actions as means to valuable ends. He states that a certain set of facts provides an opportunity to fulfill the need for individuals to be able to make reliable arrangements with each other for the solution of co-ordination problems. Finnis provides a three level explanation on how such set of facts affords this opportunity. In particular, he states that such set of facts comprises:

(i) the framework fact that a practice exists or can readily be initiated, whereby the intentional giving of certain signs will be linked by the participants with expectations of future performance;

(ii) the particular fact that a given individual has entered into the practice by voluntarily and intentionally giving the relevant signs; and

(iii) the fact that if that individual goes along with the practice by trying to perform as they promised to perform, even when performance is at the expense of some inconvenience, they will thereby not only contribute to the well-being of the person for whose benefit their promise was accepted,

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199 Finnis, “Natural Law” supra note 145 at 306.

200 The giving of a promise is the making of a sign, a sign which signifies the creation of an obligation and which is knowingly made with the intention of being taken as creative of such obligation. See Finnis, “Natural Law” supra note 145 at 299.
but will also be playing their part in a pattern of life without which many of the benefits of community could not in fact be realized.\textsuperscript{201}

Therefore, common good can be realized with reasonable impartiality only if the individual performs on his promise; and the necessity is the obligation of his promise. The major premise from the requirements of practical reasonableness is that one cannot be a person who acts for the common good unless such person goes along with the practice by performing the promises one makes. Secondarily, a person cannot be one who is rationally impartial unless he takes the burdens of the practice as well as the benefits, and performs on this promise. So, therefore, lawyers have a promissory obligation by virtue of their own oath – and must perform because of the requirements of practical reasonableness.\textsuperscript{202}

Promises are expressions of will. However, in Finnis’ view, promises ought to be kept not because they are expressions of will, but because, as was just explained, practical reasonableness and the common good require that they be.\textsuperscript{203} With regard to promissory obligation, Finnis states that the moral obligation to keep one’s promises derives, inevitably, from the fact that such a practice “is greatly to the common good”.\textsuperscript{204}

\textsuperscript{201}Finnis, “Natural Law” supra note 145 at 307.

\textsuperscript{202}Scavone, “Natural Law” supra note 198 at 113.

\textsuperscript{203}Finnis “Natural Law” supra note 145.

\textsuperscript{204}Scavone, “Natural Law” supra note 198 at 112.
Recall that his definition of “common good” involves set of conditions which enables the members of a community to pursue for themselves reasonable objectives, for the sake of which they have reason to collaborate with each other in a community.  

Although Finnis does not find consent to be a necessary component for creating obligation, Aquinas considers the common good to consist of “justice and peace”, where peace is not just absence of conflict but a proper ordering within a political community of humans that, are by nature, equal – this order is produced in part by consent. Thus, in Aquinas’ account, consent itself helps to constitute the common good, giving even greater weight to the importance of our promise of professional fidelity. 

However, it seems troublesome that lawyers have a duty to contribute to the common good by obedience to their promise, if obedience to that promise on a particular occasion will not contribute to that common good. For example, one component of a lawyer’s promise of professional fidelity is to uphold the ethical standards that govern their profession and this includes obedience to the Rules. Rule 4.01 and the associated commentary instruct a lawyer to “represent the client resolutely” and “raise fearlessly every issue”. This clearly seems to be a worthy contribution to the common good.

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205 Finnis “Natural Law” supra note 145 at 155.

206 Murphy, “Surrender”, supra note 195 at footnote 23. For further discussion of Aquinas’s view, see Mark C. Murphy, “Consent, Custom, and the Common Good in Aquinas’s Account of Political Authority” (1997) The Review of Politics, 59 at 323.

However, there may also be instances where following such a directive is actually engaging in conduct that is prejudicial to the administration of justice, and hence exposing him to engaging in “professional misconduct” or “conduct unbecoming a barrister and solicitor”. The following situation provides an example.

Consider a set of circumstances where an in-house lawyer is working for a large manufacturing company. There have been several serious accidents involving one of the company’s products. The lawyer has reviewed internal memoranda that make it clear that the product is negligently designed. Also, the lawyer has informed the board of directors that the company would have little chance of defeating well-advised legal actions. After much debate, the company decides that it is more economically efficient to keep the product on the market, not to recall any products sold, and to pay off legal claims as and when they occur. The lawyer is instructed to engage in vigorous efforts to settle such cases as expeditiously, quietly, and cheaply as possible. In this case, the lawyer’s duty to “represent his client resolutely” appears to be prejudicial to the administration of justice.

Theoretically, the LSUC could attempt to reconcile these two issues, namely, the tension between resolute representation and the administration of justice, by looking to see whether reference to any of its functions, as set out in the Act, receive priority.


This is an example provided by Allan C. Hutchinson in Allan C. Hutchinson, Legal Ethics and Professional Responsibility, (Toronto: Irwin Law, 1999) at 11 [Hutchinson, “Legal Ethics”] at 174.
Interestingly, the Act does not give priority to the principles of “advancing the cause of justice and the rule of law” over and above the principle of “protecting the public interest”. What we can be certain of is that a lawyer must not compromise his or her professional standards in order to please a client. The lawyer’s duty to his or her client is only a secondary one; the duty to the court and the profession is primary. However, this is really an academic point. With the exception of solicitor-client privilege, compromising one’s professional standards does not end up assisting a client’s cause at all. Consequently, there is not reason to consider which duty is primary.

While the LSUC has not yet tried to resolve whether “blowing the whistle” on clients to stop injury is appropriate, it may soon have an opportunity to do so. In the summer of 2010, an advisory committee of the Federation of Law Societies of Canada (“FLSC”) considered relaxing the FLSC’s stringent confidentiality rules in its Model Code of Professional Conduct (“Code”) to allow lawyers to blow the whistle on clients who may unlawfully inflict “substantial financial injury,” on individuals.


211 The reader is reminded that solicitor-client privilege is the privilege of the client. If a client releases privilege, then this may put the lawyer in a position of conflict.


The proposal to amend the FLSC’s *Model Code of Professional Conduct* would, using our example, permit the in-house counsel to set aside her duty to keep client information confidential if she believes, on reasonable grounds, that “there is an imminent risk of… substantial financial injury to an individual caused by an unlawful act that is likely to be committed, and disclosure is necessary to prevent the injury”.214

This proposed draft model rule stresses that any such disclosure would be discretionary and not mandatory – and that lawyers could only disclose as much confidential information as required to prevent the anticipated financial injury.215

Understandably, concern has been expressed about this proposal. In particular, Mr. Philip Epstein (a former Bencher of the Law Society of Upper Canada) expressed that even if Law Societies were to make disclosure of imminent financial harm purely discretionary “this places a lawyer in an impossible position because he might feel a moral duty to tell the other side, but have a legal duty to preserve and protect privilege.”216

It is interesting to note that Mr. Epstein’s comments imply that he feels that there is a conflict between a moral duty to “tell the other side” and a legal duty to “preserve

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and protect privilege”. The advisory committee itself implicitly understands this distinction when it explains that:

…in “the rare case where a lawyer could prevent very significant financial harm by limited disclosure, but was ethically prohibited from doing so, the public interest would not be served. Further, the public’s perception of lawyers and the role we occupy in the legal system might suffer if we are seen to rank our own interests above the public interest.”

It will be interesting to follow the FLSC’s proposal, especially in light of a recent and criticized decision by the European Court of Justice (“ECJ”), which held that in-house counsel have no right to professional legal privilege in cartel investigations carried out by the European Commission.218 With regard to in-house counsel, the ECJ observed that, when a company “seeks advice from its in-house lawyer, it is not dealing with an independent third party, but with one of its employees, notwithstanding any professional obligations resulting from enrolment at a Bar or Law Society.”

Finnis’ theory provides the flexibility that is necessary for such a conflict because it enables a countervailing reason to override the moral duty, including the duty not to act against the common good by breaking promises. The countervailing reason, to the same extent, could override the duty to obey the law. In principle, practical reasonableness

217 Ibid.

could, when faced with a law, refer its rationale back to the requirements of practical reasonableness and then proceed to ignore the fact that the duty has been legally stipulated. The logic is as follows:

(i) We need, for the sake of the common good, to be law-abiding;

(ii) But where ø is stipulated by law as obligatory, the only way to be law-abiding is to do ø;

(iii) Therefore, we need to do ø, where ø has been legally stipulated to be obligatory.219

According to Finnis’ theory (as stated above), the moral obligation to be law-abiding has no life apart from the moral obligation to serve the common good, and hence it seems that practical reasonableness is always free to regard its own step (i) as defeasible by other considerations.220 As an example, in the case of the legal profession, step (i) would become “lawyers need, for the sake of the common good, to follow the Rules, representing clients resolutely and fearlessly raising every issue, but only insofar as

219 Finnis “Natural Law” supra note 145 at 316.

220 Scavone, “Natural Law” supra note 198 at 114.
following the Rules actually does serve the common good” (only when this does not promote very significant harm to another innocent party).\textsuperscript{221}

Interpreting Finnis’ theory in this way raises an important consideration when applying it to the legal profession. It may seem to give lawyers wide discretion to disregard the ethical rules governing the profession. Herein lies the value of our providing consent to our promise to “observe and uphold the ethical standards that govern [the] profession”; it constrains one’s ability to disregard the ethical Rules governing our profession (e.g. representing the client resolutely fearlessly raising every issue) and it gives greater strength to our moral obligation to act in the public interest (for the common good). In our example, the in-house counsel would, regardless of any contemplated change in the Rules, have a primary duty to act in the public interest and observe the law of privilege only where doing so would in fact serve the public interest. This is because failing to observe and uphold the ethical standards of the profession would violate one’s promise and undermine the common good.

It has been demonstrated that Finnis’ theory facilitates flexibility in ethical deliberation. It has also been established that the governance structure of the LSUC has been designed in way that permits flexibility through the oath of professional allegiance but it remains to be determined whether or not the LSUC has designed flexibility at the institutional level to accord with Finnis’ theory. Accordingly, the next part of this chapter describes the significance of the Rules and how they shape legal practice.

\textsuperscript{221}Ibid.
(v) The Profession’s Responsibility Arising from the Rules of Professional Conduct

As discussed above, Finnis’ scheme (set out in steps (i)-(iii) above) is sufficiently flexible for application to the legal profession because his theory does not assert an independent moral rationale for compliance with the law. According to Finnis, the moral obligation to be law-abiding has no life apart from the moral obligation to serve the common good.\textsuperscript{222} Finnis concedes that “the force of step (i) varies according to the circumstances; sometimes the common good may best be preserved or realized by deviation from the law”. While on rare occasions step (i) can “take its place in the unrestricted flow of practical reasonableness”, when conceived from within the law, its force, its invariant and discretionary reference back to first principles, is sharply restricted.\textsuperscript{223}

Until relatively recently in the history of law as a profession, codes of ethics have not been thought necessary to guide a lawyer’s conduct.\textsuperscript{224} In fact, it was not until 1920 that the Canadian Bar Association published the \textit{Cannon of Ethics}.\textsuperscript{225} In Ontario the Professional Conduct Handbook (predecessor to the Rules) was not created until 1964.\textsuperscript{226}

\textsuperscript{222}Scavone, “Natural Law” \textit{supra} note 198 at 113.

\textsuperscript{223} Scavone, “Natural Law” \textit{supra} note 198 at 113.

\textsuperscript{224} Wilkinson, “Codes of Ethics” \textit{supra} note 33.

\textsuperscript{225} Robinson, “Ethical Evolution, \textit{supra} note 126.

\textsuperscript{226} \textit{Ibid} at 164.
Prior to these developments, 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.”

Originally, lawyers, as members of a self-governing profession, adopted codes of professional conduct in order to preserve public confidence in the profession – and in turn, in its ability to self-govern. Other reasons included educating lawyers on communal expectations; to affect behaviour; and to offer a basis for discipline.

Codes of ethics constitute a jurisprudential anomaly in that they are quasi-legal rather than legal rules. This distinction, crucial to any analysis of the effectiveness of the codes, is as follows: a legal rule gives rise to rights and duties and its breach provides a basis for redress to one harmed thereby; while a quasi-legal rule defines duties, but its breach does not give rise to a remedy. Therefore, the breach of a rule of ethics provides a basis for lawyer discipline, and so has legal efficacy in this sense but a breach does not, however, provide a basis for redress to an injured party. As well, it is important to note

227 B. Smith, Professional Conduct for Canadian Lawyers (Toronto: Butterworth, 1989) at 6, as cited in Wilkinson, “Codes of Ethics” supra note 224 at 647.

228 Wilkinson, “Codes of Ethics”, supra note 33 at 647, see also Robinson, “Ethical Evolution” supra note 126 at 165-166.

229 Hutchinson, “Legal Ethics” supra note 209 at 12.


231 Ibid at 956.
that the purposes of law society discipline proceedings are not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards and preserve public confidence in the legal profession.\(^{232}\)

Despite their efficacy as rules of discipline, the Rules are dependent upon their moral force for their effectiveness. Similar to Finnis’ claims for ethical thought and morality itself, the Rules have as their shaping object – “the good of being directed in all one’s choices and actions by the basic reasons for action, undeflected by sub-rational motivations that would, without reason, cut back of the directiveness of each and any of those basic reasons”.\(^{233}\)

Nevertheless, what if the codes, in actuality, “cut back on the directiveness of any of those reasons”? There are various examples to suggest that this may be the case.

For instance, we have already seen one perspective on the purpose for implementing the codes, namely, to preserve public confidence.\(^{234}\) Even if historically, implementing the codes had less to do with acting in the public’s interest and more to do with trying to preserve the profession’s monopoly by facilitating the public’s sanctioning of such monopoly, this would not in and of itself, cut back on the directiveness of such

\[^{232}\text{Gavin MacKenzie, } \textit{Lawyers and Ethics Professional Responsibility and Discipline,} \text{ (Toronto: Carswell, 1993) at 26-1.}\]


\[^{234}\text{Refer to Wilkinson “Codes of Ethics”, } \textit{supra} \text{ note 224 and Robinson “Ethical Evolution”, } \textit{supra} \text{ note 225.}\]
reasons. Drawing such a conclusion would have to rely on the assumption that the virtue of the Rules lay in shaping legal practice. In reality, the virtue of the Rules may have little to do with shaping legal practice. In fact this is what the evidence demonstrates.

For example, research by Dr. Wilkinson, and this thesis’ research both demonstrate that there is a lack of reliance by Ontario lawyers on the Rules for the purpose of resolving ethical issues.\(^{235}\) Most lawyers do not even refer to the Rules when they contemplate a course of action.\(^{236}\) In addition to scholarly argument that ethical rules can impede moral development, there is also evidence suggesting that ethical codes actually inhibit ethical deliberation by those lawyers who did refer to them for assistance in solving specific problems.\(^{237}\) However, this seems to be part of their very purpose, namely constraining certain choices?

Indeed, constraining certain choices is part of the purpose of the Rules. But the Rules are quasi-legal and hence obedience to the Rules is presumptive, although open to adjustment if countervailing considerations outweigh the \textit{prima facie} duty to obey the Rules. The process of considering countervailing circumstances necessarily involves

\(^{235}\) Wilkinson, “Codes of Ethics” \textit{supra} note 224. See this article for evidence to suggest that the legal profession in Ontario needs to re-examine the efficacy of the existing \textit{Rules of Professional Conduct} and the role they should play in shaping lawyers’ ethical decision making.

\(^{236}\) \textit{Ibid} at 678.

ethical deliberation. Arguably then, the quasi-legal nature of the Rules gives one a greater opportunity to engage in their own ethical deliberation.

The Rules’ content stipulates a lawyer’s duties. However, as “quasi-legal”, the Rules do not concurrently rely upon a legal basis for their effectiveness. There has, to date, been a distinct shift in the form and content of the Rules from the protection of the interests of lawyers, and the profession in general, toward promotion of the interests of clients and the general public.\textsuperscript{238} However, as a matter of practical reasonableness, regardless of an evolution to increasingly “ethical” rules of professional conduct, such an emphasis on rule making is insufficient to fulfill the profession’s undertaking to act in the public interest. Undeniably, it is individual lawyers who must fulfil their promise to observe and uphold the ethical principles that the Rules attempt to illuminate for the profession.

The defeasible nature of our obligation to obey the Rules may help us to understand that there is a distinction between our primary duty to obey the Rules and our actual obligation to uphold and observe the ethical principles that govern the profession. For example, while the in-house lawyer in our example has a duty to further the interests of her client (see Rule 4.01) and is permitted by law to do so, she does not have an actual obligation to further the interests of the client if doing so violates some more important duty, such as the duty to not pervert the administration of justice. But then we must understand why the LSUC retains the unqualified primary duty to obey the Rules in the

\textsuperscript{238} See Robinson, “Ethical Evolution” \textit{supra} note 126.
first place. Why is our duty to obey the Rules not qualified so that it eliminates this conflict?

For example, an unqualified duty to obey the rules of ethics may induce a paradoxical effect.\textsuperscript{239} In our example, it would provide the lawyer with a basis for rationalizing her conduct regarding her duty of loyalty to the client (which is strongly evident within the private practice population). Such duty of loyalty to a client gives the lawyer not only a powerful tool for rationalizing her conduct; it also gives her a protective shield against accusation of wrongdoing with regard to innocent third parties.\textsuperscript{240} Courts and colleagues would find it very difficult to pierce the protective shield of loyalty with meaningful sanctions or criticisms unless the lawyer’s conduct was illegal and the transparency of the rationalization was evident. Moreover, in reality, a lawyer’s duty is not absolute; there may be circumstances in which injustice is so obvious, and the result mandated by the functioning of a “legal” set of Rules so intolerable, that no person could, in good conscience, believe that exhibiting fidelity to the Rules is the right thing to do, all things considered.

There will be disagreement about which cases fall into the “intolerable” category, but the important thing for the purposes of this chapter is to realize that by virtue of our oath and a “quasi-legal” set of Rules, the obligation to follow the Rules is substantial.

\textsuperscript{239}Patterson, “Legal Ethics” \textit{supra} note 230.

\textsuperscript{240}Patterson, “Legal Ethics” \textit{supra} note 230 at 958.
However, these two factors also allow a reasonable lawyer to make an exception when adherence to the Rules would be obviously intolerable to any reasonably practical person.

Regardless of whether the Rules are intended to be regulatory or hortatory and regardless of what the evidence suggests about how lawyers are referring to the codes, it seems that the public will benefit if the LSUC keeps the duty to follow the Rules quasi-legal (rather than legal-rules). Otherwise, when a lawyer faces a conflict between ethical and Rule derived priorities in practice and it is apparent that the Rule does not lead to a result that is in the public interest, then in following the Rule, the lawyer would find himself acting unprofessionally.

On the other hand, it is evident from the data gathered in the survey and cases in this research that lawyers struggle to understand their proper role in the giving of business advice. This research will therefore conclude with a proposed model to assist lawyers in this endeavour.

(vi) Proposed Framework

We have seen that the LSUC must act for the common good, and we have examined both personal and institutional commitments from the legal profession. As a personal commitment, the oath has, throughout its history, been premised on access to timely, affordable justice and the provision of pro bono services to ensure that justice is available to all. Lawyers concurrently have a defeasible obligation to obey the Rules.
The result is that each and every member of our profession must prioritize their personal undertaking to effect justice and reflect its character in all they do.

This may become difficult using our example above. The corporate executive’s defined role is to maximize shareholder value or profit. The lawyer’s role is to provide access to the law. Each has a defined role morality.\textsuperscript{241} From a role morality perspective, absent the oath of professional fidelity, it would be unnecessary for the lawyer to be concerned beyond the requirements of her role. However, within their role morality, lawyers are required to have concern for the ethical principles that govern their profession and are therefore not able to repress their own acting in a practically reasonable way to protect the public interest.

Admittedly, using Finnis’ approach, obedience to the Rules is defeasible regardless of whether they are qualified as legal or quasi-legal. However, by making the Rules quasi-legal rather than legal, the LSUC has facilitated a standard that reduces the weight necessary for a lawyer to reasonably override her obligation to follow the Rules in order to uphold the ethical principles that govern the legal profession.

It may now be concluded that lawyers do, in fact, understand that they provide business advice to their clients. This thesis determined what knowledge lawyers rely on

when providing their clients with business advice and discovered whether lawyers consider themselves qualified to provide business advice.

All of this has been considered this in light of a changing legal environment wherein the role of lawyers in business enterprises has been evolving. However, we have not yet actually defined this apparent porous boundary, nor have we developed a methodology for making any kind of distinction. This chapter will provide some definitions and then outline a unique 3-step method for making such a distinction.

The New Oxford Dictionary of English defines “advice” as “guidance or recommendations concerning prudent future action, typically given by someone regarded as knowledgeable or authoritative”. The original sense of the word “advice” was a ‘way of looking at something, judgment’, and ‘an opinion given’. Similarly, today it is not just conveying information – it is a recommendation – something given, and it does not have to be acted upon or ‘taken’.

The New Oxford Dictionary of English defines “legal” as (adjective) – of, based on, or concerned with the law. And “law” as (noun) – the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.

Therefore “legal advice” can be defined as guidance or recommendations concerning prudent future action based on the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties.
“Business” may be thought of “trade and all activity relating to it, esp. considered in terms of volume or profitability; commercial transactions, engagements, and undertakings regarded collectively; an instance of this. Hence more generally: the world of trade and commerce.”

Therefore, “business advice” can be defined as guidance or recommendations concerning prudent future action pertaining to a person, partnership, or corporation engaged in commerce, manufacturing, or a service; revenue-seeking enterprise or concern.

The diagram below (Figure 8) illustrates the concepts of legal advice and business advice to which the literature review prior to the conduct of this research seemed to point. Most of the case law discussed in chapters 1 and 2 conceives of business advice and legal advice as two distinct categories.

**Figure 8: Initial Conception of Advice Categorization**

<table>
<thead>
<tr>
<th>Legal Advice</th>
<th>Non-Legal Advice</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>BUSINESS ADVICE</td>
</tr>
</tbody>
</table>

However, the data gathered in this research establishes that in some cases, business advice is legal advice. In other words, it is the same thing. However, in some cases, business advice is non-legal advice. The reality is that it is not the boundary between legal and business advice that is important but that business advice given by lawyers lies along a continuum including both legal and non-legal. There is certainly legal advice, which is non-business advice, but there is also, on the evidence provided by this survey of Ontario lawyers, non-legal advice that is not business advice. Figure 9 is more accurate than Figure 8 in terms of the conduct of lawyers because lawyers, when asked about non-legal activities (question 3) did not identify business advice in this category although given the opportunity to do so. This is despite the fact that the case-law and rules, as mentioned above, tend to point to the distinction between non-legal and legal as key.

It may be seen in Figure 9 that legal advice is conceived of as separate from business advice and non-legal advice is separate from both legal advice and business advice. However, business advice is itself seen as having two possible components, business advice, which is more closely allied with legal advice and business advice that is more closely allied with non-legal advice. However, business advice whether legally allied or non-legally allied is seen as mutually exclusive with pure legal advice.
In other words, finding out what is business advice is not necessarily important. However, finding out what is legal business advice and non-legal business advice should be the focus of any inquiry.

It is suggested that the diagram above is the best way to approach where the boundary lies, namely, that business advice may be legal or non-legal in nature.

The following framework is a suggested guideline to ensure the practical application of this research. It provides a three-step outline for distinguishing between business and legal advice. According to the Rules, lawyers have a responsibility to identify business advice that is non-legal in nature. This rule would be redundant if it were not the case that business advice can be entirely legal thus the rule itself is more consistent with the diagram shown above in Figure 9 than the conception which seems to be prevalent in previous literature, that is shown in Figure 8.
Step one of the framework suggests that there are two principal questions that a lawyer may – and perhaps, should – ask when advising clients. *Can* the proposed course of action be legally accomplished, and *should* this proposed course of action be avoided because the lawyer believes it to be unprofitable? When a lawyer becomes involved with the “should we” questions, this tends toward giving business advice.243 The second step in the framework is to determine whether the advice being given is aimed at assisting a business in its revenue making function. The greater the probability that the advice is aimed at a revenue-generating function and the “should we” questions, the greater the likelihood that the advice is business advice.244 The final step assists in determining whether business advice may be privileged or not. For this determination, one must look to the nature of the relationship, the subject matter of the advice and the circumstances in which is it sought and rendered. These steps are outlined below.

**Step 1**: In step 1 there are two principal questions that a lawyer may – and perhaps, should – ask when advising clients.

- *Can* the proposed course of action be legally accomplished?

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244 See H.B. Woodman, “What the Executive Expects of the Corporate Law Department,” (1958) 13 Bus. Law. 461. Note that all organizations by necessity must be revenue generating – whether they are for-profit or not-for-profit because otherwise, they will not be sustainable. Indeed, not-for-profit organizations must with greater force generate revenue because they may not carry debt. Accordingly, this test is for sustainable businesses and applies with equal force to profit seeking or not-for-profit organizations.
Should this proposed course of action be avoided?

When a lawyer becomes involved with the “should we” questions, this tends toward giving business advice.\(^{245}\)

**Step 2:** Determine whether the advice being given is aimed at assisting a corporation in its revenue generating function.

It is suggested that the greater the probability that the advice is aimed at: a) a revenue-making function and, b) the “should we” questions, then the greater the likelihood that the advice is business advice.\(^{246}\)

However, all we have done so far is to identify whether it is business advice or pure legal advice. If it is pure legal advice, it is privileged. But, if it is business advice, we still don’t know whether it is privileged or not.

**Step 3:** Look to:

- the nature of the relationship,
- the subject matter of the advice, and
- the circumstances in which it is sought and rendered (obligations of lawyers).

Recall the previous discussion about the duty to provide investment advice in *Brumer v. Gunn*.\(^{247}\) If we run through the first bullet, there was a solicitor-client

\(^{245}\) See D. C. Reid, *The Barrister as a Banker*, *supra* note 243 at p.98.

\(^{246}\) See H.B. Woodman, “What the Executive Expects” *supra* note 244.

\(^{247}\) *Brumer v. Gunn, supra* note 73.
relationship. Under the second bullet, the subject matter was not legal, namely investing in loans. Under the third bullet, the circumstances were such that the lawyer may have been obligated to provide the advice.

It is put forth that non-legal advice in certain circumstances should be privileged. Primarily because the lawyer has a duty to provide it and also to protect the relationship that he has with the client.

This account of the ethics of the legal profession gives lawyers a greater opportunity to engage in practical reasoning by connecting the lawyer to the values underlying the norms pertinent to her situation and hence to the larger conception of law. It reconciles a lawyer’s promise of professional fidelity with his or her own individual creativity and public service, personal ambition and social need.248

Further Research

There are a number of questions that emerge from this analysis, which would be excellent topics for further study. For example:

- Is “legal business advice” protected by privilege?
- If lawyers are *obliged* to provide “non-legal business advice”, should it be protected by privilege?

• In addition to obligations under the Rules, are lawyers required to point out that their advice is not protected by privilege?

• This study found that corporate policies are referred to as ethical more than are the LSUC Rules. This finding warrants further investigation.

Another possibility of study, which emerges from this research, is to design an instrument which would force respondents to choose between given categories using the data presented above in chapter 4, where the respondent generated data did not provide categorizable data with large enough numbers to allow us to perform a chi-square and thus generalize the data. It is remarkable that so many respondents chose to provide answers to these open-ended questions and the fact that they did lends optimism to the possibility the generalizable data could be obtained using these respondents ideas as a starting point in another study.
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Regulations

Appendix A: Rules of Professional Conduct - Rule 2

Rule 2

Relationship to Clients

2.01 COMPETENCE

Definitions
2.01 (1) In this rule

“competent lawyer” means a lawyer who has and applies relevant skills, attributes, and values in a manner appropriate to each matter undertaken on behalf of a client including

(a) knowing general legal principles and procedures and the substantive law and procedure for the areas of law in which the lawyer practises,

[Amended – June 2007]

(b) investigating facts, identifying issues, ascertaining client objectives, considering possible options, and developing and advising the client on appropriate courses of action,
(c) implementing, as each matter requires, the chosen course of action through the application of appropriate skills, including,

(i) legal research,
(ii) analysis,
(iii) application of the law to the relevant facts,
(iv) writing and drafting,
(v) negotiation,
(vi) alternative dispute resolution,
(vii) advocacy, and
(viii) problem-solving ability,

(d) (communicating at all stages of a matter in a timely and effective manner that is appropriate to the age and abilities of the client,

(e) performing all functions conscientiously, diligently, and in a timely and cost-effective manner,

(f) applying intellectual capacity, judgment, and deliberation to all functions,
(g) complying in letter and in spirit with the Rules of Professional Conduct,

(h) recognizing limitations in one’s ability to handle a matter or some aspect of it, and taking steps accordingly to ensure the client is appropriately served,

(i) managing one’s practice effectively,

(j) pursuing appropriate professional development to maintain and enhance legal knowledge and skills, and

(k) adapting to changing professional requirements, standards, techniques, and practices.

Commentary

As a member of the legal profession, a lawyer is held out as knowledgeable, skilled, and capable in the practice of law. Accordingly, the client is entitled to assume that the lawyer has the ability and capacity to deal adequately with legal matters to be undertaken on the client’s behalf.

A lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute. In addition to damaging the lawyer’s own reputation and practice, incompetence may also injure the lawyer’s partners and associates.

A lawyer should not undertake a matter without honestly feeling competent to handle it or being able to become competent without undue delay, risk, or expense to the client. This is an ethical consideration and is to be distinguished from the standard of care that a tribunal would invoke for purposes of determining negligence.

A lawyer must be alert to recognize any lack of competence for a particular task and the disservice that would be done to the client by undertaking that task. If consulted in such circumstances, the lawyer should either decline to act or obtain the client’s instructions to retain, consult, or collaborate with a lawyer who is competent for that task. The lawyer may also recognize that competence for a particular task may require seeking advice from or collaborating with experts in scientific, accounting, or other non-legal fields, and, in
such a situation, the lawyer should not hesitate to seek the client’s instructions to consult experts.

A lawyer should clearly specify the facts, circumstances, and assumptions upon which an opinion is based. Unless the client instructs otherwise, the lawyer should investigate the matter in sufficient detail to be able to express an opinion rather than mere comments with many qualifications. If the circumstances do not justify an exhaustive investigation with consequent expense to the client, the lawyer should so state in the opinion.

When a lawyer considers whether to provide legal services under a limited scope retainer, he or she must carefully assess in each case whether, under the circumstances, it is possible to render those services in a competent manner. An agreement to provide such services does not exempt a lawyer from the duty to provide competent representation. As in any retainer, the lawyer should consider the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. The lawyer should ensure that the client is fully informed of the nature of the arrangement and clearly understands the scope and limitation of the services. See also subrule 2.02(6.1) to 6.3).

[Amended – September 2011]

A lawyer should be wary of bold and confident assurances to the client, especially when the lawyer’s employment may depend upon advising in a particular way.

In addition to opinions on legal questions, the lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, policy, or social implications involved in the question or the course the client should choose. In many instances the lawyer’s experience will be such that the lawyer’s views on non-legal matters will be of real benefit to the client. The lawyer who expresses views on such matters should, where and to the extent necessary, point out any lack of experience or other qualification in the particular field and should clearly distinguish legal advice from other advice.

In a multi-discipline practice, a lawyer must be particularly alert to ensure that the client understands that he or she is receiving legal advice from a lawyer supplemented by the services of a non-licensee. If other advice or service is sought from non-licensee members of the firm, it must be sought and provided independently of and outside the scope of the retainer for the provision of legal services and will be subject to the constraints outlined in the relevant by-laws and regulations governing multi-discipline practices. In particular, the lawyer should ensure that such advice or service of non-
licensees is provided from a location separate from the premises of the multi-discipline practice.

Whenever it becomes apparent that the client has misunderstood or misconceived the position or what is really involved, the lawyer should explain, as well as advise, so that the client is apprised of the true position and fairly advised about the real issues or questions involved.

The requirement of conscientious, diligent, and efficient service means that a lawyer should make every effort to provide service to the client. If the lawyer can reasonably foresee undue delay in providing advice or services, the client should be so informed.

[Amended - June 2009]
Appendix B: Ethics Approval (next page)
CC: UWO REB; TM Bourne

THE UNIVERSITY OF WESTERN ONTARIO
FACULTY OF LAW

USE OF HUMAN SUBJECTS - ETHICS APPROVAL NOTICE

Review Number: 2010-001
Principal Investigator: Professor Margaret Ann Wilkinson (supervisor)
Student Name: Amy Ter Har
Title: The Porous Boundary Between Legal and Business Advice

Expiry Date: 1 Jan 2012
Type: Survey
Ethics Approval Date: 13 December 2010
Revision #: 2
Documents Reviewed &
Approved: 3F001NMREB; Survey Instrument; Letter of Information

This is to notify you that the Faculty of Law Sub-Research Ethics Board (REB), which operates under the authority of The University of Western Ontario Research Ethics Board for Non-Medical Research Involving Human Subjects, according to the Tri-Council Policy Statement and the applicable laws and regulations of Ontario has granted approval to the above named research study on the date noted above. The approval shall remain valid until the expiry date noted above assuming timely and acceptable responses to the REB’s periodic requests for surveillance and monitoring information.

During the course of the research, no deviations from, or changes to, the study or information/consent documents may be initiated without prior written approval from the REB, except for minor administrative aspects. Participants must receive a copy of the signed information/consent documentation. Investigators must promptly report to the Chair of the Faculty Sub-REB any adverse or unexpected experiences or events that are both serious and unexpected, and any new information which may adversely affect the safety of the subjects or the conduct of the study. In the event that any changes require a change in the information/consent documentation and/or recruitment advertisement, newly revised documents must be submitted to the Sub-REB for approval.

Pr. Mark Perry (Chair)

2010-2011 Faculty of Law Sub-Research Ethics Board
Pr. Mark Perry Faculty of Law (Chair)
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CC: UWO REB; TM Bourne
Appendix C: Survey Instrument (next page)
LEGAL PROFESSION SURVEY QUESTIONS

Please return the completed survey by April 7, 2012. If you have any additional comments please attach them to the survey. THANK YOU.

GENERAL INFORMATION

1) In what period were you called to the bar?

2) What is the nature of your work?
   □ private practice □ corporate counsel □ Other:________

LAWYER'S ROLE

3) Do you perform any non-legal duties for your law firm? Yes____ No____
   a. If YES, could you briefly describe the nature of these duties:
      ________________________________________________________________
      ________________________________________________________________
      ________________________________________________________________
   b. What % of your time is devoted to these duties? ______ %

4) In your capacity as lawyer to a corporate client, would you characterize any of the advice that you give as “business advice”?
   a. Yes____ No____ (If NO, proceed to question 5)
   b. If YES: How often do you give business advice?
      Frequently ____ Occasionally ____ Rarely ____
   c. Under what circumstances do you usually give such advice? (please specify)
      ________________________________________________________________
      ________________________________________________________________
      ________________________________________________________________
   d. What knowledge do you rely on when providing your client with business advice? (check all that apply)
      □ Experience gained within your law practice
      □ Experience gained outside of your law practice
      □ Self study
      □ Reliance on third party advice
      □ Continuing education (seminars)
      □ Formal training (courses, degrees)
   e. When you give business advice, how often do you seek to explicitly segregate the business advice from the legal advice?
      Always____ Frequently____ Occasionally____ Rarely____ Never____
f. Do you look at any ethics code(s) in connection with providing business advice?  
   YES_____ NO_____

g. If you answered "yes" to question 4(f) above, please specify to which ethics code(s) you referred:
   
   5) Do you think that lawyers have a duty to provide business advice? YES_____ NO_____ NO OPINION_____
   a. If you answered "yes" above (check all that apply):
      i. do you think this duty arises because of a contract with the client? YES_____
      ii. do you think this duty arises because of professional obligation(s)? YES_____
         a. If the duty arises because of professional obligation(s), where are these professional
            obligations found? ____________________________________________________________
      iii. other (please explain) ____________________________________________________________

6) Please rate the following advisory, management and legal roles and indicate the relative demand for these services
   by your clients (for a total of 100% of your services provided to all clients):
   _____ Performing as a business lawyer
   _____ Advising on legal services
   _____ Accomplishing business strategies
   _____ Handling special projects with important legal ramifications
   _____ Regulatory compliance
   _____ Enterprise risk management
   100% of your services, provided to all clients

7) How often in your experience have clients sent copies of their business correspondence or memorandums to your
   office without a specific request for legal advice?
   Frequently____ Occasionally____ Rarely____ Never____
   a. If you answered "frequently", "occasionally" or "rarely" then typically, what is the purpose of your client in
      doing so? ____________________________________________________________
   b. How often do you think clients send copies of documents to your office in an attempt to protect the
      documents through solicitor-client privilege?
      Frequently____ Occasionally____ Rarely____ Never____

PROFESSIONAL ADVICE

8) Do you find it difficult to distinguish business advice from legal advice? YES______ NO______

9) Have you ever refrained from providing a client with business advice? YES______ NO______
   a. If YES: Why did you refrain from providing business advice________________________________________

10) Do the Law Society of Upper Canada’s Rules of Professional Conduct speak to lawyers concerning the provision
    of business advice? YES______ NO______
    a. If "yes", please indicate which Rule(s) addresses the issue: RULE(S):____ NOT SURE____

11) Do you find that “murky lines” exist when you try to distinguish legal advice from business advice?
    YES______ NO______
    a. If “yes”, why? ____________________________________________________________
    b. If “no”, why not? ____________________________________________________________
Appendix D: Quantitative Summary

Question 3(a): Private Practice

A total of 26 lawyers responded to this question by stating that they perform non-legal duties for their law firm. The specific answers provided by the respondents in many instances overlapped, and as such the answers were divided into major categories, wherein each respondent fell into one or more categories based on the specific answer provided. In particular, 28 respondents indicated that they worked on committees, administrative and business matters, which comprised 50% of the activities performed. 11 respondents indicated that they worked on marketing matters, comprising 19% of the activities performed. 10 respondents indicated performing recruitment and HR duties, comprising 18% of the activities performed. 6 people indicated educating and mentoring of junior lawyers, which comprised 11% of the non-legal duties, and lastly, 1 person indicated pro bono activity, comprising 2% of the total non-legal duties performed by the respondents.

It should be noted that some of the respondents failed to indicate whether they provided or did not provide any non-legal duties for their law firms, but nonetheless, provided a specific answer to question 3(a). This accounts for why 28 people indicated that they performed committee and other administrative duties, when there were only 26 people who responded yes to the question.

Question 3(a): In-house Counsel

A total of 22 people responded to this question by providing specific answers. The specific answers provided by the respondents in many instances overlapped, and as such
the answers were divided into major categories, wherein each respondent fell into one or
more categories based on the specific answer provided. In particular, 17 people
responded to the question by stating work on committee, administrative, and business
matters, comprising 50% of the activities non-legal duties performed. 1 respondent
indicate marketing, comprising 3% of the total activities. 3 people indicated recruitment
and HR, totaling 9% of the activities. 3 people stated educating and mentoring junior
lawyers, comprising 9% of the total activities. 1 person indicated communication, and 1
person indicated providing notarization services, each of which comprised 3% of the
activities performed. And finally, 5 people indicated risk management and compliance,
totaling 14% of the total activities.

**Question 4(c)**

**Private Practice**

A total of 38 people responded to this question by providing a specific response to
the inquiry concerning the circumstances under which they provide their clients with
business advice. The responses provided by the respondents in many instances
overlapped, and as such the answers were divided into major categories, wherein each
respondent fell into one or more categories based on the specific answer provided. As can
be seen in the chart, 2 of the respondents indicated that they provide business advice as
appropriate, comprising 4% of the total circumstances. 5 respondents indicated that they
provide advice on business negotiations, comprising 11% of the total circumstances. 27
of the respondents indicated that they provide business advice when their client requires
help with assessing options as to how to proceed when business and legal advice is
combined, comprising 56% of the total circumstances. 7 people indicated in the context
of specific transaction, totaling 15% of the circumstances. 1 lawyer indicated in the
context of settlement proceedings, comprising 2% of the total circumstances. 2
respondents answered to provide added value to the client, which accounted for 4%. 1
person indicated insurance, risk and security advice, comprising 2% of the total. And finally, 3 individuals responded by indicating as part of information for forming legal advice, comprising 6% of the total circumstances under which lawyers provide their clients with business advice.

**In-house Counsel**

32 people responded to this question by providing specific answers. The specific answers provided by the respondents in many instances overlapped, and as such the answers were divided into major categories, wherein each respondent fell into one or more categories based on the specific answer provided. 2 people responded by stating as appropriate, comprising 5% of the circumstances under which the Lawyers provide their clients with business advice. 2 people responded by stating on business negotiation, comprising 5% of the circumstances. 18 respondents indicated they provide business advice when client requires help with assessing options as to how to proceed (legal and business combined), totaling 42% of the circumstances. 4 people indicated in the context of specific transaction, totaling 9%. 8 respondents indicated as member of management team they participate in business discussions, comprising 19% of the circumstances. 1 respondent indicated team cross functional meeting, and 1 respondent indicated to provide added value, each of which comprised 2% of the total circumstances. Insurance, risk and security was indicated by 4 respondents, totaling 9% of the circumstances. Lastly, 3 people indicated information for forming legal advice as circumstances under which they provide their client with business advice, totaling 7% of such circumstances.

**Question 4(d)**

**Private Practice**

A total of 41 respondents answered this question. Out of the 41 respondents 100% of them stated that they rely on the experience gained within law practice when providing their clients with business advice. Fifteen (15) out of 41 stated through self-study, comprising 36.58% of the total respondents. Eight (8) people, comprising 19.51% of the
respondents indicated that they do so based on continuing education. Twenty-five (25) people pointed to experience outside of law practice, comprising 60.97% of the respondents. Six (6) people stated reliance on third party, comprising 14.63% of the respondents, and finally, 12 people pointed to formal training as the source based on which they provide their clients with business advice, which comprised 29.26% of the respondents.

In-house Counsel

A total of 34 people responded to this question. Thirty-three (33) people pointed to experience gained within law practice as the source based on which they give their clients business advice, comprising 97.05% of those who responded to the question. Eighteen (18) people, comprising 52.94% of the respondents, stated that self-study was the source. Nineteen (19) respondents, totaling 55.88%, stated that continuing education was their basis. Nineteen (19) people, stated experience gained outside of law practice, totaling 55.88% of the total respondents, was their source of business advice. 11 people, comprising 32.35% of the total respondents, pointed to reliance on a third party as the source of their business advice. And finally, 14 people, comprising 41.17% of those respondents, pointed to formal training as the basis on which they provide their clients with business advice.

**Question 4(f)**

Private Practice

A total of 40 people responded to this question, 37 of which responded “no” to the question, representing 92.5% of the respondents. The three (3) people who responded “yes”, accounted for 7.5% of the respondents.

In-house Counsel
A total of 32 people responded to this question. Fifteen (15) people responded by indicating “yes”, comprising 46.87% of the respondents. Seventeen (17) people indicated “no”, comprising 53.12% of the total respondents.

**Question 4(g)**

**Private Practice**

Consistent with question 4(f) above, a total of 3 people responded to this question by providing specific answers. One (1) respondent indicated general awareness of requirements pursuant to CBA and LSUC codes of conduct, 1 person indicated that they were always guided by client’s interest, and 1 respondent indicated honest dealing and honest advice, each of which accounted for 33.33% of the total number of people that provided an answer to this question.

**In-house Counsel**

A total of 13 people responded to this question. Some of the respondents provided more than one source of ethics code, which were then divided into separate category. One (1) person pointed to general awareness of requirements of CBA & LSUC codes of conduct, comprising 7.69% of the total answers provided. Eight (8) people, comprising 61.53% of the total answers provided, pointed to corporate policies as the source of the ethics code they follow. Six (6) respondents stated that they are always guided by client’s interest, comprising 46.15% of the answers provided.

**Question 5**

**Private Practice**

A total of 40 people responded to this question. 11 respondents, totaling 27.5% of those who responded to this question stated that yes; there is a duty to provide business advice to their clients. 27 people, comprising 67.5% of the respondents indicated that
there is no duty. And finally, 2 people, comprising 5% of those who responded to this question had no opinion on the matter.

**In-house Counsel**

A total of 36 people responded to this question. 11 people indicated yes, comprising 30.55% of the total respondents. 21 people indicated no, comprising 58.33% of the total respondents. And finally, 4 people, comprising 11.11% of the total respondents, answered no opinion to the question.

**Question 5(a)(i)**

Five private practice respondents felt that a duty arose because of a contract with their client. Four private practice respondents felt that a duty arose because of a contract with their client.

**Question 5(a)(ii)(a)**

Five (5) lawyers in private practice responded to question 5(a)(ii)(a) and provided 4 answers. One (1) person indicated the obligation is found in the LSUC rules. Two (2) people indicated general obligation to help your client and work in their best interest. One (1) person indicated that being a good legal advisor requires taking into account business implications. One (1) person did not provide a specific answer. The details are provided below.

- LSUC rules of profession conduct, specifically duty to provide best advice.
- As a trusted advisor, providing just the legal advice without its relevance and implications to the business context would not be providing the level service most clients expect.
- General duty to act in clients best interest
- Your obligation to help your client generally
Four (4) in-house counsel lawyers responded to question 5(a)(ii)(a). Two (2) persons stated that it is a general obligation to help your client and work in their best interest. One (1) person indicated that being a good legal advisor requires taking into account business implications. And, one (1) indicated that as it’s a professional obligation as the in-house counsel. The details are provided below.

- Proper legal advice must include advice that is prudent and in client’s best interest
- Comes from obligation to provide best advice for clients
- Effective legal advice absent business advice is of limited benefit to a client. Whether it is “business” or “legal” advice is less important than effective advising for client. Client does not care whether we call it business or legal advice. Whether it is business or legal advice may impact rules of conduct and professional duties and privilege.
- Professional obligation as the in-house counsel.

**Question 7**

**Private Practice**

A total of 25 people responded to this question. The specific answers provided by the respondents in many instances overlapped, and as such the answers were divided into major categories, wherein each respondent fell into one or more categories based on the specific answer provided. 18 of the respondents indicated that their clients send them business correspondence in order to keep them informed and solicit their counsel, which comprised 56% of such circumstances. 4 respondents indicated as background for a future project which might arise, comprising 12% of such instances. Another 4 individuals indicated to get educated about the client, comprising 13% of the total instances. 4 respondents pointed to background information for a transaction or issue, comprising 13% of such instances. 1 person indicated making sure expectations are in
sync, and 1 person indicated second opinion, both of which comprise 3% of the total instances under which business correspondence is sent to the lawyers.

**In-house Counsel**

A total of 23 people responded to this question. The specific answers provided by the respondents in many instances overlapped, and as such the answers were divided into major categories, wherein each respondent fell into one or more categories based on the specific answer provided. 15 people indicated their clients send them business correspondence in order to keep them informed and solicit their counsel, comprising 43% of the reasons provided. 5 respondents indicated as background information for a future project that might arise, comprising 14% of the total reasons. 1 person indicated to get educated about the client, comprising 3%. 3 respondents indicated as background information for a transaction or issue, totaling 8% of the reasons provided. Second opinion, and being the legal counsel, were each individually indicated by 1 person, each totaling 3% of the reasons. 2 people indicated that they were part of the management team, totaling 6% of the reasons provided. Liability management was indicated by 4 of the respondents, comprising 11% of the total. 2 people pointed to suggesting tactical approach as the reason why their clients sent them business correspondence, totaling 6% of the total. And finally, 1 person stated to create privilege as being the reason, comprising 3% of the total.

**Question 9**

**Private Practice**

25 individuals responded to this question. The specific answers provided by the respondents in many instances overlapped, and as such the answers were divided into major categories, wherein each respondent fell into one or more categories based on the specific answer provided. Eight (8) of the respondents stated that it was not appropriate
for them to provide business advice to their client, which comprised 25% of the total reasons. 14 people stated that they were not in a position to give advice due to lack of knowledge, comprising 44% of such reasons. Two (2) people stated risk assessment based on client, comprising 6% of the reasons provided. One (1) person indicated that they refrained where it would affect their legal judgment or create conflict, totaling 3% of the reasons. 3 people indicated that when client did not want it as when they refrained to provide business advice, comprising 9% of the reasons. And finally, 4 people indicated that they refrained from giving such advice because it was the client’s decision to make, comprising 13% of total reasons provided by the respondents.

In-house Counsel

A total of 22 people responded to this sub question by providing specific answers. The specific answers provided by the respondents in many instances overlapped, and as such the answers were divided into major categories, wherein each respondent fell into one or more categories based on the specific answer provided. In particular, 5 respondents indicated that they refrained to provide business advice to their clients because it was not appropriate, which comprised 17% of the total reasons provided. 17 people indicated that they were not in a position to give advice due to lack of knowledge, comprising 57% of the reasons provided. 2 people indicated risk assessment based on client as their reason, totaling 7%. 1 person indicated where it could affect their legal judgment or create conflict, 1 indicated not required, 1 indicated client did not want it, and 1 indicated where no adverse legal consequences were apparent, as their reasons for not providing their clients with business advice, each individually totaling 3% of the total reasons. And finally, 2 people indicated it was their decision to make as their reason, comprising 7% of the total.

**Question 11**

**Private Practice**
In question 11, fifteen (15) private practice respondents indicated that murky lines do exist, and 22 respondents indicated that murky lines do not exist. Of the 15 people who indicated that murky lines exist, 9 of them responded to question 11(a) by stating that Legal issues have business implications therefore not easy to distinguish. Of the 22 people who indicated that murky lines do not exist, 6 indicated that it is clear what is a legal issue and what is not, 1 indicated that Limit business advice to recommendations relating to available business options, and 5 indicated that Legal analysis is one input in deciding a course of action.

A total of 16 respondents did not provide an answer to questions 11(b) and 11(c).

In-house Counsel

Twenty-one (21) in-house counsel respondents indicated that murky lines do exist, while, 8 respondents indicated that murky lines do not exist.

Some of the respondents did not provide an answer to question 11, but did provide an answer in the specific 11(a) or 11(b) section. Of those who responded to 11(a), twenty-six (26) people who indicated that murky lines do exist stated that Legal issues have business implications therefore not easy to distinguish. One (1) person stated that as the employee of the organization and its legal counsel lines get blurred.

In answer to question 11(b), 2 people indicated that it is clear what is a legal issue and what is not, and 4 people provided answers that best fit the category of those who believed that Legal analysis is one input in deciding a course of action.

A total of 10 people failed to provide a specific response to the questions.
Appendix E: Summary of Questions Most Answered

Question 4(c) had the most number of respondents with 70 people. Below you can find the break down for all expanded questions.

**Question 3(a) = Total respondents 48**

A total of 48 respondents provided specific answers to this question. 22 of them were provided by those who filled out the blue surveys (corporate counsel), and 26 of them were provided by those who responded to the white surveys (private counsel).

**Question 4(c) = Total respondents 70**

A total of 70 people responded to this question by providing specific answers. 32 of them were provided by those who responded to the blue surveys, and 38 of them were provided by those who responded to the white surveys.

**Question 7(a) = Total respondents 48**

A total of 48 people responded to this question. 23 of them were those who responded to the blue surveys, and 25 of them were those who responded to the white surveys.

**Question 9(a) = Total respondents 47**

A total of 47 people provided answers to this question. 22 of them were those who responded to the blue surveys. 25 of them were those who responded to the white surveys.

**Question 11(a) = Total respondents 32**

A total of 32 people responded to this question, 9 of which were those who responded to the white surveys, and 23 of which were those who responded to the blue surveys.

**Question 11(b) = Total respondents 18**

A total of 18 people responded to this question. 6 of them were those who responded to the blue surveys, and 12 of them were those who provided answers to the white surveys.
Curriculum Vitae

Name: Amy Marie ter Haar

Post-secondary
Education and Degrees:
Western University
London, Ontario, Canada
2001-2004, LL.B.

Work Experience

Western University, Faculty of Law
Adjunct Faculty (February 2013 – May 2013)
Responsible for the course design and instruction of “Privacy, Secrecy and Censorship in the Information Age”

Flow Inc.
Chief Executive Officer (June 2012 - Present)
Chief Legal Officer (April 2012 - June 2012)

Flow Inc. is a reward-based marketplace, driven by social networks and powered by secure e-payment solutions. Flow is the first company to offer true social commerce, by combining the convenience of online and mobile payments with unlimited, unrestricted rewards for both consumers and retailers.

Amy ter Haar, Barrister & Solicitor
Lawyer (June 2005-present)

Provide practical and effective legal advice on a comprehensive range of business issues. Clients include all types of business participants, such as private businesses, entrepreneurs, franchisees/franchisors, investors, regulated professionals and not-for-profit organizations.